

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Administration on Aging****45 CFR Parts 1321 and 1327**

RIN 0985-AA08

**State Long-Term Care Ombudsman Programs**

**AGENCY:** Administration on Aging, Administration for Community Living, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Administration on Aging (AoA) of the Administration for Community Living (ACL) within the Department of Health and Human Services (HHS) is issuing this final rule in order to implement provisions of the Older Americans Act (the Act) regarding States' Long-Term Care Ombudsman programs (Ombudsman programs). Since its creation in the 1970s, the functions of the Nursing Home Ombudsman program (later, changed to Long-Term Care Ombudsman program) have been delineated in the Act; however, regulations have not been promulgated specifically focused on States' implementation of this program. In the absence of regulation, there has been significant variation in the interpretation and implementation of these provisions among States. HHS expects that a number of States may need to update their statutes, regulations, policies, procedures and/or practices in order to operate the Ombudsman program consistent with Federal law and this final rule.

**DATES:** *Effective date:* These regulations are effective on July 1, 2016.

**FOR FURTHER INFORMATION CONTACT:** Becky Kurtz, Director, Office of Long-Term Care Ombudsman Programs, Administration for Community Living, Administration on Aging, Atlanta Federal Center, 61 Forsyth Street SW., Suite 5M69, Atlanta, Georgia 30303-8909, 404-562-7592.

**SUPPLEMENTARY INFORMATION:** This final rule responds to public comments on the proposed rule published in the June 18, 2013, **Federal Register** (78 FR 36449) related to the State Long-Term Care Ombudsman Program.

Consistent with AoA's proposal in the proposed rule, the effective date of the final rule is July 1, 2016. AoA intends to provide technical assistance and training to States during this time and to allow States appropriate time to make any changes to their laws, regulations, policies, procedures, or practices that may be necessary in order to comply with this final rule.

AoA anticipates little or no financial impact on the State agencies or other agencies carrying out the Ombudsman program, the consumers served by the Ombudsman program, or long-term care facilities through implementation of this rule.

AoA believes that consumers (particularly residents of long-term care facilities) and long-term care providers will benefit from the implementation of this rule. Consumers and other complainants across the country will receive services from Ombudsman programs with more consistent quality and efficiency of service delivery.

States, Ombudsmen, agencies hosting local Ombudsman entities, and representatives of Offices of State Long-Term Care Ombudsmen will also benefit from the implementation of this rule in the establishment and operation of the Ombudsman program at the State and local levels. For years, States, Ombudsmen, and representatives of the Offices of State Long-Term Care Ombudsmen have reported to AoA that they have found some provisions of the Act confusing to implement. This rule seeks to provide the clarity that Ombudsman program stakeholders have requested.

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**I. Background**

State Long-Term Care Ombudsman programs (Ombudsman programs) serve as advocates for residents of nursing homes, board and care homes, assisted living and similar adult care facilities. They work to resolve problems of individual residents and to bring about improvements to residents' care and quality of life at the local, state and national levels.

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, and appropriations to implement, the Older Americans Act (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).

This regulation is promulgated under the authority of sections 201(e), 307(a), and 712-713 of the Older Americans Act (OAA, or the Act) (42 U.S.C. 3011(e), 3027, and 3058g-3058h, respectively). These provisions authorize the Assistant Secretary for Aging to prescribe regulations regarding coordination of elder justice activities, the development of State plans on aging, and Ombudsman programs.

In its 1992 OAA reauthorization, Congress created Title VII—Allotments for Vulnerable Elder Rights Protection Activities, and incorporated the provisions related to the activities of Ombudsman programs into Title VII. Previously some of these provisions had been within Title III. Therefore, the rule governing Title III of the Act (*i.e.* 45 CFR part 1321) and last updated in 1988, includes minimal provisions which relate to the Ombudsman program. Congress made its most recent reauthorization of the Older Americans Act in 2006. The changes in this final rule update 45 CFR part 1321—as well as the new part 1327—to reflect the 2006 reauthorization of the Act.

There has been significant variation in the interpretation and implementation of the provisions of the Act related to the Ombudsman program among States. This has resulted in residents of long-term care facilities receiving inconsistent services from Ombudsman programs in some States compared to other States.

Ombudsman programs were designed by Congress to have several features which are uncharacteristic of other programs and services created by and funded under the Act. Among those features are independence (a characteristic of any type of ombudsman program, not only the Long-Term Care

Ombudsman Program), unusually stringent disclosure restrictions, a public policy advocacy function, and the Ombudsman responsibility to designate staff and volunteers to serve as representatives of the Office even if they do not report to the Ombudsman for personnel management purposes. These distinct features have been implemented with substantial variation across states, including variations which are inconsistent with the provisions of the Act. This rule is designed to address those variations which AoA has determined are inconsistent with the provisions of the Act.

## II. Analysis of and Responses to Public Comments

The Administration on Aging/ Administration for Community Living (AoA) received 85 unduplicated comments during the public comment period from State agencies, advocacy groups, long-term care providers and associations, State Long-Term Care Ombudsmen, local Ombudsman entities, representatives of Offices, Ombudsman program-related associations, and the general public. Brief summaries of each proposed provision, a summary of public comments we received, and our responses to the comments follow.

The following summarizes comments about the rule, in general, or regarding issues not contained in specific provisions:

*Comments:* A significant proportion of comments indicated general support for publication of a final rule and for the overall content of the proposed rule. The comments in support made one or more of the following points:

1. Need for rule—Numerous commenters indicated appreciation for AoA's efforts in proposing the rule, indicating that a finalized rule would fill a gap that has existed for many years. Some described the proposed rule as a long-awaited and critically-needed milestone in the development of Ombudsman program services to individuals living in long-term care facilities.

2. Benefits to residents—Several commenters indicated support for the proposed rule's emphasis on the central role of the resident in directing program action. Some indicated that, when finalized, the rule would enable people with disabilities and older adults the ability to better understand and utilize Ombudsman program services. Some indicated that the rule is likely to result in benefits for individuals needing long-term services and supports, contribute to quality of care and life for long-term

care residents, and/or more effectively implement consumer protections.

3. Program quality—Numerous commenters indicated that the rule, as proposed, would likely result in improved Ombudsman program efficiency, stability, and/or effectiveness. Some indicated that a final rule would provide consistent policy on Ombudsman program responsibilities. One commenter indicated that the proposed rule provides service consistency while addressing diversity among States in Ombudsman program organizational placement.

4. Needed clarifications—Several commenters described the proposed rule as a much needed clarification and amplification of the Act. Some commenters indicated appreciation for the proposed rule's clear indication that the Ombudsman program work is that of an advocate for residents. Some commenters found helpful the description of the respective roles of the State unit on aging and the Ombudsman, anticipating that the final rule will be helpful in guiding these relationships. Some commenters indicated that clarifications in the proposed rule would be helpful to long-term care providers to better understand the Ombudsman program and its services. One commenter indicated appreciation for several clarifications, indicating that State agencies, Ombudsmen and representatives of the Office have reported finding some OAA provisions confusing to implement, resulting in inconsistent services to residents and preventing some residents from having their rights protected.

5. Assistance to States—Some commenters indicated that the final rule will assist States as they seek to comply with the OAA in implementing a program with a complex and unique character.

*Response:* AoA appreciates that a significant proportion of commenters expressed support for promulgation of the rule.

While no commenter indicated objection to promulgation of the rule, several comments expressed general concerns which were not limited to a specific provision of the proposed rule:

*Comment:* One commenter indicated that the proposed rule would grant additional powers and authority to the Ombudsman without appropriate accountability. The commenter indicated concern that the experience, input and recommendations of local Ombudsman entities are not adequately recognized in the proposed rule. The commenter states that these changes could lessen the effectiveness of local

Ombudsman entities and harm residents.

*Response:* AoA is implementing a rule that reflects and is consistent with the intent of Congress as set forth in the OAA with respect to the role of the Ombudsman, who is the head of the Ombudsman program, and who is accountable for the overall Ombudsman program operations, determinations, and positions. The Act indicates that other individuals who are providing Ombudsman program services—whether they are directly supervised by the Ombudsman or work in an agency hosting a local Ombudsman entity—act in the capacity of representatives of the Office.

This rule does not grant significant additional authority to, nor require additional functions of, the Ombudsman, but rather clarifies the responsibilities already set forth in the Act. Further, AoA holds States accountable, as its grantees, to assure operation of the State's Ombudsman program in accordance with the OAA, including assuring that a qualified and experienced Ombudsman is in place.

AoA appreciates the experience and expertise of the thousands of committed staff and volunteers who serve residents as representatives of the Office. In every State, the Ombudsman is far more effective and knowledgeable if s/he regularly seeks and values the input of the representatives of the Office. We have reviewed the rule in light of this consideration and have included references to the representatives of the Office and/or local Ombudsman entities to emphasize the importance of their involvement at § 1327.11(e) (regarding development of Ombudsman program policies and procedures) and at § 1327.15(g) (regarding inclusion of goals and objectives of local Ombudsman entities into area plans on aging, where applicable).

*Comment:* One commenter indicated that the final rule should better accommodate Ombudsman programs organizationally located in State agencies that are separate from the State unit on aging.

*Response:* While the majority of State Long-Term Care Ombudsmen are employed by State units on aging, and several are organizationally located in non-profit organizations under contract with the State unit on aging, there are a few States that have chosen to house the Ombudsman within another State agency. We believe that the vast majority of the provisions in the proposed rule apply to all of these organizational placements.

However, we have reviewed the proposed rule in light of this comment.

We acknowledge that the proposed rule did not adequately provide for instances where the Ombudsman has the legal authority to independently promulgate policies and procedures. We have provided for this circumstance in the final rule by moving the provision related to the establishment of Ombudsman program policies to § 1327.11(e) (regarding Ombudsman program establishment), instead of § 1327.15 (regarding State agency responsibilities), to better provide for the variety of State authorities and structures related to Ombudsman program policy and procedures development. We have also included language in the new provision at § 1327.11(e) to more accurately reflect the circumstances where the Ombudsman has the legal authority to establish program policies. Further, throughout the final rule, we have accounted for this variation in State organizational structure and authority.

*Comment:* Numerous commenters indicated that the final rule should provide guidance related to ombudsman services for individuals who live in other settings. Some indicated that the ombudsman service should be expanded to these other settings. One indicated the need for a uniform system to monitor long-term services and supports, regardless of location. Others indicated the rule should address guidance regarding best practices and coordination with expanded services. Settings indicated in these comments included home and community-based services, in-home services, hospice, and PACE (Program for All-Inclusive Care for the Elderly).

*Response:* The OAA provides authority for the Ombudsman program to serve residents living in “long-term care facilities” as defined at Section 102(35) of the Act (*i.e.* nursing facilities, board and care homes, assisted living, and similar adult care facilities). Congress has not authorized or funded Ombudsman program services to individuals receiving long-term supports and services in in-home settings or in non-residential settings such as adult day health centers.

States which choose to expand the Ombudsman program to serve individuals in settings beyond those provided for in the OAA are not prohibited from doing so. In fact, thirteen States and the District of Columbia currently provide State-level authority and/or resources to support expansion of the Ombudsman program to serve individuals living in non-facility settings. In addition, some States have provided expanded Ombudsman program services to individuals served

through Federally-created demonstration projects, such as the Money Follows the Person project and the Financial Alignment Initiative (a project serving individuals dually-eligible for Medicare and Medicaid). AoA has no objection to those States which choose to utilize resources other than those appropriated through the OAA to expand ombudsman services to individuals living in a variety of settings or receiving a variety of long-term services and supports. However, absent Congressional authorization for the Ombudsman program to expand its services to new settings, AoA does not believe that it has the authority to provide for such an expansion of services through this rule.

As further clarification, Ombudsman programs, within the authority of the Act, already serve some individuals who live in long-term care facilities and receive some of the services indicated by commenters. For example, home and community based services (HCBS) services may be provided (depending on States’ Medicaid waivers or other HCBS programs) in board and care or assisted living settings; and hospice services are available within many long-term care facilities. Home-health services may be available to supplement care in assisted living settings, depending on State policies. For individuals receiving these services while residing within long-term care facilities, Ombudsman program services are already available and authorized by the Act.

*Comment:* Several commenters recommended that the rule should require that the Ombudsman program be completely separate and independent from State government.

*Response:* Requiring all States to place the Ombudsman program outside of State government would be inconsistent with the provisions of the OAA. The OAA establishes the Ombudsman program through grants to State units on aging and specifically provides the option for the State agency to determine where the program should be organizationally located. While providing some limitations (such as conflicts of interest), the Act indicates that “the State agency may establish and operate the Office, directly, or by contract or other arrangements with any public agency or nonprofit private organization.” Section 712(a)(4) of the Act.

Some States have effective Ombudsman programs which are organizationally located, in whole or in part, inside of the State agency. In these States, the Ombudsman program is able to fully carry out the provisions of the OAA, even when the policies of the

Office differ from the general policies in place for State employees. Examples of such practices are stringent disclosure limitations, making independent recommendations to legislators and other policymakers, and having direct access to the media to discuss long-term care policy matters. We realize that some States have had difficulty in carrying out all of the Ombudsman program provisions in the OAA. It is our intention that this rule will help those States have a better understanding of the OAA requirements and come into full compliance with the law. Where they are unable or unwilling to accommodate the provisions of the OAA which are necessary to provide for an effective Ombudsman program, State agencies will need to examine whether they are able to successfully operate the Ombudsman program directly or pursue an alternative course.

*Comment:* One commenter indicated that AoA is wise to build into the process time to allow networks to make appropriate changes and construct effective remedies where conflicts exist.

*Response:* AoA realizes that some States have implemented laws, regulations, policies, organizational structures, or other actions which are inconsistent with this rule. In the absence of regulation, States have by necessity moved forward with operating the Ombudsman program, resulting in significant inconsistencies among States. While accommodating a variety of organizational placements and approaches to Ombudsman program operations, we have focused, in this rule, on those areas which we believe are critical to full implementation of the OAA. In order to accommodate those States which will have to make changes to their laws or regulations, this rule becomes effective on July 1, 2016.

This date provides most States with the benefit of two legislative sessions in order to make any needed changes. States with biennial legislative sessions will have an opportunity to make legislative changes to implement the rule whether the State has a legislative session in 2015 or in 2016. In addition, since most States begin their fiscal years on July 1, we believe that this date will provide a logical and convenient time frame for those States to implement legislative or regulatory changes. ACL notes that many States will not require legislative changes in order to comply with this rule.

*Comment:* One commenter indicated concern about provisions that may necessitate State legislative action. Another commenter recommended that the period of one year for implementation be extended to provide

States and local Ombudsman entities with adequate time to remedy conflicts.

*Response:* For the reasons indicated above, ACL has changed the effective date of this rule to July 1, 2016.

*Comment:* One commenter indicated that strict implementation of the rule could jeopardize State funding, which is used to supplement the Ombudsman program, impacting the Ombudsman program, facilities, residents, and the ability of the State to expand its program into in-home settings.

*Response:* AoA appreciates that a number of States provide additional resources in order to supplement the Ombudsman program. As a result of these States' commitment to this work, residents have improved access to Ombudsman program services. It is our intent that States will continue their commitment to serve long-term care facility residents regardless of the promulgation of this rule. We do not foresee how compliance with this rule would jeopardize any State's ability to support the work of the Ombudsman program.

*Comment:* One commenter indicated that the proposed rule does not go far enough in addressing critical problems that Ombudsman programs face.

*Response:* In promulgating this rule, AoA has attempted to address the issues that would most significantly benefit from regulatory clarity and authority. These issues were identified based on our experience with State operations of Ombudsman programs as well as recommendations of evaluators and stakeholders. We also considered the variety of State approaches to implementing the Ombudsman program, with a goal of minimizing disruption to Ombudsman program operations while adhering to the requirements of the OAA. We are not clear from the comment to which "critical problems" the commenter refers. However, we anticipate that responses to more specific comments, below, may respond more fully to the comment.

*Comment:* One commenter indicated a desire for increased accessibility to more low-income persons and people with disabilities who have a hard time accessing Ombudsman program services. The commenter indicated support for re-evaluation of the poverty threshold.

*Response:* The services of Ombudsman programs are available to all residents of long-term care facility residents, without regard to financial status or payment source. The OAA requires that the Ombudsman "ensure that the residents have regular and timely access to the services provided"

(Section 712(a)(3)(D) of the Act). In most States, access is provided to residents through regular visits to facilities by representatives of the Office—as well as through telephone, email, facsimile, Web site contacts, TTY (text telephone) and other communication services, and mail—so residents do not need to visit a physical office location to have access to Ombudsman program services.

ACL does not have authority to evaluate or calculate the national poverty threshold.

*Comment:* One commenter recommended that AoA take actions to monitor Ombudsman programs, formally assess compliance with the Act, and apply sanctions for continuing non-compliance, including the use of graduated remedies and including de-designation to replace the Office where the Ombudsman fails to address major concerns of residents.

*Response:* It is our intention, through the implementation of this rule, that State agencies and Ombudsman programs will be better equipped to comply with the provisions of the Act. The State agency duty to provide for sanctions with respect to interference, retaliation and reprisals is addressed at § 1327.15(i). In addition, Federal regulation provides options for HHS grant-awarding agencies, including AoA, to respond when a grantee (the State agency in this circumstance) fails to comply with any term of an award. 45 CFR 75.371.

#### A. State Agency Policies

We proposed revision to § 1321.11(b) in order to clarify the responsibility of the State agency on aging (also referred to as "State unit on aging" and, for purposes of these regulations, "State agency") regarding appropriate access to the files, records and other information maintained by the Ombudsman program in its monitoring of the Ombudsman program. We substituted the term "files" with "files, records and other information" in order to accommodate the increased use of digital information and incorporate information obtained verbally and by other means, as well as to clarify that the disclosure provisions of the Act at section 712(d) are not limited to information that is contained in case (*i.e.* complaint resolution) records. For example, information collected during individual consultation activities which are not part of case files also would be subject to this provision.

*Comment:* Several comments indicated support for the proposed revision to 45 CFR 1321.11(b). Several comments indicated appreciation for the clarification. Others described the proposed revision as a modernization

since it provides for various formats of information—including electronic formats and information obtained verbally. One comment indicated that the revision was an acceptable balance between Ombudsman program disclosure limitations and the needs of the State agency to provide oversight and monitoring of the Ombudsman program performance. One commenter indicated that this strengthens protection of resident-specific information. One commenter indicated support for removal of the provision that permits a State agency director or senior manager to review redacted files of the Ombudsman program. Other commenters indicated that the proposed revision supports and clarifies the responsibility of the Ombudsman to monitor the operations of the Office and to protect confidential information maintained in the files, records or other information of the Office.

*Response:* AoA appreciates the supportive comments.

*Comment:* Two commenters indicated that the final rule should include language that requires State agency and AoA to "ensure that no conflicts of interest arise or persist." Another comment recommended that the rule require the State agency to develop a plan on how the Office of the State Long-Term Care Ombudsman is immunized from potential conflict of interest.

*Response:* We have addressed conflict of interest issues in the provisions set forth in § 1327.21 and believe the recommended changes would be redundant.

*Comment:* Two commenters indicated that the State agency should develop a plan on how the Office of the State Long-Term Care Ombudsman is immunized from interference by the State agency or other outside agencies to ensure autonomous advocacy.

*Response:* We have made changes to further clarify the manner in which States are to protect the Office from interference in other final rule provisions as a result of considering these and other related comments. Therefore, we believe that amending § 1321.11(b) to address interference, as recommended by commenters, would be redundant. Specifically, we have added a definition of "willful interference" at § 1327.1 and a new provision on State agency duties regarding interference, retaliation and reprisals at § 1327.15(i) in the final rule.

*Comment:* One comment indicated that AoA should clarify that it would be reasonable to require submission of aggregate data on complaint processing and activities and disclosure of

aggregate facility and provider-specific information by the Ombudsman to the State agency. Another commenter described that a local Ombudsman entity submits aggregate data to its respective area agency on aging (AAA), providing a balance of AAA need to have information and the Ombudsman program need to protect resident and complainant identifying information.

*Response:* We agree with the commenter that the submission of aggregate data of the Ombudsman program to the State agency as well as to an agency hosting a local Ombudsman entity is appropriate. This is clarified in the final rule at § 1327.15(e) with respect to the State agency.

*Comment:* One commenter recommended limitations on the use of the Ombudsman program information by the State agency so that the information is used solely for the purpose of oversight, and that it not be released outside of the State agency or be used for quality improvement or monitoring of other programs administered by the State agency.

*Response:* We do not agree that AoA should issue requirements regarding the appropriateness of the use of data which is permissible for disclosure by the State agency or other entities. The Act requires that Ombudsman program “files and records . . . may be disclosed only at the discretion of the Ombudsman” and prohibits disclosure of the identity of any complainant or resident except in limited circumstances. Section 712(d)(2) of the Act.

We believe that the final rule provisions related to disclosure limitations (at §§ 1327.11(e)(3),(8) and 1327.13(e)), as well as Ombudsman participation in the development of policies governing its operations (at §§ 1327.11(e), 1327.13(b)(1)), provide sufficient authority to the Ombudsman, in coordination with the State agency, to develop parameters about appropriate uses of aggregate Ombudsman program data.

*Comment:* One commenter suggested adding a provision encouraging Ombudsman programs to share non-confidential information with advocacy organizations and identifying information from a complainant with complainant permission.

*Response:* The Act provides the Ombudsman with the authority to determine disclosure of Ombudsman program information where it is not otherwise prohibited. See Section 712(d) of the Act. The final rule addresses this statutory requirement at § 1327.11(e)(3). We also note that

aggregate data provided by each State’s Ombudsman program to AoA through the National Ombudsman Reporting System is posted publicly on [www.agidnet.acl.gov](http://www.agidnet.acl.gov) and [www.acl.gov](http://www.acl.gov).

The Act provides the Ombudsman with the responsibility to determine appropriate disclosure of program information (unless it is otherwise prohibited), and this rule (at § 1327.11(e)(3)) requires development of policies and procedures regarding disclosure of program information. Beyond these requirements, AoA does not take a position on which specific information the Ombudsman should disclose to specific entities. However, we note that other provisions in this rule do require Ombudsman program coordination with other entities (see, e.g., § 1327.13(h)). Depending on the goals of coordinated activities, appropriate disclosure of information may support the success of such coordination.

*Comment:* One commenter suggested that the rule use the terms “identity” and “identifying information” consistently or provide explanation of the distinction in meaning.

*Response:* We have made changes in the final rule to consistently use the term “identifying information” or “resident-identifying information” and have omitted the term “identity” in provisions related to disclosure of information.

*Comment:* One commenter indicated that “other information” is ambiguous relative to which information is actually accessible and suggested adding “retained by the Office.”

*Response:* In the proposed rule, we used the language “files, records and other information maintained by the Office” for consistency with the language of the relevant provision of the Act (i.e. “files maintained by the program”). OAA section 712(d). We do not agree that the term “retained by the Office” provides more clarity than “maintained by the Office,” so have not revised this language in the final rule.

*Comment:* One commenter indicated that some States do not have a defined format for documenting consultations and that the proposed rule may suggest a specified procedure and documentation methodology for consultations.

*Response:* AoA does not intend to suggest any need for change in the manner that States document or collect data related to consultations in this rule. AoA requires States, through the National Ombudsman Reporting System (NORS), to report the total number and most frequent areas of consultation to facilities and of consultations to

individuals. OMB Control Number 0985–0005. This rule does not require States to make any changes to their documentation of consultations or related data through NORS. In order to make any change in NORS, AoA is required to publish a notice in the **Federal Register** pursuant to the Paperwork Reduction Act. This rule does not constitute such a notice.

*Comment:* One commenter requested that language be added regarding the timeframe required to capture and retain records.

*Response:* Since the Ombudsman program is operated by States pursuant to grants of the Department of Health and Human Services (HHS), the Federal requirements related to retention of records maintained pursuant to HHS grants apply to records retention of the Ombudsman program. In general, grant recipients and their sub-awardees under the grant must retain financial and programmatic records, supporting documents, statistical records, and all other records that are required by the terms of a grant, or may reasonably be considered pertinent to a grant, for a period of 3 years from the date the final Financial Status Report is submitted by States to HHS. The HHS requirements related to the retention of records are found at 45 CFR 75.361. This Federal grant requirement does not prohibit State agencies, the Office of the State Long-Term Care Ombudsman, and/or a local Ombudsman entity from establishing record retention policies which are provide for longer retention periods than the Federal requirements.

*Comment:* One commenter indicated that the files should be the property, not only of the Office, but also of the representative of the Office.

*Response:* The final rule requires that the Ombudsman shall be responsible for the management of the files, records and other information of the Office, regardless of whether the files are physically maintained by representatives of the Office. We believe that indicating that the files, records, and other information are also the property of the representatives of the Office could create confusion. However, we have clarified that nothing in the final rule prohibits a representative of the Office or local Ombudsman entity from physically maintaining such information in accordance with Ombudsman program requirements at § 1327.13(d).

## B. Definitions

### Definition of Immediate Family

We proposed to define the term “immediate family” because it is used

repeatedly, but not defined, in section 712(f) of the Act related to conflict of interest. We proposed that “immediate family, pertaining to conflicts of interest as used in section 712 of the Act, means a member of the household or a relative with whom there is a close personal or significant financial relationship.”

We selected this definition to describe relationships that could impair the judgment or give the appearance of bias on the part of an individual who is responsible to objectively designate an individual as the Ombudsman (under section 712(f)(1) of the Act) or on the part of the Ombudsman or officers, employees or representatives of the Office (under section 712(f)(2) of the Act). In developing the definition, we were informed by the Federal standards of ethical conduct related to impartiality in an employee’s conduct. See 5 CFR 2635.502(a),(b).

We also note, that, under ACL’s April 21, 2014 Guidance on Federal Recognition of Same-Sex Marriage (available at [http://www.acl.gov/Funding\\_Opportunities/Grantee\\_Info/Index.aspx](http://www.acl.gov/Funding_Opportunities/Grantee_Info/Index.aspx)), an immediate family member who is a member of the household or a relative includes a spouse in a same-sex marriage.

*Comment:* Eleven commenters indicated that they supported the proposed definition. Of those, three commenters indicated that the proposal provided helpful clarification. One indicated that the absence of a definition has left it up to State agencies to interpret. One indicated that the definition reflects the reality that non-blood and non-marital relations may cause conflicts of interest.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter suggested that we add language to the definition indicating that the definition “is not intended to restrict the authority of the Ombudsman to refuse to designate, or to de-designate, other individuals whom the Ombudsman determines are not qualified or have a conflict of interest.”

*Response:* As the commenter correctly states, AoA does not intend to restrict the authority of the Ombudsman to designate or de-designate other individuals whom the Ombudsman determines are not qualified or have a conflict of interest. The authority of the Ombudsman to designate and de-designate is provided in the final rule at § 1327.13(c), rather than in the definition.

*Comment:* Eight commenters indicated that the proposed definition is not sufficiently clear or is too open to interpretation. Two commenters of these commenters asked for clarification of

the terms “immediate family,” “household,” and “direct and predictable effect.” One commenter indicated that any relative working in a facility would pose a conflict for a representative of the Office who serves residents of that facility.

*Response:* After consideration of these comments, we have retained the proposed definition. We note that neither the proposed rule nor this final rule utilizes the term “direct and predictable effect” (although the Federal standards for ethical conduct do utilize the term).

We realize that not every question is addressed by this definition, but we believe it provides additional clarity to the provisions of the Act. In addition, while Federal interpretations of the regulation from which this definition was derived (5 CFR 2635.502(a),(b)) are not controlling, they may assist States in considering ways to apply this definition consistently with Federal government application to its employees.

*Comment:* One commenter asked about why the “immediate family” term does not include the situation where the close friend of a representative of the Office works at a facility and the complaint is against that person.

*Response:* The definition of the term “immediate family” is included in the rule in order to clarify the term, which is used in the Act. The term is used in the provisions of the OAA to specifically relate to conflicts of interest for the following situations:

(1) An individual who designates the State Ombudsman or local Ombudsman entity (section 712(f)(1));

(2) officers, employees, or representatives of the Office (section 712(f)(2)). By defining “immediate family,” ACL does not intend to indicate that the State agency is limited in its ability to identify other conflicts of interest, including conflicts of interest related to complaints lodged against a close friend of the Ombudsman or a representative of the Office. Moreover, in the provisions related to conflict of interest, the rule specifically indicates that the State agency is required to identify conflicts of interest and provides examples, but not limitations, of the types of conflicts to be identified (§ 1327.21(a), (c)).

Definition of Office of the State Long-Term Care Ombudsman

AoA proposed a definition of the “Office of the State Long-Term Care Ombudsman” due to inconsistencies among States and confusion regarding which individual or individuals constitutes the “Office.” For example,

we believe that States will benefit from clarification regarding who is responsible for making determinations specifically required of the Office by the Act.

A 2011 State compliance review revealed that AoA’s provision of technical assistance and education on this question may not have provided sufficient clarity to States regarding the decision-making authority expected of the Office, and more specifically of the Ombudsman, as the head of that Office. Thus, this rule clarifies and codifies the definition.

In the final rule, we have modified the definition to clarify that the Office is the organizational unit in a State or territory which is headed by the Ombudsman. We have provided an additional definition for “State Long-Term Care Ombudsman program” in order to distinguish this term from the “Office” since the “Office,” in some States, is organizationally separate from local Ombudsman entities. We recognize that in other States where the Ombudsman does not designate local Ombudsman entities, the Office will be identical to the “State Long-Term Care Ombudsman program.” Regardless of the organizational structure, the definition of “State Long-Term Care Ombudsman program” in § 1327.1 is inclusive of the Ombudsman, the Office, and the representatives of the Office.

*Comment:* We received ten supportive comments on the proposed definition. Several commenters indicated that the proposal would provide helpful clarity. Two commenters indicated that the proposed definition would enhance the concept that the Ombudsman program is to be a unified program within the State. Another indicated that the proposal would appropriately distinguish the Office and reinforce the responsibility of representatives of the Office.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter suggested consideration of the addition of the following language: “the Office of the State Long-Term Care Ombudsman is not the State agency on aging or State licensing agency.”

*Response:* While we do not disagree with the comment, we do not believe a change from the proposed definition is needed. We believe that the definition as it was proposed, particularly when it is taken in context with the provisions of § 1327.11 (regarding the establishment of the Office), provides adequate clarity that distinguishes the Office from both the State agency (while recognizing that the Office may be organizationally situated within or

attached to the State agency) or the State licensing entity.

*Comment:* One commenter asked the question whether, since the definition of “Office” includes representatives, only the Ombudsman can determine these positions and whether a State agency or an Ombudsman could establish a policy that prohibits representatives of the Office from taking positions without approval or that prohibits positions that are different than the Office.

*Response:* We have revised the definition of “Office of the State Long-Term Care Ombudsman” in the final rule so that it does not include the representatives of the Office. The Act indicates that “The State agency shall require the Office to . . . recommend any changes in . . . laws, regulations, and policies as the Office determines to be appropriate;” Section 712(h)(2) of the Act. We interpret this provision to mean that it would be inappropriate for a State agency to prohibit the Office from taking a particular position related to a recommendation in changes to relevant laws, regulations, and policies. Doing so would interfere with the responsibility of the Office to make such determinations. See §§ 1327.11(e)(8); 1327.13(a)(7); 1327.15(k)(2).

The Act provides that the Office shall be headed by the Ombudsman in section 712(a)(2) and specifically defines the word “Ombudsman” as the “individual described in section 712(a)(2).” Section 711(2) of the Act. Taken together, we read the statute to indicate that, as the head of the Office, the Ombudsman has the authority to determine the positions of the Office as well as the processes by which such determinations are made within the Office. Therefore, we believe the Act would not prohibit an Ombudsman from establishing a policy that limits the ability of representatives of the Office from taking positions without approval of the Ombudsman or that are different than that of the Ombudsman.

AoA encourages each Ombudsman to solicit and consider the views of representatives of the Office, to encourage dialogue among representatives of the Office in formulating the positions of the Office, and to empower representatives of the Office to carry out their duties under section 712(a)(5) of the Act, including duties to “represent the interest of residents before government agencies” (section 712(a)(5)(B)(iv)) 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” (section 712(a)(5)(B)(v)(I)).

Definition of Representatives of the Office of the State Long-Term Care Ombudsman

In proposing a definition of “Representatives of the Office of the State Long-Term Care Ombudsman,” we intended to clarify that the representatives of the Office, including employees and volunteers designated by the Ombudsman, represent the Office (as opposed to the entity by which they may be employed or managed) when they are carrying out duties of the Office set forth at § 1327.19.

We further intended to clarify that the “representatives of the Office” are to be accountable to the head of the Office (*i.e.* the Ombudsman) for purposes of Ombudsman program operations. For all programmatic operations, the representative represents the Office (for example, they must follow the policies, procedures and guidance of the Ombudsman regarding complaint processing and other Ombudsman program activities). Simultaneously, those representatives of the Office who are organizationally located within local Ombudsman entities also represent the agency hosting the local Ombudsman entity, as this agency oversees them for personnel management matters (for example, the representative of the Office must follow the agency’s personnel policies so long as those policies do not conflict with Ombudsman program law and policy).

*Comment:* Ten commenters indicated support for the proposed definition. One commenter indicated that the proposal recognizes that both employees and volunteers are to be considered representatives of the Office, regardless of the entity that provides direct supervision. Two comments indicated that the proposal would clarify that representatives of the Office are to be held accountable to the Ombudsman, regardless of whether affiliated with another entity. Another commenter indicated that the proposal should serve to unify the Ombudsman program within a State. One commenter indicated that this definition helps clarify for facilities whether they may appropriately provide volunteer representatives of the Office with access to residents and to whom facilities should address inquiries.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter indicated that the proposal did not go far enough to address the risks to the individual representative of the Office who is organizationally located within local Ombudsman entities, given that the individual is reporting to one authority

for programmatic matters and another for personnel management matters.

*Response:* We acknowledge that representatives of the Office who are employed by or who volunteer for a local Ombudsman entity can be in a difficult position when reporting to one authority for programmatic matters and another for personnel management matters. The OAA sets up a distinctive and highly unusual structure in which the Ombudsman is responsible for designating all representatives of the Office but is (depending on the State’s chosen programmatic structure) not necessarily the authority for personnel management matters. We believe that those States which choose to utilize local Ombudsman entities may operationalize the requirements of the Act by dividing the authority between the personnel functions of the agency hosting the local Ombudsman entity, including hiring and firing, and the programmatic functions of the Ombudsman, including designation and de-designation. Despite the fact that the State agency (and/or the Office of the State Long-Term Care Ombudsman, depending on the organizational structure) contracts with an agency hosting the local Ombudsman entity to provide Ombudsman program services, the relationship is more complex than a typical contractual one. In addition to contract oversight for programmatic issues, the Ombudsman is also responsible for designation of the representatives of the Office. Further, the employees and volunteers of the local Ombudsman entity (*i.e.* representatives of the Office) have a direct representational relationship to the Office. As a result, this relationship between the Ombudsman and the agency hosting the local Ombudsman entity is not limited to merely a contract oversight function.

We believe that, in the absence of regulation, many State agencies and agencies hosting local Ombudsman entities have found this distinctive relationship to be confusing and difficult to successfully implement. It is the intention of AoA to clarify this distinctive relationship through this definition, as well as through other provisions of this rule. We believe this clarification will help both States and agencies hosting local Ombudsman entities to operationalize the Ombudsman program in a manner consistent with what Congress intended and help to reduce the risks to the individual representatives of the Office. If all entities and individuals involved in operating the Ombudsman program understand that, where local Ombudsman entities are utilized in a



State, there is a separation between programmatic oversight and personnel management, and the policies of the Ombudsman program appropriately implement this separation, this should help the individual representatives know to whom they are accountable for programmatic matters (*i.e.* the Ombudsman) and to whom they are accountable for personnel management matters (*i.e.* the agency hosting the local Ombudsman entity). We believe that the proposed definition, and the context of the entire rule, provides clarity that directly relates to the cause of the risks identified by the commenter.

*Comment:* One commenter indicated that in their State, Ombudsman program volunteers are appointed by county commissioners, not designated by the Ombudsman. As a result, when a volunteer does not appropriately perform programmatic duties, the appointing authority—and not the Ombudsman—has the only authority to remove the volunteer from this role.

