

August 10, 2023

Amy Wiatr-Rodriguez, MSW
Director of Regional Operations
Administration for Community Living
U.S. Department of Health and Human Services
Attention: ACL-AA17-P
330 C Street, SW
Washington, DC 20201

Submitted electronically via <https://www.regulations.gov/commenton/ACL-2023-0001-0001>

Re: Older Americans Act: Grants to State and Community Programs on Aging; Grants to Indian Tribes for Support and Nutrition Services; Grants for Supportive and Nutritional Services to Older Hawaiian Natives; and Allotments for Vulnerable Elder Rights Protection Activities (RIN 0985-AA17; ACL-AA17-P, published June 16, 2023)

Dear Director Wiatr-Rodriguez:

On behalf of the National Association of Social Workers (NASW), I am submitting comments on the notice of proposed rulemaking (NPRM) addressing revisions to Older Americans Act (OAA) regulations (ACL-AA17-P; RIN 0985-AA17).

Founded in 1955, NASW is the largest membership organization of professional social workers in the United States, representing more than 110,000 social workers. We work to enhance the professional growth and development of our members, to create and maintain professional standards, and to advance sound social policies.

Support for the OAA is central to NASW's advocacy agenda in the area of aging. Social workers play an essential role in serving older adults and family caregivers in OAA-funded programs. NASW concurs with ACL that changes in population demographics and increased attention to social risk factors merit updates to OAA program regulations. We applaud ACL for its focus on equity and the importance of facilitating improved service delivery to and enhanced benefits for OAA participants, particularly those in greatest economic need and greatest social need consistent with the statute" (p. 39568).¹

¹ Unless noted otherwise, all citations within these comments are from the 2023 OAA NPRM (ACL-AA17-P).

NASW's comments address the following sections of the NPRM:

- Section IV: Grants to State and Community Programs on Aging
- Section V: Grants to Indian Tribes for Support and Nutrition Services
- Section VII: Allotments for Vulnerable Elder Rights Protection Activities

Section IV: Grants to State and Community Programs on Aging

IV.A—PROVISIONS REVISED TO REFLECT STATUTORY CHANGES AND/OR FOR CLARITY

SUBPART A.2—DEFINITIONS (§ 1321.3)

Family caregiver: NASW supports ACL's proposal to enact a more inclusive definition of the term "family caregiver" that incorporates the following populations:

- adults who are caring for older individual
- adults who are caring for an individual of any age with Alzheimer's disease or a related disorder with neurological and organic brain dysfunction
- older relative caregivers (for which NASW also supports the proposed definition)

We appreciate ACL's clarification that the definition of "family caregiver" includes unmarried partners, friends, or neighbors caring for an older adult, consistent with both the National Family Caregiver Support Program (NFCSP) and OAA Title III-E (p. 39573). At the same time, NASW encourages ACL to replace the phrase "family member, or another individual" within the proposed definition in § 1321.3 with "family of choice and legally recognized family." This reframed language would recognize not only that neighbors, friends, and unmarried partners may be integral members of an older adult's support system, but also that an older adult may regard these individuals as family—thereby conveying a greater sense of equity, consistent with the goals of the NPRM.

NASW also encourages ACL to consider alternatives to the term "informal" within the proposed definition. Many family caregivers have expressed that the term minimizes their invaluable—and, often, central—role in supporting older adults. Moreover, the term may be inaccurate for legally recognized family and family of choice who receive financial compensation for their services through programs such as self-direction. Yet, NASW recognizes that some way of distinguishing what have commonly been called "informal" and "formal" supports, services, and providers remains important for the purposes of OAA-funded programs that support family caregivers. We offer for ACL's consideration language from the *NASW Standards for Social Work Practice with Older Adults* (2010):

For the most part, family caregivers support their aging family members without financial compensation, although some family members may receive remuneration for their services through consumer-directed programs. However, for purposes of these

standards, family does not include individuals whose primary relationship with the older adult is based on a financial or professional agreement.²

Although the preceding definition is specific to family caregivers of older adults (in keeping with the focus of the NASW standards), we believe it would be equally relevant to adults of other ages.

