including a street address, phone number, and contact person(s) with email address(es) for each producer;

(iii) A listing of all U.S. importers of the subject merchandise, including street addresses, email addresses, and phone numbers for each importer.

* * * * *

(v) A listing of all sales or revenue lost by each petitioning firm by reason of the subject merchandise during the three years preceding filing of the petition. For each named purchaser, petitioners must provide the email address of the specific contact person, street address, city, state, and 5-digit zip code with respect to each lost sales or lost revenue allegation. Petitioners must certify that all lost sales or lost revenue allegations identified in the petition will also be submitted electronically in the manner specified in the Commission's Handbook on Filing Procedures.

* * * * *

■ 6. Amend § 207.20 by revising paragraph (b) to read as follows:

§ 207.20 Investigative activity following preliminary determination.

* * * * *

(b) The Director shall circulate draft questionnaires for the final phase of an investigation to parties to the investigation for comment. Any party desiring to comment on draft questionnaires shall submit such comments in writing to the Commission within a time specified by the Director. All requests for collecting new information shall be presented at this time. The Commission will disregard subsequent requests for collection of new information absent a showing that there is a compelling need for the information and that the information could not have been requested in the comments on the draft questionnaires.

■ 7. Amend § 207.45 by revising paragraph (c) to read as follows:

§ 207.45 Investigation to review outstanding determination.

* * * * *

(c) *Institution of an investigation.* Within forty-five (45) days after the close of the period for public comments following publication of the receipt of a request, the Commission shall determine whether the request shows changed circumstances sufficient to warrant a review and, if so, shall institute a review investigation. The Commission may also institute a review investigation on its own initiative. The review investigation shall be instituted by notice published in the **Federal Register** and shall be completed within one hundred eighty (180) days of the date of such publication. If the Commission determines that a request does not show changed circumstances sufficient to warrant a review, the request shall be dismissed and a notice of the dismissal published in the **Federal Register** stating the reasons therefor.

* * * * *

By order of the Commission.

Issued: June 7, 2013.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2013–14004 Filed 6–17–13; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration on Aging

45 CFR Parts 1321 and 1327

RIN 0985–AA08

State Long-Term Care Ombudsman Program

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

ACTION: Proposed 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 a Notice of Proposed Rulemaking, with request for comments, to implement provisions of the Older Americans Act, the State Long-Term Care Ombudsman program. This proposed rule replaces AoA's 1994 Notice of Proposed Rulemaking.

Since 1992, the functions of this program have been delineated in the Older Americans Act; however, regulations have not been promulgated for any Title VII program. In the absence of regulatory guidance, there has been significant variation in the interpretation and implementation of these provisions among States. Recent inquiries from States and an AoA compliance review in one State have highlighted the difficulty of determining State compliance in carrying out the Long-Term Care Ombudsman program functions. This rulemaking provides the first regulatory guidance for States' Long-Term Care Ombudsman programs to provide clarity about implementation.

HHS estimates that a number of states may need to update their statutes, regulations, policies and/or practices in order to operate the program consistent with federal law and this proposed regulation. The effective date of the rule is anticipated to be one year after publication of any final rule to allow States appropriate time for such changes, if needed. AoA anticipates little or no financial impact on the providers of long-term care ombudsman services, the consumers served by the program, or long-term care providers through implementation of the proposed rules.

AoA believes that consumers (particularly residents of long-term care facilities) and long-term care providers will benefit from the implementation of these proposed rules. Consumers and other complainants across the country will receive services from the Long-Term Care Ombudsman program with less variation in the quality, efficiency, and consistency of service delivery.

Long-term care ombudsmen and States will also benefit from the implementation of these proposed rules in the establishment and operation of the Long-Term Care Ombudsman program at the State and local levels. For years, States and long-term care ombudsmen at every level have reported to AoA that they have found some provisions of the Act confusing to implement. The proposed rule seeks to provide the clarity that program stakeholders have requested.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on August 19, 2013.

ADDRESSES: Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission. You may submit comments in one of four ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions under the ''More Search Options'' tab.

2. *By regular mail.* You may mail written comments to the following address: Administration for Community Living, Administration on Aging, US Department of Health and Human Services, Attention: Becky Kurtz, Washington, DC 20201.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address: Administration for Community Living, Administration on Aging, US Department of Health and Human Services, Attention: Becky Kurtz, 1 Massachusetts Avenue NW., 5th Floor, Washington, DC 20001.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close

of the comment period to: Administration for Community Living, Administration on Aging, US Department of Health and Human Services, Attention: Becky Kurtz, 1 Massachusetts Avenue NW., 5th Floor, Washington, DC 20001.

If you intend to hand deliver your comments, please call telephone number 202–401–4541 in advance to schedule your arrival with one of our staff members. Comments mailed to the address indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

FOR FURTHER INFORMATION CONTACT: Becky Kurtz, Director, Office of Long-Term Care Ombudsman Programs, Administration for Community Living, Administration on Aging, 1 Massachusetts Avenue NW., Washington, DC 20001, 202–357–3586.

SUPPLEMENTARY INFORMATION: The preamble to this notice of proposed rulemaking is organized as follows:

I. Program Background
A. AoA Authority
B. Requests for Regulatory Guidance
II. Proposed Changes to 42 CFR Part 1321 and Addition of New Part 1327
A. State Agency Policies
B. Definition of Immediate Family
C. Definition of Office of the State Long-Term Care Ombudsman
D. Definition of Representatives of the Office of the State Long-Term Care Ombudsman
E. Establishment of the Office of the State Long-Term Care Ombudsman
F. Functions and Responsibilities of the State Long-Term Care Ombudsman
G. State Agency Responsibilities Related to the Long-Term Care Ombudsman Program
H. Functions and Duties of the Office of the State Long-Term Care Ombudsman
I. Conflicts of Interest
J. Additional Considerations
III. Required Regulatory Analyses Under Executive Orders 13563 and 12866
IV. Other Administrative Requirements
A. Paperwork Reduction Act of 1995
B. Executive Order 13132
C. Unfunded Mandates Reform Act of 1995
D. Assessment of Federal Regulations and Policies on Families
E. Plain Language in Government Writing

I. Program Background

State Long-Term Care Ombudsman programs (Ombudsman programs) serve as advocates for residents of nursing homes, board and care homes, assisted living facilities 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). Nationally, in FY 2011 there were nearly 1,200 full-time equivalent staff ombudsmen; more than 9,000 certified volunteer ombudsmen, and more than 3,300 other volunteers working with Ombudsman offices.

A. AoA Authority

This NPRM is proposed under the authority of sections 201(e), 307(a), 712 and 713 of the Older Americans Act (OAA or the Act) (42 U.S.C. 3011(e), 3027, 3058g, and 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 Long-Term Care Ombudsman programs.

B. Requests for Regulatory Guidance

In addition to its statutory authority, AoA received a 2011 inquiry from the Senate Special Committee on Aging regarding regulations for Ombudsman programs. AoA responded that regulations for the Older Americans Act were last promulgated in 1988 and are found at 45 CFR Parts 1321, 1326 and 1328. Part 1321 constitutes the regulations for Title III of the Act, which at that time included the Long-Term Care Ombudsman Program. In the 1992 reauthorization of the Older Americans Act, Congress created Title VII, Allotments for Vulnerable Elder Rights Protection Activities. While regulations for Title VII programs, which includes the Long-Term Care Ombudsman program, were proposed and published in the **Federal Register** by the Administration on Aging (AoA) in 1994, final regulations were not adopted. AoA indicated its intent to issue regulations for the Long-Term Care Ombudsman Program in order to provide clear and consistent guidance.

In its evaluation of State Long-Term Care Ombudsman programs, the Institute of Medicine identified the lack of Federal guidance as a challenge for state implementation that contributed to an absence of fully-implemented state programs. The Institute of Medicine recommended that the Assistant Secretary for Aging ''issue clearly stated policy and program guidance that sets forth the federal government's expectations of state long-term care ombudsman programs. . . .'' [1]

In December, 2011, a stakeholder workgroup consisting of long-term care, elder abuse and Ombudsman program experts; national association representatives; and consumer advocates met to discuss issues impacting Ombudsman programs and requested guidance from the Assistant Secretary for Aging in areas related to:

1. The roles, responsibilities and relationship of the State agency on aging and the Office of the State Long-Term Care Ombudsman;
2. Conflicts of interest between a State's Ombudsman program and other programs or services (such as survey and certification) provided by the agency in which Ombudsman program is located at the State or local levels;
3. Conflicts of interest between the individual roles and responsibilities of the Ombudsman (or representatives of the Office) and other personal or professional interests (such as financial interest in a long-term care facility);
4. Ability of the Office to provide public policy recommendations as required by statute;
5. Ombudsman services to residents (including recommendations related to Ombudsman records, resident records, and services to individuals under age sixty); and
6. Training and certification/designation of representatives of the Office.[2]

II. Proposed Changes to 45 CFR Part 1321 and Addition of New Part 1327

In its 1992 Older Americans Act reauthorization, Congress created Title VII—Allotments for Vulnerable Elder Rights Protection Activities, and incorporated the provisions related to the activities of Long-Term Care 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 1321) and last updated in 1988, includes some minimal provisions which govern the Long-Term Care Ombudsman Program. Since its creation in 1992, Title VII has included the provisions related to Ombudsman program activities. These proposed changes update 42 CFR part 1321 to reflect the most recent (2006) reauthorization of the Act.

[1] Institute of Medicine, ''Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs under the Older Americans Act'' (1995) (IOM Report (1995)).

[2] ''Long-Term Care Ombudsman Strategy Session: Final Report,'' December 2011, National Ombudsman Resource Center. Available at: *http://www.ltcombudsman.org/sites/default/files/norc/ltcop-strategy-session.pdf*.

There has been significant variation in the interpretation and implementation of the provisions of the Act 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. An example of this inconsistency in approach is the way that various States respond to complaints to the Ombudsman program that a facility has abused a resident:

- In most States, the Ombudsman program is available to assist and resolve the complaint to the satisfaction of the resident, working with the resident to assure his or her well-being. In those States, the Ombudsman program explains to the complainant that another agency represents the State as the official finder of fact, but that the Ombudsman serves as a victim advocate to support the resident through the official investigation process and to assist the resident in voicing and realizing his or her goals.
- However, in some States, the same abuse complaint gets the same response that the Ombudsman program is not the official finder of fact for abuse complaints, and the complainant is immediately referred to another State or local agency. However, in some cases, the resident receives no additional assistance from the Ombudsman program related to the abuse allegation.
- In still other States, the Ombudsman program is designated by the State as the official finder of fact to determine whether the abuse is substantiated. It refers substantiated cases to law enforcement, at times without (or even in violation of) the wishes of the resident.
- In still other States, the Ombudsman is designated by the State as the official finder of fact, but in order to not violate the wishes of the resident or the disclosure provisions of the Act, it does not refer substantiated cases to law enforcement without resident consent.
- The Act requires that Ombudsman programs both assist residents in protecting their health, safety, welfare and rights as well as to provide the resident with the option to consent to disclosure of information about his or her complaint. This proposed rule is intended to provide the clarity and consistency needed to ensure that residents receive needed protections, and, at the same time, that resident choice is honored, regardless of the State in which a resident lives.

Long-Term Care Ombudsman programs were designed by Congress to have several features which are uncharacteristic of other programs created by and funded under the Act. Among those features are independence (a characteristic of any type of ombudsman program), unusually stringent disclosure requirements, a public policy advocacy function, and the Ombudsman responsibility to designate local 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 often create confusion in implementation which this rule is designed to address.