*Response:* We appreciate the commenter bringing this issue to our attention in the comment. The Act is clear that the Ombudsman has the authority to designate representatives of the Office. Section 712(a)(5) of the Act. Further, this rule clarifies that the Ombudsman has the sole authority to designate and de-designate representatives of the Office. § 1327.13(c). AoA plans to provide technical assistance to States to assist them in coming into compliance with this rule.

*Comment:* One commenter suggested that the proposed definition could be strengthened with a citation to OAA section 711 and with inclusion of language regarding personnel management of the local Ombudsman entity which cannot conflict with Ombudsman law and policy.

*Response:* We have included reference to section 711 of the Act in the definition of “State Long-Term Care Ombudsman program” in the final rule. We also agreed with the commenter’s suggestion to incorporate into the final rule the inclusion of the concept, included in the preamble of our proposed rule, related to personnel management of the agency hosting the local Ombudsman entity not conflicting with Ombudsman law and policy. We have incorporated this concept into a new provision at § 1327.17(b).

#### Additional Recommended Definitions

Numerous commenters suggested the need for additional definitions of terms used in the proposed rule and/or the Act.

*Comment:* Ten commenters recommended that the final rule define the term “willful interference.” Some of them indicated that the definition was needed to clarify and support the requirement in the Act that the Office and its representatives are free from interference in the course of performing required functions. Several commenters offered suggested language defining the term.

*Response:* We have added a definition of “willful interference” at § 1327.1. We have also developed new provisions regarding interference, retaliation, and reprisals in response to these and other comments at § 1327.15(i).

*Comment:* One commenter recommended that the final rule define the term “long-term care Ombudsman program.” The commenter indicated that the term “program” is commonly used to describe both the State Office and local Ombudsman entities and is described in the Act, at sections 711(4) and 712(a)(1)(B), as the mechanism through which the Office carries out its duties.

*Response:* We appreciate this helpful comment. We understand the use of these terms can be confusing due to the variety of organizational structures used by States. Therefore, in some States which use a centralized structure, the Office of the State Long-Term Care Ombudsman is made up of the individual who is the State Long-Term Care Ombudsman and representatives of the Office, and is structurally the same as the “program.” In other, more decentralized organizational structures, the “program” is a combination of the “Office of the State Long-Term Care Ombudsman” and the “representatives of the Office” who are organizationally located within “local Ombudsman entities.”

In response to this comment, we have added a definition of “State Long-Term Care Ombudsman program,” revised the definition of “Office of the State Long-Term Care Ombudsman” in order to more clearly distinguish between the meanings of these terms, and separated out the provisions related to the agencies hosting local Ombudsman entities in a new section § 1327.17.

Specifically, to the definition of “Office of the State Long-Term Care Ombudsman” we have added the term “in a State or territory” and deleted “including the representatives of the Office.” We have included the provision regarding “representatives of the Office” within a new definition for the term “State Long-Term Care Ombudsman program” and indicated that it is through the State Long-Term Care

Ombudsman program that the functions and duties of the Office are carried out.

*Comment:* One commenter recommended that the term “State agency” be defined as it is used frequently in the proposed rule.

*Response:* The final rule is part of subchapter C Administration on Aging, Older Americans Programs of chapter XIII of the Code of Federal Regulations. Part 1321 of subchapter C provides a detailed explanation of the responsibilities of the State agency which include, but are not limited to, its responsibilities in carrying out the State’s Ombudsman program. We did not adopt the recommendation to include a definition for “State agency” within these regulations, which are limited to operations of the Ombudsman program.

However, to provide additional clarity, we have included language in § 1327.15(a),(e) to cross reference the term “State agency” to the related provision in 45 CFR part 1321.

*Comment:* Seven commenters recommended that we add a definition for the term “legal representative” and/or clarify the distinction between “legal representative” and “resident representative.” One indicated that a reader might mistakenly interpret the term “legal representative” to mean a resident’s lawyer.

*Response:* We agree that it would be helpful to use one term consistently. While the Act uses the term “legal representative,” we agree that the term “resident representative” may be less confusing; since a reader is unlikely to interpret the use of “resident representative” to an attorney or court-appointed representative unlike “legal representative.” In response to these comments, we have consistently used the term “resident representative” throughout the final rule, and we have added a definition of the term in § 1327.1. We also note that, under ACL’s April 21, 2014 Guidance on Federal Recognition of Same-Sex Marriage (available at [http://www.acl.gov/Funding\\_Opportunities/Grantee\\_Info/Index.aspx](http://www.acl.gov/Funding_Opportunities/Grantee_Info/Index.aspx)), a spouse in a same-sex marriage could serve as a resident representative.

We intend for our definition of “resident representative” to be consistent with the person-centered approaches to Ombudsman program services. The “resident representative” is authorized to provide permission for a representative of the Office to perform the certain tasks when a resident is unable to communicate informed consent or prefers to have a representative act on his/her behalf. Those tasks include: Access to resident



records; disclosure of the resident identifying information; and initiation of the investigation a complaint, coordination of the investigation and resolution approach, and determination of the resolution of the complaint. Relevant provisions are found in the regulations related to complaint processing at § 1327.19(b) and related to disclosure of resident-identifying information at § 1327.11(e)(3).

*Comment:* One commenter recommended that we remove the use of the term “resident representative” because they found it confusing and ambiguous.

*Response:* For the reasons indicated above, we have chosen to continue to use the term “resident representative” consistently and to replace the term “legal representative” where that was used in the proposed rule.

*Comment:* Two commenters recommended that we add a definition for the term “protection and advocacy systems.”

*Response:* We did not add a definition of the term “protection and advocacy systems” but instead have revised the description of protection and advocacy systems in the final rule at § 1327.13(h)(4).

*Comments:* One commenter recommending adding a definition to clarify that designation and de-designation includes certification and de-certification. The commenter indicated that some States use the term “certification” to apply to individuals and “designation” for the local Ombudsman entity.

*Response:* We do not agree that a definition is needed, as we believe the commonly defined use of these terms is sufficient to explain the use of these terms. According to the *Merriam Webster Dictionary*, to “certify” means “to say officially that something or someone has met certain standards or requirements” and “designation” means “appointment to or selection for an office, post, or service.”

Therefore, in the context of the Ombudsman program, the Ombudsman certifies (*i.e.* officially says) that an individual has met the training and other requirements necessary for an individual to serve as a “representative of the Office.” Further, the Ombudsman designates (*i.e.* appoints or selects) an individual to be a “representative of the Office” and designates a “local Ombudsman entity” to assist in providing the Ombudsman program services at the local level. Certification that an individual has met required training requirements is one of the factors (along with other relevant factors, such as freedom from

unremedied conflict of interest and employment by or volunteer agreement with a local Ombudsman entity, where applicable) to be considered in the Ombudsman’s determination that the individual is qualified to be designated as a “representative of the Office.”

*Comment:* One commenter recommended that we add a definition for the term “aggregate data,” indicating that this relates to the scope of the State agency’s access to Ombudsman program data while permitting the Ombudsman program to adhere to confidentiality requirements.

*Response:* We do not agree that a definition is needed, because the common definitions of the words “data” and “aggregate” are sufficient.

According to the *Merriam Webster Dictionary*, the adjective “aggregate” means “formed by adding together two or more amounts” and “taking all units as a whole.” The word “data” means “facts or information used usually to calculate, analyze, or plan something.” Further, the provisions regarding establishment of policies and procedures regarding disclosure at § 1327.11(e)(3) provide sufficient clarity on the relevant requirements of the Act.

*Comment:* One commenter recommended that we add a definition for the term “unable to communicate informed consent,” indicating that the term is ambiguous.

*Response:* We believe that the term “unable to communicate informed consent” improves the clarity of the term “unable to consent” which is used in the Act, related to Ombudsman program access to resident records. Section 712(b)(1)(B)(i)(II) of the Act. Our expectation is that States will operationalize the use of this term by incorporating it into the Ombudsman program’s procedures for resident records and complaint processing. We are also available to provide States with technical assistance should the need arise for further clarity on how to operationalize this term within Ombudsman program operations.

#### *C. Establishment of the Office of the State Long-Term Care Ombudsman*

The regulations at § 1327.11 clarify for States how to appropriately establish the Office pursuant to section 712(a)(1) of the Act. This includes clarification regarding the determinations which are the responsibilities of the Office, and by the head of the Office (*i.e.* the Ombudsman), pursuant to section 712(h) of the Act. Because these determinations are frequently outside the scope of the authority of most State employees (many, though not all, Ombudsmen are State employees), we

believe that this clarification will assist States in full implementation of the Act.

Specifically, the Office is required by the Act to make determinations regarding:

- Disclosure of information maintained by the Ombudsman program;
- Recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and
- Provision of information to public and private agencies, legislators, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

The Act indicates that the recommendations made by, and the information provided by, the Office are limited to issues pertaining to residents of long-term care facilities and services. See section 712(a)(3)(G), (h)(2)–(3) of the Act. In order to reduce confusion at the State level where the recommendations of an Ombudsman might be mistaken for the position of the Governor or the State agency, another agency carrying out the Ombudsman program, or any other State agency, AoA proposed clarification that these determinations are those of the Office of the State Long-Term Care Ombudsman and do not represent other State governmental entities.

*Comments:* We received seven comments indicating general support for § 1327.11 as proposed. Some of these commenters indicated that the proposed language provides critically needed clarity for the Ombudsman program to accomplish its intended role under the Act. Some commented that the proposal clarifies that the Office must operate as a separately identifiable Office, regardless of its organizational location. One commenter indicated that the proposed language confirms that the Ombudsman program should operate as an integrated whole with the Ombudsman providing direction, authority, and programmatic supervision to all designated representatives.

Two of these commenters indicated that some State agencies have prohibited the Office from engaging in activities required in the Act because of concern that the Ombudsman would make determinations that would be contrary to those of the State agency or the executive branch; they indicated that the proposed language is necessary to address these concerns. One commenter indicated that the proposed language would strengthen the independence of the Office. Another

commenter indicated that the proposed language appropriately allows States flexibility to best serve residents and maintain compliance with the Act.

*Response:* We appreciate the supportive comments.

*Comment:* Two commenters indicated that AoA should require the Office to be placed outside of the State government. Another commenter disagreed with the proposed language permitting the Office to be located within or connected to the State agency, indicating that it is difficult to imagine what an Ombudsman faces in advocating for residents where he or she has a peer at a regulatory agency. Another commenter indicated that the final rule should require that the State contract the Ombudsman program with a nonprofit entity to ensure that the Ombudsman has the ability to operate independently. One of these commenters indicated that they are in a State where the Ombudsman program is independent of any State agency and that this has worked well to serve the interests of individuals served by the program.

One of these commenters indicated that advocacy and government bureaucracies are rarely compatible and that residents would be better served if Ombudsman programs were contracted out to private nonprofit entities. In support of this perspective, this commenter cited a 2001 study finding that of the nine Ombudsmen reporting conflicts of interest due to program placement, 100% were located in State agencies on aging. While eleven of thirty-seven (30%) Ombudsmen located within State agencies on aging reported that Office organizational placement limited their ability to speak with legislators and/or the media, one of fifteen (7%) Ombudsmen in other types of agencies reported experiencing limitation on autonomy due to the organizational placement of their Office. This commenter recognized that the Act permits State agencies to operate the Office and that the Act would need to be changed to achieve this recommendation.

One of these commenters indicated that placement of the Ombudsman program within a non-profit entity allows for leveraging of private and other funds and supports effective investigation and intervention. This commenter indicated that the Ombudsman must be able to articulate positions that may be critical of a State agency in order to adequately represent residents.

*Response:* Congress has indicated through the Act that it is the responsibility of the State agency to establish and operate an Office and has

expressly provided the opportunity for the State agency to carry out the Ombudsman program directly or by contract or other arrangement with a public agency or nonprofit private organization. Section 712(a)(1), (4) of the Act. AoA recognizes that the advocacy function of the Office may be a difficult fit within government bureaucratic structures and under policies governing State employees in some States. It is our intent to assist States agencies, through this rule, to clarify their responsibilities to carry out all of the requirements of the Act and to assist them in considering whether their organizational structure and State employee policies can adequately support a fully functioning, effective Ombudsman program.

We also recognize that effective consumer advocacy entities can and do successfully exist within some State governments. In some States, the Office is not the unique consumer advocacy entity located within State government.

While we agree that a non-profit agency might be able to access diverse funding sources, we also note that a number of State agencies provide significant resources to the Office in addition to the Federal grant funds appropriated under the Act.

*Comment:* One commenter expressed concern that the proposed rule grants excessive authority to the Ombudsman at the expense of local Ombudsman entities and that the Ombudsman is held accountable to no one. The commenter expressed concern about the ability of local Ombudsman entities to advocate for residents in States where the Ombudsman misuses this power and indicated that the proposed regulations provide for no recourse for situations in which the Ombudsman's actions violate the Act.

*Response:* We believe that the proposed rule appropriately follows the provisions of the Act which clearly set forth the Ombudsman (*i.e.* State Ombudsman, not all representatives of the Office) as responsible for the leadership of the Office, as the head of the Office. Section 712(a)(2) of the Act. We disagree with the assertion that the Ombudsman is accountable to no one. State agencies and other agencies which house the Office have the authority to provide personnel supervision and the ability to take personnel actions related to the performance of the Ombudsman as they would with any other employee. Some States have also set up additional mechanisms for accountability of the Ombudsman program, including governing or advisory boards. The Act does not prohibit the State agency or the Office from establishing additional

mechanisms for accountability so long as the Ombudsman can fully perform his or her functions under the Act.

The Ombudsman program is established through OAA grants to State agencies on aging. State agencies are required to assure AoA that the Ombudsman program is established and carried out consistent with the provisions of the Act. If AoA determines that a State fails to comply with any term of an award, AoA, as the granting agency, has several remedies available to it, including but not limited to wholly or partly suspending or terminating the award. 45 CFR 75.371.

*Comment:* One commenter, in reference in § 1327.13(a), questioned the ability of an Ombudsman to serve on a full-time basis if other populations are served beyond the scope of the Act.

*Response:* We have added clarity to a new provision at § 1327.11(c) in the final rule by indicating that full-time shall mean that the functions and responsibilities set forth in this section are to constitute the entirety of the Ombudsman's work. AoA does not object to a State choosing to utilize non-OAA resources for the Ombudsman program to provide services to additional populations (for example, to recipients of in-home long-term services and supports), so long as the functions and responsibilities relating to the expanded population are consistent with the services of an ombudsman. The State agency or other agency carrying out the Ombudsman program 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. This provision is not intended to limit the ability of an Ombudsman to access grants or otherwise perform special projects so long as the activities of the grant or project are consistent with the functions and responsibilities of the Ombudsman.

*Comment:* Two commenters (one commenting on § 1327.11 and the other commenting on § 1327.13) recommended that the final rule include qualifications or criteria for hiring the Ombudsman. One of these commenters indicated that the Ombudsman program would benefit from strong Federal standards in this domain since Ombudsmen who lack basic qualifications for the position are likely to not perform well. This commenter recommended that Ombudsman candidates have a strong background in the Ombudsman program or ensure that a newly hired Ombudsman promptly complete State certification training, as required by representatives of the

Office, and complete an internship within a long-term care facility. Without qualifications, the commenter wondered how AoA could remedy situations in which the State hires an unqualified candidate.

The other commenter suggested examples of recommended criteria: Knowledge of the long-term care system; demonstrated evidence of resident-focused advocacy on both an individual and systemic basis; knowledge of State and local government; communication, management, and conflict resolution skills; and clinical and/or direct health and human services experience.

*Response:* We agree with the commenters that minimum qualifications for the Ombudsman could be helpful to ensure selection from among highly-qualified candidates with appropriate expertise. We note that AoA has provided States with guidance on Ombudsman minimum qualifications since 1981, when it indicated that the Ombudsman “should minimally possess the following qualifications:

- a. Demonstrated experience with long-term care systems or professional training in long-term care and institutions;
  - b. Program development background and skills;
  - c. Administrative, arbitration, conciliation and/or negotiation experience and skills;
  - d. Experience or education in gerontology and/or aging programs.”
- AoA Program Instruction 81–8.

Based on the 1981 guidance, the qualifications indicated in the Act (*i.e.* “expertise and experience in the fields of long-term care and advocacy.” Section 712(a)(2)), and considering these comments, we have developed a new provision regarding minimum qualifications at § 1327.11(d).

*Comment:* One commenter indicated that the proposed provisions at § 1327.11 would be difficult for States to implement and for AoA to uphold. The commenter indicated that in their State, the Ombudsman is an employee of the State agency on aging and bound by its policies regarding communications with the legislature and the media. Therefore, the Ombudsman is currently unable to independently make determinations, make recommendations for changes to policies, or provide information to the public. The commenter indicated that, for AoA to suggest that the Ombudsman has authority to override his or her supervisor, agency director, and Governor, shows that AoA is not in touch with the realities of State government and the context in which Ombudsmen must work. Another commenter indicated that it is

unrealistic for AoA to think that an Ombudsman employed by a State agency can make recommendations which conflict with those of the State agency or the Governor.

*Response:* We appreciate the commenters’ perspectives of the circumstances in their States. We would like to clarify that the rule does not suggest that the Ombudsman has the authority to override his or her supervisor, agency director, or Governor. However, the Act requires that any State, in order to receive grant funds under the Act, assure to AoA that, among other things, it will permit the Ombudsman to fulfill all of the functions under the Act. These include the ability to make certain determinations which represent the positions of the Office, and not necessarily those of the supervisor, agency director, or Governor. A number of State agencies or other agencies in which the Office is organizationally located already include language in their personnel policies or other relevant laws or policies which implement this requirement of the Act.

In order to reduce confusion at the State level where the recommendations of an Ombudsman might be mistaken for the position of the Governor or any other agency, AoA has specifically indicated in the final rule that these determinations and positions are to be those of the Office and do not represent other State entities. § 1327.13(a)(7)(vi).

We wish to remind the commenters that their States have previously provided to AoA assurances in its State plan on aging that they will carry out the Ombudsman program in compliance with the Act. These State plans were signed by their respective governors and submitted to AoA for approval and as a condition of receiving grant funds under the Act.

We respectfully disagree with the comment that AoA is not in touch with the realities of State government and the context in which Ombudsmen must work. In fact, numerous AoA staff have had previous employment experience within State government entities, and AoA staff regularly communicate with State government entities. AoA is aware that the Act requires functions of the Ombudsman program that are uncharacteristic of other programs and services under the Act and that these requirements have been challenging for some States to successfully implement. AoA is also aware of the wide variations among States in their implementation of programs and services under the Act. Numerous States that have been able to successfully implement the Ombudsman program, even when the

Office is organizationally located within State government.

The Act specifically provides for the opportunity for the State agency to carry out the Office through a contract with a nonprofit entity. Section 712(a)(4) of the Act. Should any State government be unable to follow the requirements of the Act and this final rule when it houses the Office within State government, it has the opportunity to seek other arrangements to enable the Office to fulfill all of its statutory responsibilities and to, most importantly, effectively serve residents of the State’s long-term care facilities. Currently, Offices in six States and the District of Columbia are organizationally located outside of State government.

*Comment:* Eleven commenters indicated general support for the proposed language in § 1327.11(b), describing the Office as a “distinct entity, separately identifiable” regardless of its organizational placement. One of these commenters indicated support for the language as it assures autonomy of the Office to advocate for residents. Another indicated that the proposed language would ensure the independence of the Office and would strengthen the Ombudsman program. One commenter described the proposed language as an excellent clarification of the responsibilities of the Office that will benefit all levels of the organization in carrying out the Ombudsman program functions. Another commenter indicated support for the language in that it permits State agency flexibility to decide the best location for the Ombudsman program in order to best serve residents and maintain compliance with the requirements of the Act.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter described challenges to implementation of § 1327.11 where a representative of the Office is hosted within an area agency on aging with organizational conflicts of interest.

*Response:* We have described this comment more fully and responded in more detail in section H. Conflicts of interest, below.

*Comment:* Four commenters indicated general support for the proposed language of § 1327.11(c) (moved in the final rule to § 1327.11(e)(8)) regarding the ability of the Ombudsman to independently make certain determinations and establish certain positions of the Office. One of these commenters indicated that this clarification will encourage Ombudsmen to work with

representatives of the Office to bring forth resident issues. Another indicated that the proposed language is helpful because independence is critical to the Ombudsman program's ability to carry out all of its functions and duties.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter recommended that the final rule include a definition of the term "determinations" as used in proposed § 1327.11(c) (moved in the final rule to § 1327.11(e)(8)).

*Response:* We do not agree that a definition is needed because the common definition of the word "determination" is sufficient. According to the *Merriam Webster Dictionary*, "determination" means "the act of officially deciding something." Further, we believe that the provisions regarding determinations at § 1327.11(e)(8), when read in the context of the provisions related to the functions and responsibilities of the Ombudsman (§ 1327.13) and the State agency responsibilities related to the Ombudsman program (§ 1327.15) provide sufficient guidance on the Act's requirements related to Ombudsman determinations.

*Comment:* One commenter suggested the need for a definition of "independently."

*Response:* We do not agree that a definition is needed because the common definition of the word "independent" is sufficient. According to the *Merriam Webster Dictionary*, "independent" means "not requiring or relying on something else; not contingent." Further, we believe that the provisions in the final rule regarding the Ombudsman independently making determinations and establishing positions, the functions and responsibilities of the Ombudsman, the State agency responsibilities, and conflicts of interest provide sufficient clarity on the Act's requirements related to Ombudsman independence.

*Comment:* One commenter inquired about an appeal process if the Office organizational structure does not permit independence or adherence to the provisions of § 1327.11.

*Response:* No formal Federal appeal process exists for review of the independence of the Office. State agencies may develop appeal processes for these or other grievances. The final rule does require the development of a grievance process regarding determinations or actions of the Ombudsman or the representatives of the Office. § 1327.11(e)(7). Moreover, it is ACL's intention, through this final rule, to clarify the requirements in the

Act so that States, in carrying out the Ombudsman program through OAA grants, will better understand their responsibility to assure that the Ombudsman has the ability to perform all of the functions and responsibilities set forth in the Act.

*Comment:* One commenter inquired whether there may be other situations in which the Ombudsman may need to make determinations and whether the rule should provide for these other situations.

*Response:* The final rule at § 1327.11(e)(8) addresses all of the determinations of the Office which are specifically required in the Act.

*Comment:* One commenter suggested that language be added to § 1327.11(c) (moved in the final rule to § 1327.11(e)) to specify that a "nonprofit organization" could be carrying out the Ombudsman program.

*Response:* The language in § 1327.11(b)(2) is sufficiently clear that the State agency may enter into a contract or other arrangements with a "nonprofit organization" to establish the Office. We believe the term "State agency or other agency" is sufficient to cover the variety of entities in which the Office can be organizationally located.

*Comment:* One commenter indicated that the proposed language regarding Ombudsman determinations could be interpreted to mean that the Ombudsman must individually approve all disclosures, testimony or information provided by any local Ombudsman representative on a public policy issue. The commenter indicated that an Ombudsman might choose to delegate some determinations to local Ombudsman entities.

*Response:* We do not intend for the proposed provision to limit ability of Ombudsman to utilize representative of the Office for appropriate tasks in order carry out the determinations of the Office. We do not believe that the proposed or final rule, at § 1327.11(e)(8), limits this ability.

*Comment:* With respect to § 1327.11(c)(2) (moved in the final rule to § 1327.11(e)(8)), regarding recommendation to changes in laws, regulations, etc., one commenter indicated that in their State, the Ombudsman is organizationally located within an umbrella State government structure and must adhere to State government protocols related to legislative action and lobbying. The commenter requested consideration for differences in structure of the Office from State to State.

*Response:* The language in the final rule at § 1327.11(e)(8) is derived directly from the Act which states that making

recommendations to changes in laws, regulations, etc. is a function of the Ombudsman. Section 712(a)(3)(G)(ii) of the Act. Further, the Act requires State agencies to require the Office to analyze, comment on, monitor and recommend changes to laws, regulations, and policies, and provide information to, among others, legislators. Section 712(h)(2),(3) of the Act. We do not believe that AoA has the authority under the Act to make this provision optional for some States and not others.

The Act creates the Ombudsman program to resolve problems for residents of long-term care facilities on individual as well as systemic levels. Therefore, the ability to take positions and make recommendations that reflect the interests of residents is critical to the effectiveness of the Ombudsman program.

*Comment:* One commenter recommended that we add "the media" to the list of persons to whom information can be provided by the Office in proposed regulation § 1327.11(c)(3). The commenter indicated that providing access to the media logically follows from the statutory authority of the Office to provide information and recommendations and to facilitate public comment. The commenter says that there have been instances of State agencies and local Ombudsman entities that have restricted Ombudsman program contact with the media and that explicit inclusion of this term in the regulation would be helpful.

*Response:* We have accepted this recommendation in the final rule, revising § 1327.11(c)(3) (moved in the final rule to § 1327.11(e)(8)(iii)). We believe it further clarifies implementation of the Act. Further, it is consistent with the AoA 2011 finding of non-compliance regarding information dissemination in a State which required State agency and Governor prior approval of Ombudsman program press releases and which used orders and intimidation to ensure the cancellation of press conference activities. As we indicated in the AoA compliance review of this State, while we encourage Ombudsman programs to have excellent lines of communication with their State agency to avoid blind-side surprises, the Ombudsman must have the option to communicate with the media in order to advocate for residents and their interests.

*Comment:* One commenter suggested that we move § 1327.11(c)(4) so that it modifies subparagraphs (1)–(3) rather than standing alone as a separate activity.

*Response:* We have moved this provision to § 1327.13(a)(7)(vi) (regarding functions of the Ombudsman) in the final rule where it more clearly modifies the determinations of the Office related to recommendations and information dissemination.

*Comment:* One commenter indicated that the proposed language in § 1327.11(c)(4) is beneficial to State agencies in order to distinguish determinations and positions of the Office as not necessarily representing those of the State agency. The commenter indicated that the proposed language makes the reality of opposed positions and determinations understood and explainable.

*Response:* We appreciate the supportive comment.

*Comment:* One commenter suggested that the Ombudsman should have the authority to make autonomous hiring and firing decisions and should be solely responsible for determining the qualifications and positions necessary for the Ombudsman program to fulfill its mission. Without such a provision, the commenter indicated that States could significantly undermine the functions of the Ombudsman program by limiting who and what types of staff the Ombudsman is able to hire and retain.

*Response:* The Act specifically gives the Ombudsman the authority to designate local Ombudsman entities and to designate representatives of the Office. Section 712(a)(5) of the Act. It does not, however, require an arrangement where representatives of the Office are directly hired or fired by the Ombudsman. In many States, local Ombudsman entities are hosted by an agency that is not the same agency that employs the Ombudsman. This arrangement is envisioned by the Act, not prohibited by it. In fact, the most frequently utilized organizational structure for Ombudsman programs is that the Office is organizationally located within or is attached to the State agency which contracts with agencies hosting local Ombudsman entities.

In light of the Ombudsman responsibility to designate representatives of the Office, we encourage Ombudsmen and State agencies to develop policies and procedures that: (1) Coordinate the hiring and firing of individuals by agencies hosting local Ombudsman entities with the Ombudsman and (2) incorporate minimum qualifications. Such coordination will enable the Ombudsman to make designation and de-designation determinations in ways that are coordinated with the employing

agency which hosts the local Ombudsman entity.

In addition, we require Ombudsmen or State agencies, in this final rule, to develop policies and procedures regarding conflicts of interest in employing or appointing representatives of the Office. § 1327.11(e)(4)(ii). We have also added a new section regarding responsibilities of agencies hosting local Ombudsman entities at § 1327.17.

#### *D. Functions and Responsibilities of the State Long-Term Care Ombudsman (§ 1327.13)*

In § 1327.13, AoA provides clarification regarding the functions and responsibilities of the Ombudsman, as the head of the Office.

*Comment:* Eight commenters indicated support for the proposed language in the proposed regulation § 1327.13. Three of these commenters indicated that the language clearly describes the leadership role of the Ombudsman as the programmatic head of the Office. One commenter stated that the proposed language will identify the Ombudsman as responsible for the leadership and management of the Office. Three commenters stated that the language reflects the intent of Congress as set forth in the Act for the Office to be a unified entity. One commenter indicated that the language supports the concept that the Office speaks with one independent voice. One commenter indicated that they were pleased to see an emphasis on the independence of the Office in this proposed language. One commenter indicated that the proposed language is helpful in clarifying that there is only one State Long-Term Care Ombudsman in each State, critical in situations where there are agencies hosting local Ombudsman entities which hire, fire, and supervise the representatives of the Office who must look to the Ombudsman for designation and programmatic guidance.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter indicated support for the proposed provisions in this section but indicated that there will be challenges in upholding them at the State level. The commenter indicated that the Ombudsman program benefits from being within the State agency and that the Federal funds appropriated under the Act are not adequate to permit the Office to stand on its own separate and apart from the State agency. The commenter indicated that AoA must increase funding for the Ombudsman program before implementing this rule because moving the Ombudsman out of the State agency would result in loss of State agency resources and access to

State general funds to the Ombudsman program.

*Response:* Nowhere in this rule does AoA require State agencies which operate the Ombudsman program directly to move the Office out of the State agency. In fact, a number of States house the Office within or attached to the State agency and successfully fulfill the functions required by the Act. To the extent that this comment refers to conflicts of interest that may be present within a State agency, we address these comments more fully in the discussion related to § 1327.21, below. AoA is available to provide technical assistance to help States to fully implement the requirements of the Act, regardless of the organizational placement of the Office.

AoA appreciates that many States provide resources to supplement the Ombudsman program. As a result of these States' commitment to this work, residents have improved access to ombudsman services. We fail to see how compliance with this rule would jeopardize any State's ability to support the work of the Ombudsman program.

*Comment:* One commenter suggested that AoA amend the proposed language in § 1327.13 to read "The Ombudsman . . . shall have *independent* responsibility for the leadership and management . . . ."

*Response:* We find the proposed language sufficiently clear. Moreover, depending on the structure of the Ombudsman program, some management tasks (for example, personnel, contracting, bookkeeping, or budgeting processes) may be the primary responsibility of other parts of the agency in which the Office is organizationally located. We do not wish to create confusion by implying that the Ombudsman must perform or oversee all of these functions directly and independently. An Ombudsman may certainly rely on others to perform these important management processes and work cooperatively with others outside of the Office to carry out certain management functions. To require otherwise could require significant time and energy from the Ombudsman and take away from his or her ability to focus on the functions that benefit residents as required by the Act.

*Comment:* One commenter recommended that we omit the language "in coordination with the State" in § 1327.13. The commenter indicated that there is no mention of coordination with the State agency in the list of Ombudsman functions in the Act at section 712(a)(3). In addition, using the word "coordination" only prolongs the enmeshing of the Ombudsman and the

Office with the State agency. The commenter contrasted the provision in section 712(a)(5)(B) of the Act related to local Ombudsman entities which are to act “in accordance with the policies and procedures of the Office and the State agency.”

*Response:* The Act sets forth a grantee relationship between AoA and the State agency, making the State agency accountable to the AoA for the appropriate establishment and operation of the Ombudsman program. See Section 712(a)(1) of the Act. We believe that there must, therefore, be a coordinated relationship between the State agency and the Ombudsman in order for the State agency to be able to fulfill its responsibilities as grantee. We further believe that coordination is only successful if all involved parties take responsibility for its success. Therefore, we believe that coordination with the State agency should be a responsibility of the Ombudsman as well as of the State agency and have not adopted these recommendations.

We have made a revision in the final rule, changing “State” to “State agency” to clarify that we are specifically referring to the State agency on aging as the AoA grantee. Should coordination with other State agencies be involved in carrying out the program, the rule directs the Ombudsman to coordinate with them as well.

*Comment:* Two commenters recommended a new provision in § 1327.13 that establishes criteria to be used when selecting a State Ombudsman. One of these commenters indicated a need for strict guidance related to qualifications and conflicts of interest in selecting the Ombudsman.

*Response:* We have established minimum qualifications for the Ombudsman in a new provision at § 1327.11(d).

*Comment:* Two commenters recommended that the Ombudsman not be a political appointee.

*Response:* The Act provides States with significant latitude in how an Ombudsman is selected within a particular State. In AoA’s experience, we have not seen, nor have we been presented with evidence of, a correlation between effective Ombudsman programs and the mechanism by which the Ombudsman in that State has been selected or appointed.

While we have not prohibited political appointments in this rule, we do provide for minimum qualifications for the selection of an Ombudsman, in § 1327.11(d), and clarify conflicts of interest considerations relative to the selection process in § 1327.21.

*Comment:* One commenter recommended that criteria be used when firing an Ombudsman. They indicated that such criteria are the logical extension of the independence and anti-retaliation provisions in the OAA. They further indicated that, since the Act establishes the role of the Ombudsman as a potential critic of facilities and government agencies, if the governor or State agency head could fire the Ombudsman (or terminate the contract with the host agency) whenever they wish, the Ombudsman cannot truly be independent and a voice for residents, as opposed to a cautious appointee.

*Response:* After careful consideration, we have decided against providing specific criteria regarding the firing of the Ombudsman. We believe that the clarifications provided by this rule related to the operation of the program; organizational and individual conflicts of interest; and freedom from interference, retaliation, and reprisals provide sufficient clarity to protect the Ombudsman from retaliation for performing the duties required by the Act.

The Act specifically provides State agencies with significant latitude in determining whether to operate the program directly (and how to structure the program within or attached to the State agency) or operate it through contract or other agreement with another agency. Therefore, States have appropriately structured a wide variety of organizational placements for the Ombudsman and, as a result, there is wide variation among applicable laws impacting employment, labor, government contracting, and interagency agreements that may apply to the firing of an Ombudsman or the termination of a contract for the operation of the Office. AoA believes that developing criteria regarding firing might create confusion in the context of the wide variety of applicable legal requirements.

However, AoA is aware that a number of employment arrangements and organizational structures have been developed to protect employees within other types of ombudsman programs, inspectors general, and other entities where independent oversight or consumer advocacy are required activities. Therefore, AoA plans to provide States with further guidance and technical assistance regarding employment provisions and structures which they may consider in further strengthening the ability of the Ombudsman to fulfill his or her functions under the Act.

*Comment:* Ten commenters recommended that the proposed language in § 1327.13(a)(1) be revised to clarify that Ombudsman programs have authority to identify, investigate, and resolve complaints related to the actions, inactions, or decisions of guardians, legal representatives, family members, or other resident representatives. Some indicated that this should be a longer list of people whose actions may adversely impact a resident than merely guardians and representative payees.

*Response:* We have maintained the statutory structure in the final rule at § 1327.13(a)(1) regarding the types of entities which may be the object of Ombudsman program complaint investigation and resolution. See section 712(a)(3)(A) of the Act. However, we agree with commenters that other types of resident representatives, beyond guardians and representative payees specifically indicated in the Act, should be specifically added to the rule. It is reasonable to include issues related to activities of powers of attorney agents, for example, among the actions that may adversely affect the health, safety, welfare, or rights of residents, consistent with the Congressional examples of guardians and representative payees. Therefore, we have changed the language of this provision to use the term “resident representative” which we have defined in the final rule at § 1327.1, incorporating the categories of representatives indicated by the commenters.

*Comment:* One commenter indicated that the Ombudsman for long-term care facility residents should serve on a full-time basis and solely on behalf of such residents as required in the Act. The commenter questioned the capacity of the one individual to adequately serve as the Ombudsman for both long-term care facility residents and for home care consumers, while noting that these individuals need access to ombudsman services. In addition, the commenter indicated that the Ombudsman program should be funded adequately and fully funded for its current work before it expands into the home setting.

*Response:* As the commenter correctly notes, the Act provides authority for the Ombudsman program to serve residents living in “long-term care facilities” as defined at OAA section 102(35) (*i.e.* nursing facilities, board and care homes, assisted living, and similar adult care facilities.) Congress has not chosen to authorize or fund Ombudsman program services to individuals receiving long-term supports and services in in-home settings or in non-residential settings such as adult day health centers.

States which choose to expand the Ombudsman program to serve individuals in settings beyond those provided for in the OAA are not prohibited from doing so. AoA has no objection to those States which choose to utilize resources other than those appropriated through the OAA to expand ombudsman services to individuals living in a variety of settings or receiving a variety of long-term services and supports. However, absent Congressional authorization for the Ombudsman program to expand its services to new settings, AoA does not believe that it has the authority to provide for such an expansion of service through this rule.