Greatest economic need: NASW concurs with ACL that income and poverty status should remain within the definition of “economic need” under the OAA. This tenet notwithstanding, we support ACL’s proposal to permit state agencies (and, by extension, for state agencies to permit area agencies) to consider other local conditions and individual situations that may contribute to economic need. Examples might include an older adult’s recent migration (such as from a rural area with a relatively low cost of living to an urban area with a higher cost of living), a disaster affecting a particular part of the state.

Greatest social need: NASW strongly supports ACL’s delineation of characteristics that reflect populations with greatest social needs. Given the persistence of systemic oppression and increase in discriminatory policies across various levels of government, we affirm as particularly essential the inclusion of characteristics that may not be considered reflective of high-priority social needs: “language barriers,” “minority religious affiliation,” “sexual orientation, gender identity, or sex characteristics,” “HIV status,” and “rural location or other cultural, social, or geographical isolation, including isolation caused by racial or ethnic status” (p. 39610). We also affirm the ongoing importance of (a) interpersonal safety concerns, given the prevalence of elder abuse, neglect, and exploitation and intimate partner violence toward older adults, and (b) housing instability, food insecurity, lack of transportation, or utility assistance needs.

Similarly, NASW supports the inclusion of “chronic conditions” and “physical and mental disabilities” as factors of greatest social need. We recommend that ACL add “sensory loss, including deafness, being hard of hearing, blindness, and having low vision” to both categories. Although hearing and vision loss are sometimes omitted from consideration of physical disabilities and chronic conditions, they have a profound impact on many older adults:

- More than 7 percent of older people in the United States report living with blindness or low vision, and at least half of adults 65 years or older are at high risk of eye diseases that can lead to vision loss.³
- Older African Americans and Hispanic–Latino older adults report greater prevalence of vision loss than do other racial and ethnic groups in the United States; so, too, do older

² National Association of Social Workers. (2010). *NASW standards for social work practice with family caregivers of older adults*. <https://bit.ly/NASW-caregiving> [Cited material is from p. 10. Development of these standards was part of *Professional Partners Supporting Family Caregivers*, an initiative done in partnership with the AARP Foundation, AoA, the Family Caregiver Alliance, and NASW, and made possible by funding from the John A. Hartford Foundation.]

³ VisionServe Alliance. (2020). *Vision impairment and vision rehabilitation in the lives of older people in the United States*. <https://visionservealliance.org/wp-content/uploads/2023/05/Vision-Rehabilitation-and-Aging-Brief.docx>

women, people 80 years or older, and older adults living in rural areas, regardless of race and ethnicity, than do other older adults. The highest prevalence of vision loss in older adults is highest in Appalachia, the South, and the border counties in the Southwest regions of the United States.³

- Older people who are blind or have low vision are more likely to have less education and to be economically insecure than are people without such vision loss. Furthermore, they are less likely to participate in the paid workforce.³
- Older adults with blindness or low vision are more likely to report chronic conditions, including depression and hearing loss, than older adults without such vision loss.³
- One-third of U.S. adults between the ages of 65 and 74 has hearing loss, and nearly half of adults 75 years of older have difficulty hearing.⁴
- Hispanic–Latino adults 65 years and older are more likely to have a lot of difficulty hearing or to be unable to hear, even with a hearing aid, than are older people who are not Hispanic–Latino.⁵
- Hearing loss can contribute to depression, loneliness, and social isolation in older adults. Older adults with hearing loss are significantly more likely to develop dementia than are their age peers without hearing loss.⁶
- Both hearing loss⁷ and vision loss³ are linked to an increased risk for falls.

If adding “sensory loss, including deafness, being hard of hearing, blindness, and having low vision” to both the “chronic conditions” and “greatest social needs” categories is not feasible at this time, NASW urges ACL to issue guidance specific to addressing these social needs.

Accessibility: NASW recommends that ACL add a definition of this term to the final rule.

SUBPART B.3—STATE AGENCY POLICY AND PROCEDURES (§ 1321.9)

§ 1321.9(b): NASW supports ACL’s proposal that the state agency must have policies and procedures to ensure its data collection and reporting align with ACL’s requirements. We encourage ACL to encourage data stratification to the greatest possible extent and to incorporate the following elements within such stratification:

- intersex status
- gender identity (including nonbinary and transgender identities)
- sexual orientation (including, for Indigenous respondents only, Two-Spirit)

⁴ National Institute on Deafness and Other Communication Disorders. (2023). *Age-related hearing loss (presbycusis)*. National Institutes of Health. <https://www.nidcd.nih.gov/health/age-related-hearing-loss>