Summary of the Provisions of the NPRM

The State Long-Term Care Ombudsman program was originally created within Title III of the Older Americans Act, and there are regulations affecting this program in Part 1321, Grants to State and Community Programs on Aging. This rule proposes to amend the following section of Part 1321:

Sec. 1321.11 State Agency Policies

In addition, the proposed rule develops new regulations for the Ombudsman program where it currently resides in Subtitle A, Chapter 2, of Title VII of the OAA, Allotments for Vulnerable Elder Rights Protection Activities. AoA proposes a new Part 1327 in order to provide States with clarity regarding the operation of the Ombudsman program.

Topics addressed in the newly proposed Part 1327 include definitions of:

- Immediate family,
- Office of the State Long-Term Care Ombudsman, and
- Representative of the Office of the State Long-Term Care Ombudsman.

Other topics addressed in proposed Part 1327 include:

- Establishment of the Office of the State Long-Term Care Ombudsman,
- Functions and Responsibilities of the State Long-Term Care Ombudsman,
- State Agency Responsibilities Related to the Long-Term Care Ombudsman Program,
- Functions and Duties of the Office of the State Long-Term Care Ombudsman, and
- Conflicts of Interest.

A. State Agency Policies

Currently, federal regulations require State agencies to monitor the performance of programs and activities, including, but not limited to, Long-Term Care Ombudsman programs.

With respect to disclosure of Ombudsman program files and records, Section 712(d) of the Act requires that the State agency on aging (also referred to as ''State unit on aging'' and, for purposes of these regulations, ''State agency'') establish procedures for disclosure and indicates that these procedures provide that the files and records ''may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files and records).'' Further, they must prohibit disclosure of the identity of any complainant or resident with the limited exceptions set forth in the Act. *See* Section 712(d)(2)(B) of the Act. AoA proposes revising section 1321.11 to reflect this provision of the Act.

AoA proposes revising the current regulation with respect to State agency access to the files, records and other information maintained by the Ombudsman program in order to accommodate the increased use of digital information and incorporate information obtained verbally and by other means while maintaining protections for residents. AoA proposes use of the term ''files, records, and other information'' in these regulations rather than ''files'' as used in the current regulation. The term ''files, records, and other information'' more clearly indicates that the disclosure provision of Section 712(d) of the Act is not dependent on any particular format of the files and not limited to information contained in case files. For example, information collected during individual consultation activities which are not part of case files also would be subject to this provision.

AoA proposes replacing the following provisions in the current regulation at 45 CFR 1321.11(b) with the following provision:

''The State Long-Term Care Ombudsman and his or her designee shall be responsible for monitoring the files, records, and other information maintained by the Office, and shall not disclose the identity of any complainant or long-term care facility resident to individuals outside of the Office, except as otherwise specifically provided in section 712(d)(2)(B) of the Act.''

This proposal more closely reflects the provisions of the Act. However, we are aware that State agencies need certain information from the Ombudsman program in order to fulfill their responsibilities related to oversight of Ombudsman program operations and personnel and/or contract management. Aggregate data on Ombudsman program activities and complaint processing may be sufficient for this purpose and do not reveal the identities of any complainants or residents. We invite comments for the final rule that will help us identify an appropriate balance

between Ombudsman protection of confidential information and State oversight responsibilities.

In addition, AoA proposes to omit from 45 CFR 1321.11, the reference to Section 307(a)(12). The provision numbers have changed in subsequent reauthorizations of the Act, and this statutory reference is no longer necessary within the context of the proposed revision.

B. Definition of Immediate Family

The term ''immediate family'' is used repeatedly in Section 712(f) of the Act but is not defined in the statute. Absent a definition, this term has created uncertainty and inconsistency among States related to the scope of conflicts that are required to be identified and removed under Section 712(f)(4) of the Act.

AoA proposes 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). Therefore, AoA proposes the definition of ''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.

The proposed regulation is adapted from the federal standards of ethical conduct which prohibit federal executive branch employees from participating in a matter where the circumstances would raise a question regarding the employee's impartiality. Federal regulations indicate that it would be difficult for a federal employee to be impartial regarding ''a person who is a member of the employee's household or who is a relative with whom the employee has a close personal relationship'' or where the matter is likely to have a ''direct and predictable effect on the financial interest of a member of his household.'' 5 CFR Section 2635.502(a),(b).

C. Definition of Office of the State Long-Term Care Ombudsman

The Older Americans Act requires that State Offices of the State Long-Term Care Ombudsman make certain determinations. These Offices and their responsibilities are referenced in Section 712, as well as in Sections 207(b)(3)(E) and 307(a)(9), of the Act. Section 711(1) of the Act defines ''Office'' as ''the office established in section 712(a)(1)(A). There is a need for further clarification of the scope of the definition of ''Office of the State Long-Term Care Ombudsman'' due to inconsistencies among States and confusion regarding the interpretation of which individual or individuals constitute the ''Office.'' For example, States would benefit from clarification regarding who is responsible for making determinations specifically required of the Office by the Act.

With respect to several functions, the statute indicates that determinations must be made by the Office. Interference with these determinations could constitute interference with the Office, which is prohibited under Section 712(j) of the Act.

States have repeatedly requested that AoA provide clarification on the question of which individual or individuals constitute the ''Office.'' Some States have interpreted the ''Office'' to mean the Ombudsman and representatives of the Office; others have interpreted ''Office'' to mean the State agency on aging.

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 of the State Long-Term Care Ombudsman, and more specifically of the State Long-Term Care Ombudsman, as the head of that Office. Thus, this proposed rule clarifies and codifies the definition.

Section 712(a)(2) of the Act states that the Office of the State Long-Term Care Ombudsman shall be ''headed by an individual, to be known as the State Long-Term Care Ombudsman.'' In addition, under Section 712(a)(5) of the Act, the State Long-Term Care Ombudsman has the authority to designate local Ombudsman entities and employees and/or volunteers to represent these entities. The proposed definition seeks to clarify for States that the State Long-Term Care Ombudsman and his or her representatives shall constitute the ''Office.'' Therefore, AoA proposes the definition of ''Office of the State Long-Term Care Ombudsman'' as set forth at section 1327.1, which includes the organizational unit headed by the State Long-Term Care Ombudsman, including representatives of the Office.

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

The term ''representatives of the Office of the State Long-Term Care Ombudsman'' is used throughout Section 712 of the Act. For purposes of Subtitle A, Chapter 2, of Title VII, Section 711(5) of the Act. The term 'representative' includes an employee or volunteer who represents an entity designated under section 712(a)(5)(A) and who is individually designated by the Ombudsman.

Section 712(a)(5)(A) of the Act further indicates that the Ombudsman ''may designate an employee or volunteer to represent the [local Ombudsman] entity.'' These provisions of the Act have created confusion in States' operation of the Ombudsman Program because it is unclear whether the ''representatives of the Office'' are to represent the Office of the State Long-Term Care Ombudsman or to represent the local Ombudsman entity or both.

AoA intends to clarify that the representatives of the Office, including local staff and volunteers designated by the Ombudsman, indeed 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. These duties of the representatives of the Office are set forth in Section 712(a)(5)(B) of the statute. For convenience, ACL has included this statutory definition of duties at section 1327.17(a) of the proposed rule. The inclusion of these duties into the proposed rule does not and is not intended to amend the statutory language.

The practical implication of this clarification is that the ''representatives of the Office'' are accountable to the head of the Office, which is the State Long-Term Care Ombudsman under Section 712(a)(2) of the Act, 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, representatives represent the entity (i.e. the ''local Ombudsman entity'') that employs or oversees them for personnel management matters (for example, they must follow the entity's personnel policies so long as those policies do not conflict with Ombudsman program law and policy).

Therefore, AoA proposes the definition of ''Representatives of the Office of the State Long-Term Care Ombudsman'' set forth at section 1327.1 to clarify that designated employees and volunteers serve as representatives of the Office.

E. Establishment of the Office of the State Long-Term Care Ombudsman

Proposed section 1327.11 governs the establishment of the Office pursuant to Section 712(a)(1) of the Act and as defined in proposed regulation 1327.1. *See* section ''D, Definition of Office of the State Long-Term Care Ombudsman,'' above.

The Act requires that certain determinations be made by the Office. As proposed in section 1327.11(c)(4), AoA clarifies which determinations are the responsibilities of the Office, and by logical extension, by the head of the Office, 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 (most, though not all, State Ombudsmen are State employees), clarification would assist States in full implementation of the Act.

Specifically, these determinations include:

- Determinations regarding disclosure of information maintained by the program within the limitations as set forth in Section 712(d) of the Act;
- Recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents as set forth in Section 712(h)(2) of the Act; 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 as set forth in Section 712(h)(3) of the Act.

The Act indicates that the recommendations made by and the information provided by the Office are limited to issues impacting residents of long-term care facilities and services. *See, e.g.,* 712(a)(3)(G), 712(h)(2). 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 proposes the provision in section 1327.11(c)(4) to indicate determinations are those of the Office of the State Long-Term Care Ombudsman and do not represent other state governmental entities.

F. Functions and Responsibilities of the State Long-Term Care Ombudsman

AoA proposes clarification regarding the appropriate role and responsibilities of the Ombudsman, as the ''head of the Office.'' The functions of the Ombudsman are set forth in Section 712(a)(3) of the statute. For convenience, ACL has included this statutory text at section 1327.13(a) of the proposed rule. The inclusion of these functions into the proposed rule does not and is not intended to amend the statutory language.

AoA has indicated in a letter to a State that the State Unit on Aging (SUA) and the Office of the State Long-Term Care Ombudsman are distinct entities within the OAA. Section 305(a) of the OAA, requires the State to designate a single State agency to carry out the requirements of the Act. Whether the Long-Term Care Ombudsman is placed within the single State agency, or by contract with an entity outside the State agency, the OAA is explicit that the Long-Term Care Ombudsman is to be established in, and is to carry out his or her functions in, a separate 'Office.' 42 U.S.C. 3058f(1); 3058g(a)(1)(A).

Ombudsman Responsibility With Respect to Designation and De-designation of Representatives

Some States have indicated the need for more clarification about who has authority to de-designate ombudsman employees and volunteers so that a formerly designated individual is no longer authorized to act as a representative of the Office. Other States have established policies and procedures to clarify that the Ombudsman has the sole authority to designate and, consistent with that authority, also the sole authority to de-designate representatives of the Office.

Since the Ombudsman is the individual solely authorized to designate representatives pursuant to Section 712(a)(5) of the Act, the Ombudsman has sole authorization to de-designate representatives of the Office. Without such authority, the Ombudsman would have significant limitations in his or her ability to determine the individuals qualified to represent the Office and to remove such designation where a representative fails to adhere to program requirements. In order to respond to this inconsistency among States in the understanding of the authority of the Ombudsman to de-designate, AoA proposes to clarify that the Ombudsman has the sole authority both to designate and de-designate in section 1327.13(c). This provision is not intended to limit the authority of the Ombudsman to delegate certification training and examination processes or to receive recommendations of designation or de-designation from representatives of the Office, but clarifies that the Ombudsman is responsible to make the final determination of designation and de-designation of representatives of the Office.

Ombudsman Responsibility With Respect to Area Plans

Although the Ombudsman has statutory authority to designate local Ombudsman entities, the involvement of the Ombudsman in the planning of Ombudsman program operations by such local Ombudsman entities is not directly addressed in the Act. In many States, local Ombudsman entities include area agencies on aging (AAAs) and/or AAAs subcontract to non-profit agencies to serve as local Ombudsman entities. In these States, area plans include fiscal and programmatic provisions related to the operation of the Ombudsman program by the local Ombudsman entity. Those individuals working for the local Ombudsman entity and designated by the Ombudsman serve as representatives of the Ombudsman and, therefore, are within the definition of the ''Office'' as set forth in section 1327.1. AoA proposes that the Ombudsman, as head of the Office, be held responsible to review and approve the portions of area plans, submitted pursuant to section 306 of the Act, which are related to the Ombudsman program so that the work of Office is coordinated by—and the local Ombudsman entities are held accountable to—the Ombudsman. In addition, given the State agency role in reviewing and approving area plans pursuant to section 306 of the Act, the Ombudsman should conduct such review and approval in coordination with the State agency. These requirements are set forth at section 1327.13(d).