We note that historically Congress changed the title of Nursing Home Ombudsman to Long-Term Care Ombudsman in the 1981 reauthorization of the OAA, expanding the service population to include residents of board and care residents and other similar adult care facilities. Then, in the 2006 reauthorization, Congress clarified that the Ombudsman program service population includes residents of assisted living. However, Congress did not choose on either occasion to create separate ombudsman programs for these populations; instead, it choose to coordinate the efforts so that long-term care facility residents in a variety of residential settings had access to the services of the Long-Term Care Ombudsman program. In addition, AoA has long held that States are not prohibited from using OAA funds to support Ombudsman services to younger residents of long-term care facilities, even though the Act is designed to primarily benefit individuals over age 60. AoA Program Instruction 81-8.

Many of the individuals who would have lived in nursing homes in previous decades now live and receive long-term services and supports in a variety of other settings. Many of the long-term services and supports issues that impact individuals in one long-term care setting relate to individuals receiving services in other settings. Much of the expertise and experience of the Ombudsman and representatives of the Office is relevant to individuals receiving long-term services and supports in a variety of settings. Therefore, we believe there is good reason for a State to support this coordinated approach to serve individuals receiving long-term services and supports, regardless of setting, through the Long-Term Care Ombudsman program.

The discussion regarding an Ombudsman serving on a full-time basis is found above related to § 1327.11(c).

*Comments:* Two commenters indicated that the scope of complaint investigations indicated in § 1327.13(a)(1) should include complaints regarding a representative of the Ombudsman program.

*Response:* Section 1327.13(a)(1) describes functions of the Ombudsman program to benefit long-term care facility residents. These complaints are reported to the National Ombudsman Reporting System, and inform AoA, States and other entities regarding issues facing residents and Ombudsman program services to resolve problems for residents. These complaints related to the resident's experience within a long-term care facility are qualitatively different than grievances regarding fulfillment of duties by a representative of the Office.

While we have not revised this provision, we have included, in the final rule, a new provision at § 1327.11(e)(7), to require the establishment of a grievance process within the Ombudsman program so that individuals served by the Ombudsman program have a clear process for filing a grievance, having their concern investigated, and receiving a response to the grievance. We note that some States already have such processes in place.

*Comments:* Three commenters indicated that the scope of complaint investigations indicated in § 1327.13(a)(1) should include complaints related to interference with a representative of the Ombudsman program. Two commenters indicated that the scope of complaint investigations indicated in § 1327.13(a)(1) should include complaints regarding retaliation against any person who cooperates with the Ombudsman program.

*Response:* Complaints related to interference with the work of a representative of the Office or to retaliation for cooperating with the Ombudsman program are qualitatively different from the types of resident-related complaints described in § 1327.13(a)(1). We have added provisions related to protection from interference, reprisals and retaliation in § 1327.15(i).

*Comment:* One commenter suggested that we consider expanding complaint resolution work to include individuals who receive services from home care, hospice and Program for All-Inclusive Care for the Elderly (PACE) programs. Another commenter asked whether individuals who receive such services are included within the list of individuals to be served with complaint resolution services pursuant to § 1327.13(a)(1).

*Response:* As noted above, the OAA provides authority for the Ombudsman program to serve residents living in "long-term care facilities" (i.e. nursing facilities, board and care homes, assisted living, and similar adult care facilities). Congress has not chosen to authorize or fund ombudsman services to individuals receiving long-term supports and services in in-home settings or in non-residential settings. Absent authorization for the Ombudsman program to expand its services to new settings, AoA does not believe that it has the authority to provide for such an expansion of service through this rule.

*Comment:* One commenter suggested clarifying that the Ombudsman function of informing residents about the means of obtaining services does not duplicate work done by other OAA-funded programs or by Aging and Disability Resource Centers (ADRCs).

*Response:* We agree that the Act's requirement that the Ombudsman inform residents about means of obtaining services does not duplicate the work of other OAA programs, including those providing information and assistance services, defined in section 102(a)(28) of the Act, or ADRCs, defined in section 102(a)(4) of the Act. While we agree with the comment that this provision does not create duplication of services, we do not agree that such an explanation needs to be incorporated into the final rule. However, we have added the ADRC as an entity with which the Ombudsman must coordinate, in the final rule at § 1327.13(h), to enhance collaboration and reduce any risk of duplication.

*Comments:* Two commenters recommended language to enhance the independence of the Ombudsman in describing the functions in § 1327.13(a).

*Response:* We believe that we have adequately addressed the independence of the Ombudsman in other provisions of this rule.

*Comments:* Two commenters suggested incorporation of language in § 1327.13(a)(3), requiring the Ombudsman to inform residents of the services provided by the protection and advocacy system.

*Response:* As ACL administers funds to States for protection and advocacy systems, we are aware that these systems provide critically important services, as do an array of other entities which are also not mentioned in this provision. We are choosing to retain the broad description in the rule regarding the function of the Ombudsman to "inform residents about means of obtaining services provided by providers or agencies," rather than



singling out any particular entity or service provider. We note that the final rule requires the Ombudsman to coordinate with protection and advocacy systems at § 1327.13(h)(4).

*Comments:* Three commenters suggested a need for additional guidance or definition of “regular access” in § 1327.13(a)(4), indicating that the presence of a representative of the Office in facilities is critical for ensuring resident access, and recommending at least quarterly visits to each facility as a minimum standard.

*Response:* Currently there is wide variation among States’ Ombudsman programs in providing “regular visits.” For example, in 2012, Ombudsman programs in 10 States reported regular visits to 100% of all facilities, but, in three States, the Ombudsman program reported making regular visits to fewer than 10% of facilities. ACL, National Ombudsman Reporting System. (Note that, for reporting purposes, AoA asks Ombudsmen to report on the number of facilities that received “regular visits” at least once per quarter.)

We encourage Ombudsman programs to provide residents with access to the Ombudsman program through, among other means, regular visits to facilities. However, we believe creating one national minimum standard for visits to facilities would be unrealistic, given the extremely different variables among States. While some in some States, Ombudsman programs are able to make weekly or monthly visits to many facilities because they have the volunteer and/or employee capacity to do so, in other States, Ombudsman programs are unable to make even quarterly visits. Ombudsman programs face significant variables such as program resources (including funding, staff, volunteers), geographic distribution of facilities, geographic distribution of staff and/or volunteers, as well as means of and cost of transportation (while most programs are able to visit facilities using automobiles or public transportation, others must use airplanes or boats to reach some facilities).

Some Ombudsman programs have minimum standards related to frequency of these visits that are responsive to the variables in that State. We strongly encourage development of minimum standards to provide consumers, providers, and others with an expectation of the frequency of regular visits. We note that standards also provide an important mechanism for Ombudsman program accountability. We are available to provide technical assistance regarding development of such standards.

We also encourage Ombudsman programs and States to consider, in developing minimum standards, that providing “regular access” requires more than providing visits to facilities by representatives of the Office. Ombudsman programs should be easily accessible to residents, complainants, and others—including individuals with limited English proficiency—because, among other things, they have multiple methods of communication available to the public (such as telephone, email, facsimile, Web site, TTY (text telephone) and other communication services, and mail, as well as in-person visits).

*Comments:* One commenter suggested the need for a national standard on what constitutes “timely access” in § 1327.13(a)(4).

*Response:* The Act requires the Ombudsman to ensure that residents have timely access to the services of the Office. Section 712(a)(3)(D) of the Act. We interpret this provision to mean that a resident or other individual who reaches out to the Ombudsman program is able to communicate with the program to file a complaint or otherwise make a request in a reasonably prompt manner. Timely access is provided, for example, when the Ombudsman program returns telephone calls or emails in a reasonably prompt manner and a resident request for an in-person discussion with a representative of the Office is met in a reasonably prompt manner.

We believe creating one national minimum standard for timely access would be unrealistic, given the extremely different variables among States, as described in the response to “regular access,” above. We note that some States have developed standards related to timely access, such as indicating maximum time frames in which representatives of the Office must return telephone or email messages. We strongly encourage the development of minimum standards to provide consumers, providers and others with an expectation of what constitutes timely access.

We note that the Act and this rule also require that “residents and complainants receive timely responses from representatives of the Office to complaints,” distinguished from “timely access.” After a resident has received access and the opportunity to file a complaint, the “timely response” requirement envisions that a response (for example, initiating a complaint investigation) is done in a reasonably prompt manner. Some States have developed standards of promptness related to complaint response that are

responsive to the realities in that State. Again, we strongly encourage the development of minimum standards to provide consumers, providers and others with an expectation of what constitutes a timely response to a complaint.

*Comment:* Two commenters requested additional clarification of § 1327.13(a)(5) related to the statutory and proposed regulatory language requiring the Ombudsman to “seek administrative, legal, and other remedies to protect the health, safety, welfare and rights of the residents.” One of these commenters recommended that AoA add language to clarify that this requirement should include “representation in administrative fair hearings, before legislative bodies, and on behalf of residents before judicial forums.” This commenter indicated that this suggested language would clarify that the Ombudsman program would be able to go to court on behalf of a resident.

*Response:* We agree with the commenters that the term used in the statutory and proposed regulatory language requiring the Ombudsman to “seek administrative, legal, and other remedies” would benefit from further clarity. We note that this provision also relates to section 712(g)(2) of the Act which requires that the “State agency shall ensure that . . . the Office pursues administrative, legal, and other appropriate remedies on behalf of residents.”

In the final rule we have replaced the term “seek” in order to clarify that the Ombudsman is required to assure that individual residents have access to and is required to pursue remedies, with a goal of protecting the health, safety, welfare and rights of residents. See § 1327.13(a)(5).

We do not agree with the commenter that the Ombudsman program should be required to provide legal representation of individual residents in administrative fair hearings or before courts. An ombudsman service is first and foremost a conflict resolution service and not a legal service. The primary role of any ombudsman (not only a Long-Term Care Ombudsman) is to investigate and resolve complaints, whether on an individual or systemic level.

While we are aware of a few examples of States which have in-house legal counsel available (or which retain an attorney directly) to represent individual residents, these are exceptional arrangements. More often, Ombudsman programs have developed referral relationships with not-for-profit legal services providers and/or maintain lists of referral options of law offices

with relevant expertise so that they are able to assist residents in accessing appropriate legal representation when needed. We do not intend to prohibit in-house legal counsel representation of individual residents by the Ombudsman program, where a State provides this service, but rather we are acknowledging that this activity is currently the exception among States in their operation of the Ombudsman program. We also do not intend to prohibit a representative of the Office from serving as a spokesperson for a resident in an administrative hearing as provided in 42 CFR 431.206(b)(3).

We have addressed the issue of legal counsel for the Ombudsman program more fully in a new provision at § 1327.15(j) and in the related discussion found below.

*Comment:* One commenter indicated that most Ombudsman programs are not adequately equipped to undertake the requirement to pursue “administrative, legal, and other remedies.”

*Response:* We note that this is not a new requirement, but has long been required by the Act at section 712(a)(3)(D) and (g)(2). Our intent in finalizing this rule is to help provide additional clarity around this expectation. To further clarify the meaning of § 1327.13(a)(5), we provide the following examples of ways States can fulfill this requirement:

1. Ombudsman assures individual resident access to an administrative remedy: A resident receives an involuntary discharge notice that provides a notice of right to a fair hearing. The Ombudsman makes sure the resident knows how to request the hearing and is informed of available supports to make sure his/her interests are represented in the process. The Ombudsman program could, for example, refer the resident to a non-profit legal services program to file the appeal and represent the resident interests at the hearing, or provide in-house legal counsel to represent the resident, and/or provide a representative of the Office to accompany the resident to the hearing as emotional support. Alternatively, a representative of the Office could serve as a spokesperson for a resident in a hearing as provided in 42 CFR 431.206(b)(3).

2. Ombudsman assures individual resident access to a legal remedy: A resident wishes to have a power of attorney revoked to remedy financial exploitation by agent. The Ombudsman could, for example, refer the resident to a non-profit legal services program to provide legal advice to the resident and to execute the revocation of the power

of attorney, or provide in-house legal counsel to provide legal advice to the resident and to execute the revocation of the power of attorney, and/or provide protocols to representatives of the Office regarding what actions could be taken directly by the representative consistent with State laws relating to revocations of powers of attorney and avoiding the unauthorized practice of law.

3. Ombudsman pursues an administrative remedy to protect resident interests: The Ombudsman advocates before State-level policy makers to create a fair hearing process where the State that lacks a fair hearing process for involuntary transfer or discharge of nursing home residents (as required in Federal regulation at 42 CFR 431.200 *et seq.*) or for board and care/assisted living residents (as regulated under State law).

4. Ombudsman pursues a legal remedy to protect resident interests: The Ombudsman program serves as the Patient Care Ombudsman in a long-term care facility bankruptcy filing pursuant to the Federal Bankruptcy law.

5. Ombudsman pursues a legal remedy to protect resident interests: The Ombudsman program files a mandamus action against the State, representing the collective interest of residents, to ask a court to require the State to enforce its regulatory requirements related to long-term care facilities.

The above examples are some of the many possible ways that Ombudsman programs can, and currently do, fulfill this requirement. We are available to provide technical assistance to States to assist them in further meeting the requirements of § 1327.13(a)(5).

*Comment:* One commenter indicated the importance of the language in § 1327.13(a)(5) related to assisting residents who face end-of-life decisions, indicating the important role of the Ombudsman program in assisting residents so that their wishes, as expressed in advance directives, are adhered to.

*Response:* We appreciate the comment and note that Ombudsman program support for residents related to end-of-life decision-making is yet another example of ways that Ombudsman programs can, and currently do, fulfill the requirements of § 1327.13(a)(5).

*Comment:* One commenter recommended language defining adequate legal representation in § 1327.13(a)(5).

*Response:* We have added a new provision related to legal counsel at § 1327.15(j) and have addressed this recommendation in the comments related to that provision below.

*Comment:* Three commenters suggested that this provision include a requirement for, and/or a reference to, collaboration with the protection and advocacy system. One of these commenters indicated that such collaboration can be an efficient and cost-effective way for the Ombudsman program to meet this mandate.

*Response:* While we have chosen not to specifically include protection and advocacy systems within this regulatory provision, ACL is committed to continuing to provide training and other support for Ombudsman programs related to appropriate referrals of resident issues to protection and advocacy systems. The final rule requirement for the Ombudsman to coordinate with protection and advocacy systems at § 1327.13(h) further supports this intent.

*Comment:* Three commenters indicated support for the proposed language of § 1327.13(a)(7). One of the commenters stated that the proposed language makes clear that Ombudsmen have authority for systemic advocacy, indicating that many Ombudsmen are restricted currently from taking systemic advocacy actions (such as communications with legislators, policymakers or the media) at all or without prior approval from the agency in which the Ombudsman is organizationally located.

*Response:* We appreciate the supportive comments. We note that AoA is creating no additional requirements in this provision. Both the final rule and the proposed language are identical to the language that has long been in the Act. However, it is our hope that the final rule in its entirety will provide the clarity needed to enable Ombudsman programs to more adequately fulfill this function.

*Comment:* One commenter recommended a separate paragraph be added to the final language of § 1327.13(a)(7) to focus on consumer protection issues.

*Response:* We believe that consumer protection issues fall within the purview of this provision, which provides for the Ombudsman program to make recommendations, and take other actions related to governmental policies and actions that pertain to “the health, safety, welfare and rights of residents.” Therefore, we do not believe that additional language is necessary to provide the Ombudsman program with this authority.

*Comment:* Five commenters recommended that we add specific guidance regarding training requirements for certified representatives of the Office in the final

rule. Two commenters recommended sub-regulatory guidance related to training requirements. One commenter indicated that budgetary constraints have resulted in inadequate training of representatives of the Office in their State. Without consistent access to quality training, the commenter stated, the Ombudsman program is hampered in its ability to achieve positive outcomes for residents and the Ombudsman is hampered in his or her ability to advocate for resident interests on a policy level.

*Response:* We appreciate the importance of consistent access to quality training by the Ombudsman and representatives of the Office. In §§ 1327.13(c)(2) and 1327.15(c) of the final rule, we have clarified requirements related to training, including requiring State agencies to provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents. Further, we clarify that State agencies may utilize funds appropriated under Title III and/or Title VII of the Act in order to provide access to such training opportunities.

While AoA has not incorporated training standards into this rule, it intends to develop training standards for the Ombudsman program. In the meantime, we recommend that Ombudsman programs refer to the AoA-funded National Ombudsman Resource Center for training resources and a core curriculum designed for certification training of representatives of the Office.

*Comment:* Two commenters indicated concern with the use of the term “citizen organizations.” They indicated that the word “citizen” might mistakenly imply reference to United States citizenship. One of the commenters suggested that the term should be “consumer organizations” or “resident and family organizations.”

*Response:* We do not interpret the statutory requirement for the Ombudsman to “promote the development of citizen organizations” (at section 712(a)(3)(H) of the Act) to imply that the need for participants of such organizations must be determined to be United States citizens. We do not agree that a different term than that provided by Congress is necessary, as the commonly defined use of the word “citizen” is not limited to the context of national citizenship. According to the *Merriam Webster Dictionary*, definitions for “citizen” include “an inhabitant of a city or town” and “a civilian as distinguished from a specialized servant of the state.” We believe that “consumer organizations” and “resident and family

organizations” (alternative terms suggested by a commenter) are clearly included within the meaning of the broader term “citizen organization” used in the statute and in the final rule at § 1327.13(a)(8).

*Comment:* Three commenters recommended that we eliminate the words “to participate in the program; and” from proposed language at § 1327.13(a)(8)(ii). Two of the commenters indicated that this phrase could be misinterpreted to mean that the Ombudsman only develops or works with citizen organizations which work under the direct control of the Ombudsman program.

*Response:* While we are unfamiliar with the existence of any citizen organizations which work under the direct control of the Ombudsman program, we agree that this language could lead to confusion. In addition, we read the corresponding language in the Act regarding participation in the program as support for coordination between the Ombudsman program and citizen organizations. Section 712(a)(3)(H) of the Act. Therefore we have revised the language in the final rule to require the Ombudsman to “[c]oordinate with and promote the development of citizen organizations consistent with the interests of residents.” § 1327.13(a)(8).

*Comment:* One commenter indicated that “citizen organization” should be inclusive of family councils.

*Response:* While we agree that the term “citizen organizations” could be inclusive of groups consisting of or representing family members, we have not made a change to the final rule. Family councils are more specifically addressed at § 1327.13(a)(9).

*Comment:* Two commenters recommended that we add the language “actively promote” to the provision related to the Ombudsman responsibilities towards resident and family councils. The commenters indicated that some family members do not know what a family council is or how it can be formed and, therefore, need support and encouragement to join or create a family council. Further, the commenters indicate that to require the Ombudsman to “promote” family councils would make the Ombudsman work with family councils more consistent with the requirement to “promote” citizen organizations.

*Response:* We agree that it is appropriate for the Ombudsman to be responsible to promote the development of resident and family councils, similar to the requirement to promote citizen organizations, as required by § 1327.13(a)(8). We have made the

corresponding amendment at § 1327.13(a)(9).

*Comment:* Two commenters suggested language regarding Ombudsman duty to ensure the ability of resident and family councils to exercise their rights under Federal law. The commenters indicated that resident and family councils can be fragile entities that need support in the formation period as well as ongoing support.

*Response:* We agree that Ombudsman program support to resident and family councils can be important to protect councils’ rights under Federal law and to enhance their ongoing effectiveness. We believe the final rule adequately describes the Ombudsman responsibility to promote and provide technical support for the development of resident and family councils and is inclusive of Ombudsman program support for resident and family councils in the exercise of the rights provided to them by Federal law. Therefore, we do not see a need to further revise this provision as recommended.

*Comment:* One commenter recommended adding language to support the maintenance or continuation, not merely the development of, resident and family councils.

*Response:* We agree with the comment that it is appropriate for the Ombudsman program to be available to provide support to resident and family councils after they have been developed. However, given that resident and family councils should be led by residents and family members, respectively, and that AoA wishes to honor the autonomy of these councils, we indicate, at § 1327.13(a)(9), that this support is to be provided as requested by the council.

*Comment:* One commenter requested that we add a definition of family council to include past family members and that we provide reference to the Centers for Medicare and Medicaid Services (CMS) regulations regarding “family groups.”

*Response:* Terms such as “family councils” and “family groups” may be defined by relevant State licensure regulations governing long-term care facilities. CMS regulations governing nursing facilities set out various rights for “resident groups” and “family groups” in such facilities, which are set out at 42 CFR 483.15(c). *See also* CMS Pub. 100–01, State Operations Manual, Appendix PP. Our intent in this rule is to clarify AoA’s expectation of the Ombudsman program where such family councils or family groups exist, regardless of how they are defined by

the laws or regulations governing facilities.

*Comment:* One commenter recommended that someone from the Ombudsman program should speak to all family members and residents at an annual event focused on increasing awareness of resident and family councils and how they affect quality of care.

*Response:* We believe that the final rule permits this strategy within the Ombudsman function to “promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils.” § 1327.13(a)(9). However, we do not believe it is advisable for AoA to specify which strategies an Ombudsman should pursue to fulfill this function. This may be a very successful strategy, but there may be other strategies that an Ombudsman may wish to employ.

*Comment:* Seven commenters indicated support for the proposed language in § 1327.13(b) requiring that the Ombudsman “oversee a unified statewide program.” One of these commenters indicated that this language is important to ensure effective, efficient, and consistent Ombudsman services throughout the country. Two of these commenters indicated that the proposed language clarifies that representatives of the Office are accountable to the Ombudsman regarding Ombudsman program duties; providing clarity for representatives of Office and local Ombudsman entities. Another commenter indicated that the proposed language recognizes the need for coordination and unity among operations at state and local levels, with the Ombudsman as the leader of the coordinated effort.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter recommended that we add language indicating that representatives of the Office shall act “in accordance with the policy and procedures of the Office and the State agency” as set forth in Section 712(a)(5)(B) of the Act.

*Response:* The provisions of § 1327.13 specifically focus on the functions of the Ombudsman. The duties of the representatives of the Office are enumerated in § 1327.19. The recommended language is found at § 1327.19(a).

*Comment:* Twelve commenters indicated support for the proposed language in § 1327.13(c) regarding the Ombudsman responsibility for designation and de-designation of local Ombudsman entities and representatives of the Office. One of the

commenters described the proposed language as an accurate and logical interpretation of the Ombudsman’s authority, indicating that the authority to de-designate is the only logical reading of the Ombudsman’s authority to designate a representative, and comparing this to the understanding that informed consent includes the right to say no (*i.e.* informed refusal). This commenter went on to say that, if another entity had the authority to de-designate an Ombudsman representative, then the Ombudsman would no longer be able to designate that individual, which is clearly contrary to the Act.

Another commenter indicated that the proposed language clarifies that the Ombudsman can de-designate a representative of the Office who may not be appropriate for the role. Two commenters indicated support for the clarification that the Ombudsman has the sole authority to designate and de-designate representatives of the Office since the Act does not clearly indicate where authority for de-designation resides and indicated that the clarification will significantly improve the ability of the Ombudsman to meet program requirements. One commenter described the proposed language as an important clarification, essential to ensure the strength and integrity of the program.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter asked whether this provision permits the Ombudsman to override the decision of an AAA to terminate an employee. Another commenter indicated concerns regarding lines of responsibility since, in the commenter’s State, representatives of the Office are employees of AAAs who provide direct oversight and monitoring of their employees.

*Response:* This provision is not intended to provide the Ombudsman with authority to override a personnel decision made by any other entity. However, we do expect that Ombudsmen who designate AAAs or other entities to operate as local Ombudsman entities have procedures in place to clearly delineate how the Ombudsman responsibilities to designate, or to refuse, suspend or remove designation of, representatives of the Office are coordinated with the personnel decisions of the agency hosting the local Ombudsman entity. A number of States have developed procedures to address this question, and we are available to provide States with technical assistance as needed.

*Comment:* Four commenters suggested that the Ombudsman be required to have policies, protocols, and/or criteria in place regarding designation and de-designation actions to which the Ombudsman should be held accountable.

*Response:* We have adopted this recommendation by adding a new provision to § 1327.11(e)(6) requiring procedures which set forth the criteria and process implementing the Ombudsman responsibility to designate, or to refuse, suspend or remove designation, of representatives of the Office and local Ombudsman entities. We recognize that many States already have such procedures in place. In addition, the grievance process required by § 1327.11(e)(7) can be utilized by any individual or entity with reason to believe that the procedures were not adhered to by the Ombudsman.

*Comment:* One commenter recommended that we add definition or guidance regarding the term “designation” and that we distinguish between the term “designation” and the term “certification.”

*Response:* We do not agree that a definition of “designation” is needed, as we believe the commonly defined use of these terms is sufficient to explain their use. According to the *Merriam Webster Dictionary*, to “certify” means “to say officially that something or someone has met certain standards or requirements” and “designation” means “appointment to or selection for an office, post, or service.”

*Comment:* One commenter recommended that we add to § 1327.13(c) language clarifying that the local Ombudsman entity must be a public or non-profit private entity as required by section 712(a)(5) of the Act.

*Response:* We believe this recommendation adds additional clarity consistent with the Act and have made the recommended revision.

*Comment:* One commenter recommended that we include the word “independently” to describe the designation authority of the Ombudsman.

*Response:* We believe that the final rule is sufficiently clear that the Ombudsman has sole authority for designation and de-designation of local Ombudsman entities and representatives of the Office.

*Comment:* Two commenters recommended the need for a fair hearing process or appeal procedures for situations in which a representative of the Office is de-designated for good faith performance of their duties. One of these commenters recommended that representatives of the Office should

have an opportunity to appeal to AoA or that appeals be heard by an independent entity mutually selected by parties to the appeal.

*Response:* We have added a requirement that Ombudsman program policies include the criteria and process for de-designation at § 1327.11(e)(6). In addition, we have added a grievance process requirement in § 1327.11(e)(7) to address situations where an opportunity for review of an Ombudsman action or determination is warranted. Given that the Ombudsman has the sole authority responsibilities to designate, or to refuse, suspend or remove designation, of representatives of the Office, we do not agree that it is appropriate for AoA or another entity to override the designation decisions of the Ombudsman. However, we do believe that it is appropriate for there to be a process in which another entity or person reviews the grievance and makes recommendations to the Ombudsman for his or her re-consideration related to his or her decision to designate, or to refuse, suspend or remove designation.

*Comment:* One commenter indicated that in their State, Ombudsman program volunteers are appointed by county commissioners, not designated by the Ombudsman. As a result, when a volunteer does not appropriately perform programmatic duties, the appointing authority—and not the Ombudsman—has the only authority to remove the volunteer from this role.

*Response:* We appreciate the commenter bringing this issue to our attention in the comment. The Act is clear that the Ombudsman has the authority to designate representatives of the Office. OAA section 712(a)(5). Further, this rule clarifies that the Ombudsman has the sole authority to designate and to refuse, suspend or remove designation, of representatives of the Office. § 1327.13(c). AoA plans to assist to States in coming into compliance with this rule.

*Comment:* Six commenters indicated support for the proposed language related to Ombudsman approval of local Ombudsman entity plans or contracts related to Ombudsman program operations in § 1327.13(d). One of these commenters indicated that this provision is critical in establishing a clear understanding among all parties regarding expectations of the local Ombudsman entities. Another indicated strong support, saying that the Ombudsman needs this authority to coordinate an effective program. Another indicated that the proposed language is critical in order to manage a unified statewide program. One commenter appreciated that the

proposed language recognizes and supports meaningful input of Ombudsmen into area plans on aging as they relate to Ombudsman services.

*Response:* We appreciate the supportive comments and note that the relevant provisions are in newly numbered § 1327.13(c).

*Comment:* Two commenters recommended the removal of the parenthetical “(in coordination with the State agency)” in § 1327.13(d) in order to bolster the Ombudsman’s autonomy. The commenters indicated that the Ombudsman must have final right of approval for any Ombudsman program plans, contracts, or other agreements.

*Response:* We disagree with this recommendation. The OAA establishes the Ombudsman program through grants to State units on aging. The most common model used in States is where the State agency directly operates the Office of the State Long-Term Care Ombudsman and contracts with AAAs for an array of services, including, but not limited to, operation of a local Ombudsman entity. In fact, the Act utilizes this aging network structure as the basis for the vast majority of programs and services provided through the Act.

Although the Act specifically provides the option for the State agency to determine where the Office is to be organizationally located, there is no prohibition from using the aging network structure to also operate the Ombudsman program at state and local levels. Further, there is no prohibition from incorporating the Ombudsman program allocations and requirements into the standard contracts between the State agency and the AAAs, nor a prohibition from incorporating Ombudsman program activities into the area plans on aging of AAAs.

When this model is utilized, close coordination between the Ombudsman and the State agency is absolutely critical to its success. There must be parallel and coordinated processes so that the Ombudsman retains the statutory ability to designate (or refuse, suspend, or remove designation of) AAAs or their subcontractors as local Ombudsman entities and employees and volunteers of AAAs or their subcontractors as representatives of the Office. Simultaneously, the State agency must retain its ability fulfill all of its duties under the Act and applicable State law.

*Comment:* One commenter recommended that representatives of the Office be consulted in the development of all Ombudsman program-related policies, procedures,

positions and reports, including establishment of area plans.

*Response:* We agree that consultation with representatives of the Office can add significant value to the development of program-related policies and procedures. Therefore, we have incorporated a revision to § 1327.11(e) which requires the Ombudsman or State agency, in developing policies and procedures, to consult with the representatives of the Office.

We disagree with the recommendation to require the Ombudsman to consult with representatives of the Office for all positions and reports. Instead, we believe the benefit of such consultation should be left to the discretion of the Ombudsman or to relevant Ombudsman program policies and procedures.

With respect to area plans, the final rule requires that, where applicable, the State agency shall require inclusion of goals and objectives of local Ombudsman entities into area plans on aging. § 1327.15(g)

*Comment:* One commenter indicated that the proposed language would result in a cumbersome process related to area plan approval.

*Response:* We are aware of a number of States which have successfully developed procedures that provide for Ombudsman review and approval of area plans as they relate to Ombudsman program operations. We are available to provide States with technical assistance as needed to implement this provision.

*Comment:* One commenter indicated that the proposed language could be interpreted to require the Ombudsman to review every contract to which the local Ombudsman entity is a party, which would be a waste of resources.

*Response:* Our intent is to provide the Ombudsman with the opportunity to review and approve those plans or contracts which establish the local Ombudsman entity and provide parameters governing the operation of the Ombudsman program, but not to require the Ombudsman to review every contract to which the agency hosting the local Ombudsman entity is a party.

To clarify this intent, we have revised § 1327.13(c) to indicate that this requirement only applies to those contracts which govern the local Ombudsman program. We have also clarified through a new § 1327.17, and in other places in the final rule, that the agency hosting a local Ombudsman entity is not the same as the local Ombudsman entity but rather is the agency in which the local Ombudsman entity is organizationally located.

*Comment:* Four commenters indicated support for the proposed language in

§ 1327.13(e) related to management of the information of the Office. One of these commenters called the proposed language a welcome clarification. One commenter indicated that the provision is consistent with the Ombudsman's responsibilities of disclosure of information and of statewide operation of the Ombudsman program. The commenter also noted that this provision ensures consistency with access to information should there be an agency change at the State level or changes in local Ombudsman entities. One of these commenters indicated that this clarification should eliminate current frictions and confusion regarding ownership and locus of decision-making with respect to record release in the Ombudsman program.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter suggested that we add the language "files and information" in the last sentence of this provision.

*Response:* We have added language to clarify that newly numbered § 1327.13(d) refers to "files, records, and other information."

*Comment:* One commenter recommended that we clarify that it is permissible for the local Ombudsman entity to retain physical records if done securely. One commenter indicated that the information should be the property of the Office of the Ombudsman, including the representative of the Office. Another commenter indicated that the proposed language erodes the independence and integrity of local Ombudsman entities, sending a sign that local Ombudsman entities are not trusted to perform basic ombudsman functions, such as maintaining records. The commenter indicated that this approach is likely to be divisive and harmful in some States.

*Response:* We have added language indicating that nothing in this provision shall prohibit a local Ombudsman entity from maintaining such information in accordance with Ombudsman program requirements. This provision is intended neither to indicate a lack of trust in local Ombudsman entities nor to indicate that they are prohibited from maintaining records. On the contrary, we anticipate that most, if not all, Ombudsmen, will make no change regarding the ability of local Ombudsman entities to physically maintain Ombudsman program information as a result of this rule.

We believe that, ultimately, the Ombudsman must be held responsible for the management of Ombudsman program information. Otherwise, the Ombudsman might lack sufficient

access to records to meet the requirement to determine disclosure of Ombudsman program information. Section 712(d)(2)(A) of the Act. In addition, if the Ombudsman should determine that a local Ombudsman entity should no longer be designated, he or she might have difficulty retrieving necessary information in order to provide continued services to residents.

*Comment:* One commenter indicated concern about additional security needed to ensure protection of confidential information and requested clarification on record retention requirements.

*Response:* We do not anticipate that additional security, beyond that already required to meet the requirements of the Act, is required by this rule. As a reminder, this rule does not require the Ombudsman to physically maintain the program files and records. Nothing prohibits the Ombudsman from delegating that responsibility to representatives of the Office or to local Ombudsman entities as is done currently in many Ombudsman programs.

Similarly, we do not anticipate any change in record retention requirements. The Federal requirements related to retention of records maintained pursuant to HHS grants apply to records retention of the Ombudsman program. While there are some exceptions, in general, grants recipients and their sub-awardees must retain financial and programmatic records, supporting documents, statistical records, and all other records that are required by the terms of a grant, or may reasonably be considered pertinent to a grant, for a period of 3 years from the date the final Financial Status Report is submitted by States to HHS. See 45 CFR 75.361. This Federal grant requirement does not prohibit a State agency, the Office, and/or a local Ombudsman entity from establishing record retention policies which provide for longer retention periods than the Federal requirements.

*Comment:* Two commenters indicated support for the proposed language at § 1327.13(f) regarding responses to requests for disclosure of information. One of these commenters indicated that the provision is important because it covers records and files regardless of format and because it applies to all funding sources for the Ombudsman program.

*Response:* We appreciate the supportive comments and note that this provision is at newly numbered § 1327.13(e).

*Comment:* One commenter suggested adding a provision encouraging Ombudsman programs to share non-confidential information with advocacy organizations and identifying information from a complainant with complainant permission.

*Response:* We do not agree that AoA should encourage Ombudsman programs to share information with any particular type of entity. We believe the Act leaves that determination up to the Ombudsman where it does not otherwise prohibit the disclosure of resident-identifying information. The circumstances under which the Ombudsman program is permitted to disclose resident-identifying information with any outside entity is more fully described in § 1327.11(e)(3).

*Comment:* One commenter indicated a need for further clarification that the Ombudsman is solely responsible for making decisions concerning disclosure.

*Response:* We believe that the Act at section 712(d) does indicate that the Ombudsman has sole authority to make such determinations. We have amended § 1327.13(e) to further clarify this authority in the final rule.

*Comment:* One commenter indicated support for the proposed language at § 1327.13(g).

*Response:* We appreciate the supportive comment and note that this provision is at newly numbered § 1327.13(b)(1).

*Comment:* Nine commenters disagreed with proposed language at § 1327.13(g) and indicated that the Ombudsman, not the State agency, should be responsible for developing policies, procedures, and standards, regarding the administration of the Ombudsman program, rather than merely proposing them to the State agency. Five of these commenters indicated that the Office should develop the policies, procedures and standards and then consult with the State agency or seek State agency review to ensure consistency with the Act. One of these commenters described the proposed language as potentially dangerous, particularly where the Ombudsman program is organizationally located in a State government agency other than the State unit on aging. One commenter indicated that the proposed language should be amended to indicate that the Ombudsman shall "independently" propose policies, etc.

*Response:* We have amended this provision to provide for the Ombudsman to "establish or recommend" policies, procedures, and standards. In addition, a new provision at § 1327.11(e) more fully describes the process and responsibility for

establishing policies, procedures, and standards for the Ombudsman program.

*Comment:* Two commenters recommended that policies should be developed in consultation with representatives of the Office who work at local Ombudsman entities. One of these commenters indicated that, since representatives of the Office deal daily with complaints, they can strengthen policies and provide valuable insight.

*Response:* We agree with the comments and have incorporated consultation with representatives of the Office and local Ombudsman entities as part of the required process of establishing policies and procedures in a new provision at § 1327.11(e).

*Comment:* One commenter indicated support for the proposed language at § 1327.13(h).

*Response:* We appreciate the supportive comment and note that this provision is at newly numbered § 1327.13(a)(7)(iv).