⁵ Madans, J. H., Weeks, J. D., & Elgaddal, N. (2021). *Hearing difficulties among adults: United States, 2019* (NCHS Data Brief No. 414). National Center for Health Statistics, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services. <https://www.cdc.gov/nchs/products/databriefs/db414.htm>

⁶ Johns Hopkins Medicine. (2011, February 14). *Hearing loss and dementia linked in study* [News release]. https://www.hopkinsmedicine.org/news/media/releases/hearing_loss_and_dementia_linked_in_study

⁷ National Institute on Aging. (2023). *Hearing loss: A common problem for older adults*. National Institutes of Health. <https://www.nia.nih.gov/health/hearing-loss-common-problem-older-adults>

Such reporting would facilitate the state agency's identification of disparities and advancement of equity. Given the sensitivity of the preceding data elements and OAA participants' potential reluctance to disclose such information for fear of discrimination, volunteering of such demographic data must be optional. Moreover, NASW urges ACL to incorporate in the final rule guidance to states to use culturally competent, evidence-based approaches to obtaining such information, as outlined in the 2022 report *Measuring Sex, Gender Identity, and Sexual Orientation*.⁸

§ 1321.9(c)(1)(iv): In regard to direct service provision, NASW believes that the list of those with greatest economic need and greatest social need should include, at a minimum, the groups designated by ACL in proposed § 1321.3.

§ 1321.9(c)(1)(v): The NPRM proposes that state agencies use specific actions to target services toward those with greatest social need and greatest economic need. NASW encourages ACL to require that those actions be delineated separately for and individualized to each population, demonstrating that the state agency has identified the most promising, specific strategies for reaching any given population. Involvement of area agencies in identifying these actions is critical. (These recommendations also apply to SUBPART B.11, CONTENT OF STATE PLAN [§ 1321.27(d)(1)].)

§ 1321.9(c)(2)(x–xii): NASW strongly supports the following ACL proposals:

- distinguishing cost sharing for, and voluntary contributions from, program participants
- specifying, in accordance with the OAA, that voluntary contributions are allowed and may be solicited for all services, as long as the method of solicitation is noncoercive
- listing the services for which the OAA prohibits cost sharing, including information and assistance, outreach, benefits counseling, and case management services; long-term care ombudsman, elder abuse prevention, legal assistance, and other consumer protection services; congregate or home-delivered meals; and any services delivered through Tribal organizations
- listing applicable requirements, including how suggested contribution levels for cost sharing are established, which individuals are encouraged to contribute, and the manner of solicitation of contributions
- confirming that both voluntary contribution and cost sharing solicitation amounts are to be based on the actual cost of services
- clarifying that services may not be denied, even when a state has a cost sharing policy and/or a voluntary contribution policy, if someone cannot or chooses not to contribute or to pay a suggested cost-sharing amount
- clarifying that state agencies, AAAs, and service providers are prohibited from using means testing to determine eligibility for or to deny services to older people and family caregivers

⁸ National Academies of Sciences, Engineering, and Medicine. (2022). *Measuring sex, gender identity, and sexual orientation*. <https://doi.org/10.17226/26424>

NASW does not interpret this list as either encouraging or discouraging cost sharing, nor are we taking a position on the advisability of cost sharing.

§ 1321.9(c)(2)(xiii): NASW supports ACL’s proposal to specify the following information regarding private-pay programs:

- AAAs and service providers may offer private-pay programs for which individual consumers agree to pay to receive services.
- Private-pay programs may offer similar or the same services as those funded under Title III but may not be supported with OAA funds.
- Private-pay programs do not compromise core OAA responsibilities, such as ensuring that individuals who receive information about private-pay programs and who are eligible for services provided with Title III funds also are made aware of Title III–funded services.

§ 1321.9(c)(2)(xiv): NASW strongly supports ACL’s proposal that AAAs or service providers entities establishing contracts and commercial relationships with must develop policies and procedures to promote fairness, inclusion, and adherence to OAA requirements. We encourage ACL to specify that such policies and procedures must include nondiscrimination toward all groups identified in this NPRM as constituting populations of greatest social need and all federally protected classes. Optimally, entities with which contracts and commercial relationships are developed would participate in cultural competence training that covers all aspects of greatest social need and greatest economic need addressed within this NPRM.