Ombudsman Responsibility With Respect to Ombudsman Program Information

Section 712(d)(2)(A) of the Act indicates that ''files and records [maintained by the Ombudsman program] may be disclosed only at the discretion of the Ombudsman (or the person designated by the Ombudsman to disclose the files and records).''

Many of the files, records, and other information maintained by the representatives of the Office are physically maintained at the offices of the designated local Ombudsman entities (including, but not limited to, AAAs). This can create confusion about who has the authority to make determinations about the disclosure and maintenance of the files, records, and other information of the Office even though the Act clearly gives the sole discretion for their disclosure to the Ombudsman or his or her designee.

Therefore, AoA proposes to clarify that the files, records, and other information of the Office shall be controlled by the Ombudsman and are the property of the Office, including when such files, records, and other information are maintained by a local Ombudsman entity or representatives of the Office.

AoA uses the term ''files, records, and other information'' to indicate that the disclosure provision of Section 712(d) of the Act should not be dependent upon any particular format of the files. In addition, because the Act does not limit the disclosure of files, records and other information to paper copies—and since electronic recordkeeping is increasingly the norm—AoA proposes that the requirements related to files, records and other information apply to physical, electronic, or other formats.

AoA proposes the provision regarding the responsibility of the Ombudsman to manage Ombudsman program information at section 1327.13(e).

Ombudsman Responsibility With Respect to Disclosure of Files, Records and Other Information

AoA proposes, at section 1327.13(f), to include within the responsibility of the Ombudsman, decisions related to disclosure of information in the possession of the Office in addition to information contained within case files (for example, information obtained during consultations with individuals or facilities). *See also* section ''A. State Agency Policies,'' above, and section ''H. State Agency Responsibilities Related to the Long-Term Care Ombudsman Program,'' below.

Ombudsman Responsibility With Respect to Determining the Use of the Fiscal Resources

In its evaluation of Long-Term Care Ombudsman programs, the Institute of Medicine recommended to the Assistant Secretary for Aging:

''6.4 The committee recommends that the Assistant Secretary for Aging issue program guidance to states that stresses the importance of delegating to the Office of the State Long-Term Care Ombudsman responsibility for managing all of the human and fiscal resources earmarked for the state ombudsman program within the boundaries of what is permitted by state budget policy and procedures and required by federal mandates for compliance. . . .'' [3].

AoA agrees with the recommendation that the head of the Office should be responsible for managing the fiscal resources of the Office. AoA proposes that the Ombudsman be held responsible for determining the use of fiscal resources appropriated or otherwise designated for the Office, subject to applicable Federal and State laws and policies, as set forth at section 1327.13(i).

Ombudsman Responsibility With Respect To Monitoring Local Ombudsman Entities

The Ombudsman, as head of the Office, has responsibility for designating local Ombudsman entities pursuant to section 712(a)(5) of the Act. So that the work of Office is coordinated by and the local Ombudsman entities are accountable to the Ombudsman, AoA proposes that, where an Ombudsman designates local Ombudsman entities, the Ombudsman be held responsible to monitor the Ombudsman program performance of such entities as set forth in section 1327.13(j).

Ombudsman Responsibility With Respect To Coordination of Ombudsman Activities With Other Elder Rights, Disability Rights, and Elder Justice Entities

The Act requires that the State agency require the Office to coordinate with protection and advocacy systems, legal assistance, State and local law enforcement agencies, and courts of competent jurisdiction. Section 712(h)(6)–(8) of the Act. In another part of the Act, the Ombudsman program is listed among the programs and services which protect elder rights or promote elder justice and for which coordination of efforts is required by the Act. *See* Section 721(d) of the Act.

In section 1327.13(l), AoA proposes a list of the relevant entities covered by the Act, including AAA programs, adult protective services programs, protection and advocacy systems, facility and long-term care provider licensure and certification programs, State Medicaid fraud control units, etc. The proposal also establishes the statewide leadership role of the Ombudsman in coordinating the activities of the Office with those of these elder rights and elder justice programs.

G. State Agency Responsibilities Related to the Long-Term Care Ombudsman Program

The proposed rule defines the appropriate role and responsibilities of the State agency on aging (also referred to as ''State unit on aging'' or, for purposes of these regulations, ''State agency'') related to the establishment and operation of the Ombudsman program. A primary responsibility of the State agency related to the operation of the Ombudsman program is to establish the policies and procedures which enable the Ombudsman program to operate in accordance with the Act. The Act requires that the State agency establish, in accordance with the Office, policies and procedures regarding how the Office will fulfill its functions. Section 712(a)(5)(D). AoA proposes consolidating the State agency responsibilities related to the Ombudsman that are included in the Act into section 1327.15.

State Agency Responsibility With Respect to Standards for Complaint Response

In its 1999 report, the HHS Inspector General recommended that AoA work with States to develop guidelines for complaint response and resolution times. . . .'' While numerous States have developed such standards, others have not yet done so. Through section 1327.15(a)(2)(B), AoA proposes that States develop standards related to complaint response times and further requires standards to assure prompt response that prioritize abuse, gross neglect, exploitation and time-sensitive complaints. AoA believes that States are best suited to establish these standards due to the wide variation among States in terms of resources available to the Ombudsman program, density of population centers, geographic distribution of facilities, and similar State-specific factors which would make a national standard difficult to implement.

State Agency Responsibility With Respect to Disclosure of Resident or Complainant Identifying Information

Under Section 712(d) of the Act, States must ensure that the Ombudsman and representatives of the Office are prohibited from disclosing the identity of any complainant or resident, except as specifically authorized in the statute.

This requirement also applies to situations of reporting abuse, gross neglect or exploitation notwithstanding State laws to the contrary. This is consistent with AoA's long-standing position.

The Older Americans Act [Section 712(d)(2)] prohibits disclosure of the identity of any complainant or resident by the ombudsman, unless the complainant or resident, or the resident's legal representative, consents, or a court orders the disclosure. In contrast to, and sometimes in conflict with, the Federal law, a number of States have mandatory reporting requirements for individuals—including ombudsmen—who know of or suspect adult abuse, neglect, or exploitation.

AoA proposes that the disclosure procedures must comply with the

[3] IOM Report (1995) at pp. 199–200.

''Complaint Processing'' provisions of the proposed regulations, section 1327.17(b), in which AoA clarifies exceptions (specifically related to suspected abuse, gross neglect and exploitation complaints), when disclosure of the identity of a resident by the Ombudsman may be permitted to appropriate entities. These include circumstances when the Ombudsman or representative of the Office is processing a complaint related to the resident, and:

(a) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office, has no guardian or other legal representative, and the Ombudsman or representative of the Office has reason to suspect that the resident is a victim of abuse, gross neglect, or exploitation; or

(b) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office, and the resident has a guardian or other legal representative who the Ombudsman or representative of the Office has reasonable cause to believe is a perpetrator of abuse, gross neglect, or exploitation of the resident.

In addition, AoA proposes that the Ombudsman must disclose the identity of a resident where the Ombudsman or representative of the Office personally witnesses suspected abuse, gross neglect or exploitation of a resident, so long as (1) the resident at issue does not request the Ombudsman or representative to not make a report of the suspected activity witnessed by the Ombudsman or representative and (2) the Ombudsman determines it to be in the best interest of the resident.

In both of these circumstances, the proposed rule requires that such disclosure only be permitted 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 and the representative obtains the approval of the Ombudsman.

AoA intends the proposed regulations to address areas where clarification is needed regarding access to files, records, and other information maintained by the Office. First, this provision addresses questions regarding whether State units on aging, area agencies on aging or any other entities with monitoring responsibility have access to Ombudsman information. See also section ''A. State Agency Policies,'' above. Note that this proposed regulation does not limit the disclosure of aggregate information, performance measures, and similar performance data to monitoring agencies. Instead, it implements the statutory provision that the Ombudsman is prohibited from disclosing the identities of residents or complainants without obtaining appropriate consent or unless required by court order, pursuant to Section 712(d) of the Act.

Second, the proposed regulation clarifies that the requirements related to files, records and information apply regardless of funding source, including funds from Title VII, Chapter 3, of the Act. The provision in Chapter 3 of the Act which has created confusion on this issue states:

> [A]ll information gathered in the course of receiving reports and making referrals shall remain confidential except. . . (ii) if the release of such information is to a law enforcement agency, public protective service agency, licensing or certification agency, ombudsman program, or protection or advocacy system. . . .
> Section 705(a)(6)(C) of the Act.

While Title VII of the Act does provide for an exception which permits the release of otherwise confidential information with respect to the programs funded through Chapter 3, Chapter 2 (the chapter related to the Ombudsman Program) contains no similar exception for the release of confidential information to law enforcement and similar agencies absent appropriate consent or a court order. *See* Section 712 (d)(2) of the Act.

AoA proposes use of the term ''files, records, and other information'' in these regulations rather than ''files and records'' as used in Section 712(d) of the Act. *See* section ''G, Functions and Responsibilities of the State Long-Term Care Ombudsman,'' above. The proposed rule clarifies that the State, in providing for Ombudsman program procedures for appropriate disclosure, shall develop procedures related to at least the following types of files, records, and information (each of which is specifically referenced within Section 712 of the Act): medical and social 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 statewide uniform reporting system of the Ombudsman program.

This proposed regulation uses the term ''communication of informed consent'' to describe the manner in which Ombudsmen and representatives of the Office obtain consent from residents (or complainants or legal representatives, where applicable) for purposes of disclosure. The Act prohibits disclosure of the identity of any complainant or resident without appropriate ''consent.'' Section 712(d)(2)(B) of the Act. Since the Ombudsman and representatives of the Office provide an advocacy service, but do not perform clinical assessments or make legal determinations related to ability to consent, the Ombudsman or representatives of the Office must rely on the ability of the individual to communicate consent (whether verbally or written, including through the use of assistive technology). In addition, the Ombudsman and representatives of the Office will want to be assured that the resident (or complainant or legal representative) appears to understand that to which he or she is consenting. Therefore, the proposed rule requires the State agency to maintain the confidentiality and protection of identifying information of residents or complainants and only allow disclosure consistent with the proposed rule.

State Agency Responsibility With Respect to State Lobbying Prohibitions

To be eligible for Older Americans Act funding, the State agency must require that the Office perform certain activities, set forth in section 1327.15(h). These activities are identified in statute and required of entities receiving federal funding under the OAA. They include recommending changes in laws, regulations and policy and providing information to public and private agencies and legislators as the Office determines to be appropriate. These provisions must be carried out notwithstanding any State laws or regulations, such as restrictions on lobbying, which may be in conflict with such provisions. Section 1327.15(a)(2)(E) establishes the State agency's responsibilities with respect to excluding the Ombudsman and representatives of the Ombudsman Office from state lobbying prohibitions.