*Comment:* Four commenters suggested language to enhance coordination of advocacy efforts with representatives of the Office, indicating that accountability for the positions of the Office lies with the Ombudsman, consistent with § 1327.13(b) which provides for the representatives of the Office to report to the Ombudsman regarding Ombudsman program functions and duties.

*Response:* We have accepted this recommendation by adding the language “including coordination of systems advocacy efforts carried out by representatives of the Office” to the functions of the Ombudsman set forth at § 1327.13(a)(7)(iv).

*Comment:* One commenter indicated that the proposed language should be amended to indicate that the Ombudsman shall “independently” provide leadership to statewide advocacy efforts.

*Response:* We believe that this provision, along with the provision regarding the Ombudsman independently making determinations and establishing positions at § 1327.11(e)(5) and (8), sufficiently describe the independence of the Ombudsman related to policy advocacy.

*Comment:* Seven commenters indicated support for the proposed language regarding Ombudsman management of fiscal resources at § 1327.13(i). One of these commenters indicated that the provision is important to the Ombudsman’s effective leadership of the Ombudsman program. One of the commenters noted that this provision is consistent with the 1995 Institute of Medicine recommendation that, without fiscal control, the Office

cannot adequately manage the statewide program.

*Response:* We appreciate the supportive comment and note that this provision is at newly numbered § 1327.13(f).

*Comment:* Two commenters recommended that the Ombudsman should determine the use of, or approve allocation of, funds to local Ombudsman entities at § 1327.13(i).

*Response:* The suggested language helps clarify our intent, so we have accepted the recommendation at § 1327.13(f).

*Comment:* One commenter suggested language that would clarify that the Ombudsman should determine that “program expenditures of the Office and local Ombudsman entities are consistent with policies established by the Office” at § 1327.13(i).

*Response:* The suggested language helps clarify our intent, so we have accepted the recommendation at § 1327.13(f).

*Comment:* One commenter recommended that the rule at § 1327.13(i) not prohibit the ability of the Office or local Ombudsman entities from seeking additional funds to support the Ombudsman program.

*Response:* We agree with the comment, but we do not read the proposed language, nor that of the final rule at § 1327.13(f), to prohibit fundraising efforts. We do note, however, that fundraising efforts need to be consistent with the policies and procedures established by the Office. For example, the Office might appropriately have a policy prohibiting the receipt of funds from a source that would pose a conflict of interest to the local Ombudsman program.

*Comment:* Three commenters requested additional clarification on the extent of Ombudsman involvement in fiscal monitoring of local Ombudsman entities anticipated by the proposed provision at § 1327.13(i). One commenter recommended that we require transparency in the management of the financial resources of the Office, including of local Ombudsman programs.

*Response:* We believe that the organizational location of the Office as well as the nature of the relationship between the Office and the local Ombudsman entities will determine whether the Ombudsman should be responsible for fiscal monitoring of local Ombudsman entities. Depending on the organizational structure used to host the Office and local Ombudsman entities, the State agency or other agency may be most appropriately responsible for fiscal monitoring of area agencies on aging or

other agencies hosting local Ombudsman entities.

Rather than make one approach that may not adequately cover all States’ organizational structures, we have clarified in § 1327.13(f) that the unique Ombudsman responsibility, regardless of organizational structure, is to determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with policies and procedures established by the Office. In order to assure that the Ombudsman has access to the information needed to perform this function, we have amended § 1327.15(b) to require the State agency to assure that the Ombudsman has access to information needed to perform required functions and responsibilities.

We encourage the Ombudsman to be involved in the fiscal monitoring of local Ombudsman entities. Where applicable, we encourage the State agency or other entity in which the Office is organizationally located to provide opportunities to the Ombudsman to be involved in its fiscal monitoring activities related to agencies hosting local Ombudsman entities.

*Comment:* Three commenters did not support the provision at § 1327.13(i), indicating that the proposed language fails to address the issue of a representative of the Office’s access to financial information related to the local Ombudsman entity. These commenters recommended that local Ombudsman entities should have fiscal oversight over their allocated funds or control over their own finances. One commenter recommended that we require transparency in the management of the financial resources of the Office, including of local Ombudsman programs. One commenter suggested that the provision require the Ombudsman to work in consultation with representatives of the Office and local Ombudsman entities in developing the fiscal determinations.

*Response:* We believe that the revisions made in the final rule at § 1327.13(f) adequately clarify the responsibility of the Ombudsman. In addition, we require that the policies and procedures of the Office should clarify for the local Ombudsman entity, among other things, the appropriate fiscal responsibilities and/or access to financial information at § 1327.11(e)(1)(vi).

*Comment:* One commenter suggested addition of language at § 1327.13(i) that clarifies the authority and autonomy of the Ombudsman to determine the use of fiscal resources. The commenter indicated that, given State budgetary constraints, the Ombudsman may be at



the mercy of the State agency for fiscal resources required to operate an effective Ombudsman program.

*Response:* We agree that budgetary constraints (at any level, not only due to State budget constraints) can limit the ability of the Ombudsman program to have sufficient fiscal resources required to operate an effective Ombudsman program. However, we do not intend to suggest in this provision that the Ombudsman has the authority to appropriate funds (which is the duty of Congress at the Federal level and State legislatures at the State level).

Therefore, in this provision, we intend to clarify that the Ombudsman is to have the authority to make fiscal determinations regarding those funds available to the Ombudsman program.

We also note that it is appropriate for the Ombudsman to work with the State agency and other potential sources of funding to explain Ombudsman program resource needs and to seek ways to maximize resources available to operate the Ombudsman program.

*Comment:* One commenter recommended that we use a word other than “designated” when referring to funds, given that the term “designated” has a specialized meaning in the context of designating local Ombudsman entities and representatives of the Office.

*Response:* We have made a change in the wording at § 1327.13(f) to reflect this comment, intending to avoid confusion around the meaning of the term “designated.”

*Comment:* Two commenters asked whether this provision will apply to funds raised locally. One of the commenters indicated that, while local fundraising should not be discouraged, it should be clarified what level of control the Ombudsman should have over locally raised funds. The other commenter recommended that the provision state that the Ombudsman should have control over only those funds allocated by the State agency, and not to funding for local Ombudsman entities. This commenter indicated that it would be inappropriate to give the Ombudsman control over funds raised locally to support the work of the local Ombudsman entity.

*Response:* The Ombudsman is responsible with respect to fiscal management, as described in the final rule at § 1327.13(f), for: (a) Determining the use of the fiscal resources appropriated or otherwise available for the operation of the Office, (b) where local Ombudsman entities are designated, approving the allocations of Federal and State funds provided to such entities, and (c) determining that

program expenditures of the Office and local Ombudsman entities are consistent with policies and procedures established by the Office. We do not believe that this language limits the ability of local Ombudsman entities to seek diversified funding or other resources to support the operations of the Ombudsman program at the local or regional level.

*Comment:* One commenter recommended that we include the word “independently” to describe the fiscal determinations of the Ombudsman at § 1327.13(i).

*Response:* Depending on the organizational structure of the agency in which the Ombudsman is hosted, fiscal management may necessarily be coordinated with the State agency or other agency or non-profit entity in which the Ombudsman is located. We are not convinced that the term “independently” would therefore be appropriate in this provision. While we intend to signal here that the Ombudsman should make determinations, including fiscal determinations regarding available funds, related to Ombudsman programmatic priorities, we are aware that the Ombudsman program is often one part of a larger entity with multiple services and programs that may manage the fiscal duties of the entity. We do not intend to suggest that the Ombudsman must independently perform all of these fiscal duties, which could include budgeting, tracking of expenditures, fiscal reporting to funders, responses to auditors, etc.

*Comment:* Four commenters indicated support for the proposed language in § 1327.13(j). One of these commenters indicated that the proposed language will strengthen the integrity of the program. Another indicated that monitoring is essential to a unified and effective statewide program. Another indicated that the proposed language would strengthen accountability.

*Response:* We appreciate the supportive comments and note that this provision is found in the final rule at § 1327.13(c)(1)(iii), related to designation of local Ombudsman entities.

*Comment:* Two commenters suggested that monitoring, as required in § 1327.13(j), should occur on a regular basis.

*Response:* We agree that monitoring cannot be a one-time occurrence but should be on-going; therefore we have adopted this recommended language that monitoring be on a “regular basis” at the final rule at § 1327.13(c)(1)(iii).

*Comment:* One commenter recommended an added requirement, in

§ 1327.13(j), that the Ombudsman consult with the local supervisor of the Ombudsman representative when determining performance.

*Response:* We agree that this approach is an important practice where it is applicable. Since the applicability of an Ombudsman consulting with others, such as area agency on aging directors, who may have responsibility for personnel supervision of a representative of the Office, depends upon the organizational structure of local Ombudsman entities, we believe that State agencies and Ombudsmen can most appropriately address this practice through State-specific policies and procedures. We plan to also promote this type of coordination in monitoring practices through technical assistance to States and Ombudsmen.

*Comment:* One commenter indicated that the proposed language should be amended to indicate that the Ombudsman shall “independently” develop and provide final approval of an annual report at § 1327.13(k).

*Response:* We have accepted this recommended change at § 1327.13(g). We are aware of circumstances in some States in which questions have arisen regarding the process by which this report is to be developed. Since the Act specifically requires this report and requires it to include some content which would be necessarily determined by the Ombudsman (e.g., evaluation of problems experienced by and complaints made by or on behalf of residents; providing relevant policy, regulatory, and legislative recommendations), we believe it is consistent with the Act that the Ombudsman, as head of the Office, be responsible to independently develop and approve the content of this report. See section 712(h)(1) of the Act.

*Comment:* Three commenters indicated support for the proposed language in § 1327.13(l). One of these commenters indicated that this provision will help establish clear lines of communication and education among programs and services. Another indicated that the proposed language effectively describes the critical and unique dynamic between the Office and the State agency, maintaining separation yet coordinating closely on the State’s elder rights agenda.

*Response:* We appreciate the supportive comments and note that the applicable provisions are in the final rule at § 1327.13(h).

*Comment:* Three commenters indicated that the proposed language is unclear. Two of the commenters questioned whether AoA is requiring a new, additional responsibility with

respect to other programs and with no resources. Since the Act already requires the State agency to coordinate programs for vulnerable adults, the commenter indicated that this responsibility is more appropriate for the State agency than the Ombudsman. Another commenter indicated that the proposed language is unclear whether the expectation for the Ombudsman to lead the statewide coordination or to lead the Ombudsman program-specific portion of that effort.

*Response:* This provision is not intended to require a new undertaking of the Ombudsman, nor is it intended to detract from the State agency leadership role with respect to elder rights activities as set forth in section 721(d) of the Act. We have, therefore, revised this provision in order to further clarify our intent to implement the provisions of the Act which require coordination of Ombudsman program services with protection and advocacy networks, legal assistance programs, law enforcement agencies and courts of competent jurisdiction, as well as other entities with responsibilities which relate to the health, safety, welfare, or rights of residents of long-term care facilities. See section 712(h)(6)–(8) of the Act.

AoA's intent in this provision is for the Ombudsman to lead the coordination at the state level between the activities of the Ombudsman program and of the enumerated entities, not to be responsible for the statewide leadership of broader elder rights coordination, which is more appropriately the role of the State agency. We have revised language in the final rule at §§ 1327.13(h); 1327.15(h), and (k)(5) to reflect this intent.

*Comment:* One commenter suggested language to clarify that memoranda of understanding should not be limited to the coordination between the Office and the legal assistance developer and legal assistance programs as indicated in proposed language at § 1327.13(l)(8).

*Response:* We have adopted the recommended language at § 1327.13(h).

*Comment:* Three commenters recommended that we use alternate language, rather than the language used in the Act at section 712(h)(6) for the reference to the protection and advocacy system in § 1327.13(l)(3). The commenters indicated that the proposed language is more descriptive and clear since the network serves people with all types of disabilities, not only individuals with developmental disabilities or mental illness that are referenced in the statutory references.

*Response:* We have worked with the Administration for Intellectual and Developmental Disabilities to revise the

description of “protection and advocacy system” in the final rule at § 1327.13(h)(4).

*Comment:* One commenter recommended that the final rule expressly acknowledge the existing relationship between protection and advocacy systems and Ombudsman program and should reflect the reality that the leadership of the coordination effort may lie in other entities.

*Response:* We acknowledge and appreciate the existing coordination between many States' Ombudsman programs and protection and advocacy systems, as well as Ombudsman program coordination with the other entities listed in this provision. This provision is not intended to imply that such coordination does not exist, but rather to reflect the statutory requirement as well as to reinforce that such coordination is absolutely critical to the well-being of residents served by the respective entities. It is, therefore, an AoA expectation of the Ombudsman in every State.

We also acknowledge and appreciate that the leadership for such coordination could happen in a variety of ways. Our intent in this provision is to indicate that the Ombudsman is responsible for providing state-level leadership within the statewide Ombudsman program, but not that the Ombudsman is to exclusively provide leadership across all of the entities in this coordinated effort, nor that this duty is to exclude leadership opportunities at the local or regional level of local Ombudsman entities.

*Comment:* Two commenters requested that we add a duty of the Ombudsman to investigate allegations of inappropriate conduct by a representative of the Office.

*Response:* We agree that this is should be the responsibility of an Ombudsman and inherent his or her duty to designate representatives of the Office. We have therefore added a provision reflecting this duty at a new § 1327.13(c)(4). We also address the policies governing grievance processes at a new § 1327.11(e)(7).

*Comment:* One commenter recommended that we add protections that provide due process through a third party formal appeals process if representative of the Office faces de-designation.

*Response:* We address this comment in a new provision regarding grievance processes at § 1327.11(e)(7).

#### *E. State Agency Responsibilities Related to the Ombudsman Program (§ 1327.15)*

In § 1327.15, AoA provides clarification regarding the State unit on

aging (State agency) and its responsibilities as OAA grantee in relation to the Long-Term Care Ombudsman Program.

*Comment:* Four commenters indicated general support for the proposed provision at § 1327.15. One indicated that the proposed language provided welcome clarifications.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter indicated that they foresee challenges in implementing the proposed rule as there are several policies and protocols in place that would prohibit their State agency from meeting several of the requirements indicated in § 1327.15.

*Response:* The Act is clear on a number of these requirements of the State agency which are incorporated into this rule. It is our intent to further clarify these requirements. AoA plans to provide technical assistance to States regarding compliance with this rule.

*Comment:* One commenter indicated that the proposed language could have unintended consequences for Ombudsman programs located outside of the State agency. The commenter recommended language to clarify that the State's responsibility is to ensure that the Ombudsman program has the resources necessary to meet the requirements of the Act and conforms to Federal and State law.

*Response:* We have adopted the recommendation to add language in § 1327.15(a) regarding the State agency duty to ensure that the Office complies with the relevant provisions of the Act and of this rule.

*Comment:* Two commenters recommended that we add clarifying language in § 1327.15(a)(1) to ensure the independence of the Ombudsman program.

*Response:* We believe that the rule in its entirety supports the operation of the Office as a distinct entity and the ability of the Ombudsman to make independent determinations. Therefore, we do not believe that additional language regarding independence is necessary in § 1327.15.

*Comment:* One commenter suggested that where conflict of interest exists, the State agency should assist the Office in identifying and remedying the conflict.

*Response:* We believe we have adequately described responsibilities of the State agency and the Office related to conflict of interest in § 1327.19 of the final rule.

*Comment:* In commenting on the definitions section, § 1327.1, one commenter recommended that we define “State agency.”

*Response:* While we have not incorporated a definition within the final rule, we have added a cross-reference to part 1321 to clarify that references to the State agency found in part 1321 also apply to those references in part 1327.

*Comment:* One commenter suggested that the language should be amended to indicate that “[t]he State agency shall require the Office to” perform the enumerated duties in § 1327.15(c).

*Response:* Our intent in § 1327.15 is to describe the responsibilities of the State agency. The functions and responsibilities of the Ombudsman are enumerated in § 1327.13. To further clarify this intent and with a goal of reducing confusion regarding which entity is responsible for which duty, we have reduced the level of detail for the Ombudsman responsibilities, which the Act requires the State agency to ensure (section 712(h) of the Act). These provisions are now found at § 1327.15(k). We have moved many of the more detailed provisions that had been in § 1327.15(c) to § 1327.13, in order to clarify that these are responsibilities of the Ombudsman to perform through the Office, and not of the State agency.

In addition, we believe the responsibility of the State agency, at § 1327.15(b), to ensure that the Ombudsman program has sufficient authority and access to information needed to fully perform all of the functions, responsibilities, and duties enumerated in the rule, sufficiently describes the State agency responsibilities related to these provisions.

*Comment:* Twelve commenters recommended revisions to proposed language § 1327.15(a)(2), recommending that the Ombudsman, rather than the State agency, should have primary responsibility for (or, at a minimum, the Ombudsman should have enhanced participation in) developing the policies, procedures, and standards of the Ombudsman program. One of the commenters indicated that if the State agency establishes the policies and procedures, the autonomy of the Ombudsman and of local Ombudsman entities would be at risk. Two commenters indicated that this provision is in direct contravention of the independence of the Office. One commenter indicated that it would be more realistic and effective if the Ombudsman would be primarily responsible for the development of policies and procedures. One of the commenters indicated that, where the Ombudsman is organizationally located in another State agency, for the State

unit on aging to dictate the policies of another State agency would be problematic and potentially dangerous.

*Response:* The final rule at § 1327.11(e) more fully describes the process and responsibility for establishing policies, procedures, and standards for the Ombudsman program.

*Comment:* One commenter recommended that we change the format of subparagraph § 1327.15(a)(2) to make the language more readable.

*Response:* We have adopted this recommendation within the new provision at paragraph § 1327.11(e).

*Comment:* Two commenters indicated support for the proposed language in § 1327.15(a)(2)(i) requiring policies related to Ombudsman monitoring of local Ombudsman entities.

*Response:* We appreciate the supportive comments and note that we have moved the relevant provision in the final rule to § 1327.11(e)(1)(iii).

*Comment:* One commenter requested that we add the descriptor “periodically” to indicate that monitoring in § 1327.15(a)(2)(i) should be on-going.

*Response:* We believe that the final rule at § 1327.11(e)(1)(iii) is adequate.

*Comment:* One commenter recommended the development of a fair hearing process, indicating that, when representatives of the Office are employees of agencies hosting local Ombudsman entities, there is risk of conflict of interest or willful interference, and that employees may be caught between following policies of their employer and those of the Ombudsman.

*Response:* We have addressed the requirement for a grievance process in § 1327.11(e)(7).

*Comment:* Three commenters indicated support for the proposed language at § 1327.15(a)(2)(ii) regarding standards to assure prompt response to complaints. One of these commenters indicated that States are in the best position to determine any response time frames through policies and procedures, and that a more specific requirement would place some States which rely entirely on Federal funds to operate the Ombudsman program in an untenable position.

*Response:* We appreciate the supportive comments and note that we have moved the relevant provision in the final rule to § 1327.11(e)(1)(v).

*Comment:* Five commenters indicated a need for a national standard or additional guidance for what is considered a “prompt response.”

*Response:* We believe creating one national standard of promptness would be unrealistic, given the extremely

different variables among States. Some States have developed standards of promptness related to complaint response that are responsive to the realities in that State. We strongly encourage the development of minimum standards to provide consumers, providers and others with an expectation of what constitutes a timely response to a complaint. We note that these standards provide an important mechanism for Ombudsman program accountability. We are available to provide technical assistance to States and Ombudsmen as they develop these standards.

*Comment:* One commenter recommended that we refer to the availability of resources to the Ombudsman program, agreeing with the need for high standards, but not wanting to create unrealistic expectations.

*Response:* We provide sufficient flexibility to the States for state-specific standards in this rule, providing opportunity for the State agency and Ombudsman program to consider available resources as they develop the standards.

*Comment:* Eight commenters suggested that we use the term “neglect” instead of “gross neglect” or provide further clarification of “gross neglect” in § 1327.15(a)(2)(ii) and in other places where it occurs.

*Response:* We have adopted this recommendation within § 1327.11(e)(1)(v). In both the proposed rule and the final rule, the Ombudsman program is required to respond to and work to resolve complaints of neglect. In contrast, this provision specifically relates to what AoA requires of State agencies and Ombudsmen as they develop standards of promptness to respond to these and other types of complaints. The final rule, rather than distinguishing between “gross neglect” and “neglect” for purposes of triage, requires development of standards of promptness which can guide the Ombudsman program to prioritize abuse, neglect, exploitation, and time-sensitive complaints. The rule also requires consideration of 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 by providing services of the Ombudsman program in response to a complaint. Rather than distinguishing between “neglect” and “gross neglect” in this provision, this rule provides States with the latitude to consider the use of the terms (and accompanying definitions) that are most appropriate to their State’s Ombudsman program.

For purposes of determining standards of promptness, States may

choose to use “gross neglect,” which is defined in NORS instructions, or “neglect.” We note that, “neglect” is defined in the Act at section 102(38) and by the Centers for Medicaid & Medicare Services (CMS) regarding nursing facilities at 42 CFR 488.301. Alternatively, States may choose to rely on their relevant State definition of “neglect” in developing their standard of promptness.

*Comment:* One commenter indicated the need for the final rule to have a provision implementing section 712(b) of the Act (“Procedures for Access”) requiring States to have policies on Ombudsman program access to facilities, residents, and records and providing guidance on how to appropriately implement this statutory requirement. The commenter indicated that, before addressing disclosure of Ombudsman program records and files, Ombudsman program authority to access and obtain records should be addressed, and provided a number of related recommendations, including the need for the final rule to:

- Clarify times when the representative of the Office may have access to facilities and residents and providing for privacy in resident access.

- Provide for representatives of the Office to have access to the name and contact information of the resident representative, indicating that, when a resident is not competent to communicate with the Ombudsman, the resident representative is authorized by law to provide consent. The commenter indicated that, if the Ombudsman does not know how to contact the resident representative, he or she cannot fulfill his or her duties to the resident.

- Clarify that access to resident records should include “other records relating to the resident” and maintained by the facility. The commenter indicated that, should a facility consider nursing, therapy, financial or other common records that the facility maintains which relate to the resident to be other than “medical or social,” there could be a question about whether a representative of the Office has access to such records.

- Clarify that the statutory provision providing Ombudsman access to “all licensing and certification records maintained by the State” (at section 712(b)(1)(D)) includes unredacted licensing, certification, and complaint investigation files maintained by the State regarding long-term care facilities. This would enable the Ombudsman to meet the Act’s requirement to monitor and analyze the implementation of laws pertaining to the “health, safety, welfare, or rights of the residents, with

respect to the adequacy of long-term care facilities and services” as required by section 712(a)(3)(G)(i) of the Act, since the primary way a State implements the laws is through licensing and certification inspections and complaint investigations. The commenter argues that, if the access in this provision of the statute were to be limited to redacted records, the Ombudsman would have no more access than the general public under the state’s public disclosure laws.

The commenter further notes that the confidential information in these State records would be subject to the disclosure limitations of section 712(d) of the Act.

Other commenters, in comments related to proposed language at § 1327.15(b), recommended that the final rule require “prompt” access to resident records and clearly state that all persons acting under the authority of the Office have access to resident records as part of a health oversight agency pursuant to HIPAA. Three commenters recommended that we incorporate language to clarify that access to resident records by the Ombudsman program should include authority to view records in any format and to obtain copies of the records. Two commenters indicated the need for additional clarity regarding how a representative of the Office should carry out his or her duties when a resident representative opposes a request for access to records.

*Response:* We agree that the rule is strengthened by incorporating provisions related to Ombudsman program access to facilities, residents and records and have added § 1327.11(e)(2) to require policies and procedures related to access. We have also added a provision in § 1327.15(b) to clarify the State agency’s responsibility, as required by section 712(b) of the Act, to ensure that the Ombudsman program has sufficient authority and access to facilities, residents and needed information in order to perform required functions, responsibilities, and duties.

In addition, we have incorporated a provision at § 1327.11(e)(2)(vi) related to 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, reflecting the statutory requirement in section 712(b)(1)(D) of the Act. While we are not suggesting that representatives of the Office be prohibited from this access, we anticipate that the Ombudsman and/or State agency will coordinate this policy and procedure development, and incorporate procedures for appropriate

access of representatives of the Office, with the State agency or agencies which maintain such licensing and certification records. Ombudsman programs are not prohibited from access to unredacted licensing and certification records, which may include resident-identifying information, under the Health Insurance Portability and Accountability Act (HIPAA) of 1996. See HIPAA Privacy Rule, 45 CFR part 160 and subparts A and E of part 164; see also § 1327.11(e)(2)(vii) of this rule.

*Comment:* Two commenters disagreed with the proposed language that the Ombudsman program be required to prioritize abuse complaints, indicating that investigation of abuse is a protective services responsibility. One of the commenters indicated that, in their State, where an individual is the victim of abuse or at imminent risk, the Ombudsman program refers to protective services for investigation, indicating that the Ombudsman program will report abuse on certain occasions without resident consent if the allegation would potentially impact the health and safety of the individual and/or other residents. Another commenter requested clarification regarding establishing policy and procedure for the Ombudsman program to respond to abuse complaints, as required in the proposed rule at § 1327.11(a)(2)(ii), in light of the fact that the State agency that, in their State, serves as the official finder of fact related to allegations of abuse, neglect and exploitation.

*Response:* The Act requires the Ombudsman program to “identify, investigate, and resolve complaints that . . . relate to action, inaction or decisions that may adversely affect the health, safety, welfare, or rights of the residents.” Section 712(a)(3)(A) and (5)(B)(iii) of the Act. Abuse, neglect and exploitation of residents are among the complaints that fall within this purview. Through NORS, States report on the types of complaints processed by the Ombudsman program, specifically including complaint codes and definitions related to abuse, gross neglect and exploitation. “Long-Term Care Ombudsman Program Complaint Codes,” OMB 0985–0005, at pp. 1–3, 17–18.

The services of the Ombudsman program are distinct from, and as indicated in § 1327.21(c), may even conflict with the responsibilities of protective services. An individual resident, may, for example, have a complaint about protective services or may seek support from the Ombudsman program to realize a goal that is

inconsistent with his or her protective services plan.

While the complaint resolution function of the Ombudsman program requires "investigation," an Ombudsman investigation is not for the same purposes as an investigation by protective services, licensing and regulatory agencies, law enforcement or other entities. This may result in confusion regarding the appropriate investigatory role of such entities. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), the goal is to resolve the complaint to the resident's satisfaction, rather than to substantiate whether the abuse or other allegation occurred. The Ombudsman program does not have a duty to collect sufficient evidence to meet the higher legal standards of proof that protective services, licensing or regulatory agencies, or law enforcement may need to meet their respective purposes. The Ombudsman program investigates solely for the purpose of gathering necessary information to resolve the complaint to the resident's satisfaction, not to determine whether any law or regulation has been violated for purposes of a potential civil or criminal enforcement action.

With the Ombudsman program fulfilling its duties, the priorities and interests of the individual resident can be supported and advocated for. If the protective services and other government systems charged with taking protective or enforcement actions are not providing the outcomes that serve the health, safety, welfare or rights of residents, the Ombudsman program is available to address the larger systemic problems. Therefore, it is critically important that each of these agencies is able to fully and distinctly fulfill their duties.

The provisions related to disclosure of resident identifying information, including exclusion from abuse reporting requirements, are set forth in § 1327.11(e)(3).

*Comment:* Three commenters indicated support for the proposed language at § 1327.15(a)(2)(iii). One of these commenters indicated that the proposed language very effectively addresses the practical and achievable balance between Ombudsman program requirements regarding disclosure and the State agency's need to responsibly monitor for Ombudsman program integrity and effectiveness.

*Response:* We appreciate the supportive comments and note that the provisions regarding disclosure policies and procedures are now found at § 1327.11(e)(3).

*Comment:* One commenter indicated that, since the State agency has the responsibility to monitor and provide oversight of the operation and performance of the Ombudsman program, it must be able to define, specify and require reports that reflect Ombudsman program activities and performance. While acknowledging the need to protect the identity of individuals served by the program, the commenter indicated that the State agency should be able to require the Ombudsman program to provide requested reports of aggregated program information.

*Response:* We agree that the State agency, in order to provide monitoring and personnel management, as required in §§ 1321.11 and 1327.15, may need to reasonably request reports regarding the activities of the Ombudsman program which do not conflict with the disclosure provisions of § 1327.11(e)(3). We have added language to the final rule at § 1327.15(e), clarifying this requirement.

*Comment:* One commenter requested further clarification regarding the decision point for disclosure of records and identities. Another commenter indicated that the discretion of the Ombudsman to decide whether to disclose any of the files or records maintained by the Ombudsman program, set forth in the proposed language at § 1327.15(a)(2)(iii)(A) and required by the Act at section 712(d)(2)(A), should also apply to the disclosure of the resident or complainant identifying information in the final rule, as required by the Act at section 712(d)(2)(B).

*Response:* We agree that the final rule should be consistent with the requirement of the Act at section 712(d)(2)(B) regarding Ombudsman discretion and have revised § 1327.11(e)(3) to provide that clarification.

*Comment:* One commenter recommended that the final rule direct the Ombudsman to use criteria to guide his or her discretion in determining whether to disclose the files, records or other information of the Office and to include in procedure the different types of requests, source of the request, and identification of the appropriate designee for determination of the disclosure. For example, the commenter indicated that a representative of the Office should be able, with resident permission, to share with facility staff that the resident has requested a particular service. In contrast, the Ombudsman may wish to make a determination directly should a representative of the Office receive a

subpoena to testify at and bring case records to a deposition.

*Response:* We believe that the discretion described by the commenter is consistent with the proposed language, but the request to provide additional clarification has merit. We have revised the provision at § 1327.13(e)(3) in the final rule to require that the Ombudsman, in carrying out the responsibility to use his or her discretion related to the disclosure of Ombudsman program information, be required to develop and adhere to criteria to guide this determination. In addition, we require the Ombudsman to develop and adhere to a process for determining which types of information, to whom, and under what circumstances, the Ombudsman may delegate determinations regarding the disclosure of information.

*Comment:* One commenter recommended that some entity must have access to review basic file information to be sure that records are kept up to date and proper information maintained. They indicated familiarity with a situation in which an AAA determined that a number of representatives of the Office within a local Ombudsman entity were not keeping records updated and some did not know how to properly use case management software.

*Response:* We agree that regular monitoring of the records and reporting of the representatives of the Office is important. It is the responsibility of the Ombudsman to monitor the performance of local Ombudsman entities in fulfilling their Ombudsman program duties, including maintaining updated and accurate records and reporting their work in a timely and accurate manner. See § 1327.13(c)(1)(3).

The State agency is required to monitor the performance of the Ombudsman program for quality and effectiveness; in so doing, it may request and review reports of aggregate data (see § 1327.15(e)). However, we believe the Act is clear in limiting access to the identifying information of residents and complainants to the Office (*i.e.* the State Ombudsman and representatives of the Office) with very limited and specified exceptions. Section 712(d)(2)(B) of the Act.

*Comment:* Six commenters recommended that language be added to provide for Ombudsman program disclosure to protection and advocacy systems (P&As). One of these commenters indicated that limiting access to information by the P&As may violate P&A authority to access records under Federal statute, may jeopardize

the work of the protection and advocacy network, and may be harmful to the people served. Another commenter recommended language clarifying that representatives of the Office must share records with P&As when confidentiality standards are met to assure cooperation between the two entities. Three of the commenters indicated the importance of the P&A mission to access Ombudsman information especially in light of residents who are unable to communicate informed consent. One commenter recommended that we require Ombudsman programs to report allegations of abuse, neglect and exploitation to P&As.

Three commenters recommended specific language to permit disclosure of resident or complainant-identifying information to P&As in the proposed rule at § 1327.15(a)(2)(iii) (the corresponding provisions are in the final rule at § 1327.11(e)(3)). One of these commenters indicated some P&As have faced barriers in accessing needed documents from Ombudsman programs.

*Response:* As ACL is the entity that administers grants to States both for the P&As and the Ombudsman program, we appreciate the significant value of both programs and understand the distinctions between them. We strongly support coordination of these programs, noting that such coordination is required in § 1327.13(h) of this rule.

Nothing in this rule prohibits the Ombudsman from making a determination to disclose information in response to a P&A request where the information:

- Does not provide resident-identifying information (for example, aggregated complaint trends);
- provides resident-identifying information where the resident indicates his or her consent to the Ombudsman to do so; or
- is provided consistent with a court order requiring such disclosure.

Further, we have clarified that the Ombudsman has the authority to determine when resident-identifying information maintained by the Ombudsman program may be disclosed to appropriate agencies (which may include P&As) for, among other things, “access to administrative, legal, or other remedies” in specified circumstances in which the resident is unable to communicate informed consent. See § 1327.19(b)(6), (7), and (8).

ACL understands that these provisions address some, but not all, of the recommendations of these commenters. In implementing the DD Act, ACL seeks to ensure that P&As have access to information and records as described in the DD Act. In

implementing the OAA, ACL seeks to assist Ombudsman programs to fulfill their duty to protect resident and complainant privacy and to honor the preferences of residents and complainants to reveal (or not reveal) identifying information. In addition, ACL seeks to implement the statutory requirement that Ombudsman program files and records “may be disclosed only at the discretion of the Ombudsman.” OAA Section 712(d)(2)(A).

Questions regarding P&A and Ombudsman program information sharing have understandably emerged in the context of implementation of these statutes and coordination of these programs. ACL plans to separately develop a process for additional public input focused on these questions in order to assist ACL in its implementation of these statutes and administration of these programs. However, since we did not include a request for comment regarding information sharing between P&A and Ombudsman programs in the notice of proposed rulemaking, ACL has made no change to the final rule on this topic.

*Comment:* One commenter recommended language to incorporate the statutory provision protecting the identity of any complainant, including staff of a long-term care facility.

*Response:* We agree that the Act, at section 712(d)(2) addresses protection of identifying information of the complainant as well as the resident at issue. We have, therefore, added a new provision at § 1327.11(e)(3)(iii) in the final rule that specifically addresses disclosure of identifying information of complainants. This provision is intended to protect the identity of any individual making a complaint to the Ombudsman program, including, but not limited to, the staff of a long-term care facility. We also note that the final rule includes a new provision requiring the prohibition and investigation of allegations of interference, reprisals and retaliation 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. § 1327.15(i).

*Comment:* One commenter recommended that § 1327.15(a)(2)(iii)(B)(1) and (2) include parallel provisions which clearly permit oral consent for disclosure by the resident representative.

*Response:* We believe that the recommendation is consistent with the Act at section 712(d)(2)(B)(ii), which permits oral consent for disclosure with contemporaneous documentation by the representative of the Office and have

made this revision in the final rule, in a newly numbered provision at § 1327.11(e)(3)(ii)(B).

*Comment:* One commenter indicated that the ability of an individual to communicate consent may be difficult to ascertain and recommended inclusion of language that permits visual consent, such as by use of video or other visual means, nods, blinks of eye, finger tapping, etc.

*Response:* We agree that residents with varying abilities may communicate consent in a number of ways. This is why we did not limit communication to verbal communication and have added the use of auxiliary aids and services as an appropriate aid to communication. We believe that adoption of this recommendation appropriately adapts the services of the Ombudsman program to accommodate individuals with a variety of disabilities. In light of this recommendation, we have added “visually,” to the final rule wherever “consent orally” is found, at §§ 1327.11(e)(2)(iv)(B), (e)(3)(ii)(B), (e)(3)(iii)(B) and 1327.19(b)(4).

*Comment:* One commenter indicated that the proposed language at § 1327.15(a)(2)(iii)(B)(2) should be amended to clarify that the resident’s guardian or other legal representative may provide consent.

*Response:* We agree that this recommendation provides for additional clarity and consistency among the consent-related provisions of the rule and the Act. We have made these amendments in the newly numbered provision at § 1327.11(e)(3)(ii)(B).

*Comment:* One commenter indicated support for the language of the proposed rule at § 1327.15(a)(2)(iii)(D).

*Response:* We appreciate the supportive comment and note that the corresponding provision is now found as part of the Ombudsman responsibilities related to disclosure at § 1327.13(e).

*Comment:* One commenter indicated that the language of the proposed rule at § 1327.15(a)(2)(iii)(D) appears to require a separate procedure for disclosure of each type of file, rather than an over-arching procedure.

*Response:* We believe the revised language at in the newly numbered provision at § 1327.13(e) addresses this comment.

*Comment:* Two commenters indicated that the language of the proposed rule at § 1327.15(a)(2)(iii)(D) should include the limitation that disclosure of facility records be limited to those which “residents have, or the general public has access,” referencing this language in section 712(b)(1)(C) of the Act.