§ 1321.9(c)(2)(xvii): NASW supports ACL’s proposal to specify that the state agency must have policies and procedures to monitor compliance regarding the assurances to which the State and area agencies attest. Implementation of this proposal would promote accountability, including in regard to equity.

SUBPART B.4—ADVOCACY RESPONSIBILITIES (§ 1321.11)

NASW supports the proposed revisions to include activities related to the NFCSP. Likewise, NASW supports NFCSP-related additions to the following provisions within Section IV.A:

- SUBPART C.3, ADVOCACY RESPONSIBILITIES OF THE AREA AGENCY (§ 1321.61)
- SUBPART C.4, AREA AGENCY ADVISORY COUNCIL (§ 1321.63)
- SUBPART D.1, PURPOSE OF SERVICES ALLOTMENTS UNDER TITLE III (§ 1321.71)
- SUBPART D.3—CONFIDENTIALITY AND DISCLOSURE OF INFORMATION (§ 1321.75)

SUBPART B.11—CONTENT OF STATE PLAN (§ 1321.27)

NASW supports ACL’s proposal in that the state plan must define “greatest economic need” and greatest social need,” including for *every* population with the needs outlined in proposed § 1321.3. We affirm the addition to this list of “Native American persons,” on whom ongoing colonization has a severe impact. We encourage ACL to expand this language in the following manner, consistent with the scope of the OAA: “Native American persons, including Alaska Natives, American Indians, and Native Hawaiians.”

SUBPART D.3—CONFIDENTIALITY AND DISCLOSURE OF INFORMATION (§ 1321.75)

NASW strongly supports ACL’s proposal to clarify the obligation of state agencies, AAAs, and other contracting, granting, or auditing agencies to protect the confidentiality of OAA participants and to specify that the policies and procedures of service providers comply with all applicable federal laws, codes, rules, and regulations.

SUBPART D.4—RESPONSIBILITIES OF SERVICE PROVIDERS UNDER STATE AND AREA PLANS (§ 1321.79)

NASW strongly supports ACL’s proposal to require each state agency and/or AAA to assure that providers of services shall specify how the provider intends to satisfy the service needs of those identified as in greatest economic need or greatest social need,

with a focus on low-income minority individuals in the area served, including attempting to provide services to low-income minority individuals at least in proportion to the number of low-income minority older persons and family caregivers in the population serviced by the provider. (p. 39626)

We encourage ACL to require that each provider of services addresses each greatest social need and greatest economic need group on an individual basis.

SUBPART D.6—LEGAL ASSISTANCE (§ 1321.93)

NASW strongly supports ACL’s proposal to focus legal assistance on two topics: (1) the rights of individuals residing in congregate settings and rights to alternatives to institutionalization and (2) guardianship and alternatives to guardianship. Likewise, we support the proposed requirements for legal assistance providers to (1) collaborate and support the long-term care ombudsman program and (2) use OAA funds to represent older adults at risk of being denied their decision-making rights. Moreover, we support the following ACL proposals regarding legal assistance and financial matters:

- prohibiting means testing and cost sharing
- reserving requests for voluntary contributions until representation has concluded
- prohibiting representation of an older adult in a fee-generating case
- clarifying activities that cannot be done using legal assistance funds

The NPRM acknowledges that nonattorney personnel (which “may include law students, paralegals, nurses, social workers, case managers, and peer counselors”) working under the supervision of legal assistance attorneys must adhere to the applicable Rules of Professional Conduct for attorneys, even if such nonattorney staff have their own rules of professional conduct:

Non-disclosure of confidential client information is a critical component of adhering to Rules of Professional Conduct for both attorney and non-attorney staff, even if, for example, the non-lawyer staff may otherwise be subject to mandatory reporting of suspected elder maltreatment. (p. 39588)

NASW respectfully requests that ACL issue subregulatory guidance to help social workers and other nonattorney staff navigate these conflicting responsibilities. We elaborate on a similar conflict in our comments addressing the state long-term care ombudsman program (Section VII.A, Subpart A.2).

IV.B—NEW PROVISIONS ADDED TO CLARIFY RESPONSIBILITIES AND REQUIREMENTS UNDER GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

SUBPART D.1—PURPOSE OF SERVICES—PERSON- AND FAMILY-CENTERED, TRAUMA-INFORMED (§ 1321.77)
NASW strongly supports ACL’s proposal to clarify that services under the OAA should be provided in a person-centered, trauma-informed manner.