State Agency Not Prohibited From Consulting on Ombudsman Determinations

Questions have arisen from States regarding whether it is permissible for a State agency to require consultation regarding the determinations of the Office. AoA has long maintained that consultation, so long as it does not interfere with the functions of the Office, is not prohibited and has provided such guidance to States. The OAA does not prohibit States from seeking comments or in-put, including from the State Unit on Aging, provided that in the end the Ombudsman retains the absolute right to decide what finally should be presented by the Office. Such cooperation ensures that the SUA and the Ombudsman's office would not needlessly duplicate their efforts. The

SUA may also have valuable information as well as recommendations to contribute which the Ombudsman might decide to accept. Even where the SUA and Ombudsman's Office ultimately disagree, such advance notice and consultation permit both entities to coordinate their reports to the State legislature, thereby furthering a truly informed debate to the benefit of the legislature and other policy makers.

The Act places the Ombudsman in a unique position within States. To eliminate confusion, the proposed rule seeks to clarify that States may appropriately coordinate with Ombudsman programs while, at the same time, the rule reaffirms that the Office makes independent determinations. Therefore, AoA proposes the provision clarifying that the State agency is not prohibited from consulting on Ombudsman determinations at section 1327.15(a)(2)(E)(ii). The proposed rule further indicates that policies which promote consultation may not limit the ability of the Office to fulfill its functions and duties. Therefore, in circumstances in which advanced communication is impractical or would interfere with the independent determination of the Ombudsman, a State policy could not require advanced communication of the determinations of the Office.

State Agency Responsibility To Provide Ombudsman Access to Training

In response to questions from States regarding appropriate uses of Title III–B and Title VII, Subtitle A, Chapter 2 funds, AoA proposes to clarify that a State agency may appropriately utilize, these funds to meet the State agency responsibility with respect to the training needs of the Ombudsman. In addition, Section 301(c) of the Act requires the Assistant Secretary for Aging (ASA) to provide training and technical assistance to State Ombudsman programs. In some cases, Ombudsmen are prevented from attending training provided by the AoA-funded National Ombudsman Resource Center because of limits on State administrative funds. Representatives of the Office may have difficulty accessing other necessary training to perform their duties without access to these resources.

AoA has previously issued guidance saying that States may use Title III, Part B funds to fund any aspect of the statewide Ombudsman Program, as the program is defined in Section 712 of the Act. It has also said that States may not include any Title VII funding in their calculation of funds available for State plan administration. The programs under Title VII, unlike most of the programs under Title III, are established and operated as direct advocacy services by the State Agency on Aging and/or agencies with which the State Agency contracts or provides grants to operate the programs.[4]

Since the Title III–B and Title VII funds used for the Ombudsman program are considered service dollars, States may use these funds to carry out Ombudsman services. Adequate training in order to provide this service is a reasonable cost of providing the service. Through this proposed rule, AoA clarifies for States that Title III–B and/or Title VII–2 (i.e. Ombudsman service) funds may be used for the purposes of the Ombudsman and representatives of the Office accessing and/or providing service-related training and, in fact, may be used in lieu of ''administrative funds'' provided to States under Title III–A. Therefore, AoA proposes the provision regarding responsibility of the State agency to provide Ombudsman and representatives of the Office access to training at section 1327.15(a)(3).

State Agency Responsibilities With Respect to Personnel Management and Program Monitoring

Where the Ombudsman and any representatives of the Office are employed by the State agency, AoA expects the State agency, as the employer, to provide supervision and management of Ombudsman program personnel, while respecting the limits on access to resident or complainant-identifying information, as included in the proposed rule. In addition, State agencies have a responsibility to establish policies for monitoring the performance of all programs and activities initiated under the Act for quality and effectiveness. Therefore, where the Office is outside of the State agency, the State agency has a responsibility to monitor the contract or other arrangement through which the Ombudsman program is carried out, while respecting the limits on access to information, as included in the proposed rule.

In both its personnel management and program monitoring responsibilities, the State is subject to limits on its access to the files, records and other information of the Ombudsman program. While the State agency may review aggregate data and analyze reports of Ombudsman program performance, it may not have access to information that is prohibited to be shared outside of the Ombudsman program by the Act. The proposed regulation clarifies the State agency responsibility regarding personnel supervision and management and regarding program monitoring, including with respect to prohibitions related to disclosure of files and records in Section 712(d) in the Act. *See also* sections ''A. State Agency Policies,'' and ''G. Functions and Responsibilities of the State Long-Term Care Ombudsman,'' above. Therefore, AoA proposes the provision regarding the responsibilities of the State agency with respect to personnel management and program monitoring at section 1327.15(a)(4),(5).

State Agency Responsibility With Respect to Coordinating Elder Rights, Disability Rights, and Elder Justice Programs

The Act requires the Assistant Secretary to ''provide Federal leadership to support State efforts in carrying out elder justice program and activities.'' Section 201(e)(2)(A)(ii) of the Act. This duty includes ''promoting collaborative efforts and diminishing duplicative efforts in the development and carrying out of elder justice programs at the Federal, State and local levels.'' Section 201(e)(2)(A)(ix) of the Act. In addition, the Act requires State agencies 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. Among the programs specifically listed for coordination, are State Long-Term Care Ombudsman programs. Section 721(d)(3) of the Act.

The proposed rule emphasizes the importance of States' coordinating role being integrated into the State plan process. It also requires coordination of Title VII program activities to promote State-level alignment with the duties of the Assistant Secretary as set forth in Section 201(e)(2) of the Act. Therefore, AoA proposes the provision regarding responsibility of the State agency to coordinate elder rights, disability rights, and elder justice programs at section 1327.15(a)(6)–(7).

State Agency Responsibility With Respect to Non-Interference

States are required by the Act to ensure that willful interference with representatives of the Office in the performance of their official duties shall be unlawful. Section 712(j)(1) of the Act. These duties are set forth in section 1327.17(a). Proposed section 1327.15(a)(8) clarifies that interference is not limited to interference by facilities or other third parties, but that State agencies on aging and local

[4] AoA Program Issuance 94–02; *see also* AoA Fiscal Guide, Older Americans Act, Titles III and VII (May 2004).

Ombudsman entities are also subject to the prohibition on interference. In fulfilling their statutory duty to protect the Ombudsman program from interference, State agencies may not themselves interfere with the Ombudsman program's ability to perform its official duties.

State Agency Responsibility With Respect to Access to Records

The Act requires that the State agency ensure that representatives of the Office have access to facilities, residents, and resident records pursuant to Section 712(b) of the Act. With respect to access to resident records, the Act states:

The State shall ensure that representatives of the Office shall have * * *

(i) appropriate access to review the medical and social records of a resident, if—

(I) The representative has the permission of the resident, or the legal representative of the resident; or

(II) the resident is unable to consent to the review and has no legal representative; or

(ii) Access to the records as is necessary to investigate a complaint if—

(I) A legal guardian of the resident refuses to give the permission;

(II) A representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and

(III) The representative obtains the approval of the Ombudsman. * * *

Section 712(b)(1)(B) of the Act.

AoA has received reports of long-term care facilities, state government agencies, and other entities denying Ombudsmen or representatives of the Office access to resident records due to concerns that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule does not permit the disclosure. AoA has previously provided program guidance to States that the HIPAA Privacy Rule, 45 CFR Part 160 and Subparts A and E of Part 164, does not preclude release of residents' medical and social records to the Office. AoA Information Memorandum 03–01, February 4, 2003 (available at *http://www.aoa.gov/AOARoot/AoA_Programs/OAA/Aging_Network/im/docs/Info_Memoradum_%20HIPAA.pdf*). Proposed section 1327.15(b)(1) clarifies that the State agency has a responsibility to establish policies and procedures consistent with this HIPAA guidance in order to provide representatives of the Office with appropriate access to resident records.

State Agency Requirements of the Office

The Act sets forth specified activities that States must require of the Office in the administration of the Ombudsman program. Section 712(h) of the Act. For convenience, ACL has included this statutory text at section 1327.15(c) of the proposed rule. The inclusion of these requirements into the proposed rule does not and is not intended to amend the statutory language.

H. Functions and Duties of the Office of the State Long-Term Care Ombudsman

Section 1327.17 includes provisions related to both the functions that may be performed by the State Long-Term Care Ombudsman (the ''Ombudsman'') and/or the duties which may be performed by the representatives of the Office, as opposed to solely by the Ombudsman. (The functions which are the sole responsibility of the Ombudsman are found under section ''G, Functions and Responsibilities of the State Long-Term Care Ombudsman,'' above.)

Proposed section 1327.17(a) sets forth the duties of the representatives of the Office as set forth in Section 712(a)(5)(B) of the statute. For convenience, ACL included this statutory text at section 1327.17(a) of the proposed rule. The inclusion of these duties into the proposed rule does not and is not intended to amend the statutory language. The complete list of functions statutorily required of the Ombudsman is found above at section 1327.13(a).

For convenience, AoA proposes compiling regulations which relate to both the functions of Ombudsman and the duties of the Office (i.e. those which may be performed by either the Ombudsman and/or the representatives of the Office) into this section.

Complaint Processing

The requirement to ''identify, investigate, and resolve complaints made by or on behalf of residents'' is a required function of the Ombudsman under Section 712(a)(3)(A) of the Act and a required duty of representatives of the Office under Section 712(a)(5)(B)(iii) of the Act. While facilities, family members, agencies, or other individuals may indirectly benefit from the complaint resolution work of the Office, complaint processing by the Office must focus on seeking an outcome that satisfies the resident. Therefore, section 1327.17(b)(1) of the proposed rule defines the resident as the primary recipient of Ombudsman program services and sets forth the purposes of the Ombudsman program complaint process as follows:

(1) Resolving the complaint to the resident's satisfaction, and

(2) assisting residents in protecting their health, safety, welfare, and rights.

The Act provides that the resolution of complaints made by, or on behalf of, residents is a function of the Ombudsman and a duty of representatives of the Office. Sections 712(a)(3)(A); 712(a)(5)(B)(iii) of the Act. Through its National Ombudsman Reporting System (NORS) [5] instructions, States report on resolved complaints only if they meet the following definition: ''Definition of *resolved* complaint: The complaint/problem was addressed to the satisfaction of the resident or complainant.'' [6]

In proposed section 1327.17(b)(2)(A), AoA describes how this person-centered focus is implemented into complaint processing activities. The proposed rule indicates that, regardless of the source of the complaint, the Ombudsman or representative of the Office shall discuss the complaint with the resident in order to determine the perception of the resident, request consent in order to investigate the complaint, determine the wishes of the resident, advise the resident of his or her rights, work with the resident to develop a plan of action, investigate the complaint, and determine whether the complaint is resolved to the satisfaction of the resident.

The Act also requires as a function of the Ombudsman: ''provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents;'' and as a duty of the representatives of the Office: ''provide services to protect the health, safety, welfare, and rights of residents.'' Sections 712(a)(3)(B); 712(a)(5)(B)(i) of the Act.

Minimal new burden will be placed on the States, State agencies on aging, AAAs, Ombudsmen, or the Office because these proposed regulations in section 1327.17(b) are largely consistent with the present practice as set forth in the National Ombudsman Reporting System (NORS) instructions which States currently follow in submitting Ombudsman program performance reports annually to AoA.

Communication of Informed Consent by a Resident

At several places in the Act, the Ombudsman and representatives of the Office must rely on the ''permission''

[5] AoA maintains the National Ombudsman Reporting System in order to receive reports on program activities, characteristics, and funding; complaint resolution; and recommendations for long-term care systems change from State Long-Term Care Ombudsman Programs. OMB No. 0985–0005.

[6] OMB No. 0985–0005 at p. 5

(*see, e.g.,* Section 712(b) of the Act) or ''consent'' (*see, e.g.,* Section 712(d)(2)(B) of the Act) of the resident, (or legal representative, where applicable). Since the Ombudsman and representatives of the Office provide an advocacy service, but do not perform clinical assessments or make legal determinations related to ability to consent, the Ombudsman or representatives of the Office must rely on the ability of the individual to communicate consent (whether verbally or written including through the use of assistive technology).