*Response:* The language cited by the commenter relates to Ombudsman program access to facility information, rather than disclosure of Ombudsman program information once it is obtained from the facility. However, we have incorporated this relevant statutory language into the new provision regarding “procedures for access” in the final rule at § 1327.11(e)(2)(v).

*Comment:* One commenter indicated that the language of the proposed rule at § 1327.15(a)(2)(iii)(D) fails to put limitations on the Ombudsman’s discretion regarding disclosure of Ombudsman records and files, that the term “for appropriate disclosure” is too vague, and that the requirement that the State agency must comply with section 712(d) of the Act is omitted. The commenter recommended inclusion of the discretionary authority of the Ombudsman over Ombudsman program records and files in this provision.

*Response:* We believe the revised language in the newly numbered provision at § 1327.11(e)(3), regarding disclosure policies and procedures, and at § 1327.13(e), regarding Ombudsman responsibilities related to disclosure, addresses this comment.

*Comment:* Nine commenters indicated support for the language of the proposed rule at § 1327.15(a)(2)(iii)(E) regarding abuse reporting requirements. One of these commenters indicated that the proposed language is essential for the Ombudsman to gain a resident’s trust, given the unique role of the Ombudsman as the resident advocate and that, without the ability to assure confidentiality of resident information, the ability of the Ombudsman to gather information needed for successful resolution of problems would be impaired. One of these commenters indicated that some State laws currently conflict with the requirements of the Act and that this language would help clarify the need for changes in the language and/or interpretation of State laws with respect to Ombudsman reporting. Six commenters indicated that the proposed language is a welcome clarification since a number of States have experienced confusion in resolving the conflict between the Act’s limitations on Ombudsman disclosure of resident identifying information and State mandated abuse reporting laws. One commenter indicated that the proposed language would strengthen the Ombudsman program ability to resolve complaints on behalf of residents.

*Response:* We appreciate the supportive comments and note that the relevant provision is now incorporated into a newly numbered provision in the final rule at § 1327.11(e)(3)(iv).

*Comment:* Two commenters recommended the inclusion of penalties for a State agency which violates this provision.

*Response:* We have not included penalties in this provision specifically; the broader topic of the State agency duty to provide for sanctions with respect to interference, retaliation and reprisals is addressed at § 1327.15(i). In addition, the Federal regulation provides options for HHS grant awarding agencies such as AoA to respond when a grantee fails to comply with any term of an award ensure compliance by its grantees. 45 CFR 75.371.

*Comment:* Two commenters disagreed with the language of the proposed rule at § 1327.15(a)(2)(iii)(E) regarding abuse reporting requirements. One of these commenters indicated that the Ombudsman program should defer to State regulations with respect to mandatory reporting requirements in protective services matters. The other commenter asked why the Federal government would not want a system that requires advocates to keep people safe from further abuse.

*Response:* Through the strict disclosure limitations within the OAA at section 712(d)(2)(B), Congress has indicated its intent for the Ombudsman program to be a safe place for the concerns of residents to be brought, knowing that their information will not be disclosed without their consent (or the consent of the resident representative). Despite numerous Congressional reauthorizations of the Act, Congress has never provided an exception for abuse reporting in the Act. While we have provided, in this final rule, limited exceptions for reporting resident-identifying information where residents are unable to communicate informed consent (see § 1327.19(b)), we do not believe that the Act provides us with the authority to promulgate a rule that would permit Ombudsman program reporting of resident identifying information if the resident or resident representative, who is able to communicate informed consent, has not provided consent nor do we support such reporting over the resident’s objection, as a matter of policy.

Residents reaching out for assistance on an abuse, neglect or exploitation complaint may well want their information conveyed by the Ombudsman program to protective services, the licensing and regulatory agency, and/or law enforcement; indeed, the final rule clarifies that the Ombudsman program has a duty to make such a referral when requested by the resident. See § 1327.19(b)(3)(i). The

Ombudsman program may inform complainants who report suspected abuse that they may (and, under some circumstances, must) report the complaint information to protective services, the licensing and regulatory agency, and/or law enforcement. The Ombudsman program may advise the resident of the appropriate role and limitations of the Ombudsman program, assist the resident in understanding his or her options, and encourage the resident to report—and/or consent to the Ombudsman program referral—to protective services, the licensing and regulatory agency, and/or law enforcement.

However, the Ombudsman program is designed to represent the interest of the resident (and not necessarily the interest of the State) in order to support the resident to make informed decisions about the disclosure of his or her own information. Residents may be concerned about retaliation if their concern is known or have other reasons why they do not want the Ombudsman program to disclose their private information. While Congress intends for the Ombudsman program to resolve complaints related to the health, safety, welfare and rights of residents, and while that intent logically includes response to and protection from abuse, Congress provided the resident—and not the Ombudsman program—with the authority to make the decision about when and where resident-identifying information can be disclosed by the Ombudsman program. That is as it should be.

*Comment:* One commenter recommended adding the word “including” to modify “when such reporting discloses the identity of a complainant or resident” in the proposed rule at § 1327.15(a)(2)(iii)(E) regarding abuse reporting requirements. According to the commenter, as proposed, the Ombudsman program could be included as a mandatory reporter under State law so long as they don’t include resident or complainant identity.

*Response:* We have adopted this recommendation in the provisions related to policies and procedures for disclosure at § 1327.11(e)(3)(iv). The circumstances which set forth appropriate parameters for Ombudsman program reporting of abuse as part of complaint processing are more fully described in the final rule at § 1327.19(b).

*Comment:* One commenter requested technical assistance to States for which the current State law is inconsistent with the Act regarding abuse reporting. Another commenter requested



additional clarification regarding State agency responsibility and Ombudsman authority related to abuse reporting.

*Response:* AoA continues to be available to provide technical assistance to State agencies and Ombudsmen regarding compliance with these and other provisions of the Act.

*Comment:* One commenter requested an exception related to reporting where an incident of abuse is witnessed by a representative of the Office.

*Response:* We have provided clarity regarding this circumstance in the final rule at § 1327.19(b)(8).

*Comment:* One commenter recommended guidance regarding Ombudsman program responsibility related to attending consent for identity disclosure when a resident alleges suicidal ideation.

*Response:* While we have not included a regulation regarding disclosure of resident identifying information when the resident alleges suicidal ideation into this rule, we appreciate the comment and have noted the need for technical assistance for State agencies and Ombudsman programs related to this issue.

*Comment:* Three commenters indicated support for the language of the proposed rule at § 1327.15(a)(2)(iii)(F) regarding the source of the request for information or source of funding for the Ombudsman program services.

*Response:* We appreciate the supportive comments and note that the relevant provision is now incorporated into a newly numbered provision in the final rule at § 1327.11(e)(3)(v).

*Comment:* One commenter recommended that we add reference to the fact that the requirements of the proposed provision should be effective notwithstanding section 705(a)(6)(c) of the Act.

*Response:* We are aware that some State agencies and other entities have found this provision (governing administration of the Title VII, Chapter 3, Prevention of Elder Abuse, Neglect and Exploitation Program, and not the Ombudsman program) confusing, particularly since both of these programs are established within Title VII of the Act. Additionally, in some States, Title VII, Chapter 3-funded activities are performed in whole or in part by the Ombudsman program. Therefore, we are including this recommendation to clarify our intent in the final rule at § 1327.11(e)(3)(v).

*Comment:* One commenter recommended that we clarify the protection of facility staff members who are willing to speak openly in Ombudsman program investigations and

may be at risk of retaliation for their cooperation.

*Response:* The Ombudsman is provided discretion by the Act to determine disclosure of files, records and other information of the Office. The policies and procedures regarding disclosure, required by § 1327.11(e)(3), and the criteria developed by the Ombudsman related to disclosure, required by § 1327.13(e), may appropriately include provisions related to protection of sources of information.

The Act does not prohibit the Ombudsman program from disclosing identifying information for facility staff members or other individuals who provide information to the Ombudsman program. However, it does provide that “[t]he State shall . . . (2) prohibit retaliation and reprisals by a long-term care facility or other entity 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.” Section 712(j)(2) of the Act.

Therefore, we have added a provision in this final rule at § 1327.15(i) regarding interference, retaliation and reprisals.

*Comment:* One commenter recommended that we include the word “independently” to describe the authority of the Ombudsman to recommend changes to laws, regulations, and policies as set forth in the proposed language of § 1327.15(a)(2)(v).

*Response:* We believe that the final rule, at § 1327.11(e)(8) is sufficiently clear that the Ombudsman has discretion to make such recommendations. The Ombudsman is the head of the Office, and Act is clear that the Office is to make the determination regarding the appropriateness of recommendations. Therefore, we do not believe the recommended change is necessary.

*Comment:* One commenter indicated that in their State, current policies and protocols prohibit the State agency from upholding this requirement.

*Response:* We appreciate the commenter bringing this issue to our attention in the comment. The Act is clear that the Office has the authority to make recommendations regarding changes to laws, regulations, and policies pertaining to the interests of long-term care facility residents. This is both a required function of the Ombudsman (at section 712(a)(3)(G) of the Act) and an expectation of the State agency to require of the Office (section 712(h)(2) of the Act). AoA plans to provide assistance to State agencies and

Ombudsmen to assist them in coming into compliance with this rule.

*Comment:* Twelve commenters indicated support for the proposed language at § 1327.15(a)(2)(v)(A) regarding the State’s duty to exclude the Ombudsman and representatives of the Office from State lobbying prohibitions inconsistent with the Act. One of these commenters indicated that this is a welcome clarification since many States have experienced problems with implementing these provisions of the Act. One commenter indicated that the proposed language supports the independence of the Office and the ability of the Ombudsman to fulfill requirements of the Act. One commenter indicated that the proposed language is essential to shield the Ombudsman program from potential interference.

Another commenter indicated that the Act is clear in its directive that the Ombudsman program is to provide input on public policy decisions that pertain to health, safety, welfare and rights of residents, and that the proposed language will help secure this vital voice for long-term care consumers in the public policy arena.

*Response:* We appreciate the supportive comments and note that relevant provisions are found at §§ 1327.11(e)(5) and 1327.13(a)(7)(vii) of the final rule.

*Comment:* One commenter recommended that we indicate that obstruction of the activity required at § 1327.15(a)(2)(v)(A) (*i.e.* the State agency responsibility to exclude the Office Ombudsman and representatives of the Office from State lobbying prohibitions inconsistent with section 712 of the Act) by a host agency is willful interference and should be reported to AoA for investigation. Another recommended that the provision should include penalties for a State agency that violates this provision of the Act.

*Response:* In the final rule, the corresponding provision related to State lobbying prohibitions is found at § 1327.11(e)(5)(i). Federal regulation provides options for HHS grant awarding agencies such as AoA to respond when a grantee, such as a State agency, fails to comply with any term of an award. 45 CFR 75.371.

*Comment:* One commenter recommended that the provision at § 1327.15(a)(2)(v)(A) indicate that the Ombudsman and representatives of the Office are excluded from lobbying restrictions within the State agency or local Ombudsman entities’ personnel policies.

*Response:* The final rule requires that the agency hosting the Office and any agency hosting local Ombudsman entities may not have personnel policies or practices which prohibit the Ombudsman or representatives of the Office, respectively, from carrying out their functions, responsibilities or duties required by this rule. §§ 1327.11(e)(1)(i), 1327.17(b).

*Comment:* One commenter indicated that, in their State, the Ombudsman is organizationally located in a government umbrella agency and must adhere to State protocols related to legislative action and lobbying which apply to State employees. The commenter recommended that AoA consider differences in structure from State to State in finalizing this rule. Another commenter indicated that the Ombudsman in their State is a State employee and is therefore bound by policy that does not exclude the Ombudsman from State lobbying prohibitions. The commenter anticipates significant challenges in their State in upholding this proposed provision based on current State policy.

*Response:* We appreciate the commenters bringing these issues to our attention. The Act is clear that Congress intends for the Office to have the authority to make recommendations regarding changes to laws, regulations, and policies pertaining to the interests of long-term care facility residents. This is both a required function of the Ombudsman (at section 712(a)(3)(G) of the Act) and an expectation of the State agency to require of the Office (section 712(h)(2) of the Act).

Should a State not wish to have a State employee in the role of fulfilling the Ombudsman functions of the Act, the Act provides States with options to carry out the program by contract or other arrangement with another public agency or a nonprofit private organization. Section 712(a)(4)(A) of the Act. AoA plans to assist State agencies and Ombudsmen to comply with this rule.

*Comment:* One commenter indicated that the proposed language at § 1327.15(a)(2)(v)(A) essentially negates the wisdom of input of others and questioned the wisdom of one person having unilateral authority to express their opinion about any legislative bill or legal matter. The commenter indicated that the State aging network is to be a comprehensive, coordinated system of care for older adults and that this proposed rule pits one part of the network against another. The commenter also questioned how the State agency can be required by the Act to advocate for older adults except

where the Ombudsman program exists, describing this as an inconsistent message.

*Response:* It is not the intent of AoA to negate the wisdom of input of others in the work of the Ombudsman program. On the contrary, we expressly provide (at newly numbered § 1327.11(e)(5)(ii)) that policies which promote consultation regarding the determinations of the Office are not prohibited and we require that the Office coordinate its activities with a large number of relevant entities (at § 1327.13(h)). We strongly encourage collaboration between the Ombudsman and the State agency, as well as with other stakeholders.

We intend to clarify in this rule how both the State agency and the Ombudsman program can successfully fulfill all of the functions and duties required by the Act. AoA is available to provide technical assistance to any State in its implementation of the final rule.

*Comment:* One commenter requested additional clarification regarding the roles and responsibilities of the Ombudsman program with respect to lobbying and legislative advocacy as well as the interaction between the Ombudsman program and the State agency in its fulfillment of oversight duties. The commenter requested enhanced technical assistance and sub-regulatory guidance for gubernatorial, State agency, State legislative, and local levels regarding the proposed language at § 1327.15(a)(2)(v)(A).

*Response:* We believe that the final rule assists in clarifying the responsibilities of the Ombudsman, the representatives of the Office, and the State agency. We are available to provide training and technical assistance regarding the implementation of the final rule.

*Comment:* One commenter requested that we amend the proposed language regarding the Office making recommendations to ensure that local Ombudsman entities are able to carry out their duties freely and independently from the Office. The commenter indicated that, if the Ombudsman is given authority to veto positions of representatives of the Office, in many States residents of long-term care facilities may have no voice at all.

*Response:* The Act sets out the Ombudsman as the head of the Office. Section 712(a)(2) of the Act. The Ombudsman has the authority to make determinations regarding the positions of the Office, including but not limited to recommendations for changes in laws, regulations and policies. See section 712(h)(2) of the Act. We note

that there is nothing prohibiting the Ombudsman establishing policies that provide for representatives of the Office to also perform the function of making recommendations, and that the final rule requires procedures that exclude representatives of the Office from any state lobbying prohibitions inconsistent with section 712 of the Act.

However, the duties of the representatives of the Office are to be performed in accordance with the policies and procedures established by the Office and the State agency. Section 712(a)(5)(B) of the Act. Therefore, we believe that requiring the State agency or the Ombudsman to permit representatives of the Office to make recommendations freely and independently from the Office would be inconsistent with the Act.

*Comment:* One commenter indicated that, related to the proposed language at § 1327.15(a)(2)(v)(A), some local Ombudsman entities are organizationally located within agencies funded by Legal Services Corporation (LSC) which prohibits lobbying. The commenter recommended that AoA require LSC-funded entities to comply with the Act or the Ombudsman should be required to ensure that advocacy for residents in areas served by legal services programs is being done by contracting with a separate entity to perform services prohibited by the LSC.

*Response:* Congress has prohibited LSC-funded entities from participating in certain lobbying activities, except in limited situations. This prohibition also applies to activities performed with non-LSC funds. See 42 U.S.C. 2996e; section 504 (a)–(e), Public Law 104–134, 110 Stat. 1321, 1321–53–1321–57; 45 CFR parts 1610, 1612. (We note that a transfer of non-LSC funds from a LSC entity to a non-LSC sub-grantee is not subject to LSC restrictions. See 45 CFR part 1610; see also 62 FR 27695–27597.) AoA does not have the authority to require LSC-funded entities to violate Federal requirements under the LSC laws and regulations in order to carry out the requirements of the Act.

AoA has concluded that, in light of the current LSC limitations on policy work with a legislative body or other government offices or agencies, if an Office were to be organizationally located in a LSC-funded entity, the Ombudsman would be unable to fulfill all of the functions required by the Act. Therefore, it would not be appropriate for a State to select an LSC-funded entity for organizational placement of the Office under current laws and regulations governing LSC-funded entities. Nonetheless, LSC-funded entities could host local Ombudsman

entities or representatives of the Office so long as the Ombudsman determines that the representatives of the Office can adequately fulfill their duties directly or in conjunction with the Office.

We note that the functions which could violate the LSC provisions are specifically listed as required functions of the Office (*i.e.* the Office of the State Long-Term Care Ombudsman), as opposed to duties required of local Ombudsman entities or representatives of the Office. For example, the function to recommend any changes in such laws, regulations, policies, and actions (section 712(a)(3)(G)(ii) of the Act) is required of the Office, but not listed within the duties of the representatives of the Office as set forth in section 712(a)(5) of the Act. The State agency is required by the Act to require the Office to provide policy, regulatory, and legislative recommendations in its annual report (section 712(h)(1)(F)); recommend changes in laws, regulations and policies (section 712(h)(2)) and provide information to legislators regarding recommendations related to problems and concerns (section 712(h)(3)).

We recommend that, if the Ombudsman is considering designating (or continuing to designate) an LSC-funded entity as a local Ombudsman entity, the Ombudsman be familiar with the relevant LSC requirements that may impact the ability of the representatives of the Office to perform some systems advocacy activities.

The Ombudsman should evaluate whether the LSC requirements limit the ability of the representatives of the Office to adequately fulfill their requirements under the policies and procedures of that State's Ombudsman program. So long as the Office is able to fulfill all of its functions required by the Act, we do not interpret the Act to prohibit the Ombudsman from designating a local Ombudsman entity hosted by a LSC-funded entity. AoA is available to provide technical assistance to State agencies and Ombudsmen. Any LSC-funded entity which is requesting consideration to host (or continue to host) a local Ombudsman entity should similarly be familiar with these limitations, seek guidance from LSC regarding their interpretation, and evaluate its ability to support its employees and volunteers in fulfilling their duties as representatives of the Office. Ultimately, the LSC-funded entity is responsible for its compliance with LSC requirements and prohibitions. LSC has developed helpful guidance regarding these LSC lobbying restrictions that is available on its Web site at [www.lsc.gov](http://www.lsc.gov). The most recent

guidance is at <http://www.lsc.gov/sites/lsc.gov/files/AO-2014-005.pdf>.

*Comment:* One commenter supported the proposed language at § 1327.15(a)(2)(v)(B) regarding consultation on Ombudsman determinations by the State agency or other agency carrying out the Ombudsman program and regarding accountability of the Ombudsman and representatives of the Office to the policies and procedures of their employer. The commenter indicated that, while the State agency may not interfere with the Ombudsman's functions, and while the Ombudsman does have the authority to have a different agenda and position than that of the State agency, it is crucial that the State agency be permitted to request regular communication regarding the Ombudsman's determinations.

*Response:* We appreciate the supportive comment and note that the relevant provision in the final rule is § 1327.11(e)(5)(ii).

*Comment:* One commenter indicated that the proposed rule at § 1327.15(a)(2)(v)(B) attempts to use the regulatory process to create a positive relationship. Where that already exists, this requirement is unnecessary and where there is tension, the State authority to create policies that force the Ombudsman to disclose and discuss policy strategies and determinations will make the relationship more difficult. The commenter indicated that the rule is silent on the State agency's responsibility to share its policy decisions and determinations with the Ombudsman.

*Response:* Our intent in this provision is to clarify the appropriateness of the relationship between the State agency and the Ombudsman program, given that the State agency is the Federal grantee with responsibility for making sure that an Ombudsman program is appropriately carried out in the State and that the Office has the statutory authority and requirements to make determinations which are not typical of other programs for which the State agency has responsibility. We believe the provision appropriately describes this relationship so that the State agency and the Ombudsman—as well as the entity carrying out the Office, if other than the State agency—have more clarity regarding both the appropriateness of consultation and the inappropriateness of interference with Ombudsman determinations.

*Comment:* One commenter suggested separation of the employer policies and procedures and the opportunity for consultation at § 1327.15(a)(2)(v)(B).

*Response:* We agree that it would be clearer to separate these concepts, rather than combining them into one paragraph. Therefore, in the final rule the provisions related to personnel policies and the Office have been incorporated into § 1327.11(e)(1)(ii). The provisions related to personnel policies of agencies hosting local Ombudsman entities are at § 1327.17(b). We retain the amended provision related to consultation and systems advocacy at newly numbered provision at § 1327.11(e)(5)(ii).

*Comment:* One commenter provided suggested language focusing the consultation requirement § 1327.15(a)(2)(v)(B) on public policy determinations of the Office.

*Response:* We agree that the determinations of the Ombudsman most appropriate for consultation are those related to recommendations to laws, regulations and policies of government agencies and have made this amendment to the final rule and moved the provision to the subparagraph entitled "Systems Advocacy" in § 1327.11(e)(5).

*Comment:* One commenter objected to and suggested deletion of the proposed language at § 1327.15(a)(2)(v)(B). The commenter indicated that the primary threat to the success and integrity of the Ombudsman program is its lack of independence and that the most common entity to threaten that independence is the State agency. The commenter indicated that AoA is unrealistic to believe that State agencies do not sometimes use consultation requirements to interfere with Ombudsman independence and, that, by authorizing the State agency to require consultation, AoA was putting Ombudsman independence into question. The commenter indicated that good communication can take place without putting this requirement into the final rule.

*Response:* The provision regarding consultation, in the final rule at § 1327.11(e)(5)(ii), permits the policies and procedures of a State's Ombudsman program to promote Ombudsman consultation with the State agency on systems advocacy. It is permissive, rather than a requirement. While we appreciate the commenter's concern regarding the Ombudsman program's ability to independently fulfill its functions, we believe that the rule in its entirety supports the commenter's concern that the Office should operate as a distinct entity (*see*, § 1327.11(b)) and that the Ombudsman be able to make independent determinations (*see* § 1327.11(e)(8)).

We believe that the final rule strikes the right balance between this independence and the opportunity for a State agency to be knowledgeable of the determinations of the Office, since the head of the Office (*i.e.* the Ombudsman) is necessarily either its employee, or employed by an entity with which it has a contract or other arrangement. In addition, without consultation, the State agency may be limited in its ability to make its own determinations with full knowledge of the perspectives of the Office related to resident interests.

*Comment:* One commenter indicated that the provision at § 1327.15(a)(2)(v)(B) should be amended to indicate that an employer's policies must be in accordance with the access, confidentiality and disclosure provisions set forth in section 712 of the Act.

*Response:* We agree with this recommendation and have incorporated related language into § 1327.11(e)(1)(i) (regarding the Office) and §§ 1327.11(e)(ii) and .17(b) (regarding agencies hosting local Ombudsman entities).

*Comment:* One commenter indicated that the proposed language at § 1327.15(a)(2)(v)(B) should be amended to indicate that a policy promoting consultation cannot require a right to review or pre-approve communications by the Ombudsman or representatives of the Office.

*Response:* We agree with the recommendation and have made a corresponding amendment in the final rule at § 1327.11(e)(5)(ii).

*Comment:* One commenter recommended that the provision at § 1327.15(a)(2)(v)(B) require, rather than not prohibit, consultation. The commenter argued that such a requirement would promote effective Ombudsman program operation by ensuring that both the Ombudsman and State agency have an opportunity to discuss and review positions and so that neither is caught off guard in public arenas.

*Response:* We agree that consultation can promote effective Ombudsman program operation if done in a manner supportive of the Office's responsibility to represent the interests of residents through recommended changes to laws, regulations and policies of government agencies. We believe that it is sufficient to clarify that such consultation is not prohibited and to leave the determination up to the State agency and Ombudsman of whether the parameters of consultation need to be formalized in state-level policies and procedures.

*Comment:* One commenter indicated that the only way to make sure that political interference with the Ombudsman does not occur is to require that the State agency cannot fire the Ombudsman due to the nature or content of the Ombudsman's advocacy. The commenter recommended this be required in State policies.

*Response:* After careful consideration, we have decided against providing specific criteria regarding the firing of the Ombudsman. We believe that the clarifications provided by this rule related to the operation of the Ombudsman program; organizational and individual conflicts of interest; and freedom from interference, retaliation, and reprisals provide sufficient clarity to protect the Ombudsman from retaliation for performing the duties required by the Act.

The Act specifically provides State agencies with significant latitude in determining whether to operate the Ombudsman program directly (and how to structure the program within or attached to the State agency) or operate it through contract or other agreement with another agency. Therefore, States have appropriately structured a wide variety of organizational placements for the Ombudsman and, as a result, there is wide variation among applicable laws impacting employment, labor, government contracting, and interagency agreements that may apply to the firing of an Ombudsman or the termination of a contract for the operation of the Office. AoA believes that developing criteria regarding firing might create confusion in the context of the wide variety of applicable legal requirements.

However, AoA is aware that a number of employment arrangements and organizational structures have been developed to protect employees within other types of ombudsman programs, inspectors general, and other entities where independent oversight or consumer advocacy are required activities. Therefore, AoA plans to provide States with further guidance and technical assistance regarding employment provisions and structures which they may consider in further strengthening the ability of the Ombudsman to fulfill his or her functions under the Act.

*Comment:* Three commenters indicated support for the proposed language of § 1327.15(a)(3) regarding the use of Title III and Title VII funds for access to training opportunities.

*Response:* We appreciate the supportive comments and note that, in the final rule, this provision is at § 1327.15(c).

*Comment:* One commenter requested language that defines training standards and indicated that budgetary constraints have resulted in insufficient training availability to representatives of the Office. Another commenter indicated that current training is insufficient, creating inconsistencies among local Ombudsman entities.

*Response:* We have decided to not incorporate training standards into this rule, but do plan to develop and implement training standards for the Ombudsman program. We also recommend that Ombudsman programs refer to the National Ombudsman Resource Center for training resources and a core curriculum.

*Comment:* One commenter indicated support for the proposed language of § 1327.15(a)(4) and (5) regarding the responsibilities of the State agency to provide personnel supervision and management, monitoring and oversight, and to clarify limitations on review of files, records or other information maintained by the Office.

*Response:* We appreciate the supportive comment.

*Comment:* One commenter indicated that the proposed language of § 1327.15(a)(4) and (5) regarding limitations on the review of files, records or other information maintained by the Office is too broadly written and could open up virtually all of the of the Ombudsman program records, files and thought processes to the State agency, resulting in a chilling effect on the Ombudsman program. The commenter recommended that it would more appropriate to indicate to the State agency that access to aggregate data and required Ombudsman program reports is sufficient to fulfill these responsibilities.

*Response:* In order to reduce confusion regarding disclosure of files, records or other information, we have revised these provisions in the final rule at newly numbered § 1327.15(d)–(f).

*Comment:* One commenter recommended that the provisions related to oversight of the Office at proposed § 1327.15(a)(4) and (5) should include a process for investigating complaints against the Ombudsman and representatives of the Office and a mechanism for due process in the event of disciplinary action or de-designation.

*Response:* We have included a new provision at § 1327.11(e)(6) of the final rule to require that the development of designation policies and procedures, which include the criteria and process for de-designation. In addition, we have added a grievance process requirement in § 1327.11(e)(7) to address this and other situations where an opportunity

for review of an action or determination is warranted.

*Comment:* One commenter indicated that the regulations include language specifying that allegations against the Ombudsman for failure to carry out his or her duties as required in the Act shall be filed with the State agency with concurrent notification to the Director of the Office of Long-Term Care Ombudsman Programs at AoA.

*Response:* We do not believe that we have authority to require a person with an allegation related to the Ombudsman to report to the State agency, AoA, or any other entity. Instead, we have required in the final rule, at § 1327.11(e)(7), that a grievance process be available to address this and other situations where an opportunity for review of an action or determination is warranted.

*Comment:* Two commenters indicated that the monitoring by the State agency, required at proposed rule § 1327.15(a)(5), should include an assessment of whether the Office is performing all required functions, including systems advocacy, but should be clear that such monitoring should not include monitoring the substance of any public comment or recommendation so it does not hinder the independent voice of the Ombudsman.

*Response:* We agree that the monitoring required in proposed § 1327.15(a)(5) (newly numbered at § 1327.15(e)) shall include an assessment of whether the Office is performing all of its functions under the Act and have amended this provision accordingly. We have also made a parallel provision in the newly numbered § 1327.15(d), regarding personnel supervision and management.

In addition, we appreciate the commenter's concern regarding the Ombudsman program's ability to independently fulfill its function related to systems advocacy. We believe that the rule in its entirety supports the Act's requirement that the Ombudsman must be able to make independent determinations regarding recommended changes to laws, regulations or policies.

*Comment:* One commenter indicated that the proposed language was a good clarification of the importance of integrating Ombudsman program operations into the State Plan. Another commenter appreciation for the proposed language at § 1327.15(a)(6) regarding integration of the goals and objectives of the Office into the State plan and coordinate the goals of the Office with those of other programs and services, indicating that, as an Office operating outside of the State agency,

such integration and coordination does not currently occur.

*Response:* We appreciate the supportive comments and note that the corresponding provision in the final rule is at § 1327.15(g).

*Comment:* One commenter recommended that we substitute the term "promote collaborative efforts" with "require collaborative efforts" in § 1327.15(a)(6) of the proposed rule.

*Response:* Given that the range of programs and services referenced in this provision include some entities over which the State agency may have no authority, we believe the term "promote" is more appropriate than "require." We note that the corresponding provision in the final rule is at § 1327.15(g).

*Comment:* One commenter indicated that the proposed language at § 1327.15(a)(7) effectively describes the critical and unique dynamic between the Office and State agency, simultaneously maintaining an important separateness while coordinating closely on the State's elder rights agenda.

*Response:* We appreciate the supportive comments and note that the corresponding provision in the final rule is at § 1327.15(h).

We also note that we have added in the final rule the responsibility for the State agency to "provide elder rights leadership" in order to distinguish the role of the State agency from that of the Ombudsman, in response to comments made in response to proposed language at § 1327.13(l). We believe that this revision more accurately reflects the Act's requirement of the State agency to "coordinate the programs [to address elder abuse, neglect and exploitation] with other State and local program and services for the protection of vulnerable adults." Section 721(d) of the Act.

We have amended the term "responsibilities relevant to the health, safety, well-being, or rights of older adults, including residents of long-term care facilities" for "protection of vulnerable adults" in order to more closely correspond to the language of § 1327.13(h). Additionally, we note that we have maintained the term "older" in this provision (though not in § 1327.13(h)) since this provision specifically relates to the duty of the State agency (*i.e.* the State unit on aging).

*Comment:* Nine commenters indicated support for the proposed language at § 1327.15(a)(8). One of these commenters indicated that independence of the Office to conduct advocacy on both individual and systemic levels without interference of

State agencies, facilities or others is of primary importance. Two of these commenters indicated that Ombudsmen and representatives of the Office have experienced limitations on their ability to act due to policies or practices of their host agencies which have made them unable to fulfill their mandates under the Act. Two commenters indicated appreciation for the preamble language related to potential interference by State agencies. One commenter indicated that the proposed language reference to duties of the representatives of the Office (*i.e.* at the local level) is particularly helpful.

*Response:* We appreciate the supportive comments and note that the corresponding provision in the final rule is at § 1327.15(b).

*Comment:* Nine commenters recommended that a mechanism be developed and implemented to protect the Office whenever State agencies attempt to curtail the advocacy of Ombudsmen for people the Ombudsman program was created to serve. Some commenters recommended penalties for willful interference be included, such as civil money penalties or intermediate sanctions including directed plans of correction; others recommended that AoA provide a grievance process for review and action where interference is found.

Another commenter recommended that the final rule address sanctions for other parties, in addition to the State agency, that willfully interfere with representatives of the Office in the performance of their duties or retaliate against residents or other persons who complain to or cooperate with representatives of the Office as prohibited by 712(j) of OAA.

*Response:* The final rule includes a new provision requiring that the State agency prohibit interference with the Office in the performance of its functions and duties, as a result of considering these and other related comments. Specifically, we have addressed the issue of interference in new provisions at § 1327.1 (defining "willful interference") and § 1327.15(i) (related to interference, reprisals, and retaliation).

We note that the relationship between AoA and the State agency is one of a grant awarding agency to a grantee. Federal regulation provides options for HHS grant awarding agencies such as AoA to respond when a grantee fails to comply with any term of an award. 45 CFR 75.371

*Comment:* One commenter recommended that the final rule include the requirements in section 712(j)(2) and (3) of the Act which require the State to

prohibit retaliation or reprisals by any entity, including the State and local agencies as well as to long-term care facilities, and which require the State to provide for appropriate sanctions. Another commenter recommended that the rule provide the Office with the authority and ability to perform all duties and ensure that allegations of willful interference are investigated, and, as appropriate, referred to outside agencies. Another commenter recommended that the State agency be responsible to identify and remedy allegations of willful interference.

*Response:* We have incorporated provisions related to this recommendation at § 1327.15(b) and (i) of the final rule.

*Comment:* One commenter recommended that the proposed language at § 1327.15(b) regarding Ombudsman access to records be amended to require long-term care facilities to disclose the name and contact information of the resident's legal representative or guardian, indicating that this is necessary in order for a representative of the Office to identify whether a legal representative exists in order to make a contact when necessary. In addition, the commenter indicated that the provision should require "prompt" access to records as well as identify actions to be taken by the State agency where facilities violate this requirement.

*Response:* We have added a new provision in the final rule at § 1327.11(e)(2) requiring Ombudsman program policies and procedures which relate to timely access to facilities, residents and records, including contact information for the resident's representative.

We have also added a new paragraph in § 1327.15(b) to clarify the State agency's responsibility to assure that Ombudsman authority to access to facilities, residents and records is adequately provided for in State law. We recognize that, in many States, the State agency does not have the authority to make requirements of long-term care facilities, but we expect that it can work with other appropriate State agencies to provide for this authority.

*Comment:* Three commenters indicated support for the proposed language at § 1327.15(b)(1) regarding the relationship between the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Ombudsman program access to records. One of these commenters indicated that this provision will help support Ombudsman program education to facilities and reduce delays in complaint resolution for residents.

*Response:* We appreciate the supportive comments and note that the corresponding provision is at § 1327.11(e)(2)(vii).

*Comment:* One commenter recommended that the language in the final rule should clearly state that all persons acting under the authority of the Office have access to resident records as part of a health oversight agency pursuant to HIPAA.

*Response:* We have clarified that both Ombudsmen and representatives of the Office have access to resident records, as well as other appropriate access to facilities, residents and records, in the new provision regarding "procedures for access" in the final rule at § 1327.11(e)(2).

*Comment:* One commenter recommended that AoA communicate with CMS regarding the importance of enforcing the HIPAA provision.

*Response:* We have shared this comment with CMS Division of Nursing Homes within the Center for Clinical Quality and Standards, as recommended. We also note that the HHS Office for Civil Rights enforces the HIPAA Privacy Rule, which protects the privacy of individually identifiable health information ([www.ocr.hhs.gov](http://www.ocr.hhs.gov)).

*Comment:* One commenter recommended that the final rule include language to clarify that HIPAA does not prohibit covered entities (such as nursing facilities) from releasing to the Office:

- (1) Other records related to the resident,
- (2) a list of resident names and room numbers (indicating that, while this may not be considered private health information, some facilities have used HIPAA to deny Ombudsman program access to such information), or
- (3) access to survey-related information, including at exit conferences during nursing facility surveys.

*Response:* We have amended the final rule at § 1327.11(e)(2)(vii) to clarify that the HIPAA Privacy Rule does not preclude release by covered entities of resident private health information or other resident identifying information to the Office, 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.

*Comment:* One commenter indicated support for the proposed language in § 1327.15(b)(2), indicating that it assists the Ombudsman in performing essential functions of complaint investigations when a resident has a guardian or other legal representative.

*Response:* We appreciate the supportive comment and note that the related provisions are incorporated in the final rule at § 1327.11(e)(2)(iv) regarding procedures for access.