SUBPART D.3—SUPPORTIVE SERVICES (§ 1321.85)
NASW supports ACL’s proposal to clarify that Title III–funded supportive services include in-home supportive services, access services, and legal services. Additionally, we support the proposal to clarify the allowable use of funds.

SUBPART D.4—NUTRITION SERVICES (§ 1321.87)
NASW supports ACL’s proposals to clarify the following topics:

- Title III C-1 congregate meal funds may be used for shelf-stable, pick-up, carry-out, drive-through, or similar meals (“grab-and-go meals”).
- Home-delivered meals may be provided by home delivery, pick-up, carry-out, or drive-through.
- Eligibility for home-delivered meals is not limited to individuals who may be identified as “homebound; eligibility criteria may consider multiple factors.
- Nutrition service providers may encourage OAA participants who use home-delivered or grab-and-go meals to attend congregate meals and other activities, as feasible, based on a person-centered approach and local service availability.

SUBPART D.6—FAMILY CAREGIVER SUPPORT SERVICES (§ 1321.91)
NASW supports ACL’s proposal to clarify the family caregiver support services available under the OAA and the eligibility requirements for respite care and supplemental services.

SUBPART E.1—COORDINATION WITH STATE, TRIBAL, AND LOCAL EMERGENCY MANAGEMENT (§ 1321.97)
NASW supports ACL’s proposal to require state agencies and AAAs to establish emergency plans, to specify the requirements those plans must meet, and to provide guidance regarding development of emergency plans.

SUBPART E.2—FLEXIBILITIES UNDER A MAJOR DISASTER DECLARATION (§ 1321.101)
NASW supports ACL’s proposal to allow state agencies up to 90 days after the expiration of a major disaster declaration to obligate Title III funds for disaster relief services for affected older adults and family caregivers.

SUBPART E.4—TITLE III AND TITLE VI COORDINATION FOR EMERGENCY PREPAREDNESS (§ 1321.103)

NASW supports ACL’s proposal to clarify that Title III and Title VI coordination should extend to emergency preparedness and response.

SECTION V: Grants to Indian Tribes for Support and Nutrition Services

V.A—PROVISIONS REVISED TO REFLECT STATUTORY CHANGES AND/OR FOR CLARITY

SUBPART D.3—CONFIDENTIALITY AND DISCLOSURE OF INFORMATION (§ 1322.15)

Please refer to NASW’s comments regarding Section IV.A, Subpart D.3 (§ 1321.75).

SUBPART D.4—SUPPORTIVE SERVICES (§ 1322.25)

Please refer to NASW’s comments regarding Section IV.A, Subpart D.4 (§ 1321.85).

SUBPART D.5—NUTRITION SERVICES (§ 1322.27)

Please refer to NASW’s comments regarding Section IV.A, Subpart D.5 (§ 1321.87).

V.B—NEW PROVISIONS ADDED TO CLARIFY RESPONSIBILITIES AND REQUIREMENTS UNDER GRANTS TO INDIAN TRIBES AND NATIVE HAWAIIAN GRANTEES FOR SUPPORTIVE, NUTRITION, AND CAREGIVER SERVICES

SUBPART C.2—PURPOSE OF SERVICES—PERSON- AND FAMILY-CENTERED, TRAUMA-INFORMED (§ 1322.17)

Please refer to NASW’s comments regarding Section IV.B, Subpart D.1 (§ 1321.77).

SUBPART C.3—RESPONSIBILITIES OF SERVICE PROVIDERS (§ 1322.19)

NASW supports ACL’s proposal to specify the responsibilities of service providers. We suggest that ACL add two responsibilities to the list:

- cultural competence training that covers all aspects of greatest social need and greatest economic need addressed within this NPRM
- inclusion of nondiscrimination language

SUBPART C.4—CLIENT ELIGIBILITY FOR PARTICIPATION (§ 1322.21)

NASW supports ACL’s proposal to clarify that a Tribal organization or Hawaiian Native grantee may adopt eligibility requirements beyond those included in the OAA, provided those additional requirements do not conflict with the OAA, implementing regulation, or guidance issued by the Assistant Secretary for Aging.