In addition, the Ombudsman and representatives of the Office will want to be assured that the resident (or legal representative, where applicable) appears to understand to what he or she is consenting. Therefore, throughout the regulations, the term ''communication of informed consent'' is used to describe the interaction between residents (or their legal representative, where applicable) and Ombudsmen and representatives of the Office.

The Ombudsman and representatives of the Office have a duty to ''provide services to protect the health, safety, welfare, and rights of residents.'' Section 712(a)(5)(B)(i); *see also* 712(a)(3)(B) of the Act. This may be impossible for the Ombudsman or representatives of the Office to accomplish where the resident is unable to provide informed consent and where there is no legal representative to provide informed consent on behalf of the resident. Therefore, AoA proposes, at section 1327.17(b)(2)(B), that the Ombudsman or representative of the Office shall determine whether the complaint was resolved ''in a manner that is in the resident's best interest'' in circumstances where the resident is unable to provide informed consent and where there is no legal representative to provide informed consent on behalf of the resident.

The ''resident's best interest'' standard is proposed only in the circumstance where the resident is unable to provide informed consent and where there is no legal representative to provide informed consent on behalf of the resident. In all other circumstances, the current NORS instruction applies, which defines ''resolved complaint'' as ''The complaint/problem was addressed to the satisfaction of the resident or complainant.'' [7] AoA seeks comment on this provision, noting that this proposed standard differs from the current NORS instruction in specified circumstances.

As stated above regarding proposed section 1327.15(b)(2)(c), the proposed regulations provide that the State procedures for disclosure under Section 712(d) of the Act must provide that the Ombudsman and representatives of the Office shall not be required to report abuse, neglect or exploitation, despite State laws to the contrary, where such report would constitute disclosure prohibited by the Act. Through proposed section 13271.17(b)(3), AoA seeks to clarify the disclosure requirements of the Act with respect to abuse reporting and provide limited circumstances in which disclosure is permitted, i.e. where an individual may be at risk and unable to indicate his or her wishes related to disclosure.

Communication of Informed Consent by a Representative of a Resident

Where an Ombudsman or representative of the Office is processing a complaint on behalf of a resident, but the resident is unable to communicate informed consent and has an authorized representative, the proposed regulations clarify that the Ombudsman or representative of the Office has the authority to rely on the guidance of a guardian or other legal representative. However, the provision qualifies this reliance ''so long as the Ombudsman or representative of the Office has no reasonable cause to believe that the representative of the resident is not acting in the best interests of the resident.'' The purpose of this limitation is to conform to the principle stated in Section 712(b)(1)(B)(ii) of the Act:

''The State shall ensure that representatives of the Office shall have . . . access to the records access to the records as is necessary to investigate a complaint if—

(I) a legal guardian of the resident refuses to give the permission;

(II) a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and

(III) the representative obtains the approval of the Ombudsman. . . .''

Section 712 of the Act at various places uses the terms ''guardian'' (*e.g.,* 712(a)(3)(A)(ii)) and ''legal representative'' (*e.g.,* 712(b)(1)(B)(i)(I), 712(d)(2)(B)(i)). AoA proposes to use the term ''guardian or other legal representative'' throughout the proposed regulations to clarify that the Ombudsman and representatives of the Office may rely, where appropriate, on the communications of a resident's guardian or other legally authorized representative (such as a health care proxy or financial power of attorney authorized by the resident). In many cases, a resident may have previously authorized someone to make decisions on his or her behalf and, therefore, may not need a court-appointed guardian even if he or she meets the standard of incapacity for appointment of a guardian. Therefore, AoA proposes the provision regarding communication of informed consent by the representative of the resident at section 1327.17(b)(5).

Abuse Reporting Where a Resident Is Unable To Communicate Informed Consent to Disclosure

In fiscal year 2011, 9% of the 204,044 complaints investigated, resolved and closed by Ombudsman programs were complaints of abuse, gross neglect or exploitation (represented by A, P–117, and P–121 codes in the National Ombudsman Reporting System (NORS)). NORS Instructions provide guidance and definitions to Ombudsman programs regarding the reporting of complaints related to abuse, gross neglect and exploitation.

Under Sections 712(a)(3)(B) and 712(a)(5)(B)(i) of the Act, the Ombudsman and representatives of the Office have a duty to ''provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents.'' Where a resident is able to consent related to disclosure of his or her identity, the provisions of Section 712(d) of the Act require the Ombudsman and the representatives of the Office to prohibit disclosure absent consent.

The Act requires the Office to ''provide service to protect the health, safety, welfare, and rights of the residents.'' Section 712(a)(5)(B)(i) of the Act. However, this requirement is particularly challenging to meet in situations where a resident is allegedly a victim of abuse, gross neglect or exploitation, and is unable to communicate informed consent to disclose his or her identity.

Therefore, AoA proposes that the State-developed procedures for disclosure by the Ombudsman and representatives of the Office may provide authority to disclose the identity of the resident to appropriate authorities when the Ombudsman or representative of the Office is processing a complaint related to the resident when the disclosure would be in the best interest of the resident and meets at least one of the following criteria:

(1) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office, has no guardian or other legal representative, and the Ombudsman or representative of the Office has reason to suspect that the resident is a victim of abuse, gross neglect, or exploitation (as stated in proposed section 1327.17(b)(6))

[7] OMB No. 0985–0005 at p. 5.

(2) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office, and the resident has a guardian or other legal representative who the Ombudsman or representative of the Office has reasonable cause to believe is a perpetrator of abuse, gross neglect, or exploitation of the resident (as stated in proposed section 1327.17(b)(7)). AoA proposes this provision as it is consistent with the statutory provision requiring that States provide the Office with access to the records of a resident where the representative of the Office has reasonable cause to believe a guardian is not acting in the best interest of the resident. Section 712(b)(1)(B)(ii) of the Act.

AoA seeks comment on this proposed approach.

The proposed rule states that the disclosure procedures may permit the Ombudsman or representative of the Office to ''refer the matter and disclose the identity of the resident'' based on the determination of the best interest of the resident by the Ombudsman or representative of the Office in proposed sections 1327.17(b)(6)–(7). This proposal authorizes, but does not require, procedures related to disclosure to provide this authority in order to be consistent with Section 712(d)(2)(A) of the Act which provides for disclosure ''only at the discretion of the Ombudsman.''

However, AoA proposes that the State-developed procedures for disclosure by the Ombudsman and representatives of the Office must require disclosure of the identity of the resident to appropriate authorities when the Ombudsman or representative of the Office is processing a complaint related to the resident in the narrow circumstance when: (1) The Ombudsman or representative of the Office personally witnesses suspected abuse, gross neglect or exploitation of a resident (as stated in proposed section 1327.17(b)(8)) and (2) the representative has reasonable cause to believe that the disclosure would be in the best interest of the resident, and (3) the representative obtains the approval of the Ombudsman.

A representative of the Office who personally witnesses suspected abuse would be required to obtain approval of the Ombudsman before disclosing the identity of the resident to appropriate authorities. This is analogous to the approval required by the Act for representatives seeking access to records to investigate a complaint related to a legal guardian for whom the representative of the Office has reasonable cause to believe is not acting the best interests of the resident. Section 712(b)(1)(B)(ii) of the Act. In this situation of personally witnessing an incident, the Ombudsman or the representative of the Office may be the only person other than the victim with information on the incident.

This is in contrast to the more common occurrence where complaints of suspected abuse, gross neglect or exploitation are brought to the attention of the Ombudsman program from another person with information regarding the incident. Where another person is bringing the information to the attention of the Office, such complainant or reporter is presumably able (and may be mandated under State law) to report to appropriate authorities for an official investigation of the allegations. As background, in fiscal year 2011, Ombudsman program cases (in all complaint categories, not only abuse-related complaints) were generated by the following types of complainants: Residents (38%), relatives or friends of residents (19%), facility staff (17%), Ombudsman program staff and volunteers (13%), and others (12%).[8]

Where the Ombudsman or representative of the Office personally witnesses the incident, and the resident is unable to communicate informed consent, the Ombudsman or representative of the Office may open a complaint with himself or herself as the complainant and work to resolve the issue but may incorrectly conclude that they are prohibited by the Act from disclosing the identity of the resident. AoA believes that the absence of disclosure of the resident's identity in this situation could create a barrier to facility management which may need information to protect the resident and/or to appropriate investigatory agencies which may need information in order to fulfill their protective, regulatory and/or law enforcement duties related to the alleged victim.

Therefore, AoA proposes, at section 1327.17(b)(8) that disclosure of the identity of a resident should be required in the situation where an Ombudsman or representative of the Office personally witnesses the incident, so long as (1) the resident at issue does not request the Ombudsman or representative to not make a report of the suspected activity witnessed by the Ombudsman or representative, (2) the representative has reasonable cause to believe that the disclosure would be in the best interest of the resident, and (3) the representative obtains the approval of the Ombudsman.

Coordination of Ombudsman Activities With Other Elder Rights, Disability Rights, and Elder Justice Entities

The Act requires the State agency to require the Office to coordinate with protection and advocacy systems, legal assistance, and State and local law enforcement agencies and courts of competent jurisdiction. Section 712(h)(6)–(8) of the Act; *see also* Section 721(d) of the Act, and section ''G. Functions and Responsibilities of the State Long-Term Care Ombudsman'' regarding ''Ombudsman Responsibility with respect to Coordination of Ombudsman Activities with Other Elder Rights, Disability Rights, and Elder Justice Entities,'' above.

AoA proposes section 1327.17(c) in order to consolidate the list of the relevant entities covered by the Act into a comprehensive list and to clearly set forth its expectation that all levels of the Office should promote collaborative efforts and diminish duplicative efforts in the development and carrying out of elder rights and elder justice programs. *See* Section 201(e)(2)(A)(ix) of the Act. This provision addresses the duty to coordinate activities by representatives of the Office, including those representatives in a local Ombudsman entity, at the local level, in contrast to proposed rule section 1327.13(l), above, which relates specifically to the responsibility of the State Ombudsman to coordinate with relevant entities at the State level.

Relation of Required Functions and Duties to Federal Lobbying Restrictions

The Act requires the Ombudsman to perform functions that may be considered ''lobbying'' under some state laws, including recommending changes in laws pursuant to Section 712(a)(3)(G)(ii) and providing information to legislators regarding recommendations related to the problems and concerns of residents of long-term care facilities pursuant to Section 712(h)(3) of the Act.

As federal grantees, States are required to make certain certifications regarding lobbying under the 45 CFR Part 93. AoA proposes section 1327.17(d) in order to clarify that the functions and duties required of the Office by the Act do not constitute a violation of this part (see 45 CFR § 93.100).

I. Conflicts of Interest

The Act specifically requires the Assistant Secretary to issue regulations related to conflicts of interest at Section

[8] These percentages do not equal 100% due to rounding.

713 of the Act. Freedom from conflicts of interest is critically important to the successful operation of Ombudsman programs. Ombudsman programs are effective only when they can provide credible representation of the interests of residents without conflicts of interest.