*Comment:* One commenter indicated that the proposed language in § 1327.15(b)(2) is inadequate with regards to Ombudsman program access to records and fails to mention access to residents, facilities or licensing agency records. The commenter recommended inclusion of the provisions of section 712(b) of the Act and additional provisions described in comments related to § 1327.15(a)(2). Another commenter recommended the need for provisions related to access to residents, as well as records. Two commenters indicated the need for additional clarity in the proposed language at § 1327.15(b)(2) regarding how a representative of the Office should carry out his or her duties when a legal representative opposes a request for access to records. One commenter recommended that the proposed language at § 1327.15(b)(2) be amended to provide for "appropriate access to resident medical and social records."

*Response:* We have incorporated new provisions related to procedures for access in the final rule at § 1327.11(e)(2) in response to these comments.

*Comment:* Three commenters recommended that we incorporate language to clarify that access to resident records by the Ombudsman program should include authority to view records in any format and to obtain copies of the records.

*Response:* In response to these comments, we have added the language "regardless of format and including, upon request, copies of such records" to the procedures for access provision in the final rule at § 1327.11(e)(2).

*Comment:* One commenter indicated that the proposed language at § 1327.15(c)(1) regarding the annual report is useful.

*Response:* We appreciate the supportive comment and note that the corresponding provision is in the final rule at § 1327.15(k)(1).

*Comment:* One commenter recommended that we change the proposed language to require the Office to "independently prepare an annual report" in § 1327.15(c)(1).

*Response:* We have made the recommended change in § 1327.13(g).

*Comment:* One commenter recommended that we change the proposed language to require the Office to "independently analyze, comment on, and monitor" in § 1327.15(c)(2).

*Response:* We have not made the recommended change in this provision.

Instead, we believe that this recommendation is adequately addressed within other provisions of the final rule, which requires that the policies and procedures of the Office must provide that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office regarding (among other things) recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and provision of information to legislators, regarding the problems and concerns of residents and recommendations related to the problems and concerns. Further, the final rule clarifies that these determinations and positions of the Office shall be those of the Office and shall not necessarily represent the determinations or positions of the State agency, or entity carrying out the Ombudsman program, or any other State agency. See § 1327.11(e)(8).

*Comment:* Two commenters recommended that we omit the word “older” in the proposed language at § 1327.15(c)(3)(i)(A).

*Response:* We have made the recommended amendment in the final rule at § 1327.13(a)(7)(v).

*Comment:* One commenter indicated that the proposed language at § 1327.13(c)(3)(ii) is a good clarification of the intended recipients of information contained in the reports prepared under paragraph (c)(1).

*Response:* We appreciate the supportive comment. We note that this language is identical to the provision at section 712(h)(3)(B) of the Act and that the corresponding provision is at § 1327.13(g) of the final rule.

*Comment:* One commenter indicated support for the proposed language at § 1327.15(c)(4) regarding procedures for training.

*Response:* We appreciate the supportive comment and note that the corresponding provision is at § 1327.13(c)(2) of the final rule.

*Comment:* One commenter recommended the need for additional guidance regarding minimum hours for initial training and continuing education as well as the content of such training. The commenter noted that training requirements vary widely among States and that this is a detriment to Ombudsman program consistency.

*Response:* We appreciate the commenter’s perspective on the importance of consistency and minimum standards related to training for the Ombudsman program. In

§ 1327.15(c) in the final rule, we have clarified that States must provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents and that they 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.

While we have not incorporated training standards into this rule, we plan to develop and implement training standards for the Ombudsman program in the future. We also recommend that Ombudsman programs refer to the National Ombudsman Resource Center for training resources and a core curriculum.

*Comment:* One commenter recommended that we add to the categories of representatives with which the State agency must require the Office to consult in establishing Ombudsman program training procedures, specifically including representatives of residents of facilities and families of residents in § 1327.15(c)(4)(i).

*Response:* We have adopted this recommendation in the final rule by adding residents and resident representatives in § 1327.13(c)(2) of the final rule. We used the term “resident representatives” since friends, partners, and others whom a resident may authorize to represent them may include, but not be limited to, family members.

*Comment:* One commenter recommended that we add a new provision to the proposed language at § 1327.15(c)(4) to require that the representative of the Office must be a “certified ombudsman.”

*Response:* We have not adopted this recommendation since we believe this is already provided for in the final rule. The provision refers to the term “representative of the Office,” which is defined in this rule at § 1327.1 to mean “designated by the Ombudsman.” In the context of the Ombudsman program, the Ombudsman certifies that an individual has met the training and other requirements necessary for an individual to serve as a “representative of the Office.”

*Comment:* One commenter requested that we revise the reference in § 1327.15(c)(6)(ii) to protection and advocacy systems. Another commenter recommended that we include reference to the Protection and Advocacy of Individual Rights (PAIR) Act, 29 U.S.C. 794e.

*Response:* We have revised this reference in the final rule to be consistent with the broader references to

protection and advocacy systems; the relevant provision is at § 1327.13(h)(4).

#### *F. Responsibilities of Agencies Hosting Local Ombudsman Entities (§ 1327.17)*

We have added a new section in the final rule, § 1327.17, in order for AoA to provide clarification regarding the responsibilities of agencies in which local Ombudsman entities are organizationally located.

*Comment:* One commenter recommended that we incorporate into the final rule the inclusion of the concept, included in the preamble of the proposed rule, that personnel management of the local Ombudsman entity not conflict with Ombudsman law and policy.

*Response:* We have incorporated this concept into a new § 1327.17 regarding “Responsibilities of agencies hosting local Ombudsman entities.”

#### *G. Duties of the Representatives of the Office (§ 1327.19)*

At § 1327.19, AoA provides clarification regarding the duties of the representatives of the Office, particularly related to the core Ombudsman program service of complaint resolution. Through this rule, AoA emphasizes the person-centered nature of the Ombudsman program and its services to residents of long-term care facilities.

*Comment:* One commenter indicated that the title of § 1327.17 would be clearer if titled “Functions and Duties of Ombudsman Entities and Representatives,” which more closely reflects the language in the Act. The commenter indicated that the “Office of the State Long-Term Care Ombudsman” is more closely identified with the State Ombudsman and the functions and responsibilities set forth in § 1327.13.

*Response:* In the proposed rule, this subsection was titled “Functions and duties of the Office of the State Long-Term Care Ombudsman.” We have titled the corresponding subsection, newly numbered as § 1327.19, “Duties of the representatives of the Office” in the final rule.

*Comment:* One commenter recommended that introductory language to § 1327.17 be included to more closely reflect the language of the Act at section 712(a)(5)(A) and (B).

*Response:* We have adopted this recommendation in the final rule, at § 1327.19, so that it more closely reflects the applicable language of the Act.

*Comment:* Three commenters expressed support for the proposed language in § 1327.17(a). Two of the commenters indicated that proposed language clarifies the role of the



representatives of the Office, including staff and volunteers. Another commenter indicated that the proposed language is helpful in that it clarifies that there is one Office of the State Long-Term Care Ombudsman within the State, made up of the Ombudsman and representatives of the Office.

*Response:* We appreciate the supportive comments and note that the relevant provisions are at § 1327.19(a) in the final rule.

*Comment:* One commenter indicated that § 1327.17(a) should include additional duties of representatives of the Office including survey involvement and transfer and discharge hearings.

*Response:* We have not included survey participation as a duty in § 1327.19(a) since it is not specifically required by the Act. However, we encourage Ombudsman program participation in survey process in the role of resident advocate (for example, by consulting with State survey agencies and providing relevant information to the survey agency prior to a facility survey subject to disclosure limitations, and by participating in resident group meetings or exit conferences). We note that many Ombudsman programs do participate in long-term care survey processes and that the AoA requires reporting of this activity in NORS. OMB NO.: 0985–0005.

Where the representative of the Office receives a discharge or transfer complaint, he or she is required to work to resolve this complaint. In fact, this complaint category ranks among the most frequently received and processed complaints reported in NORS. OMB NO.: 0985–0005. However, whether a representative of the Office participates in a resident hearing, as part of the resolution of such a complaint, and in what capacity, depends on a number of factors, including the wishes of the resident, the availability of legal representation for the resident, and the policies and procedures of the Ombudsman program in that State.

*Comment:* Two commenters indicated support for the proposed language at § 1327.17(a)(2). One commenter indicated that the provision would provide representatives of the Office with unimpeded, private access to residents, noting that in some States, representatives of the Office face challenges gaining access to a resident or having the opportunity to privately communicate with a resident.

*Response:* We appreciate the supportive comments and note that the relevant provisions are in the final rule at § 1327.19(a)(3).

*Comment:* One commenter requested more clarity around the term “regular access.”

*Response:* We encourage Ombudsman programs to provide residents with access to the Ombudsman program through, among other means, regular visits to facilities. However, we believe creating one national minimum standard for visits to facilities would be unrealistic, given the extremely different variables among States. We strongly encourage the development of minimum standards to provide consumers, providers and others with an expectation of what constitutes regular visits. We also encourage Ombudsman programs to consider that providing “regular access” requires more than providing visits to facilities by representatives of the Office. Ombudsman programs should be easily accessible to residents, complainants, and others—including individuals with limited English proficiency—because, among other things, they have multiple methods of communication available to the public (including telephone, email, facsimile, Web site contacts, TTY (text telephone) and other communication services, and mail).

*Comment:* Two commenters indicated that the proposed language in § 1327.17(a)(4) regarding representing the interests of residents before government agencies and seeking remedies is overlooked or disregarded by many States. The comment suggested that the responsibility needs to be emphasized and stringently enforced by AoA. The commenters indicated that failure by a State to remedy the organizational conflicts that prevent performance of this duty must be resolved immediately, that AoA should create a certification program for Ombudsman programs with an auditing component.

*Response:* AoA expects that this final rule will help to clarify expectations of State agencies and Ombudsman programs related to this and other duties required by the Act. The Long-Term Care Ombudsman Program is established through Federal grants to State agencies. The State agency must assure AoA that the Ombudsman program is established and carried out consistent with the provisions of the Act. If AoA determines that a State fails to comply with any term of an award, AoA, as the granting agency, has several remedies available to it, including but not limited to wholly or partly suspending or terminating the award. 45 CFR 75.371.

The issue of organizational conflicts, as described in these comments, is more

fully discussed at § 1327.21 of the final rule.

*Comment:* One commenter indicated that the proposed language in § 1327.17(a)(4) and (5) is unclear regarding whether the Ombudsman can override a representative of the Office in its duty to carry out these duties. The commenter indicated that it would be a grave mistake if the Ombudsman is the only one who is able to determine the positions of the Office or if the Ombudsman could prohibit representatives of the Office from taking positions without approval or from taking positions that are inconsistent with those of the Office. The commenter described a State in which the Ombudsman was not engaged with the legislature or government agencies related to resident issues but where local Ombudsman entities have made significant contributions to the interests of residents through their systems advocacy. The commenter indicated that the only reason why the Ombudsman is now able to take public positions in that State is due to the systems advocacy efforts of local Ombudsman entities.

*Response:* The Act sets out the Ombudsman as the head of the Office. Section 712(a)(2) of the Act. The Ombudsman has the authority to make determinations regarding the positions of the Office, including but not limited to recommendations for changes in laws, regulations and policies. See section 712(h)(2) of the Act. We note that there is nothing prohibiting the Ombudsman establishing policies that provide for representatives of the Office to also perform the function of making recommendations, and that the final rule requires procedures that exclude representatives of the Office from any State lobbying prohibitions inconsistent with section 712 of the Act.

However, the duties of the representatives of the Office are to be performed in accordance with the policies and procedures established by the Office and the State agency. Section 712(a)(5)(B) of the Act. Therefore, we believe that it would be inappropriate for this rule to require the State agency or the Ombudsman to permit representatives of the Office to make recommendations which are inconsistent with the positions of the Office. Instead, we conclude that Congress intended that the Ombudsman, as head of the Ombudsman program, to provide leadership to the statewide advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of advocacy efforts carried

out by representatives of the Office. See final rule at § 1327.13(a)(7)(iv) and (b).

*Comment:* One commenter recommended that the final rule at § 1327.17(a)(4) include a definition of adequate legal representation.

*Response:* We have addressed this and similar comments in the provisions related to § 1327.15(j) of the final rule.

*Comment:* One commenter supported the use of the phrase “if necessary” in the proposed language that indicates that the representative of the Office shall “review, and if necessary, comment on any existing and proposed laws, regulations policies and actions . . .” in § 1327.17(a)(4). The commenter indicated that this provision supports the concept that the Ombudsman is expected to provide comments on behalf of the Office and that representatives of the Office would only comment as necessary as determined by the Ombudsman. The commenter indicated that this provision allows for designation of local Ombudsman entities that may be restricted from certain public policy activities, such as those funded through the LSC.

*Response:* We appreciate the supportive comment. We note that we have provided a more in-depth discussion of our analysis of lobbying by local Ombudsman entities within LSC-funded entities in the comments related to § 1327.15.

*Comment:* Two commenters recommended greater specificity regarding what is expected of the Office with respect to the language in section 712(a)(5)(B)(v)(II) of the Act and the proposed language at § 1327.17(a)(5)(ii).

*Response:* We are available to provide State agencies and Ombudsman programs with technical assistance regarding this provision of the law and regulation, found at § 1327.19(a)(5)(ii) of the final rule.

*Comment:* Three commenters indicated support for the proposed language at § 1327.17(b). One of these commenters indicated that the provision clarifies that the Ombudsman program serves the resident in complaint investigation and resolution. One commenter indicated that it is important that the Ombudsman program serve resident in a person-centered manner; including where the resident is unable to express wishes but the wishes have been made clear previously, such as in an advance directive. One commenter supported inclusion of phrase “the Ombudsman and/or the representative of the Office serve the resident of a long-term care facility,” describing it as a clear statement of whose satisfaction the

Ombudsman program is trying to achieve.

*Response:* We appreciate the supportive comments and note that the relevant provisions are at § 1327.19(b) in the final rule.

*Comment:* One commenter indicated that a resident should not have to suffer abuse or neglect to benefit from Ombudsman program services.

*Response:* We agree with this comment; both the proposed rule and final rule support this perspective. In fact, AoA requires Ombudsmen to report on Ombudsman program resolution using numerous types of complaint codes, only a few of which are complaints with abuse, gross neglect, or exploitation codes. OMB NO.: 0985–0005.

We use the language “including but not limited to a complaint related to abuse, neglect, or exploitation” in § 1327.19(b)(1) in order to clarify that the Ombudsman program does have a role to play in complaints related to abuse, neglect and exploitation. We have included this language in response to the policies and practices of a few States in which all complaints of abuse, gross neglect or exploitation are immediately referred to protective services, law enforcement, and/or a regulatory agency, with no further Ombudsman program service made available to the resident related to such a complaint. This practice deprives the resident of the services of the Ombudsman program and we intend, through this rule, to signal that such a practice is not an appropriate interpretation of the Act.

*Comment:* Five commenters recommended that the rule use the term “neglect” instead of “gross neglect” in § 1327.17(b)(1). One of these commenters indicated that Ombudsman program purview should encompass any complaint of neglect without having to meet additional elements to demonstrate “gross neglect.” Another commenter indicated that, by using the term “neglect,” the rule would better support the Ombudsman program’s ability to resolve potentially dangerous problems before they escalate, describing this as one of the hallmarks of the Ombudsman program.

*Response:* We agree that working to resolve “neglect” complaints are within the purview of the Ombudsman program. We also agree that one of the hallmarks of the Ombudsman program is its ability to resolve potentially dangerous problems before they escalate. To avoid any confusion on this point, we have omitted the term “gross” in the final rule at the corresponding provision, § 1327.19(b)(1).

*Comment:* Six commenters indicated that the reference in § 1327.17(b)(1) that Ombudsman program investigation includes investigation of abuse complaints conflicts with their State’s requirement to separate the job duties of protective services from duties of representatives of the Office. Three of these commenters felt that, if the Ombudsman program is responsible for investigation of abuse, this is a conflict of interest. One of these commenters indicated that the provision would negatively impact the integrity of the Ombudsman program as the provision would require the Ombudsman program to substantiate abuse cases in conflict with the State protective services functions and the advocacy function of the Ombudsman program.

*Response:* The Act requires the Ombudsman program to “identify, investigate, and resolve complaints that . . . relate to action, inaction or decisions, that may adversely affect the health, safety, welfare, or rights of the residents.” Section 712(a)(3)(A) and (5)(B)(iii) of the Act. Abuse, neglect and exploitation of residents are among the complaints that fall within this purview. AoA requires Ombudsmen to report in NORS the types of complaints processed by the Ombudsman program, specifically including complaint codes and definitions related to abuse, gross neglect and exploitation. “Long-Term Care Ombudsman Program Complaint Codes,” OMB 0985–0005, at pp. 1–3, 17–18.

The services of the Ombudsman program are distinct from, and as indicated in § 1327.21(a), at times may conflict with the responsibilities of protective services. An individual resident, may, for example, have a complaint about protective services or may seek support from the Ombudsman program for a goal that is inconsistent with his or her protective services plan.

Some of the functions of the Ombudsman program use the same terms, such as “investigation,” which are not always used for consistent purposes among Ombudsman programs, protective services, licensing and regulatory agencies, or other programs. This may result in confusion regarding the appropriate role of such programs. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), its goal is to resolve the complaint to the resident’s satisfaction, but not to substantiate whether the abuse or other allegation occurred. The Ombudsman program does not have a duty to collect sufficient evidence to meet the higher legal standards of proof that protective services, licensing or regulatory

agencies, or law enforcement may need to meet their respective purposes. The Ombudsman program investigates solely for the purpose of gathering necessary information to resolve the complaint to the resident's satisfaction, not to determine whether any law or regulation has been violated for purposes of a potential civil or criminal enforcement action.

With the Ombudsman program fulfilling its duties, the priorities and interests of the individual resident can be supported and advocated for. If the protective services and other government systems charged with taking protective or enforcement actions are not providing the outcomes that serve the health, safety, welfare or rights of residents, the Ombudsman program is available to advocate for improvements to the system. Therefore, it is critically important that each of these agencies is able to fully and distinctly fulfill their duties.

*Comment:* One commenter indicated that the proposed language is suited to States where the Ombudsman program is the finder of fact for abuse. The commenter recommended that we add language to include that the Ombudsman program should report abuse to the State entity which is the finder of fact for abuse complaints.

*Response:* We intend, through this rule, to clarify that the Ombudsman program is not appropriately the finder of fact for abuse complaints. The requirements related to Ombudsman program referral of abuse complaints to other agencies for substantiation of the facts are set forth in § 1327.19(b)(3)–(8).

*Comment:* Three commenters indicated support for the person-centered approach of the proposed language in § 1327.17(b)(1). One of these commenters indicated that the language strikes an appropriate balance between ensuring resident preference and encouraging family involvement (by using the term “guardian and other legal representative”). Another commenter indicated that the person-centered approach driven by the wishes and goals of an individual resident is appropriate and necessary for individualized complaints. Another commenter indicated that the proposed rule is helpful in clarifying that perception of the resident and wishes of the resident are paramount for the Ombudsman program.

*Response:* We appreciate the supportive comments and note that the corresponding provision is at § 1327.19(b)(1) in the final rule.

*Comment:* One commenter indicated that not all complaints are individual and recommended that the final rule

should support the broader authority to advocate for residents for facility-wide complaints or observations. The commenter indicated that some representatives of the Office do not believe they have authority to respond to complaints regarding facility-wide problems without the written consent of the resident.

*Response:* We agree with the commenter that some complaints may be facility-wide. It is not our intent to imply otherwise with the proposed language. We note that some complaints may impact multiple residents, even if they are not relevant to the facility as a whole. We have added language in the final rule at § 1327.19(b)(1) in order to clarify that the Ombudsman or representative of the Office may identify, investigate and resolve a complaint impacting multiple residents or all of the residents who live in a facility.

We note that the representative of the Office may be considered a complainant. In order to avoid any confusion on this point, we have modified the language in the final rule at § 1327.19(b)(2) to clarify that the complainant may include the Ombudsman or representative of the Office. We further note that the provisions related to adequate evidence of resident or resident representative consent are found at § 1327.19(b)(4).

*Comment:* One commenter indicated appreciation for the resident-centered focus of the proposed language at § 1327.17(b)(2).

*Response:* We appreciate the supportive comment and note that the corresponding provision is at § 1327.19(b)(2) in the final rule.

*Comment:* One commenter indicated that the Ombudsman program should be able to initiate as well as receive complaints.

*Response:* We agree with the comment; the proposed language was not intended to limit or prohibit the Ombudsman or representative of the Office from initiating a complaint (*i.e.* from being the complainant) where they pro-actively identify a complaint that needs Ombudsman program intervention. In NORS, AoA requires Ombudsmen to report on the number of “Ombudsman/ombudsman volunteer” complainants among the categories of complainants for cases closed by the Ombudsman program. OMB NO.: 0985–0005. In order to avoid any confusion on this point, we have modified the language in the final rule at § 1327.19(b)(2) to clarify that the complainant may include the Ombudsman or representative of the Office.

*Comment:* One commenter indicated that the proposed language “informed consent, wishes, or perspectives” at § 1327.17(b)(2)(i) may be confusing and difficult to implement. The commenter recommended that we omit the term “wish” and consider omitting “perspective,” noting that these terms may be inconsistent with State surrogate decision-making rules.

*Response:* We agree with this recommendation and have amended the phrase at § 1327.19(b)(2)(i) to omit “wishes, or perspective.”

*Comment:* One commenter recommended the addition of a statement that, where a resident has a court-appointed guardian or conservator, the resident may have already been determined unable to give informed consent, so the Ombudsman program should check the extent of the court order. The commenter recommended that, regardless of whether the resident has a representative, the right to participate in their care and resolution of a complaint should be supported by the Ombudsman program, since the greater the involvement of the resident in the resolution of the complaint, the higher the likelihood of its success.

*Response:* We agree with these recommendations and have made the following revisions to the final rule as a result:

(1) We have added language at § 1327.19(b)(2) that requires the Ombudsman or representative of the Office to support and maximize resident participation in the process of resolving a complaint.

(2) We have added a new paragraph at § 1327.19(b)(2)(iv) to clarify that the Ombudsman or representative of the Office must ascertain the extent of the authority that has been granted to the resident representative when determining whether to rely on a resident representative's communications or determinations.

*Comment:* Three commenters indicated that the terms “legal representative” and “resident representative” and “guardian” are used inconsistently and recommended further clarification of the terms.

*Response:* In the final rule, we have used the term “resident representative” consistently and have defined the term at § 1327.1.

*Comment:* One commenter recommended revising the proposed language to replace the word “or, where” at § 1327.17(b)(2)(i) with “and in the case where.” The commenter indicated that the change will make sure that both the resident and the resident's representative viewpoints are to be

considered. Without the change, the commenter indicated that the representative of the Office could choose to consult with the resident or the resident representative but might omit consultation to the resident.

*Response:* We have amended the corresponding § 1327.19(b)(2)(ii) in the final rule, replacing the “or, where” with “and, if”).

*Comment:* One commenter recommended that, since advising the resident of his or her rights does not require communication of informed consent, the “or” in proposed § 1327.17(b)(2)(i)(D) should be changed to an “and” so that every resident is advised of his or her rights.

*Response:* We believe that the suggested language helps to clarify the intent of AoA and have amended the corresponding provision at § 1327.19(b)(2)(ii)(D) accordingly.

*Comment:* One commenter indicated support for the proposed language at § 1327.17(b)(2)(i)(C) regarding reporting of allegations to other appropriate agencies, but recommended that the provision be amended to include a reference to the statutory or regulatory parameters for disclosure of resident identifying information.

*Response:* We have amended the language at § 1327.19(b)(2)(ii)(C) in the final rule to indicate that “Such report and disclosure shall be consistent with paragraph (b)(3).”

*Comment:* Two commenters recommended that we add clarity that the representative of the Office may investigate a complaint even where the resident is unable to provide consent and has no resident representative. One of the commenters indicated that, as proposed, the rule implies that the representative of the Office may not take action unless the complaint relates to an allegation of abuse, neglect, or exploitation. The other commenter indicated that this authority is implied in the provision related to resolution at § 1327.17(b)(2)(ii) but needs to be explicitly stated.

*Response:* We agree that explicit statement of this authority would be helpful and note that it is consistent with the “Procedures for Access” provision of the Act which provides that the State shall ensure that representatives of the Office shall have “appropriate access to review the medical and social records of a resident . . . if the resident is unable to consent to the review and has no legal representative.” Section 712(b)(1)(B)(i)(II) of the Act. We have modified the corresponding provision at § 1327.19(b)(2)(iii) in the final rule accordingly.

*Comment:* Eight commenters expressed concerns related to the use of the “best interest” standard referenced in several places in the proposed language of § 1327.17(b). One of these commenters recommended that, in situations where the resident is unable to communicate informed consent, AoA should require that the Ombudsman program to attempt to obtain information about what the resident had expressed prior to being unable to communicate or having diminished capacity, or alternatively determine what the resident would have wanted, instead of using a “best interest” standard. Two commenters recommended that we use a “substituted judgment” or “substitute decision making” standard instead of a “best interest” standard in the final rule. One commenter indicated that the “best interest” standard weakens the relationship between the resident and the representative of the Office in their capacity as resident advocate, does not support resident choice, and will weaken the resident’s voice. Four commenters indicated that “best interest” is subjective and could be applied inconsistently. Several commenters recommended that we add an objective framework for determining “best interest.” One commenter recommended that, if we use the “best interest” standard, that we link its use to the safety of the resident.

*Response:* We agree with the commenters’ concern that Ombudsman programs should be cautious in using a paternalistic “best interest” standard, as opposed to a “substituted judgment” standard which is more consistent with the person-centered focus of the Ombudsman program. We agree that, where evidence exists of a resident’s previous expressions of values and choices or evidence of what the resident would have wanted, a “substituted judgment” standard is preferable. In light of this comment, in both § 1327.19(b)(6) and (7), we have added the language: “The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made.”

However, when the Ombudsman or representative of the Office has no evidence to rely on, and has no resident representative available or appropriate, we believe that the Ombudsman or representative of the Office must consider what action is in the “best interest” of the resident. Therefore we have retained the provisions indicating that the Ombudsman or representative of the Office may make a referral, where all of the other provisions are met and where 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. See § 1327.19(b)(6)(v) and (7)(iv).

We understand that determining “best interest” does necessarily require some judgment, but we believe that Ombudsmen and representatives of the Office are required to use sound judgment in their work on a frequent basis. We further note that Ombudsman programs should be familiar with the use of this standard since the Act provides for use of the “best interest” standard in the situation where “a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident.” Section 712(b)(1)(B)(ii)(II) of the Act. Moreover, the “best interest” standard is commonly used in ethical and professional literature. We are available to provide technical assistance regarding its use in the context of Ombudsman program practice.

*Comment:* One commenter recommended language to ensure that the Ombudsman program can investigate and take action on a complaint in addition to disclose the resident name to other agencies.

*Response:* We read § 1327.19(b)(1) and (2) in the final rule to provide authority to the Ombudsman program to investigate and take action on a complaint in addition to disclosing the resident name to other agencies.

*Comment:* One commenter recommended that we use the term “perspective of resident” regarding a complaint rather than “perception of resident” in the proposed language at § 1327.17(b)(2)(i)(A), arguing that the term “perception” is vague. Another commenter recommended the use of the term “description of the problem.”

*Response:* We believe that “perspective” is a more appropriate term in this context and have adopted this change in the final rule at § 1327.19(b)(2)(ii)(A).

*Comment:* One commenter recommended that we further explain what evidence of satisfaction might be appropriate in order for a representative of the Office to determine that a complaint has been resolved. The commenter indicated that an example of evidence could be an affirmative response to a standard question.

*Response:* We agree that an affirmative response to a question could be evidence of satisfaction of resolution of a complaint. We do not believe that a regulation is necessary in order to provide examples of evidence. However, a State agency or Ombudsman may

choose to develop policies to provide further specificity regarding adequate evidence of satisfaction for purposes of complaint resolution.

*Comment:* One commenter recommended that anonymous complaints should be allowed in order to protect resident confidentiality.

*Response:* Nothing in the proposed or final rule would limit the ability of the Ombudsman program to receive complaints from anonymous sources. Currently, the AoA requires States, through NORS, to report the types of complainants, including anonymous complainants, for closed cases of the Ombudsman program. OMB NO.: 0985-0005. We note, however, that the Ombudsman program must protect against inappropriate disclosure of resident and complainant-identifying information regardless of whether the complainant wishes to remain anonymous. See § 1327.11(e)(3).

*Comment:* One commenter recommended that we add guidance to ensure that representatives of the Ombudsman program report complaint results to the complainant if known and other than the resident. The commenter indicated that family members and other complainants have criticized the Ombudsman program for not providing a report back to the complainant, leading them to incorrectly believe that the Ombudsman program failed to process the complaint.

*Response:* We appreciate that complainants may wish to understand the results of their complaint. While we have not required this in the final rule, we note that Ombudsmen and State agencies, in developing Ombudsman program policies and procedures, may choose to provide guidance to representatives of the Office on the appropriateness of providing follow up with complainants consistent with the disclosure limitations of the Act and this final rule. We note that the guidance might also apply to follow up with resident representatives.

*Comment:* One commenter recommended that we address the question of appropriate Ombudsman program response where a resident does not wish the representative of Office to act on a complaint.

*Response:* We agree that the Ombudsman program should follow the direction of the resident regarding whether to act on a complaint. We believe that this issue is adequately addressed in the final rule at § 1327.19(b)(2)(ii), which requires the Ombudsman or representative of the Office to determine and follow resident direction through every step of the complaint process.

*Comment:* One commenter indicated that the introductory wording of the proposed rule at § 1327.17(b)(2) is confusing and recommended that we use “Regardless of the source of the complaint.”

*Response:* We have adopted the recommended language at § 1327.19(b)(2) in the final rule.

*Comment:* Four commenters indicated support for the proposed language in § 1327.17(b)(3). One of these commenters indicated that the proposed language is helpful in clarifying that the Ombudsman and representatives of the Office are not mandated reporters and that many States have had long-standing tensions around this question. Another commenter indicated that this is helpful in determining the circumstances under which it is appropriate for the Ombudsman program to share information with oversight agencies. Another commenter indicated that the proposed rule empowers residents to retain control over their own information while providing the Ombudsman with discretion in instances when the resident is at risk due to abuse but the resident lacks capacity (or a representative available) to provide consent.

*Response:* We appreciate the supportive comments and note that the relevant provision is found at § 1327.19(b)(3) in the final rule.

*Comment:* One commenter recommended deleting or modifying the proposed provision at § 1327.17(b)(3)(ii) to include that, where adult protective services exists, the representative of the Office can and should advocate on the resident’s behalf as long as the individual provides consent.

*Response:* We believe the final rule at § 1327.19(b) adequately describes the appropriate relationship between the Ombudsman program and adult protective services, including the circumstances in which Ombudsman program referrals may, may not, or must be made to adult protective services or other entities.

*Comment:* Four commenters recommended that we require that the Ombudsman or representatives of the Office report suspected abuse. One of these commenters indicated that the Ombudsman program has a duty to all residents of a facility, not only one resident. Two commenters indicated that reporting could protect other residents in some circumstances. One commenter indicated that, by not reporting, the representative of the Office would be subject to liability if the suspected abuse put other residents at risk. One commenter indicated deep concern if the Ombudsman program is

unable to fulfill its very purpose where the representative of the Office is aware of allegations of abuse but is forced to be silent if informed consent is not obtained.

*Response:* Through the strict disclosure limitations within the Act at section 712(d)(2)(B), Congress has indicated its intent for the Ombudsman program to be a safe place for residents to bring their concerns, knowing that their information will not be disclosed without their consent (or the consent of their representative). Through numerous reauthorizations of the Act, Congress has never chosen to provide an exception for abuse reporting in the Act. While we have provided, in § 1327.19(b) of the final rule, limited exceptions for reporting resident-identifying information where residents are unable to communicate informed consent, we do not believe that the Act provides us with the authority to promulgate a rule that would permit reporting of a resident’s identifying information when the resident (or resident representative) who is able to communicate informed consent has not done so. Nor would we support a rule that would permit such reporting, as a matter of policy.

Residents reaching out for assistance on an abuse, neglect or exploitation complaint may well want their information conveyed by the Ombudsman program to protective services, the licensing and regulatory agency, and/or law enforcement; indeed, the final rule clarifies that the Ombudsman program has a duty to make such a referral when requested by the resident (see § 1327.19(b)(3)(i)). The Ombudsman program may inform complainants who report suspected abuse that they may (and, under some circumstances, must) report the complaint information to protective services, the licensing and regulatory agency and/or law enforcement. The Ombudsman program may advise the resident of the appropriate role and limitations of the Ombudsman program, assist the resident in understanding his or her options, and encourage the resident to report—and/or consent to the Ombudsman program referral—to protective services, the licensing and regulatory agency and/or law enforcement.

However, the Ombudsman program is designed to represent the interest of the resident (and not necessarily the interest of the State) in order to support the resident to make informed decisions about the disclosure of his or her own information. Residents may be concerned about retaliation if their concern is known or have other reasons why they do not want the Ombudsman

program to share their information. While Congress intends for the Ombudsman program to resolve complaints related to the health, safety, welfare and rights of residents, and while that intent logically includes protection from abuse, Congress provided the resident—and not the Ombudsman program—with the authority to make the decision about when and where the resident's information can be disclosed.

*Comment:* One commenter indicated that the proposed rule should have included provision for the consent of the resident's legal representative at § 1327.17(b)(3).

*Response:* We agree that this recommendation provides further clarity so have added "or resident representative" in § 1327.19(b)(3)(i),(ii) of the final rule.

*Comment:* One commenter indicated that, by giving a short list of types of assistance (*i.e.* regulatory, protective, or law enforcement) available under proposed rule § 1327.17(b)(3)(i), the provision implies that the Ombudsman program could not contact various other entities who could assist the resident and whom the resident or resident's representative wishes to contact.

*Response:* We believe that the language in § 1327.19(b)(3) adequately provides the Ombudsman program with discretion to provide information to other agencies for "other purposes" (*i.e.* not limited to regulatory, protective, or law enforcement purposes), where disclosure limitations are met. The reference to regulatory, protective, or law enforcement assistance in § 1327.19(b)(3)(i) is to require the Ombudsman program to make referrals and disclose information in certain circumstances.

To provide further clarity, as a result of this recommendation, we have added a new provision in the final rule at § 1327.19(b)(3)(ii). This provision provides authority for the provision of contact information and/or referrals to other types of entities than those indicated in paragraph (b)(3)(i).

*Comment:* One commenter indicated that the proposed language at § 1327.17(b)(3)(ii) is an appropriate reminder that the Ombudsman program must respect the resident's wishes.

*Response:* We appreciate the supportive comment and note that this provision is now in a newly numbered provision in the final rule at § 1327.19(b)(3)(iii).

*Comment:* One commenter recommended that the proposed language at § 1327.17(b)(3)(ii) should extend to the resident's representative when a resident lacks capacity.

*Response:* We agree with this recommendation and have added the phrase: "(or, in the case where the resident is unable to communicate informed consent, the wishes of the resident representative)" into newly numbered provision in the final rule at § 1327.19(b)(3)(iii).

*Comment:* One commenter recommended that the reports referenced in the proposed language at § 1327.17(b)(3)(ii) not be limited to suspected abuse, gross neglect or exploitation.

*Response:* We believe that § 1327.19(b)(3) adequately provides authority for the Ombudsman program to provide information regarding any type of complaint to another appropriate entity so long as the disclosure requirements are adhered to. The provision in newly numbered § 1327.19(b)(3)(iii) of the final rule is intentionally limited in order to clarify this provision specifically related to abuse, neglect, or exploitation reporting, given need for additional clarity on this point.

*Comment:* One commenter recommended that the final rule at § 1327.17(b)(3) expressly state that the confidentiality and disclosure provisions in the Act preempt State mandatory reporting laws.

*Response:* The Act specifically requires the State agency to establish the procedures for the appropriate disclosure of files maintained by the Ombudsman program, as a condition of receiving the grant to operate the Ombudsman program (Section 712(d)(1) of the Act) and to assure that it will carry out the provisions of section 712 in its State Plan on Aging (Section 307(a)(9) of the Act). We believe that the final rule appropriately describes the Ombudsman program duty to carry out (as well as the State duty to assure adherence to) the disclosure provisions in the Act.

*Comment:* One commenter recommended that the final rule expressly state that the Ombudsman has sole discretion over the release of the program's records and files, not only control over the release of files with resident or complainant identities.

*Response:* We believe the language at § 1327.11(e)(3)(i), regarding Ombudsman discretion over release of information maintained by the Ombudsman program, addresses this comment.