SUBPART C.5—CLIENT AND SERVICE PRIORITY (§ 1322.23)

NASW supports ACL’s proposal to clarify that Tribal organizations and Hawaiian Native grantees have the flexibility to prioritize services and set their own policies based on their assessment of local needs and resources. We encourage ACL to mention Two-Spirit Elders as a potential group that may have high social and economic needs. Moreover, we support the addition of priorities

for serving family caregivers. (The latter comment also applies to Subpart C.6—Family Caregiver Support Services [§ 1322.29].)

SUBPART D.1—COORDINATION WITH TRIBAL, STATE, AND LOCAL EMERGENCY MANAGEMENT (§ 1322.33)
Please refer to NASW’s comments regarding Section IV.B, Subpart E.1—Coordination With State, Tribal, and Local Emergency Management (§ 1321.97).

SUBPART D.2—FLEXIBILITIES UNDER A MAJOR DISASTER DECLARATION (§ 1322.35)
Please refer to NASW’s comments regarding Section IV.B, Subpart E.2—Flexibilities Under a Major Disaster Declaration (§ 1321.101).

SUBPART D.3—TITLE VI AND TITLE III COORDINATION FOR EMERGENCY PREPAREDNESS (§ 1322.37)
Please refer to NASW’s comments regarding Section IV.B, Subpart E.3—Title III and Title VI Coordination for Emergency Preparedness (§ 1321.103).

SECTION VII: Allotments for Vulnerable Elder Rights Protection Activities

VII.A—PROVISIONS REVISED TO REFLECT STATUTORY CHANGES AND/OR FOR CLARITY

SUBPART A.2—ESTABLISHMENT OF THE OFFICE OF THE STATE LONG-TERM CARE OMBUDSMAN (§ 1324.11)

§ 1324.11(e)(2): NASW strongly supports ACL’s proposal to add language to require policies and procedures to provide direction for the ombudsman and representatives of the office regarding how to address a situation in which a resident is unable to communicate consent to the review of their records and has no legal representative who can communicate consent on their behalf.

§ 1324.11(e)(3)(v): Some state long-term care ombudsmen and many representatives of the office of the ombudsman are social workers. Most states and jurisdictions require social workers (among other licensed service providers) to report incidents of suspected abuse or neglect to APS. Likewise, the NASW *Code of Ethics* states:

Social workers should protect the confidentiality of all information obtained in the course of professional service, except for compelling professional reasons. The general expectation that social workers will keep information confidential does not apply when disclosure is necessary to prevent serious, foreseeable, and imminent harm to a client or others.⁹

In contrast, the OAA requires LTC ombudsmen to maintain client confidentiality unless the client requests disclosure of an incident. NASW respects the rationale for this unique requirement and has discussed this issue not only with ACL staff, but also with associations representing ombudsman programs and representatives. We appreciate ACL’s

⁹ National Association of Social Workers. (2021). *Code of ethics of the National Association of Social Workers*. <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English/Social-Workers-Ethical-Responsibilities-to-Clients> [Cited text is from 1.07, Privacy and Confidentiality, section c.]

acknowledgment of this conflict between state and federal requirements in its frequently asked questions regarding the long-term care ombudsman program, which included the following guidance:

The OAA and implementing regulations include strict disclosure provisions. The regulations specifically prohibit the Ombudsman or representatives of the Office from reporting suspected abuse, neglect or exploitation of a resident without informed consent, *notwithstanding State laws to the contrary*. 45 CFR 1324.19(b)(3)(iii). The Preamble to the Final Rule addresses the Congressional intent “for the Ombudsman program to be a safe place for the concerns of residents to be brought, knowing that their information will not be disclosed without their consent ...” 80 Fed. Reg. 7732.

In addition, the OAA provides that the Ombudsman must consider individual conflicts of interest that may impact the effectiveness of the office. 45 CFR 1324.21. If a professional licensing organization has mandatory reporting requirements that do not comport with the disclosure provisions under the OAA, this may create a conflict of interest.

ACL understands that State agencies and Ombudsmen are working to implement the LTC Ombudsman program in accordance with the Act and the Rule and to address any potential conflicts of interest. ACL encourages State agencies and Ombudsmen who identify licensing organization requirements that are in conflict to determine whether the professional licensing entity is able to provide a waiver or other type of remedy.