In its evaluation of Long-Term Care Ombudsman programs, the Institute of Medicine dedicated a chapter to issues related to conflicts of interest, explaining:

> The Older Americans Act (OAA) mandates that the ombudsman work toward changing government and other institutions for the betterment of the residents of LTC facilities. . . . Thus, by accepting OAA monies, state governments agree to allow one of their own employees (or a contractor of the state) both to criticize openly and publicly their policies and procedures and to work toward implementing improvements. The directive to ''seek administrative, legal, and other remedies'' is broad enough to include the state government itself as a target of ombudsman advocacy. Conflicts of interest can easily occur in such situations.[9]

Organizational conflicts may arise from the organizational location of the Office and/or local Ombudsman entities, in which the work of the Ombudsman is unable to focus primarily on the interests of long-term care residents due to competing functions or priorities. For example, the Office might be located within an agency that makes determinations regarding resident eligibility for benefits or services. A resident who requests the Ombudsman to resolve a complaint related to the eligibility determination, and discovers that the Ombudsman is housed within the same entity, may not trust the Ombudsman to perform credible complaint resolution work on his or her behalf.

Similarly, the Office might be located within an agency that is the official finder of fact regarding abuse allegations (such as adult protective services or the state licensing agency). If an Ombudsman identifies a pattern of inadequate abuse investigation taken by the agency, the agency may have a conflicting interest in protecting its reputation, which may cause it to interfere with the Ombudsman's duty to address the issue systemically (for example, by making recommendations to policymakers outside of the agency).

In some states, individual representatives of the Office have been assigned conflicting roles by a local Ombudsman entity with multiple service responsibilities. For example, the representative may have employment assignments both in the Ombudsman Program and protective services so may be called upon to provide protective services for a resident. But the actions taken to protect the resident and actions to advocate for what the resident desires may conflict with one another. As another example, a representative may be assigned conflicting duties of case management for long-term supports and services for a resident. If the resident wishes to file a complaint related to the service plan developed by the case manager, he or she would be in the position of requesting advocacy assistance of the very individual who made the case management decisions which the resident.

The IOM recommended, among other things, the following:

> 4.2 The committee recommends that the Assistant Secretary for Aging adopt a clear policy that prohibits parties who provide, purchase, or regulate services that are within the purview of the ombudsman program from membership on policy boards having governance over the long-term care ombudsman program. . . .
>
> 4.3 The committee recommends that the Assistant Secretary for Aging establish procedures and resources by which to identify potential conflicts of interest in the areas of loyalty, commitment, and control that are pertinent to the long-term care ombudsman and ombudsman representatives and provide guidance on how to address such conflicts of interest.[10]

While AoA has provided States with technical assistance and education on questions related to conflicts of interest, a recent compliance review and recurring questions raised by States and Ombudsman programs suggest that clear regulations would assist in the effective and efficient determination of compliance with the conflict of interest principles in Section 712 of the Act.

Proposed Process

1. Identification of Conflicts

The proposed regulations require a State agency to examine whether it has conflicts related to either the organizational placement of the Ombudsman program or the individuals selected to serve as Ombudsmen and representatives of the Office. If an organizational or individual conflict exists, the State agency must identify the conflict. *See* Section 712(f)(4) of the Act.

AoA proposes the following process to assist States in complying with the Act. Ombudsmen annually report on program activities, characteristics, and funding; complaint resolution; and recommendations for long-term care systems change through NORS.[11] The proposed regulations would utilize the current reporting process to provide States and Ombudsmen with a mechanism for submitting evidence of compliance with the Act's requirements related to conflicts. It is AoA's intent to include in future NORS Instructions a description of how to appropriately report the identification of any conflicts related to the implementation of the Ombudsman program and describe steps the State has taken to remove or remedy the conflict.

For example, a State agency which houses both adult protective services and the Office of the State Long-Term Care Ombudsman should identify such conflict in NORS and indicate its plans to remove or remedy the conflict so that it does not interfere with the duties of the Office as set forth below.

Section 712(f)(4) of the Act requires that State agencies ''establish, and specify in writing, mechanisms to identify . . . conflicts of interest.'' The proposed regulations provide a comprehensive, though not exhaustive, list of potential conflicts to assist States in this identification process. The list consists of conflicts identified in Section 712 of the Act, as well as others specified in the IOM report.

2. Removal or Remedy of Conflicts

The proposed regulations require a State agency to remove or remedy all identified organizational and individual conflicts. AoA realizes that many State agencies provide multiple programs and services, including adult protective services, guardianship services, licensing and regulation, and home and community-based services in board and care and assisted living settings. Some of these responsibilities create organizational conflicts with the functions and duties of Ombudsman programs. As the IOM reported:

> Since the list of duties for [State Units on Aging], area agencies on aging (AAAs), and ombudsmen has grown in length and specificity . . . , an even greater potential for conflict of interest exists between LTC ombudsman programs and the public agencies that typically house them. . . . The [Act] has clearly designated the LTC ombudsman program as the voice representing the LTC resident to government, yet in most cases the program continues to be housed within state and local governments that are increasingly responsible for service provisions to older persons.
>
> The ombudsman program has a mandate to focus on the individual resident. If the ombudsman finds him or herself in a conflict of interest situation . . . the resident, even

[9] IOM Report (1995), at p. 102.

[10] IOM Report (1995) at pp. 124–125.

[11] OMB No. 0985–0005.

more than the program, may suffer. The resident's problem may not be resolved, certain avenues of resolution may be foreclosed, the resident's voice may not be heard by policy makers, and the resident's interests will be inadequately represented or altogether absent from the table at which public policy is made.[12]

AoA proposes use of NORS reporting for States to describe the steps taken to remove or remedy conflicts of interest. For example, a State agency which houses both adult protective services and the Office of the State Long-Term Care Ombudsman might submit assurances that staff are not assigned conflicting responsibilities and submit policies and procedures demonstrating the distinct public roles and public information related to the respective programs; separate, secure, and confidential data collection systems; separate and confidential record-keeping; and clear referral processes between the programs.

AoA realizes that some States will face challenges in removing or remedying some organizational conflicts of interest. We welcome comments on the anticipated impact of this proposed regulation. In addition, AoA realizes that some of the provisions related to employment of the Ombudsman or representatives of the Office at proposed section 1327.19(d)(5) (i.e., one-year waiting period after serving in a licensing or long-term care provider responsibility) serve as a proxy for avoiding conflicts of interest but do not guarantee the outcome of an Ombudsman or representatives of the Office free of potential conflicts. AoA welcomes suggestions on alternative approaches that promote the conflict-free integrity of the Ombudsman and representatives of the Office, but do not arbitrarily disqualify excellent candidates for the position.

AoA plans to engage with States in the provision of technical assistance, training and resources to assist them in crafting effective solutions to remedy conflicts that may impact the ability of the Ombudsman program to fulfill its duties to residents under the Act. AoA also recognizes that many States have already taken significant steps to avoid, identify and remedy conflicts. For example, in terms of organization, some have moved the Office into a distinctly identifiable and more independent office within the organizational structure of the State agency on aging. Some have moved it into another State agency. Others have moved the Office out of State government entirely. Some States have established laws, regulations, or policies that have clearly delineated an independent identity for the Office, providing the Ombudsman with the ability to represent resident interests to policymakers, the public, and others without interference. Others have implemented clear policies and procedures, within the designation process, for identifying and remedying conflicts of interest for current and potential representatives of the Office.

J. Additional Considerations

AoA proposes that this rule become effective one year after the publication of the final rule. This will provide States time to review their relevant laws, regulations, policies, standards, State plan on aging, and practices and to take any steps that might be necessary in order to achieve compliance with the rule.

AoA has proposed regulations on operational issues for which it believes regulatory action is critical to assure successful Ombudsman program operation. AoA acknowledges that guidance in other areas related to Ombudsman program operation may also be beneficial to States but that the statute is sufficiently specific and/or sub-regulatory guidance, training, technical assistance or other types of assistance to the States may be sufficient to meet the need. One such area for which additional guidance may be necessary is the provision of legal counsel to the Ombudsman program.

The Act provides:

LEGAL COUNSEL.—The State agency shall ensure that—

(1)(A) adequate legal counsel is available, and is able, without conflict of interest, to—

(i) provide advice and consultation needed to protect the health, safety, welfare, and rights of residents; and

(ii) assist the Ombudsman and representatives of the Office in the performance of the official duties of the Ombudsman and representatives; and

(B) legal representation is provided to 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 of the Ombudsman or such a representative; and

(2) the Office pursues administrative, legal, and other appropriate remedies on behalf of residents.

Section 712(g) of the Act.

AoA believes that the statute is adequately specific to determine State compliance with regard to adequate legal counsel. In the past, AoA has determined that it has adequate authority under the statute, without a regulation in place, to cite a State agency deficiency in compliance with this provision. AoA Region IV Ombudsman Assessment Report, June 13, 1994. AoA acknowledges that guidance could be helpful in defining competencies of legal counsel that may contribute to its adequacy and the application of the conflict of interest provisions in the proposed regulations to the legal counsel requirement. AoA believes this guidance could be provided to States without the need for regulation. However, AoA welcomes comments on the question of whether regulations are needed by States in order to more fully implement the Act's requirements related to the provision of legal counsel to the Ombudsman program.

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 proposed rule has been designated a ''substantive, non-significant regulatory action'' and not economically significant, under Section 3(f) of Executive Order 12866. The proposed 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 proposed rule will not have a significant economic impact on a substantial number of small entities. AoA does not anticipate that this NPRM 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

[12] IOM (1995) at pp. 108–109.

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 has determined there are limited new information collection requirements in 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).[13] The proposed regulations would add one additional question to NORS: the identification of organizational conflicts of interest and a description of steps taken by the State to remove or remedy any identified conflict(s). Prior to the effective date of a final rule, AoA intends to request an amendment to current NORS instructions and to alter existing reporting software to capture data consistent with this requirement.

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).

We invite comments on: (1) The necessity and utility of the information collection, (2) the accuracy of the estimate of the burden, (3) ways to enhance the quality, utility, and clarity of the information to be collected, and (4) ways to minimize the burden of collection without reducing the quality of the collected information.

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 proposed regulations are intended to clarify this existing requirement without creating any additional burden on States.

[13] OMB No. 0985–0005.

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 million or more in any one year. If a covered agency must prepare a budgetary impact statement, Section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, Section 203 requires a plan for informing and advising any small governments that 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 more than $100 million in any one year. Accordingly, we have not prepared a budgetary impact statement, specifically addressed the regulatory alternatives considered, or prepared a plan for informing and advising any significantly or uniquely impacted small governments.

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 regulation protects the confidentiality of information contained in the records of State child support enforcement agencies. These regulations 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 of the proposed rule and would welcome any comment from the public in this regard.

List of Subjects

45 CFR Part 1321

Administrative practice and procedure, Aged, Grant programs—social programs, Reporting and recordkeeping requirements.

45 CFR Part 1327

Administrative practice and procedure, Aged, Long-term care.

Dated: January 14, 2013.

Kathy Greenlee,

Administrator, Administration for Community Living, Assistant Secretary for Aging, Administration on Aging.

Approved: January 25, 2013.

Kathleen Sebelius,

Secretary.

Editorial Note: This document was received in the Office of the Federal Register on June 12, 2013.

For the reasons stated in the preamble, the Administration on Aging, Administration for Community Living, U.S. Department of Health and Human Services, proposes to amend 45 CFR Part 1321 and add Part 1327 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 or his or her designee shall be responsible for monitoring the files, records and other information maintained by the Office, and shall not disclose the identity of any complainant or long-term care facility resident to individuals outside of the Office, except as otherwise

specifically provided in § 1327.17(b)(2)(C) 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 Functions and duties of the Office of the State Long-Term Care Ombudsman.
1327.19 Conflicts of interest.

Subpart B—[Reserved]

Authority: 42 U.S.C. 3001 *et seq.;* titles II, III and VII of the Older Americans Act, as amended.

Subpart A—State Long-Term Care Ombudsman Program

§ 1327.1 Definitions.

The following definitons 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 section 712 of the Act, means the organizational unit headed by the State Long-Term Care Ombudsman, including the representatives of the Office.