*Comment:* Three commenters recommended that we add language to § 1327.17(b)(3) to specifically include licensing agencies and protection and advocacy systems.

*Response:* We agree that licensing agencies and protection and advocacy systems are among the other agencies to which an Ombudsman program may provide information as appropriate, but do not see a need to amend the provision in order to specifically list two examples of agencies potentially relevant to this provision.

*Comment:* One commenter indicated support for the proposed language at § 1327.17(b)(4).

*Response:* We appreciate the supportive comment and note that the corresponding provision is at § 1327.19(b)(4) in the final rule.

*Comment:* One commenter recommended that informed consent can be provided orally or in writing without preference. The commenter indicated that oral consent allows the representative of the Office an opportunity to act more efficiently than waiting for exchange of written consent documents.

*Response:* We do not believe that the proposed language implied a preference for the method of communication for consent.

*Comment:* One commenter indicated that the proposed language at § 1327.17(b)(4) appears to be a restatement of § 1327.15(a)(2)(iii)(B)(2), which establishes the range of options for communication of informed consent, and indicated that the reason for restatement in this section is unclear.

*Response:* This provision (in § 1327.19(b)(4) of the final rule) is not intended to be a duplication, but rather a consistent requirement regarding disclosure within (1) requirements related to development of Ombudsman program policies and procedures (in the final rule at § 1327.11(e)(3)(ii)) and (2) provisions related to the duties of the representatives of the Office and local Ombudsman entities (in the final rule at § 1327.19(b)(4)). While the parameters related to appropriate disclosure found in these provisions are consistent (and therefore may appear redundant), the purposes of these sections are distinct.

*Comment:* One commenter indicated that the ability of an individual to communicate consent may be difficult to ascertain and recommended inclusion of language at § 1327.17(b)(4) that permits visual consent, such as by use of video or other visual means, nods, blinks of eye, finger tapping, etc.

*Response:* We agree that residents with varying abilities may communicate consent in a number of ways. This is why we did not limit communication to verbal communication and have added the use of auxiliary aids and services as an appropriate aid to communication. We believe that adoption of this

recommendation appropriately adapts the services of the Ombudsman program to accommodate individuals with a variety of disabilities. In light of this recommendation, we have added “visually,” to the final rule wherever “consent orally” is found.

*Comment:* Seven commenters indicated support for the proposed language at § 1327.17(b)(5). One of these commenters indicated that the specificity of the proposed language is helpful in setting out what a representative of the Office may do if a resident is unable to communicate informed consent and has no authorized representative. The commenter indicated that the provision appropriately appreciates the central role of the resident in giving consent while recognizing the need for a process when the resident lacks capacity to provide consent. One commenter applauded the clarification that representatives of the Office are able to speak for vulnerable elders who cannot speak for themselves or have anyone available or willing to speak for them.

*Response:* We appreciate the supportive comments and note that the corresponding language is at § 1327.19(b)(6) in the final rule.

*Comment:* One commenter indicated that use of the term “unable to communicate informed consent” is problematic in determining when a representative of the Office should disclose identifying information of a resident, potentially weakening the core client advocate role of the Ombudsman program. The commenter indicated that it is paramount that the representative of the Office obtains permission from the resident prior to identifying them.

*Response:* We agree that the representative of the Office must obtain consent from the resident whenever possible prior to identifying them; this requirement is consistent throughout this final rule. However, without the opportunity to disclose resident-identifying information, the Ombudsman program may be powerless to work with the facility or other agencies that may be needed in order to protect the health, safety, welfare or rights of the resident. In these cases, we disagree that taking such action weakens the core client advocate role of the Ombudsman program.

*Comment:* Two commenters indicated support for the proposed language at § 1327.17(b)(6). One commenter indicated that the proposed rule helps resolve the logical gap, contained in the Act, in that it allows the representative of the Office to access the records of an incompetent resident who has no guardian or legal representative but does

not say what the representative of the Office can do with that information.

*Response:* We appreciate the supportive comments and note that the corresponding provision is at § 1327.19(b)(6) in the final rule.

*Comment:* One commenter indicated appreciation for the clarification of the exception for the disclosure of resident identifying information in the proposed language at § 1327.17(b)(6)–(8). The commenter indicated that this provision will promote protection of vulnerable adults and enhance the capacity of the Ombudsman program to fulfill its duties to protect the health, safety, welfare, and rights of residents.

*Response:* We appreciate the supportive comment and note that the corresponding provision is at § 1327.19(b)(6)–(8) in the final rule.

*Comment:* One commenter indicated that requiring approval of the Ombudsman for disclosure in § 1327.17(b)(6) is appropriate.

*Response:* We appreciate the supportive comment and note that the corresponding provision is at § 1327.19(b)(6) in the final rule.

*Comment:* Eight commenters indicated that obtaining approval from the Ombudsman for disclosure in § 1327.17(b)(6)–(8) might delay referrals to law enforcement, adult protective services or the facility and suggested elimination of this requirement. One of these commenters indicated that this would especially be burdensome in a large State, recommending that standards be developed by the Office requiring the representative of the Office to notify the Ombudsman of the report. One of these commenters suggested that, alternatively, the final rule should require a time limit for Ombudsman decision on the approval. One of the commenters indicated that it is not practical, necessary or efficient to require approval of the Ombudsman for such disclosure.

*Response:* We believe that the circumstances in which disclosure is made without resident or resident representative permission, as described in § 1327.19(b)(6)–(8) of the final rule, should be made with great caution. Ideally, the Ombudsman would be made aware of these circumstances and provide or deny approval. However, we understand that, particularly in States with large resident populations, this requirement could foreseeably create delays that could inhibit the ability of the representative of the Office, as well as other appropriate agencies, to protect the health, safety, welfare or rights of residents.

Therefore, we have added the option, in § 1327.19(b)(6) and (8), for the

representative of the Office to follow the relevant policies and procedures of the Office regarding disclosure and added a new paragraph at § 1327.19(b)(9) to provide additional clarity related to these policies and procedures of the Ombudsman program disclosure approval process.

The final rule maintains the requirement for Ombudsman approval, however, in § 1327.19(b)(7) in circumstances where the resident has a resident representative who is not acting in the best interest of the resident. This requirement is maintained because it is consistent with the statutory requirement for the representative of the Office to obtain Ombudsman approval prior to accessing resident records when a resident’s guardian is not acting in the resident’s best interest. Section 712(b)(1)(B)(ii) of the Act. Since these circumstances are likely to be less frequent, and since the provision related to records access already exists in the law so should be the current practice in States, we do not believe that this provision will be burdensome, even to States with large resident populations.

*Comment:* Two commenters recommended that the final rule compel Ombudsman program disclosure in the circumstances set forth in the proposed language at § 1327.17(b)(6), replacing the “may refer” with “shall refer.”

*Response:* The Act indicates that determinations regarding disclosure of Ombudsman program information may be disclosed only at the discretion of the Ombudsman or the person designated by the Ombudsman. Section 712(d)(2)(A) of the Act. We believe that maintaining the proposed language “may refer” in the final rule at § 1327.19(b)(7) reflects this statutory provision, so have not made the recommended change.

*Comment:* One commenter recommended that the authority for the Ombudsman program to act in the circumstances described in § 1327.17(b)(6) not be limited to circumstances of abuse, gross neglect, or exploitation, indicating that the Act is not similarly limiting.

*Response:* We agree with this recommendation and have instead more closely reflected the statutory language from section 712(a)(3)(A)(ii) and (5)(B)(iii) of the Act, to read “has reasonable cause to believe that an action, inaction or decision may adversely affect the health, safety, welfare, or rights of the resident” in the final rule at § 1327.19(b)(6).

*Comment:* One commenter indicated that the P&A system should be explicitly included as an appropriate referral in § 1327.17(b)(6),(7) and (8).



*Response:* As ACL administers funds to States for P&A systems, we are aware that they provide critically important services, as do other entities which are also not specified in this provision. We are choosing to retain the broad description in the final rule at § 1327.19(b)(6),(7), and (8) regarding referrals for “access to administrative, legal, or other remedies,” rather than specifying any particular entity or service provider. In addition, the final rule requirements at § 1327.13(h)(4) for the Ombudsman to coordinate with P&A systems will support these referrals.

*Comment:* One commenter recommended that we replace the word “may” with “shall” in the proposed language in § 1327.17(b)(6) and (7): “the procedures for disclosure may provide.” The commenter indicated the need for consistency across Ombudsman programs.

*Response:* We have accepted this recommendation in the final rule at § 1327.17(b)(6) and (7). While we have maintained the discretion of the Ombudsman regarding when to make such referrals, we agree that it is appropriate to require these policies and procedures regarding disclosure in order to promote quality ombudsman services for residents.

*Comment:* Two commenters indicated support for the proposed language at § 1327.17(b)(7). One commenter indicated that the Act contains a logical gap in that it allows the representative of the Office to access the records of an incompetent resident over the protests of a guardian or legal representative who is not acting in the resident’s best interest, but does not say what the representative of the Office can do with that information.

*Response:* We appreciate the supportive comments and note that the corresponding provision in the final rule is § 1327.19(b)(7).

*Comment:* One commenter recommended that the authority for the Ombudsman program to act in the circumstances described in § 1327.17(b)(7) not be limited to circumstances of abuse, gross neglect, or exploitation, indicating that the Act is not similarly limiting.

*Response:* We agree with this recommendation and have instead more closely reflected the statutory language from section 712(a)(3)(A)(ii) and (5)(B)(iii) of the Act, to read “a resident representative who has taken an action, inaction or decision that the Ombudsman or representative of the Office has reasonable cause to believe may adversely affect the health, safety, welfare, or rights of the resident” at § 1327.19(b)(7).

*Comment:* Two commenters indicated that the final rule should compel Ombudsman program disclosure in § 1327.17(b)(6), replacing the “may” with “shall.” One of the commenters indicated that it is inconceivable that reporting to protective services and/or law enforcement would be anything but in the resident’s best interest.

*Response:* The Act indicates that determinations regarding disclosure of Ombudsman program information may be disclosed only at the discretion of the Ombudsman or the person designated by the Ombudsman. Section 712(d)(2)(A) of the Act. We believe that maintaining the proposed language “may refer” in the final rule at § 1327.19(b)(7) reflects this statutory provision, so have not made the recommended change.

*Comment:* Five commenters indicated support for the proposed provision at § 1327.17(b)(8). One of these commenters indicated agreement with the process, appreciation of the detail and careful weighing of competing values reflected in the proposed rule, and expectation that the proposed rule will give the Ombudsman program clear guidance in handling these difficult situations.

*Response:* We appreciate the supportive comments and note that the corresponding provision in the final rule is § 1327.19(b)(8).

*Comment:* Seven commenters recommended that the final rule should require implementation of policies that require the representative of the Office who witnesses abuse, gross neglect, or exploitation to report the observation. Several of these commenters indicated that, if any representative of the Office personally witnesses an event and takes no action, it gives the perpetrator permission to continue the behavior, and that the witness has the responsibility to report as a firsthand observer of the incident. One of the commenters indicated that reporting is not a violation of the Act since, by witnessing the event, the representative of the Office has not been provided information from a third party.

*Response:* Both the proposed language and the final rule clarify that the procedures for disclosure shall provide that—where the Ombudsman or representative of the Office personally witnesses suspected abuse, neglect or exploitation of a resident—the representative of the Office shall follow the direction of the resident or resident representative. We believe this approach is consistent with the Act which permits disclosure of resident identifying information only with consent or in other very limited situations.

The Act is silent on how to best handle this situation when the Ombudsman or representative of the Office personally witnesses an incident and the resident at issue is unable to communicate informed consent (and has no resident representative available to do so). In these cases, we have described the circumstances in the final rule, at § 1327.19(b)(8), that the Ombudsman or representative shall refer the matter and disclose the identifying information of the resident to the facility and/or appropriate agency for substantiation of abuse and may refer the matter to other appropriate agencies.

*Comment:* One commenter indicated that, if the representative of the Office witnesses an issue, he or she must have the authority to initiate a complaint.

*Response:* There is nothing in the rule that would limit the ability of the representative of the Office to initiate a complaint (*i.e.* open a case with one or more complaints). This rule at § 1327.19(b)(8) addresses procedures for disclosure of resident-identifying information in the work to resolve such a complaint.

*Comment:* Five commenters indicated that the proposed language at § 1327.17(b)(8) appears to require representatives of the Office to be mandatory abuse reporters, at least in certain circumstances. One of these commenters described this as contrary to their State law. Two of these commenters indicated mandated reporting runs counter to the principles of the Ombudsman program and its unique role as resident advocate under the Act. Two of these commenters requested clarification to ensure that representatives of the Office are not mandated reporters in facilities where the resident has the ability to grant or deny consent. One commenter expressed that personally witnessing abuse versus being told or otherwise discovering evidence of abuse is an artificial distinction.

*Response:* In the final rule at § 1327.19(b)(8), we describe circumstances when an Ombudsman or representative of the Office has personal knowledge of circumstances that others may not have. This information is likely relevant to the ability of the facility to protect the resident and to the ability of the official finder of fact to determine whether the alleged abuse, gross neglect or exploitation can be substantiated.

When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), its goal is to resolve the complaint to the resident’s satisfaction, but not to serve as the official finder of

fact to substantiate whether the abuse or other allegation occurred. In most States, the substantiation decision is made either by adult protective services and/or the licensing and regulatory agency. By contrast, when a report has been made to the Ombudsman program or when a representative of the Office discovers information through review of resident records, someone else is necessarily aware of the circumstances and can (and in many instances is mandated to) report this information to the agency which is responsible for substantiating abuse. Therefore, absent an indication from the resident or resident representative that there is not consent for this information to be shared, we believe that the representative of the Office should be required to disclose such information.

*Comment:* One of the commenters recommended that the proposed language at § 1327.17(b)(8) should require that reporting of Ombudsman program information remain within the discretion of the Ombudsman.

*Response:* For the reasons mentioned above, we believe that the disclosure procedures should require reporting in the narrow circumstances provided in the final rule at § 1327.19(b)(8). We do, however, provide for Ombudsman discretion in determining whether the required reporting is in the best interest of the resident in § 1327.19(b)(8)(ii)(B). We further provide for Ombudsman discretion regarding referring or reporting to other agencies for regulatory oversight, protective services, access to remedies and/or law enforcement in § 1327.19(b)(8)(iii).

*Comment:* One commenter requested definition of the term “suspected abuse, gross neglect, or exploitation” since States have differing interpretations and definitions of these terms. Some commenters recommended that we omit the term “gross” from the term “gross neglect.”

*Response:* The rationale for our maintaining the use of “gross neglect” in the final rule at § 1327.19(b)(8)(iii) is consistent with the rationale used in AoA’s instructions for Ombudsman program reporting in the NORS. OMB NO.: 0985–0005. AoA provides a separate code for complaints of “gross neglect” (defined as “willful deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness”). This distinction in NORS instructions is intended to differentiate “gross neglect” from other complaint codes which the Ombudsman program receives related to facility care and practices, many of

which could also reasonably be considered “neglect.”

*Comment:* One commenter recommended deletion of proposed paragraph § 1327.17(c), questioning how realistic it is to expect local Ombudsman entities to coordinate with this long list of programs and agencies.

*Response:* We have accepted this recommendation by deleting this provision and incorporating into the final rule a responsibility for the Ombudsman to “support appropriate local Ombudsman entity coordination” with the listed entities at § 1327.13(h).

*Comment:* Several commenters indicated support for the proposed language at § 1327.17(d). Some commenters indicated that providing information and speaking directly to legislators, including making recommendations for changes to laws, are critical to the Ombudsman program work. Some commenters indicated that this provision supports the premise that the Ombudsman has the ability to act independently, even if the target of the advocacy is the State government itself.

*Response:* We appreciate the supportive comments and note that the corresponding provision is found at § 1327.13(a)(7)(vii).

*Comment:* One commenter indicated that they foresee challenges in States upholding the requirement related to lobbying activities found in the proposed language at § 1327.17(d).

*Response:* The Act is clear that Congress intends for the Office to have the authority to make recommendations regarding changes to laws, regulations, and policies pertaining to the interests of long-term care facility residents. This is both a required function of the Ombudsman (at section 712(a)(3)(G) of the Act) and an expectation of the State agency to require of the Office (section 712(h)(2) of the Act). AoA’s intent in the final rule at § 1327.13(a)(7)(vii) is to clarify that by performing these statutorily required functions, the Office is not violating the federal lobbying restrictions of 45 CFR part 93.

*Comment:* Two commenters recommended that we add a provision to § 1327.17 which adds penalties and a process for reporting to AoA for interference with the Ombudsman program.

*Response:* While we have not included penalties in this provision, we have addressed interference, retaliation and reprisals, including sanctions for interference, in the final rule at § 1327.15(i).

#### H. Conflicts of Interest (§ 1327.21)

In § 1327.21, AoA provides clarification to State agencies and

Ombudsman programs regarding the process of identifying conflicts of interest with the Ombudsman program, as required by the Act. This section provides examples of conflicts of interest at both the organizational and individual levels. It also provides clarification regarding the statutorily-required process of removing or remedying identified conflicts.

*Comment:* Sixteen commenters expressed support for § 1327.19 (§ 1327.21 in the final rule) as proposed. One of these commenters indicated that this proposed regulation is critical to promoting and maintaining the autonomy and integrity of the Ombudsman program. Two commenters indicated that the proposed language provides avenues for State agencies to address scenarios where the Ombudsman program is compromised by conflicts of interest. One commenter congratulated AoA on taking on this complicated issue which becomes increasingly complex as agencies become more diversified in provision of services. The commenter indicated that recognizing placement raises inherent conflicts is first step to finding ways to ensure that policies are in place to address conflicts when they do arise, ensuring that resident concerns are fully and appropriately addressed.

Another indicated that the proposed language gives clarity regarding potential conflicts of interest and guidance for eliminating or remedying it. The commenter indicated that Ombudsmen in some State agencies have other job responsibilities or are located in agencies where responsibilities can appear to or actually compete with resident interests, resulting in residents perceiving that the Ombudsman is not truly representing their interests.

One commenter indicated appreciation for AoA building in time to allow networks to make appropriate changes and construct effective remedies where conflicts exist. Several commenters requested further guidance and training to help States craft remedies or expressed appreciation for AoA’s indication of its intent to do so in advance of final rule implementation.

*Response:* We appreciate the supportive comments and note that the corresponding provisions are at § 1327.21 of the final rule.

*Comment:* Two commenters indicated that the proposed rule is too weak given the reality of many of the enumerated conflicts of interest.

*Response:* It is our intent that through the implementation of the final rule, State agencies and Ombudsman programs will be better equipped to

comply with the provisions related to conflicts of interest as required by section 712(f) of the Act.

*Comment:* Seven commenters recommended that the final rule describe consequences for non-compliance with reporting or interference and indicated the need for AoA enforcement. Several of the commenters indicated that, unless AoA monitors and reinforces the requirements, compliance cannot be assured.

*Response:* We have addressed the State agency responsibilities related to interference, retaliation and reprisals at § 1327.15(i). In addition, Federal regulation provides options for HHS grant awarding agencies, including AoA, to respond when a grantee fails to comply with any term of an award. 45 CFR 75.371.

*Comment:* Three commenters indicated concern for adequate staffing in agencies housing local Ombudsman entities where every staff person must perform multiple roles and responsibilities, with insufficient funding for a full-time representative of the Office, or in entities with conflicting responsibilities which must share the same work space. Two of these commenters indicated that this is particularly a challenge in rural areas.

*Response:* We acknowledge the significant challenges faced by individuals who must perform multiple roles and responsibilities. Multiple roles and responsibilities do not necessarily pose a conflict of interest. However, where they do, the Act, and this final rule in implementing the Act, require that the conflicts be identified and remedied or removed. We intend to provide additional technical assistance to State agencies and Ombudsman programs to assist them in complying with this rule.

*Comment:* One commenter indicated that the benefits of coordination among programs (e.g., adult protective services and Ombudsman programs) may outweigh the potential conflicts of interest.

*Response:* We agree that coordination between adult protective services and Ombudsman programs can and does benefit the individuals whom they serve. In fact, the Act (at section 712(h)(6)–(8)) and this final rule (at § 1327.13(h)) require the Ombudsman to coordinate Ombudsman program services with various entities; the rule requires coordination with adult protective services. We believe that the identification of a conflict of interest does not diminish the importance of coordination among relevant programs.

*Comment:* Seven commenters recommended clarification related to conflict of interest and legal counsel for the Ombudsman program, requesting a requirement that any individual providing legal counsel to the Office is not subject to a conflict of interest.

*Response:* As a result of these and other comments, we have included in the final regulation a provision that the State agency ensure the provision of conflict-free legal counsel at § 1327.15(j).

*Comment:* One commenter indicated that the best way to minimize conflicts is to legislatively require the Office to be moved outside of State government. Another commenter indicated that the rule should explicitly state that the Ombudsman program not be located within or connected to the State agency.

*Response:* The Act specifically provides State agencies with significant latitude in determining whether to operate the program directly or operate it through contract or other agreement with another agency. Section 712(a)(4) of the Act. Therefore, we do not believe the Act provides us with the authority to promulgate a rule which would prohibit State agencies from operating the Office directly or from arranging for another State agency to operate the Office. Further, we have observed examples of Ombudsman programs located within or attached to State agencies which have been successfully able to perform the functions required in the Act.

*Comment:* One commenter requested that AoA be flexible in addressing States' unique programmatic concerns. Another recommended that AoA provide examples of acceptable remedies and situations which cannot be remedied. One commenter recommended that AoA provide oversight to enable States agencies and local Ombudsman entities to properly implement this rule without undermining existing infrastructure.

*Response:* We plan to provide training and technical assistance to assist State agencies and Ombudsmen to implement the final rule.

*Comment:* One commenter recommended that the Ombudsman, in addition to the State agency, be required in the final rule to identify possible conflicts and develop policies to remedy the conflicts.

*Response:* We have adopted this recommended change in the final rule at § 1327.21. In addition, the final rule provides for Ombudsman involvement in developing and/or collaborating on the development of Ombudsman program conflict of interest policy at § 1327.11(e)(4).

*Comment:* One commenter recommended that we include language requiring the State agency to have written policies and methods to identify and remove conflicts of interest and other influences that could limit the Ombudsman program's ability to carry out its assigned functions. They recommended including methods by which the State agency will examine individuals and their immediate family members to identify conflicts and actions the State agency will require the individuals and such family members to take to remove such conflicts.

*Response:* We have included language that incorporates this recommendation in the final rule at § 1327.11(e)(4) related to development of policies and procedures. We note that the recommended language is taken largely from the statutory provision at section 712(f)(4) of the Act and agree that it is appropriate to reflect that statutory language in the rule.

*Comment:* One commenter recommended that we include language requiring the State agency to have policies regarding interference, prohibiting retaliation and reprisals and providing for appropriate sanctions.

*Response:* Provisions related to State agency development of policies and procedures on interference, retaliation, and reprisals, and providing for appropriate sanctions have been included in the final rule at § 1327.15(i).

*Comment:* Eight commenters indicated support for the proposed language regarding identification of organizational conflicts at § 1327.19(a). Two commenters commended AoA for including surrogate decision-makers in the list of examples at § 1327.19(a)(12).

*Response:* We appreciate the supportive comments and note that the corresponding provisions are in the final rule at § 1327.21(a).

*Comment:* Several commenters interpreted the proposed rule to prohibit the operation of the Ombudsman program in a host agency with one or more of the conflicts enumerated in § 1327.19(a). One commenter indicated concern that the proposed rule would prohibit the Office from being located in a host agency responsible for public guardianship or Medicaid assessments, given current locations of Ombudsman programs in agencies that have these responsibilities. One commenter recommended that the final rule clarify that a remedy might be found that does not require moving out of the agency with a conflicting responsibility. Another indicated that, if the Ombudsman program should be separated from the State unit on aging and its funding stream, this would have

a significant financial impact on the program as significant funds do not come from Federal sources.

*Response:* We recognize that some States have organizationally located the Office and/or local Ombudsman entities inside agencies with duties which are identified as examples of conflicting duties under the final rule. The final rule does not prohibit the Office or local Ombudsman entities from being hosted in the entities enumerated in § 1327.21(a), except for those conflicts enumerated in § 1327.21(b)(3). However, the final rule does require the State agency and Ombudsman to identify these conflicts and take steps to remove or remedy the conflicts. Further, the Ombudsman must report on these steps to AoA. See § 1327.21(b)(1).

*Comment:* One commenter recommended defining “long-term care services” where it appears in § 1327.19, suggesting it be limited to services provided to residents and applicants of long-term care facilities but not services provided in the applicant or residents’ home outside of a long-term care facility.

*Response:* We have added language in the final rule at § 1327.21(a) to clarify that a potential or actual conflict exists where the services are provided to residents of long-term care facilities, as defined by the Act at section 102(35), but not necessarily for services provided to individuals receiving long-term care (or long-term services and supports) in other settings. For consistency, we have also removed the term “long-term care services” from the other places where it was found in the proposed rule.

We understand that some States have expanded the Ombudsman program’s jurisdiction to serve individuals in adult day health centers, in their own homes, and other settings, beyond the scope of the Act. While this rule does not restrict those State decisions which have expanded the Ombudsman program scope, it is equally important for the State agency and the Ombudsman program to identify and remedy or remove additional conflicts of interest that may exist where the Ombudsman program serves individuals receiving long-term care in settings other than long-term care facilities.

*Comment:* One commenter indicated that, at the local level, a representative of the Office hosted by an AAA faces conflicts with the agency when the representative of the Office makes recommendations or investigates problems at county-based facilities. This is especially challenging, according to the commenter, where the representative of the Office is co-located with workers with roles such as

guardians, protective services workers, and care managers.

*Response:* Section 1327.21(b)(6) of the final rule requires the identification of such conflicts of interest and requires that the agency hosting a local Ombudsman entity take steps to remedy or remove such conflicts.

*Comment:* One commenter recommended that the final rule indicate that conflicting activities performed by an Ombudsman or representatives of the Office are not permissible.

*Response:* We have adopted this recommendation at § 1327.21(a) of the final rule.

*Comment:* One commenter recommended that the final rule include “supported decision makers” to the list of surrogate decision-makers in § 1327.19(a)(12).

*Response:* Since supported decision-makers are designed to support the wishes of the individual, we do not understand this function to be a conflict of interest with the Ombudsman program. This is in contrast to surrogate decision-makers which may focus on the best interest of the individual and may have the authority to override the wishes of the individual.

*Comment:* One commenter indicated that, since a number of States and AAAs provide both Ombudsman services and protective services, the final regulation should recognize that such an arrangement does not inherently present a conflict of interest.

*Response:* While there may be remedies available to address this conflict of interest, we do not agree that the fact that these two programs are co-located in some States or AAAs eliminates the conflict.

*Comment:* Several commenters recommended that AoA provide further guidance on implementation of this regulation, including clarification of terms such as “placement” in § 1327.19(a), clarifying and distinguishing between “remedy” and “removal,” to assist States as they identify conflicts.

*Response:* We plan to provide additional training and technical assistance to assist State agencies and Ombudsmen to implement the final rule.

*Comment:* One commenter recommended that the final rule indicate that “any aspect of licensing” be included in § 1327.19(a)(1) and (a)(2)(i) to address the circumstance where various regulatory responsibilities are divided among various agencies.

*Response:* We believe that the proposed language is sufficiently clear

to apply to more than one entity with functions of licensing, surveying or certifying long-term care facilities, so have not made this change in the final rule in the corresponding provisions at § 1327.21(a)(1) and (a)(2)(i).

*Comment:* One commenter indicated that some AAAs which organizationally house local Ombudsman programs receive donations from long-term care facilities. Another commenter indicated that some AAAs are county agencies in counties that own, operate and/or manage long-term care facilities and where the facility and the AAA report to the same leadership.

*Response:* We acknowledge that conflicts of interest exist currently in some State agencies and agencies hosting local Ombudsman entities. It is our intent that the final rule will clarify the process by which State agencies and Ombudsmen can appropriately carry out their responsibilities to identify, remedy and/or remove such conflicts.

*Comment:* One commenter indicated that co-locating care coordination services, protective services, guardianship services, and a local Ombudsman entity within an AAA has been positive and has strengthened working relationships. Another commenter indicated that co-location of protective services and a local Ombudsman entity has allowed for greater advocacy and efficiency.

*Response:* We believe that positive relationships between the individuals who work for various programs and agencies—even those which provide potentially conflicting services—can be extremely beneficial for recipients. In fact, Ombudsman program coordination with many of these entities is required in the final rule at § 1327.13(h).

*Comment:* One commenter recommended that the final rule include as a conflict: “determining training requirements for long-term care service providers.”

*Response:* Since training requirements for long-term care facilities are typically established as part of licensing or certification requirements, we believe that the provision related to “licensing, surveying, or certifying long-term care facilities” (in the final rule at § 1327.21(a)(1)) would typically be inclusive of this activity. The list of organizational conflicts of interest in the final rule is not exhaustive and does not preclude the identification of additional conflicts.

*Comment:* Several commenters recommended approaches to remediating identified organizational conflicts. One commenter recommended that the final rule require development of firewalls to protect the Ombudsman program and

personnel from interference, intimidation and retaliation by State officials. Another commenter recommended that the rule indicate that each entity must ensure administrative separateness of all programs as a remedy. Another indicated that separating out AAA staff functions could help remedy conflicts with a local Ombudsman entity. One commenter recommended that all local Ombudsman entities have their own brand identity (e.g., signage, stationary, business cards, outreach materials) separate from the AAA to reduce perceived conflicts of interest and confusion (including questions from residents about why representatives of the Office wear name tags with the AAA name on them).

One comment recommended that the final rule include criteria for steps that should be taken by the State agency as evidence of a process to remedy or remove conflicts. The commenter noted that some of these are included in the preamble to the proposed rule and proposed additional criteria.

*Response:* We acknowledge that administrative structures, such as firewalls, may be appropriate remedies in some circumstances. AoA plans to provide additional technical assistance to States as they develop plans to remove and remedy existing conflicts of interest. Provisions related to development of policies and procedures on interference, retaliation and reprisals, and providing for appropriate sanctions have been included in § 1327.15(i).

*Comment:* One commenter recommended that the final rule should emphasize removal of conflicts, as opposed to remedy of conflicts, which may be superficial. The commenter recommended that, where conflicts exist, the Ombudsman program or the conflicting service should be relocated within a reasonable time frame.

*Response:* We disagree. We are aware of examples where remedies have been effective in ensuring the credibility of the Ombudsman program. We plan to provide additional technical assistance to State agencies and to Ombudsman programs to assist them in developing effective steps to remedy or remove conflicts.

*Comment:* One commenter recommended that the State agency and the Ombudsman should describe the organizational placement of the Office, identify any organizational conflicts, develop a proposal for removing or remedying the conflict, and submit their plan to AoA for approval, indicating the State's plan to continue operating under the approved plan until there is some

change in the Office that requires reporting.

*Response:* The final rule at § 1327.21(b)(1) requires the Ombudsman to report on any identified conflicts and steps taken to remedy the conflicts through the NORS.

*Comment:* One commenter recommended that we add the term "periodic" to describe the review process required in § 1327.19(b)(1)(ii) of the proposed rule in order to require that review be made on a regular basis.

*Response:* We agree that periodic reviews are reasonable. The final rule provides flexibility for a State agency and Ombudsman program to develop a review process that includes periodic reviews.

*Comment:* One commenter recommended clarity on enforcement actions that might be taken where conflicts exist.

*Response:* Determinations regarding organizational placement of the Office and/or local Ombudsman entities may remove conflicts of interest. Further, the final rule at § 1327.21(b)(7) provides that failure to disclose a conflict by an agency hosting a local Ombudsman entity is adequate grounds for the Ombudsman to refuse, suspend, or remove the entity's designation.

In addition, the relationship between AoA and the State agency is one of a grant awarding agency to a grantee. Federal regulation provides options for HHS grant awarding agencies such as AoA to respond when a grantee fails to comply with any term of an award. 45 CFR 75.371.

*Comment:* Three commenters indicated support for the proposed requirement for reporting of conflicts into the NORS.

*Response:* We appreciate the supportive comments.

*Comment:* One commenter recommended language that would require submission of and approval of a plan for removing or remedying organizational conflicts.

*Response:* The final rule at § 1327.21(b)(1) requires the reporting of organizational conflicts and steps taken to remove or remedy them through the NORS.

*Comment:* One commenter requested information on how AoA intends to use the information regarding disclosure of conflicts of interest reported in the NORS. Two commenters expressed concern for possible retaliation against the Ombudsman who submits information in NORS.

*Response:* AoA intends to use the reports in order to assist it in assuring that State agencies and Ombudsman programs are complying with the

requirements in the Act and in this rule to identify and remedy or remove conflicts of interest. We would also review the circumstances if we were to receive any reports of retaliation against an Ombudsman who truthfully submits information required by Federal rule, and we would take appropriate steps to address any such allegations.

*Comment:* One commenter indicated that not all States use the NORS system. Another commenter recommended that AoA consider the cost to States if this reporting requires updating of NORS.

*Response:* While not all States use the same software to collect their data, all States are required to report into NORS as a condition of receiving OAA funds. OMB NO.: 0985-0005. In order to make changes to NORS, the AoA is required to publish, and invite public comment on, the proposal as well as provide estimates of any cost impact, as required by the Paperwork Reduction Act. We will invite public comment on any proposed changes to NORS as a result of the implementation of this rule.

*Comment:* Four commenters indicated that, in addition to NORS reporting, conflicts at the state level should be immediately reported to AoA. One of these commenters indicated that annual reporting in NORS is untimely to report a matter of such great significance.

Instead, the commenter recommended that the rule at § 1327.19(b)(1)(v) require the State agency to immediately report (in no later than ten days) conflicts to AoA, indicating that the State agency is likely to be the source of the conflict. The commenter proposed that State agency failure to immediately disclose and adequately remedy or remove conflict should be grounds to remove State agency authority to operate the Office, and that the same penalty be applied to a local Ombudsman entity under § 1327.19(b)(6). Another commenter recommended that all Ombudsmen and representatives of the Office should be required in the final rule to report any perceived or real conflict of interest directly to a neutral third party.

*Response:* We believe that the approach we have taken in the final rule at § 1327.21, which provides for annual identification of organizational conflicts and description of steps taken to remedy or remove conflicts, will provide an orderly process that will implement the requirements of the Act, enhance transparency, avoid burdensome reporting requirements on Ombudsman programs, and emphasize the importance of States providing credible, conflict-free Ombudsman programs for residents.

*Comment:* One commenter recommended that all conflicts of interest at state or local levels should be included in the NORS report.

*Response:* The rule does not limit reporting in NORS to state-level organizational conflicts of interest.

*Comment:* One of the commenters recommended that the final rule include stronger language to protect the Ombudsman from retaliation, indicating that retaliation occurs in spite of prohibitions under the Act.

*Response:* Provisions related to development of policies and procedures on interference, retaliation, and reprisals, and providing for appropriate sanctions have been included in § 1327.15(i).

*Comment:* One commenter noted that the proposed rule at § 1327.19(b)(2) prohibits co-location of the Ombudsman program with only three of the twelve examples listed in § 1327.19(a). The commenter recommended that the final rule include a prohibition of co-location of the Ombudsman program with adult protective services and entities making admission or discharge decisions regarding long-term care facility residents. The commenter indicated that the actions of these entities may be too directly coercive for most residents or their families to be able to feel that the Ombudsman could be impartial.

*Response:* A State agency or Ombudsman program may choose to implement policies that prohibit the co-location of the Ombudsman program with adult protective services and entities making admission or discharge decisions regarding long-term care facility residents. However, we have not amended the final rule to adopt this recommendation.

*Comment:* One commenter recommended that there should not be an absolute prohibition of the Office being co-located with the entity responsible for licensing, surveying or certifying long-term care facilities as proposed in § 1327.19(b)(2)(i).

*Response:* The Act prohibits a State agency to enter into a contract or other arrangement to carry out the Office with “an agency or organization that is responsible for licensing or certifying long-term care services in the State.” Section 712(a)(4)(B)(i) of the Act. We have narrowed the applicability of this provision to “long-term facilities” in the final rule. However, we believe that same prohibition to co-locate the Office with a licensing or certification agency where the State agency contracts out the Office, should also apply to the State agency when it houses the Office, since the same conflicts of interest exist in either organizational placement.