Representatives of the Office of the State Long-Term Care Ombudsman, as used in section 712 of the Act, means the employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1327.17(a), whether supervised by the Ombudsman or his or her designees or by a local entity designated by the Ombudsman pursuant to section 712(a)(5) of the Act.

§ 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 and carry out all of the functions and duties set forth in §§ 1327.13 and 1327.17.

(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 and, where applicable, any other agency carrying out the Ombudsman program, shall ensure that the State Long-Term Care Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office regarding:

(1) Determinations regarding disclosure of information maintained by the program within the limitations set forth in section 712(d) of the Act;

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

(3) 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.

(4) Such determinations and positions shall be those of the Office and do not necessarily represent the determinations or positions of the State agency, another agency carrying out the Ombudsman program, or any other State agency.

§ 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, and, where applicable, the other agency or agencies carrying out the Ombudsman program, as follows.

(a) The Ombudsman shall serve on a fulltime basis, and 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 the residents (including the welfare and rights of the residents with respect to the appointment and activities of guardians and representative payees), of—

(A) Providers, or representatives of providers, of long-term care services;

(B) Public agencies; or

(C) Health and social service agencies;

(2) Provide services to assist the residents in protecting the health, safety, welfare, and rights of the residents;

(3) Inform the residents about means of obtaining services provided by providers or agencies described in paragraph (a)(1)(ii) of this section or services described in paragraph (a)(2) of this section;

(4) Ensure that the residents have regular and timely access to the services provided through the Office and that the residents and complainants receive timely responses from representatives of the Office to complaints;

(5) Represent the interests of the residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(6) Provide administrative and technical assistance to entities designated under paragraph (a)(5) of this section to assist the entities in participating in the program;

(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;

(8)(i) Provide for training representatives of the Office;

(ii) Promote the development of citizen organizations, to participate in the program; and

(iii) Provide technical support for the development of resident and family councils to protect the well-being and rights of residents; and carry out such other activities as the Assistant Secretary determines to be appropriate.

(b) The Ombudsman shall oversee a unified statewide program in which representatives of the Office report to the Ombudsman regarding Ombudsman program functions and duties as set forth in §§ 1327.13(a) and 1327.17(a).

(c) The Ombudsman shall determine designation and de-designation of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act.

(d) Where local Ombudsman entities are designated, the Ombudsman shall review and approve plans or contracts related to Ombudsman program operations, including, where applicable, through area agency on aging plans (in coordination with the State agency).

(e) The Ombudsman shall manage the files, records, and other information of the Office, whether in physical, electronic, or other formats, including information maintained by representatives of the Office and designated local Ombudsman entities pertaining to the cases and activities of the Ombudsman program. Such records are the property of the Office.

(f) 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.

(g) The Ombudsman shall propose to the State agency policies, procedures and standards for administration of the Ombudsman program.

(h) The Ombudsman shall provide leadership to statewide advocacy efforts of the Office on behalf of long-term care facility residents.

(i) The Ombudsman shall determine the use of the fiscal resources appropriated or otherwise designated for the Office, subject to applicable Federal and State laws and policies.

(j) Where applicable, the Ombudsman shall monitor the Ombudsman program performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

(k) The Ombudsman shall 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.

(l) The Ombudsman shall provide Ombudsman program leadership to statewide coordination efforts between the Office and other entities responsible for the protection of vulnerable adults including, but not limited to:

(1) Area agency on aging programs;

(2) Adult protective services programs;

(3) Protection and advocacy systems for individuals with developmental disabilities and mental illnesses established under subtitle C of Title I of the Developmental Disabilities Assistance and Bill of Rights Act of 2000; and the Protection and Advocacy of Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 *et seq.*)

(4) Facility and long-term care provider licensure and certification programs;

(5) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));

(6) Victim assistance programs;

(7) Consumer protection and State and local law enforcement programs; as well as other State and local programs that identify and assist vulnerable adults and services provided by agencies and courts of competent jurisdiction; and

(8) The State legal assistance developer and legal assistance programs, including those provided under section 306(a)(2)(C) of the Act, through adoption of memoranda of understanding and other means.

§ 1327.15 State agency responsibilities related to the Ombudsman program.

(a) The State agency shall:

(1) Ensure, through the development of policies and other means, that the Ombudsman and the representatives of the Office are able to fully perform all of the duties specified in section 712 of the Act;

(2) Establish policies and procedures, in consultation with the Office, to carry out the Ombudsman program in accordance with the Act. Where the designated local Ombudsman entities are grantees, and/or the representatives of the Office are employees, of area agencies on aging, the State agency shall develop the policies in consultation with the area agencies on aging. Such policies and procedures shall include, but not be limited to:

(i) Requirements that the Ombudsman shall monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

(ii) Standards to assure prompt response which prioritize abuse, gross neglect, exploitation and time-sensitive complaints;

(iii) Confidentiality and protection of identifying information of residents and complainants, including procedures related to the disclosure of files, records, and other information maintained by the Ombudsman program;

(A) Such procedures shall provide that the files, records, and information maintained by the Ombudsman program may be disclosed only at the discretion of the Ombudsman or the person designated by the Ombudsman to disclose the files, records, and information.

(B) Such procedures shall prohibit the disclosure of the identity of any complainant or resident with respect to whom the Office maintains files, records, or information unless:

(*1*) The complainant or resident, or the legal representative of the complainant or resident, communicates informed consent to the disclosure and the consent is given in writing or through the use of assistive technology;

(*2*) The complainant or resident communicates informed consent orally or through the use of assistive technology and such consent is documented contemporaneously in a writing made by a representative of the Office in accordance with such procedures; or

(*3*) The disclosure is required by court order.

(C) Such procedures shall provide that if the Ombudsman or his or her representative has reason to believe that the resident is unable to provide informed consent, disclosure of the resident identity shall be prohibited unless another exception applies.

(D) Such procedures shall provide for procedures for appropriate disclosure of at least the following types of files, records, and information which may be maintained by the Office: medical and social 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 statewide uniform reporting system of the Ombudsman program.

(E) Such procedures shall exclude the Ombudsman and representatives of the Office from abuse reporting requirements when such reporting discloses the identity of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1327.17(b)(5)–(8).

(F) Such procedures shall prohibit disclosure of the identity of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1327.17(b)(5)–(8), regardless of the source of the request for information or the source of funding for the services of the Ombudsman program; and

(iv) Mechanisms to identify and remove or remedy conflicts of interest pursuant to section 712(f) of the Act; and

(v) Procedures that require the Office to carry out its requirement 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, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

(A) Such procedures shall 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.

(B) Nothing in this part shall prohibit the State agency or other agency carrying out the Ombudsman program from establishing policies which promote consultation regarding the determinations of the Office or otherwise require that the Ombudsman and representatives of the Office are held accountable to the policies and procedures of their respective employer, subject to applicable federal and state laws and policies. However, such policies may not limit the ability of the Ombudsman and representatives of the Office to fulfill all of the functions and duties set forth in section 712 of the Act and shall be in accordance with the requirement that the Ombudsman and representatives of the Office must remain free of interference in carrying out such functions and duties.

(3) 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.

(4) Provide personnel supervision and management for the Ombudsman and representatives of the Office who are employees of the State agency, but such supervision shall not include review of files, records or other information maintained by the Office which could reveal the identity of any complainant or long-term care facility resident;

(5) Provide monitoring and oversight, including but not limited to fiscal monitoring, where the Ombudsman or representatives of the Office are hired by an agency or entity that is under contract or other arrangement with the State agency, but such monitoring shall not include review of files, records, or other information maintained by the Office which could reveal the identity of any complainant or long-term care facility resident; and

(6) Integrate the goals and objectives of the Office into the State plan; 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 legal assistance programs provided under section 306(a)(2)(C) of the Act, to promote collaborative efforts, diminish duplicative efforts, and, where applicable, require inclusion of goals and objectives related to representatives of the Office into area plans;

(7) 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 responsible for the protection of vulnerable adults as set forth in § 1327.13(l); and

(8) Ensure that the Office has sufficient authority to perform its functions enumerated at § 1327.13 and duties enumerated at § 1327.17, and to make the determinations enumerated at § 1327.11(c). Failure to do so shall constitute interference as prohibited by section 712(j) of the Act.

(b) State policies, procedures or other mechanisms regarding access to records pursuant to section 712(b)(1) of the Act, shall:

(1) Reaffirm that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR Part 160 and Subparts A and E of Part 164, does not preclude release of residents' medical and social records to the Office, and

(2) Provide for representatives of the Office to have access to resident records, including when residents have guardians or other legal representatives.

(c) The State agency shall require the Office to:

(1) Prepare an annual report—

(i) Describing the activities carried out by the Office in the year for which the report is prepared;

(ii) Containing and analyzing the data collected under this paragraph (c);

(iii) Evaluating the problems experienced by, and the complaints made by or on behalf of, residents;

(iv) Containing recommendations for—

(A) Improving quality of the care and life of the residents; and

(B) Protecting the health, safety, welfare, and rights of the residents;

(v)(A) Analyzing the success of the program including success in providing services to residents of board and care facilities and other similar adult care facilities; and

(B) Identifying barriers that prevent the optimal operation of the program; and

(vi) Providing policy, regulatory, and legislative recommendations to solve identified problems, to resolve the complaints, to improve the quality of care and life of residents, to protect the health, safety, welfare, and rights of residents, and to remove the barriers;

(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)(i) Provide such information as the Office determines to be necessary to public and private agencies, legislators, and other persons, regarding—

(A) The problems and concerns of older individuals residing in long-term care facilities; and

(B) Recommendations related to the problems and concerns; and

(ii) Make available to the public, and submit 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, each report prepared under paragraph (c)(1) of this section;

(4)(i) Establish procedures for the training of the representatives of the Office, including unpaid volunteers, 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 representatives of citizen groups, long-term care providers, and the Office, that—

(A) Specify a minimum number of hours of initial training;

(B) Specify the content of the training, including training relating to—

(*1*) Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State;

(*2*) Investigative techniques; and

(*3*) Such other matters as the State determines to be appropriate; and

(C) Specify an annual number of hours of in-service training for all designated representatives;

(5) Prohibit any representative of the Office (other than the Ombudsman) from carrying out any activity described in § 1327.13(a)(1) through (8) unless the representative—

(i) Has received the training required under paragraph (c)(4) of this section; and

(ii) Has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;

(6) Coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illnesses established under—

(i) Subtitle C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000; and

(ii) The Protection and Advocacy for Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 et seq.);

(7) Coordinate, to the greatest extent possible, ombudsman services with legal assistance provided under section 306(a)(2)(C) of the Act, through adoption of memoranda of understanding and other means;

(8) Coordinate services with State and local law enforcement agencies and courts of competent jurisdiction; and

(9) Permit any local Ombudsman entity to carry out the responsibilities described in paragraph (c)(1), (2), (3), (6), or (7) of this section.

§ 1327.17 Functions and duties of the Office of the State Long-Term Care Ombudsman.

(a) An individual designated as a representative of the Office shall, in accordance with the policies and procedures established by the Office and the State agency:

(1) Provide services to protect the health, safety, welfare, and rights of residents;

(2) Ensure that residents in the service area of the entity have regular, timely access to representatives of the program and timely responses to complaints and requests for assistance;

(3) 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;

(4) Represent the interests of residents before government agencies and seek 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) Support the development of 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/or 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, gross 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.

(2) Regardless of the complainant who is the source of a complaint—

(i) The Ombudsman or representative of the Office shall personally discuss the complaint with the resident (or, where the resident is unable to communicate informed consent, wishes, or perspective, the resident's guardian or other legal representative) in order to:

(A) Determine the perception 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 allegations are to be reported to other appropriate agencies,

(D) Advise the resident (or resident's 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).

(ii) Where the resident is unable to communicate his or her perspective on the extent to which the matter has or has not been satisfactorily resolved, and where there is no legal representative, the Ombudsman or representative of the Office shall determine whether the complaint was resolved to the satisfaction of the complainant.

(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 § 1327.15(a)(2)(C).

(i) Where the goals of a resident are for regulatory, protective services or law enforcement action, and the Ombudsman or representative of the Office determines that the resident has communicated informed consent to the Office, the Office must assist the resident 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) In order to comply with the wishes of the resident, the Ombudsman and representatives of the Office shall not report suspected abuse, gross neglect or exploitation of a resident when a resident has not communicated informed consent to such report pursuant except as set forth in paragraphs (b)(5)–(7) of this section, notwithstanding state laws to the contrary.

(4) For purposes of paragraphs (b)(1)–(3) of this section, communication of informed consent may be made verbally, (and documented contemporaneously in writing by the representative of the Office) or in writing, including through the use of assistive technology.

(5) For purposes of paragraphs (b)(1)–(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 or has not been satisfactorily resolved, the Ombudsman or representative of the Office may rely on the informed consent, or perspective on the extent to which the matter has or has not been satisfactorily resolved, of a guardian or other legal representative of the resident so long as the representative of the Office has no reasonable cause to believe that the guardian or other legal representative of the resident is not acting in the best interests of the resident.

(6) For purposes of paragraphs (b)(1)–(3) of this section, the procedures for disclosure may provide that, when the resident is unable to communicate informed consent to the Ombudsman or representative of the Office, has no guardian or other legal representative, and the Ombudsman or representative of the Office has reason to suspect that the resident is a victim of abuse, gross neglect, or exploitation; 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 the representative obtains the approval of the Ombudsman, then the Ombudsman or representative of the Office may refer the matter and disclose the identity of the resident to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.

(7) For purposes of paragraphs (b)(1)–(3) of this section, the procedures for disclosure may provide that, when the resident is unable to communicate informed consent to the Ombudsman or representative of the Office; the resident has a guardian or other legal representative who the Ombudsman or representative of the Office has reasonable cause to believe is a perpetrator of abuse, gross neglect, or exploitation of the resident; 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 the

representative obtains the approval of the Ombudsman, then the Ombudsman or representative of the Office may refer the matter and disclose the identity of the resident to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.

(8) The procedures for disclosure 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 shall seek communication of informed consent from such resident to disclose the identity of the resident to appropriate agencies;

(i) Where such resident is able to communicate informed consent, or has a representative available to provide informed consent, the Ombudsman shall follow the direction of the resident (or representative, if applicable) as set forth paragraphs (b)(1)–(3) of this section; and

(ii) Where the resident is unable to communicate informed consent, and has no 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 (so long as the Ombudsman or representative has reasonable cause to believe that disclosure would be in the best interest of the resident and the representative obtains the approval of the Ombudsman) shall refer the matter and disclose the identity 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.

(iii) In addition, the Ombudsman 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.

(c) *Coordination of Ombudsman activities with other elder rights, disability rights, and elder justice entities*—The Ombudsman and representatives of the Office shall coordinate Ombudsman program services with those of other state and local entities responsible for the protection of vulnerable adults for the purpose of promoting collaborative efforts and diminishing duplicative efforts in the development and carrying out of elder rights, disability rights, and elder justice programs. Such entities shall include, but not be limited to:

(1) Area agency on aging programs;

(2) Adult protective services programs;

(3) Protection and advocacy systems for individuals with developmental disabilities and mental illnesses established under subtitle C of Title I of the Developmental Disabilities Assistance and Bill of Rights Act of 2000; and the Protection and Advocacy of Mentally Ill Individuals Act of 1986 (42 U.S.C. 10801 *et seq.*);

(4) Facility and long-term care provider licensure and certification programs;

(5) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));

(6) Victim assistance programs;

(7) Consumer protection and State and local law enforcement programs; as well as other State and local programs that identify and assist vulnerable adults and services provided by agencies and courts of competent jurisdiction; and

(8) Legal assistance programs provided under section 306(a)(c) of the Act.

(d) *Lobbying activities.* In carrying out the functions and duties of the Office set forth in §§ 1327.13(a) and 1327.17(a) and pursuant to the receipt of grant funds under the Act, the Ombudsman's provision of information, recommendations of changes of laws to legislators, and recommendations of changes of regulations and policies to government agencies, do not constitute lobbying activities as defined by 45 CFR Part 93.

§ 1327.19 Conflicts of interest.

The State agency shall consider both the organizational and individual conflicts that may impact the effectiveness and credibility of the work of the Office. In so doing, it shall identify actual and potential conflicts and, where a conflict has been identified, shall 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 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 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 an 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 ownership, investment or employment interest in long-term care facilities;

(5) Provides long-term care services, 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;

(7) Sets reimbursement rates for long-term care services;

(8) Provides adult protective services;

(9) Is responsible for Medicaid eligibility determinations;

(10) Conducts preadmission screening for long-term care residential 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 shall identify and remove or remedy conflicts of interest between the Office and the State agency or other agency carrying out the Ombudsman program.

(1) 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.

(2) 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 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

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service.

(3) 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;

(ii) Establish a process for periodic review and identification of conflicts in the agency or organization;

(iii) Require that such agency or organization have a process in place to:

(A) Take reasonable steps to avoid conflicts of interest, and

(B) Disclose such conflicts and steps taken to remove or remedy conflicts to the State agency for review and approval; and

(iv) Establish a process for State agency review of and criteria for approval of steps taken to remove or remedy conflicts in such agency or organization; and

(4) 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 may not enter into such contract or other arrangement with an agency or organization which is responsible for licensing or certifying long-term care services in the state or is an association (or affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals.

(5) Where local Ombudsman entities provide Ombudsman services, the Ombudsman shall:

(i) Establish a process for periodic review and identification of conflicts in such entities,

(ii) Require disclosure of conflicts to the Ombudsman by such entities,

(iii) Establish a process for review of and criteria for approval of plans to remove or remedy conflicts in such entities; and

(iv) Prior to designating or renewing designation, take reasonable steps to assure that any conflicts of interest in such entities have been removed or remedied,

(6) Failure of a local Ombudsman entity to disclose a conflict to the Office or inability to adequately remove or remedy a conflict shall constitute grounds for de-designation of a 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 shall consider individual conflicts that may impact the effectiveness and credibility of the work of the Office.

(2) Individual conflicts of interest for an Ombudsman, representatives of the Office, and members of their immediate family include, but are not limited to:

(i) Direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service;

(ii) Ownership or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility or long-term care service;

(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 within the previous year;

(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;

(vi) Accepting money or any other consideration from anyone other than the Office or an entity designated 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 the service area;

(viii) Serving residents of a facility in which an immediate family member resides; and

(ix) Participating in activities which negatively impact on the ability of the Ombudsman or the representatives of the Office to serve residents or are likely to create a perception that the primary interest of the Ombudsman or the representatives of the Office is other than as a resident advocate.

(d) *Removing or remedying individual conflicts.* (1)The State agency shall develop and implement policies and procedures to ensure that no Ombudsman, representatives of the Office, or officer of the Office, are required to perform duties that would constitute a conflict of interest as set forth in § 1327.19(c).

(2) When the State agency is considering the employment of an individual as the Ombudsman or a representative of the Office the State agency shall:

(i) Take reasonable steps to avoid hiring an individual who has a conflict of interest or who has a member of the immediate family with a conflict of interest;

(ii) Establish a process for periodic review and identification of conflicts of the Ombudsman and representatives of the Office, and

(iii) Take steps to remove or remedy conflicts.

(3) Where the candidate for Ombudsman or representative of the Office has a conflict that cannot be adequately removed or remedied, the State agency may not employ such candidate.

(4) Where the Office is operated by another public agency or a nonprofit private organization, and/or where local Ombudsman entities employ representatives of the Office, the State agency shall ensure that the agency organization, or entity has policies in place to prohibit hiring of an Ombudsman or representatives of the Office with a conflict that cannot be adequately removed or remedied.

(5) In no circumstance may the State agency; where applicable, the public agency or non-profit private organization which carries out the program; or a local Ombudsman entity employ an individual as the Ombudsman or representative of the Office who:

(i) Has had direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service within the previous year;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service. 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 year; or

(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.

(6) Where the Ombudsman or representative of the Office acquires a conflict that cannot be adequately removed or remedied, the State agency; where applicable, the public agency or non-profit private organization which carries out the program; or a local Ombudsman entity, may not continue to employ the individual as the Ombudsman or representative of the Office.

(7) The State agency shall ensure that policies and procedures are in place so that, in designating representatives of the Office, the Ombudsman shall:

(i) Take reasonable steps to avoid designation of an individual who has a conflict of interest or who has a member of the immediate family with a conflict of interest;

(ii) Establish a process for periodic review and identification of conflicts of the representatives; and

(iii) Take steps which remove or remedy individual conflicts.

Subpart B—[Reserved]

[FR Doc. 2013–14325 Filed 6–14–13; 11:15 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 20

[GN Docket No. 13–111; RM–11430; ET Docket No. 08–73; WT Docket No. 10–4; PRM09WT; PRM11WT; FCC 13–58]

Promoting Technological Solutions to Combat Contraband Wireless Device Use in Correctional Facilities

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission proposes rules to encourage the development of multiple technological solutions to combat the use of contraband wireless devices in correctional facilities nationwide. Specifically, the Commission proposes rule modifications to facilitate spectrum lease agreements between wireless providers and providers or operators of managed access systems. The Commission further proposes to require wireless providers to terminate service to a contraband wireless device if an authorized correctional facility official notifies the provider of the presence of the contraband wireless device within the correctional facility. The Commission seeks comment on these proposals as well as other technological approaches for addressing the problem of contraband wireless device usage in correctional facilities.

DATES: Interested parties may file comments on or before July 18, 2013, and reply comments on or before August 2, 2013.

ADDRESSES: You may submit comments, identified by GN Docket No. 13–111, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the Commission's Electronic Comment Filing System (ECFS), through the Commission's Web site *http://fjallfoss.fcc.gov/ecfs2/*. Filers should follow the instructions provided on the Web site for submitting comments. For ECFS filers, in completing the transmittal screen, filers should include their full name, U.S. Postal service mailing address, and GN Docket No. 13–111.
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing. Generally if more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Note that while multiple dockets are listed in the caption, commenters are only required to file copies in GN Docket No. 13–111.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.
- In addition, parties must serve one copy of each pleading with the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554, or via email to *fcc@bcpiweb.com.*

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Melissa Conway, *Melissa.Conway@fcc.gov* or (202) 418–2887, of the Wireless Telecommunications Bureau, Mobility Division.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rulemaking (*NPRM*), FCC 13–58, adopted on April 29, 2013, and released on May 1, 2013, in GN Docket No. 13–111; RM–11430; ET Docket No. 08–73; WT Docket No. 10–4; PRM09WT; PRM11WT; and FCC 13–58. The full text of the *NPRM* and copies of any subsequently filed documents in this matter may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW., Room CY–B402, Washington, DC 20554. Customers may contact the Commission's duplication contractor at its Web site, *www.bcpiweb.com,* or by calling (202) 488–5300. Document can also be downloaded in Word or Portable Document Format (PDF) at *http://www.fcc.gov/guides/cramming-unauthorized-misleading-or-deceptive-charges-placed-your-telephone-bill.*

Pursuant to 47 CFR 1.1200 *through 1.1216,* this matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must: (1) List all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made; and (2) summarize all data presented and arguments made during the