*Comment:* Three commenters recommended that AoA, rather than the State agency, be responsible for determining whether the State agency has adequately remedied or removed a conflict. The commenters indicated concerns that conflicts have increased as State agencies and AAAs increasingly take on additional direct service provision, including through Medicaid waiver programs.

*Response:* The Act requires that the State agency establish mechanisms to identify and remove conflicts of interest. Section 712(f)(4) of the Act. We are available to provide technical assistance to support States in fulfilling this requirement. Moreover, the final rule, at § 1327.21(b), provides AoA with a mechanism to become more aware of existing conflicts and steps States and Ombudsman programs have taken to remedy or remove the conflicts through regular reports.

*Comment:* One commenter recommended that we add the term “operational” to the proposed language at § 1327.19(b)(2)(iii).

*Response:* We have accepted this recommended language in the final rule at § 1327.21(b)(3)(iii).

*Comment:* One commenter recommended that the final rule address the situation of conflicts when the State agency has responsibility for oversight of a contract to operate the Office.

*Response:* We have accepted this recommended language in the final rule at § 1327.21(b)(4)(i).

*Comment:* One commenter indicated support for the State agency and the Ombudsman being in the best position to identify a process to remove and/or remedy any organizational conflicts within local agencies.

*Response:* We appreciate the supportive comment.

*Comment:* Two commenters indicated support for the proposed language at § 1327.19(c). One of these commenters indicated appreciation for AoA’s indication of the importance of promoting conflict-free integrity of the Ombudsman program.

*Response:* We appreciate the supportive comments and note that the corresponding provisions are in the final rule at § 1327.21(c).

*Comment:* One commenter indicated that the proposed rule will create a challenge in rural areas where employees of long-term care facilities are neighbors, friends and family of representatives of the Office.

*Response:* The Act requires the State to ensure that no representative of the Office or member of his or her immediate family is subject to a conflict of interest. Section 712(f)(2) of the Act.

We appreciate that this requirement may create challenges to some Ombudsman programs and local Ombudsman entities, including in rural areas. Our intent is to help States and Ombudsman programs carry out this statutory requirement and to enhance the credibility of the Ombudsman program. We plan to provide additional technical assistance to State agencies and Ombudsman programs as they develop approaches to remove and remedy existing conflicts of interest.

*Comment:* One commenter recommended that AoA provide States with deference in their hiring practices and not limit States from selecting otherwise qualified candidates from serving in the Office.

*Response:* Under the final rule, State agencies and other entities responsible for employing or appointing the Ombudsman do have significant latitude to select a person who meets the qualifications of the position. See § 1327.11(d). The Act requires that the State agency shall ensure that the Ombudsman be free of conflict of interest and provides a number of specific examples of prohibited interests or relationships. Section 712(f) of the Act. Our intent in this rule is to assist States to implement this statutory provision, but not to limit them from selecting qualified candidates.

*Comment:* One commenter recommended that we add a new provision to the proposed language at § 1327.19(c)(2) which prohibits the ability to gain financially through an action or potential action brought on behalf of individuals the Ombudsman serves. The commenter indicated that this language reflects the language of the Act at Section 712(a)(5)(C)(ii) and provide additional clarity.

*Response:* We have not added this recommended provision in the final rule but note that other provisions, including § 1327.21(c)(2)(iv), (v), and (vi) in the final rule, include examples of conflicting financial gains.

*Comment:* One commenter recommended that individual conflicts identified in the proposed rule at § 1327.19(c)(2)(i)–(vi) should have a one-year ban and that States may impose longer periods of disqualification.

*Response:* We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for these or other conflicts.

*Comment:* One commenter recommended that the final rule require a period of two to five years before an individual can be employed as an Ombudsman or representative of the

Office after direct involvement with licensing or certification of a facility or provider.

*Response:* We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for this or other conflicts.

*Comment:* One commenter recommended that the final rule require a cooling off period of two to five years for ownership or investment interest in an existing or proposed long-term care facility or service.

*Response:* We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for this or other conflicts.

*Comment:* Several commenters recommended that the conflict identified in the proposed rule at § 1327.19(c)(2)(iii) regarding employment in a long-term care facility, should not be limited to the service area, but statewide. One of the commenters indicated that their State has had several Ombudsmen which had been hired directly from long-term care provider employment, some of whom have exhibited sympathy with providers over consumers, and depriving residents of an autonomous and independent advocate. One commenter recommended that the final rule require a cooling off period of two to five years after employment in a long-term care facility.

*Response:* We have eliminated the reference to employment in a long-term care facility “within the previous year” in the final rule at § 1327.21(c)(2)(iii), as this provision relates to identification of an existing conflict of interest. However, we have maintained for the Ombudsman a cooling off period of twelve months for previous employment in a long-term care facility in the final rule at § 1327.21(d)(3).

*Comment:* One commenter recommended that we eliminate the prohibition on hiring representatives of the Office who have been employed in a long-term care facility within the previous year at § 1327.19(c)(2)(iii), and limit the prohibition to the Ombudsman, as qualified staff and volunteers are difficult to recruit. Another commenter recommended that we amend the provision in the proposed rule at § 1327.19(c)(2)(iii) to reduce the restriction to a six-month period after being employed at a long-term care facility for representatives of the Office (as opposed to the Ombudsman).

*Response:* We have eliminated the reference to employment in a long-term care facility “within the previous year” in the final rule at § 1327.21(c)(2)(iii), as

this provision relates to identification of an existing conflict of interest. In the final rule at § 1327.21(d)(3), we have limited the twelve month cooling off period to employment or appointment to the Ombudsman only. We encourage, but don’t require, that States apply a cooling off period to the representatives of the Office in the final rule at § 1327.21(d)(4)(iv)(A).

*Comment:* One commenter recommended that we provide additional clarity regarding what constitutes “significant value” related to gifts or gratuities of a facility, management, resident or resident representative in the proposed rule at § 1327.19(c)(2)(v).

*Response:* Some States define “significant value” or similar terms in the context of gifts or gratuities. Rather than requiring States to replace existing definitions and standards, we have chosen to use the final rule (at § 1327.21(c)(2)(v)) to establish the general expectation and defer to State agencies and Ombudsman programs to develop more specific definitions and standards as needed.

*Comment:* Two commenters indicated support for the identification of a conflict where the Ombudsman or representative of the Office serves as a surrogate decision-maker for a resident in the service area in the proposed rule at § 1327.19(c)(2)(vii).

*Response:* We appreciate the supportive comments and note that the corresponding provision appears in the final rule at § 1327.21(c)(2)(vii).

*Comment:* Two commenters recommended that the conflict identified in the proposed rule at § 1327.19(c)(2)(vii), regarding serving as a surrogate decision-maker, be more specific. One of the commenters indicated that this conflict should apply only to facilities served by the representative of the Office. The commenter indicated that a representative may hold a power of attorney for a family member who lives in the same county and that this would not create a conflict. The commenter indicated concern that this proposal would discourage qualified people from serving as representatives of the Office.

*Response:* The cited provision provides an example of an existing conflict of interest. The commenter indicates an example of a remedy to that conflict (*i.e.* that the representative of the Office not serve the facility where a conflict exists). To prevent confusion, however, we have clarified that the conflict exists in a facility “in which the Ombudsman or representative of the Office provides services” in § 1327.21(c)(2)(vii) of the final rule.

*Comment:* One commenter indicated that the proposed language at § 1327.19(c)(2)(viii) regarding immediate family residing in a facility is impractical and would limit the ability of the Ombudsman program to provide services in smaller communities where a large percentage of individuals are related. The commenter indicated that this provision would make it especially difficult to have Native Americans serve as representatives of the Office and serve residents of Tribal facilities. Instead, the commenter recommended that States be permitted to develop policies on how to mitigate the conflict.

*Response:* The Act requires the State to ensure that no representative of the Office or member of his or her immediate family is subject to a conflict of interest. Section 712(f)(2) of the Act. We appreciate that this requirement may create challenges to some Ombudsman programs and local Ombudsman entities, including in Tribal areas. Our intent is to help State agencies and Ombudsman programs carry out this statutory requirement and to enhance the credibility of the Ombudsman program. We plan to provide additional technical assistance to State agencies and Ombudsman programs as they develop approaches to remove and remedy existing conflicts of interest.

*Comment:* Two commenters recommended we delete the provision of the proposed rule at § 1327.19(c)(2)(ix) regarding participation in activities which negatively impact the Ombudsman or the perception of the Office. One of the commenters indicated that this provision is too vague and could lead to unwarranted scrutiny by agencies who do not like the actions of the Ombudsman. Another commenter indicated that the provision could be used to unjustifiably discredit or retaliate against the Ombudsman.

*Response:* We have accepted the recommended revision.

*Comment:* One commenter recommended that the final rule include as an enumerated conflict, in § 1327.19(c)(2), employment by a long-term care trade association or Medicaid managed care organization.

*Response:* We agree with the commenter that there are circumstances, including employment by a long-term care provider trade association or by a managed care organization providing coverage for managed long-term services and supports, which are not listed in the rule but would constitute an individual conflict of interest. We created a list of examples, indicating that the list is not



exhaustive, in the final rule at § 1327.21(c)(2).

*Comment:* One commenter recommended that we add the term “or permitted” after “required” in the final rule at § 1327.19(d)(1).

*Response:* This is a helpful clarification. We have revised the final rule at § 1327.21(d)(1) accordingly.

*Comment:* Two commenters recommended that the final rule clarify that the provisions at § 1327.19(d)(1) apply to appointment by the Governor or other State official.

*Response:* In light of this recommendation, we have revised the final rule at § 1327.21(d) to apply to circumstances of appointment as well as employment.

*Comment:* One commenter recommended that a neutral third party with no stake in the Ombudsman program, not the State agency, be ultimately responsible for identifying, removing or remedying a conflict of interest.

*Response:* The Act provides that the State agency has the duty to ensure that the Ombudsman and representatives of the Office are free of conflicts of interest as well as to establish mechanisms to identify and remove conflicts. Section 712(f) of the Act. As the grantee, the State agency is held accountable by AoA for adherence to the terms and conditions of this grant.

*Comment:* One commenter recommended that the final rule include a provision which would allow the State agency to de-designate a representative of the Office if there is an unremedied conflict of interest and the Ombudsman chooses not to de-designate the individual.

*Response:* The Act provides that the Ombudsman has the authority to designate representatives of the Office. We interpret the Act to require that the Ombudsman should also be responsible to refuse, suspend or remove designation of the representatives of the Office. See section 712(a)(5) of the Act and § 1327.13(c) of the final rule.

*Comment:* Several commenters recommended approaches to remedying identified individual conflicts.

*Response:* We appreciate that commenters have provided suggested remedies. We plan to provide additional technical assistance to States as they develop approaches to remove and remedy existing conflicts of interest.

*Comment:* Three commenters recommended deletion of or clarification of the term “officer” in the proposed language at § 1327.19(d)(1)

*Response:* The Act uses the term “officer” in section 712(f)(2) of the Act. However, we have adopted this

recommendation in the final rule at § 1327.21(d)(1), because we believe that the final rule’s provisions covering the Ombudsman and representatives of the Office cover the relevant individuals envisioned by Congress in this provision of the Act.

*Comment:* One commenter recommended that we add “The State agency and the Ombudsman shall develop and implement policies” at § 1327.19(d)(1).

*Response:* For consistency with the provisions related to development of policies in § 1327.11(e)(4), we have provided that either the State agency or the Ombudsman may develop policies and procedures on conflicts of interest. In addition, we have removed proposed language at § 1327.21(d)(4) and (8) so that all provisions related to required content of conflict of interest policies and procedures are found at § 1327.11(e)(4).

*Comment:* One commenter recommended that we clarify that the requirements of the proposed rule at § 1327.19(d)(2) apply to the State entity or other entity that hires the Ombudsman.

*Response:* We have added, in the final rule at § 1327.21(d)(2), the language “or other employing or appointing entity” in response to this recommendation.

*Comment:* One commenter recommended that we add language to the proposed rule at § 1327.19(d)(2)(i) as a reminder that the Ombudsman, not the State agency or local entity, is the person with authority to designate and de-designate individuals as representatives of the Office.

*Response:* We believe the authority of the Ombudsman to designate representatives of the Office is adequately set forth in other provisions of the final rule. This authority is also re-iterated at § 1327.11(e)(4)(iii) of the final rule regarding policies on conflicts of interest.

*Comment:* One commenter recommended that we add a clarification that the proposed provision at § 1327.19(d)(2)(i) does not pre-empt stronger State laws.

*Response:* Stronger State laws or regulations are not prohibited by this Federal regulation.

*Comment:* One commenter indicated that the proposed rule at § 1327.19(d)(2)(i) (prohibiting hiring of an individual with an immediate family member with a conflict of interest) ignores the possibility of an extension of the traditional definition of “family.”

*Response:* We believe that the definition of “immediate family member” in the final rule at § 1327.1 provides flexibility which covers non-

traditional families and households. We also note, that, under ACL’s April 21, 2014 Guidance on Federal Recognition of Same-Sex Marriage (available at [http://www.acl.gov/Funding/Opportunities/Grantee\\_Info/Index.aspx](http://www.acl.gov/Funding/Opportunities/Grantee_Info/Index.aspx)), an immediate family member who is a member of the household or a relative includes a spouse in a same-sex marriage.

*Comment:* One commenter described the proposed prohibitions on employment of individuals (in proposed § 1327.19(d)(5)) as overly broad and precluding of significant numbers of individuals with expertise and experience in the fields of long-term care and advocacy. Another commenter indicated that when a conflict of interest exists in one facility, it should not prohibit individual representatives of the Office from serving in other facilities.

*Response:* In the final rule at § 1327.21(d)(4), we have modified the provision to prohibit the employment or appointment of an Ombudsman or representative of the Office under some circumstances. For example, we have deleted the cooling off period for individuals with direct involvement in licensing or certification and narrowed the scope of conflicting ownership or investment interest to long-term care facilities (rather than services). The rule does not prohibit States from imposing periods of disqualification or other more stringent requirements related to these or other conflicts.

*Comment:* One commenter recommended the final rule should require that, should an individual be employed as Ombudsman or representative of the Office with a conflict of interest as described in proposed § 1327.19(d)(5), the State agency should provide a plan to AoA for remedying or removing the conflict, and AoA should determine whether the conflict has been adequately removed or remedied.

*Response:* The final rule requires the Ombudsman to report on any identified conflicts and steps taken to remedy the conflicts through NORS at § 1327.21(b)(1).

*Comment:* One commenter indicated that proposed § 1327.19(d)(5) is unnecessary in light of subsection (2) and might incorrectly imply that some of the provisions in subsection (2) do not apply to the Ombudsman.

*Response:* The provision in the final rule at § 1327.21(d)(2) broadly describes the process of employment or appointment related to conflict of interest and the Ombudsman program at any level. In contrast, the corresponding provision in the final rule at

§ 1327.21(d)(4) identifies specific prohibited conflicts regarding representatives of the Office. We note that the provision in the final rule at § 1327.21(d)(3) identifies specific prohibited conflicts regarding the Ombudsman.

*Comment:* One commenter recommended that we add a period of two years to five years to the proposed language at § 1327.19(d)(5)(ii) regarding ownership or investment interest in a long-term care facility or service.

*Response:* In the final rule, at § 1327.21(d)(4)(ii), we have modified the provision to prohibit the employment or appointment of an Ombudsman or representative of the Office in circumstances which more closely reflect the provisions of the Act, including by taking out references to the individual having had specified conflicts within the previous year. We note that the rule does not prohibit States from imposing periods of disqualification for these or other conflicts.

*Comment:* Two commenters expressed support for the proposed rule at § 1327.19(d)(5)(iii) regarding the one-year period before employing individuals who have been employed by, or participated in the management of, a long-term care facility.

*Response:* We appreciate the supportive comments. The relevant provision in the final rule provides for a twelve month period and is limited to the Ombudsman. § 1327.21(d)(3)(iii). The final rule does not require a twelve month cooling off period for representatives of the Office at § 1327.21(d)(4)(iv) of the final rule. We note that the rule does not prohibit States from imposing periods of disqualification for these or other conflicts.

*Comment:* Five commenters expressed concerns regarding the proposed rule at § 1327.19(d)(5)(iii) regarding the one-year period before employing individuals who have been employed by, or participated in the management of, a long-term care facility. Several indicated that the proposed provision unnecessarily limits the ability of a State or Ombudsman program to recruit representatives with expertise. One of these commenters recommended the ability to permit a remedy. Two commenters recommended that States be provided with latitude to determine the best candidates and self-monitor for conflict-free assurance. Another recommended limiting the prohibition to the service area to avoid unduly limiting the pool of candidates.

*Response:* The relevant provision in the final rule provides for a twelve-month period and is limited to the Ombudsman. § 1327.21(d)(3)(iii). The final rule does not require a twelve-month cooling off period for representatives of the Office at § 1327.21(d)(4)(iv) of the final rule. We note that the rule does not prohibit States from imposing periods of disqualification for these or other conflicts.

AoA realizes that this required twelve-month cooling off period serves as a proxy for avoiding conflicts of interest and does not guarantee the outcome of an Ombudsman free of potential conflicts. We also realize that this rule could—and likely would—disqualify some excellent and otherwise qualified candidates from the position of Ombudsman. However, we are convinced that the final rule will bolster the credibility of the Ombudsman program, particularly among residents and their representatives, when the Ombudsman is not selected from among individuals who are employed in long-term care facilities at or near the time of their selection. The Ombudsman is the head of a program with responsibility to identify, investigate, and resolve complaints of residents who live in these settings and to represent the interests of the residents. Residents must be able to trust that the Ombudsman has their interests as his or her primary focus, without a sense of loyalty to a previous employer or coworkers.

*Comment:* Four commenters recommended that the final rule prohibit employment of individuals who have been employed by, or participated in the management of, a long-term care facility for a period longer than one year. Recommendations ranged from two years to five years before employing individuals as the Ombudsman or representative of the Office who have been employed by, or participated in the management of, a long-term care facility.

*Response:* We believe that a twelve-month cooling off period should be the minimum requirement when an Ombudsman is employed or appointed who has been previously employed by a long-term care facility. We note that the rule does not prohibit States from imposing periods of disqualification for these or other conflicts.

*Comment:* Two commenters recommended the proposed rule at § 1327.19(d)(7) be amended to add a requirement that AoA ensure that policies and procedures are in place. Two commenters indicated that, unless AoA monitors and provides Federal

oversight, compliance with the conflict of interest provisions cannot be assured. Another commenter recommended that the proposed rule at § 1327.19(d)(7) be amended to add a requirement that the Ombudsman be required to comply with this provision, as opposed to the State agency ensuring that the Ombudsman complies.

*Response:* The Act designed the Ombudsman program to be operated through grants to States. Therefore, AoA requires that State agencies (the grantee) ensure compliance by the Ombudsman with the requirements set forth in the final rule. We note that the provisions regarding the development of conflict of interest policies and procedures are in the final rule at § 1327.11(e)(4).

*Comment:* One commenter requested AoA to adopt a regulation prohibiting the State agency from imposing restrictions on the actions of the attorney of the Ombudsman program under the guise of conflicts of interest.

*Response:* The provisions related to legal counsel for the Ombudsman program are provided in a new provision at § 1327.15(j).

*Comment:* One commenter recommended that the final rule include a provision that identifies conflicts relating to individuals involved in the designation of the Ombudsman as required by section 712(f)(1) of the Act.

*Response:* In the final rule at § 1327.11(e)(4)(i), we have added language requiring that policies and procedures ensure that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the Ombudsman is subject to a conflict of interest.

## I. Additional Considerations

### Legal Counsel

*Comment:* In the NPRM, we indicated that we believe the Act is adequately specific regarding what constitutes adequate legal counsel for the Ombudsman program but invited comments on the question of whether regulations are needed by States in order to more fully implement the Act's requirements. Many commenters offered comments in response. All of them indicated the need for regulations to clarify what constitutes adequate legal counsel. No commenters indicated that a rule was unnecessary. Among the reasons cited for the need were:

- It is rare that Ombudsman programs have adequate access to legal counsel.
- Current policies and practices have not fulfilled this requirement of the Act.
- The Act does not provide guidance to States regarding what functions should be performed, how counsel

should be financed, and identifying conflicts for purposes of legal counsel.

- Conflicted legal counsel has contributed to misguided policies.
- Conflicts exist when the legal counsel for the Office also represents the interest of State government programs such as Medicaid or public guardians.
- It is critical for Ombudsman programs to have conflict-free legal counsel in order to ensure that resident rights are protected.
- The authority and capacity of the Ombudsman program to provide individual representation for residents in administrative and legal proceedings is virtually non-existent in some States.
- The Act requires that the Ombudsman program pursue legal remedies on behalf of residents.

*Response:* In response to these comments, we have added a provision regarding legal counsel in the final rule at § 1327.15(j).

*Comment:* Two commenters recommended that the final rule require that legal counsel not be part of the State agency or limited to an Attorney General's office. One of these commenters indicated that in-house counsel in State agencies represents the interests of the State rather than of the residents or the Ombudsman program.

*Response:* We have not prohibited legal counsel from being part of the State agency or limited to an Attorney General's office. There are some legal issues for which attorneys in these entities may be quite appropriate and the issue at hand does not present a conflict of interest. However, where an in-house counsel in a State agency or the Attorney General's office has a conflicting interest from the interest of the Ombudsman program or the residents it serves, the final rule requires that the State agency has a duty to ensure that the Ombudsman program has access to conflict-free legal counsel.

*Comment:* One commenter recommended that the Ombudsman have access to independent legal counsel of the Ombudsman's choosing. The commenter described how the legal counsel in their State has been extremely important to the success of the Ombudsman program in providing credible, effective services at both the systemic and individual levels.

*Response:* The Act requires that the State agency shall ensure the provision of adequate and conflict-free legal counsel. While some States will choose to provide the opportunity for the Ombudsman to choose the legal counsel for the Ombudsman program, other States may choose to ensure the provision of legal counsel through a

more collaborative process. We do not read the Act to require that legal counsel be selected solely by the Ombudsman but neither does it prohibit a State from providing that opportunity to the Ombudsman.

#### Other Comments

*Comment:* One commenter recommended that AoA, through NORS, require collection and reporting of demographic data including English as a second language (ESL); lesbian, gay, bi-sexual, transgender (LGBT); intellectual and developmental disabilities (I/DD), chronic mental illness and persons of color. The commenter indicated that collection of such data would better inform the work of the Ombudsman program, provide for new and creative approaches, and demonstrate the need for increased funding. Another commenter recommended that NORS require collection and reporting of the number of people residing in facilities in addition to the number of beds as is currently required.

*Response:* AoA does not require reporting of any demographic information regarding individual residents through NORS. Currently AoA is reviewing the data elements it requires to be reported in NORS, and we will include these comments in that review process. Please note that any changes proposed to NORS by AoA will be published in the **Federal Register** with opportunity for public comment prior to their final adoption.

*Comment:* One commenter recommended that, throughout the rule, we acknowledge that the term "family" includes domestic partners and significant others who are considered as members of families by residents.

*Response:* In the definitions of "immediate family member" and "resident representative" in the final rule at § 1327.1, we have adopted language intended to be inclusive of domestic partners and significant others.

*Comment:* One commenter recommended the use of "ombuds" instead of "ombudsman," indicating that at least one State has done so through its State law.

*Response:* AoA utilizes the same term as in the Act (*i.e.* "Ombudsman") in this rule, but States are not prohibited from using the term "ombuds" to describe the program.

*Comment:* Two commenters recommended clarification of whether the Ombudsman program should serve residents under age sixty in the final rule.

*Response:* AoA has long held that States are not prohibited from using OAA funds to support Ombudsman services to younger residents of long-term care facilities, even though the Act is designed to primarily benefit individuals over age 60. AoA Program Instruction 81–8.

There are no provisions in the final rule which limit Ombudsman program services to individuals based on age. Although the proposed rule contained one reference to "older individuals" (at § 1327.15(c)(3)(i)(A)), we have omitted the word "older" in the corresponding provision in the final rule at § 1327.15(k)(3).

*Comment:* One commenter recommended clarification of the types of facilities in which Ombudsman programs services are delivered in the final rule. Another commenter indicated that the local Ombudsman entity in which they serve does not visit board and care homes, asking whether States would be required in the final rule to visit board and care homes. The commenter recommended that the Ombudsman should determine the type of facilities to be visited within the respective State.

*Response:* The term "long-term care facility"—*i.e.* the settings in which the Ombudsman program has jurisdiction to serve residents—is defined in section 102(a)(35) of the Act:

The term "long-term care facility" means—

(A) Any skilled nursing facility, as defined in section 1819(a) of the Social Security Act (42 U.S.C. 1395i–3(a));

(B) any nursing facility, as defined in section 1919(a) of the Social Security Act (42 U.S.C. 1396r(a));

(C) for purposes of sections 307(a)(9) and 712, a board and care facility; and

(D) any other adult care home, including an assisted living facility, similar to a facility or institution described in subparagraphs (A) through (C).

*Comment:* One commenter recommended guidance regarding how Ombudsman programs could access nursing home ownership information as provided by the Affordable Care Act.

*Response:* This rule implements the provisions of the Act, not the Affordable Care Act. We have noted the need for technical assistance regarding the issue of Ombudsman programs accessing nursing home ownership information.

### III. Required Regulatory Analyses Under Executive Orders 13563 and 12866

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 (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. This rule has been designated a “significant regulatory action” under Executive Order 12866; as such, this rule has been reviewed by the Office of Management and Budget.

#### *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 rule will not have a significant economic impact on a substantial number of small entities. AoA does not anticipate that this rule will have a significant economic impact on a substantial number of small businesses and other small entities.

### **IV. Other Administrative Requirements**

#### *A. Paperwork Reduction Act of 1995*

Under the Paperwork Reduction Act, before an agency submits a proposed collection of information to the Office of Management and Budget (OMB) for approval, it must publish a document in the **Federal Register** providing notice of the proposed collection of information and a 60-day comment period, and must otherwise consult with members of the public and affected agencies concerning the proposed collection. In accordance with Section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), AoA determined there were limited new information collection requirements in the proposed rule. Therefore, AoA sought comments on these information collections at the time of the proposed rule.

Currently, States are required to annually report on program activities, characteristics, and funding; complaint resolution; and recommendations for long-term care systems change of the Office of the State Long-Term Care Ombudsman through the National Ombudsman Reporting System (NORS).<sup>1</sup> The final regulations would add one additional question to NORS:

the identification of organizational conflicts of interest and a description of steps taken to remove or remedy any identified conflict(s). Prior to the effective date of the final rule, AoA intends to request OMB approval for an amendment to current NORS instructions. It also plans to alter existing reporting software to capture data consistent with this requirement.

*Comment:* One commenter recommended that AoA consider the cost to States if this reporting requires updating of NORS.

*Response:* While not all States use the same software to collect their data, all States are required to report into NORS as a condition of receiving OAA funds. OMB Control Number: 0985–0005. In order to make changes to NORS, the AoA is required to publish, and invite public comment on, the proposal as well as provide estimates of any cost impact, as required by the Paperwork Reduction Act. We will invite additional public comment on any proposed changes to NORS as a result of the implementation of this rule. AoA estimates that the proposed changes would expand the reporting requirement from 8569 hours to 8621 hours.

*Title:* State Annual Long-Term Care Ombudsman Report.

*OMB Control Number:* 0985–0005.

*Type of Request:* Modification of Information Collection Request.

*Respondents:* 50 States, the District of Columbia and Puerto Rico.

*Frequency:* Annually.

*Estimated Annual Burden on Respondents:* 52 hours (52 respondents × 1 hour per year).

In addition, States are already required by section 712 of the Act to develop policies and procedures for the operation of the Long-Term Care Ombudsman Program. The final regulations are intended to clarify this existing requirement without creating any additional burden on States.

#### *B. Executive Order 13132*

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.

#### *C. 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 \$100,000,000 or more (adjusted annually for inflation) 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 may be significantly or uniquely impacted by the rule.

We have determined that this rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) 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.

#### *D. Assessment of Federal Regulations and Policies on Families*

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency’s determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. This rule protects the confidentiality of information contained in the records of State child support enforcement agencies. This rule will not have an adverse impact on family well-being as defined in the legislation.

#### *E. 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. AoA believes it has used plain language in drafting the final rule, and has incorporated a number of revisions in the rule in order to respond to comments requesting further clarity.

<sup>1</sup> OMB No. 0985–0005.

**List of Subjects**

*45 CFR Part 1321*

Administrative practice and procedure, Aged, Grant programs—Indians, Grant programs—social programs, Indians, Legal services, Nutrition, Reporting and recordkeeping requirements.

*45 CFR Part 1327*

Administrative practice and procedure, Aged, Long-term care.

Dated: September 15, 2014.

**Kathy Greenlee,**

*Administrator, Administration for Community Living, Assistant Secretary for Aging, Administration on Aging.*

Approved: October 9, 2014.

**Sylvia M. Burwell,**

*Secretary.*

For the reasons stated in the preamble, the Administration on Aging, Administration for Community Living, U.S. Department of Health and Human Services, amends 45 CFR subchapter C as follows:

**PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING**

■ 1. The authority citation for part 1321 continues to read as follows:

**Authority:** 42 U.S.C. 3001 *et seq.*; title III of the Older Americans Act, as amended.

■ 2. Section 1321.11 is amended by revising paragraph (b) to read as follows:

**§ 1321.11 State agency policies.**

\* \* \* \* \*

(b) The policies developed by the State agency shall address the manner in which the State agency will monitor the performance of all programs and activities initiated under this part for quality and effectiveness. The State Long-Term Care Ombudsman shall be responsible for monitoring the files, records and other information maintained by the Ombudsman program. 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 § 1327.11(e)(3) of this chapter.

\* \* \* \* \*

■ 3. Part 1327 is added to read as follows:

**PART 1327—ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES**

**Subpart A—State Long-Term Care Ombudsman Program**

Sec.

1327.1 Definitions.

1327.11 Establishment of the Office of the State Long-Term Care Ombudsman.

1327.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

1327.15 State agency responsibilities related to the Ombudsman program.

1327.17 Responsibilities of agencies hosting local Ombudsman entities.

1327.19 Duties of the representatives of the Office.

1327.21 Conflicts of interest.

**Subpart B—[Reserved]**

**Authority:** 42 U.S.C. 3001 *et seq.*

**Subpart A—State Long-Term Care Ombudsman Program**

**§ 1327.1 Definitions.**

The following definitions apply to this part:

*Immediate family*, pertaining to conflicts of interest as used in section 712 of the Act, means a member of the household or a relative with whom there is a close personal or significant financial relationship.

*Office of the State Long-Term Care Ombudsman*, as used in sections 711 and 712 of the Act, means the organizational unit in a State or territory which is headed by a State Long-Term Care Ombudsman.

*Representatives of the Office of the State Long-Term Care Ombudsman*, as used in sections 711 and 712 of the Act, means the employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1327.19(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.

*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 medical, social or other personal information of the resident; manage financial matters; or receive 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 medical, social or other personal information of

the resident; manage financial matters; or receive notifications;

(3) Legal representative, as used in section 712 of the Act; 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 and 712 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 §§ 1327.13 and 1327.19.

*State Long-Term Care Ombudsman program, Ombudsman program, or program*, as used in sections 711 and 712 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 § 1327.13, or the Ombudsman or a representative of the Office from performing any of the duties set forth in § 1327.19.

**§ 1327.11 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 which shall be headed by the State Long-Term Care Ombudsman, who shall carry out all of the functions and responsibilities set forth in § 1327.13 and shall carry out, directly and/or through local Ombudsman entities, the duties set forth in § 1327.19.

(b) The State agency shall establish the Office and, thereby carry out the Long-Term Care Ombudsman program in any 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 §§ 1327.13 and 1327.19 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) *Policies and procedures.* 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 matters within this subsection.

(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 which prohibit the Ombudsman from performing the

functions and responsibilities of the Ombudsman, as set forth in § 1327.13, or from adhering to the requirements of section 712 of the Act. 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. 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 to complaints by the Office and/or local Ombudsman entities which prioritize abuse, neglect, exploitation and time-sensitive complaints and which 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 §§ 1327.13 and 1327.19;

(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 §§ 1327.13 and 1327.19;

(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; and

(C) 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 § 1327.13(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 § 1327.19(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) 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 § 1327.19(b)(5) through (8); and

(v) 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.

(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 § 1327.21, including:

(i) Ensuring that no individual, or member of the immediate family of an individual, involved in the employment

or appointment of the Ombudsman is subject to 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 representatives of the Office with 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 with a conflict of interest, which cannot be adequately 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.

(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 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 adequately removed or remedied as set forth in § 1327.21.

(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 necessarily representing 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;

(ii) Recommendations to changes in Federal, State and local laws, regulations, 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.

#### **§ 1327.13 Functions and responsibilities of the State Long-Term Care Ombudsman.**

The Ombudsman, as head of the Office, shall have responsibility 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 of regulations and policies to government agencies 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) The Ombudsman shall be the head of a unified statewide program and shall:

(1) Establish or recommend policies, procedures and standards for administration of the Ombudsman program pursuant to § 1327.11(e);

(2) Require representatives of the Office to fulfill the duties set forth in § 1327.19 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 and the policies and procedures set forth in § 1327.11(e)(6).

(1) Where 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) *Training requirements.* The Ombudsman shall 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 as described in section 201(d) of the Act, 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; and

(iii) 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 § 1327.19 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.

(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 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; and

(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; and

(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.* The Ombudsman shall independently develop and provide final approval of an annual report as set forth in section 712(h)(1) of

the Act 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) Through adoption of memoranda of understanding and 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, but not limited to:

(1) Area agency on aging programs;

(2) Aging and disability resource

centers;

(3) Adult protective services programs;

(4) 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.*);

(5) Facility and long-term care provider licensure and certification programs;

(6) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));

(7) Victim assistance programs;

(8) State and local law enforcement

agencies;

(9) Courts of competent jurisdiction; and

(10) The State legal assistance developer and legal assistance

programs, including those provided under section 306(a)(2)(C) of the Act.

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

**§ 1327.15 State agency responsibilities related to the Ombudsman program.**

(a) 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) The State agency shall ensure, through the development of policies, procedures, and other means, consistent with § 1327.11(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) 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) 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) The State agency shall provide monitoring, as required by § 1321.11(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 §§ 1327.13 and 1327.19. The State agency may make reasonable requests of reports, including aggregated data regarding Ombudsman program activities, to meet the requirements of this provision.

(f) 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 §§ 1327.11(e)(3) and 1327.13(e).

(g) 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, 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) 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 § 1327.13(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 §§ 1327.13 and 1327.19; 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, has competencies relevant to the legal needs of the program and of residents, and is without conflict of interest (as defined by the State ethical standards governing the legal profession), in order to—

(A) Provide consultation and representation as needed in order for the Ombudsman program to protect the health, safety, welfare, and rights of residents; and

(B) 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, but not limited to, complaint resolution and systems advocacy;

(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 services developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents; and

(iii) 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 the official duties.

(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). However, 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 legal counsel are subject to attorney-client privilege.

(k) 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 and § 1327.13(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; and

(4) Establish procedures for the training of the representatives of the Office, as set forth in § 1327.13(c)(2).

(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 § 1327.13(h).

**§ 1327.17 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, 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.

**§ 1327.19 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 personally 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 and the procedures set forth in § 1327.11(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) paragraph (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 of informed consent and/or perspective regarding the resolution of the complaint of a resident representative so long as 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 § 1327.11(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 § 1327.11(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 has no resident representative, or 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 § 1327.11(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.

#### § 1327.21 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, 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 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 coordination or case management for residents of long-term care facilities;

(7) Sets reimbursement rates for long-term care facilities;

(8) Provides adult protective services;

(9) Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;

(10) Conducts preadmission screening for long-term care facility placements;

(11) Makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or

(12) 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. 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, 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. 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.

(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, 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;

(ii) Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility;

(iii) Employment of an individual by, or participation in the management of, a long-term care facility 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.

(d) *Removing or remedying individual conflicts.* (1) The State agency or Ombudsman shall develop and implement policies and procedures, pursuant to § 1327.11(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 § 1327.21(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 arrangement with an owner or operator of a long-term care facility.

(4) In no circumstance shall the State agency, other agency which carries out the Office, or an agency hosting a local Ombudsman entity appoint or employ an individual, nor shall the Ombudsman designate an individual, as a representative of the Office who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Receives, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; or

(iv) Is employed by, or participating in the management of, a long-term care facility.

(A) An agency which appoints or employs representatives of the Office shall make efforts to avoid appointing or employing an individual as a representative of the Office who has been employed by or 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—[Reserved]**

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