If individual concerns remain after such State agency or Ombudsman implementation activities, ACL encourages individuals who hold professional licenses and also serve as Ombudsmen or representatives of the Office to notify their respective licensing organization of this requirement in order to determine whether the professional licensing entity is able to provide a waiver or other type of remedy in order to avoid these conflicts.¹⁰

NASW addressed these conflicting responsibilities for social workers serving in the ombudsman program, ACL’s guidance, and additional considerations in a recent report on social work roles in elder abuse prevention and response.¹¹ Consequently, we appreciate the NPRM’s inclusion of this clarification:

States may have laws that require mandatory reporting of abuse, neglect, and exploitation. We have received questions as to the applicability of these requirements to the Ombudsman program, despite the prohibitions in section 712(b) of the Act against disclosure of resident records and identifying information without resident consent. To provide clarity, we propose to add language to § 1324.11(e)(3)(v) to require State agencies to have policies and procedures in place to prohibit mandatory reporting of abuse, neglect, and exploitation by the Ombudsman program. Subsequent

¹⁰ Administration for Community Living. (2022). *Long-term care ombudsman FAQ*. U.S. Department of Health and Human Services. Retrieved July 14, 2023, from <https://acl.gov/programs/long-term-care-ombudsman/long-term-care-ombudsman-faq> [Cited text is from question 6, para. 3–4.]

¹¹ Herman, C. (with Anetzberger, G. J., Brandl, B., & Breckman, R). (2022). *Social work roles in elder abuse prevention and response: A report by the National Association of Social Workers*. <https://bit.ly/NASW-SW-ElderJustice-2022> [The ombudsman content is on pp. 5–6 of the report.]

subsections within § 1324.11(e)(3) have been re-numbered to reflect the new language.
(p. 39598)

NASW thanks ACL for its continued attention to this important issue. We urge ACL to issue additional subregulatory guidance to help ombudsman programs and individuals serving as ombudsman to navigate the issue. For example, information about *how* organizations and individuals have obtained waivers or other remedies for mandatory reporting requirements and the specific nature of those waivers or other remedies would be extremely helpful.

Similar subregulatory guidance from ACL would be helpful in regard to the legal assistance provision within the NPRM (Section IV.A, Subpart D.6 [§ 1321.93]).

§ 1324.11(e)(8): NASW strongly supports ACL's proposal to clarify that state government agencies may not involve themselves in the functions of the ombudsman office (such as by requiring prior approval of positions of the office with respect to governmental laws, regulations, or policies). Such interference limits the office's ability to fulfill its mission of advocating for residents.

SUBPART A.3—FUNCTIONS AND RESPONSIBILITIES OF THE STATE LONG-TERM CARE OMBUDSMAN (§ 1324.13)
NASW supports ACL's proposal to clarify that the state long-term care ombudsman has the authority to lead and manage the office (that is, to carry out statutory functions).

§ 1324.13(c)(2): NASW supports the proposal to require that procedures for training for certification and continuing education of the representatives of the office of long-term care ombudsman programs be consistent with (as well as based on) the standards established by ACL's director of the Office of Long-Term Care Ombudsman Programs, as well as with any standards set forth by the Assistant Secretary for Aging. Furthermore, we encourage ACL to ensure that these standards include cultural competence training that addresses all populations identified within this NPRM as having greatest social need or greatest economic need.

§ 1324.13(c)(2)(iii) and § 1324.13(d): NASW supports the proposal to add a requirement that all staff and volunteers of the ombudsman program who will have access to resident records (as well as to other files, records, and information subject to disclosure requirements) be trained and certified as designated representatives of the office.

SUBPART A.6—CONFLICTS OF INTEREST (§ 1324.21)

NASW strongly agrees with ACL's proposals asserting that an organizational conflict of interest exists when an ombudsman program is placed within any of the following settings:

- an organization that licenses, surveys, or certifies long-term care services [§ 1324.21(a)(1)]
- an organization that provides long-term care services and supports under a Medicaid waiver or a Medicaid State plan amendment [§ 1324.21(a)(6)]

- an organization that provides long-term care coordination or case management services in settings that include long-term care facilities; a conflict also exists if a representative of the office is required to perform conflicting activities in such a setting [§ 1324.21(a)(7)]
- an organization that sets reimbursement rates for long-term care services [§ 1324.21(a)(9)]
- an organization that is responsible for eligibility determinations for the Medicaid program carried out under Title XIX of the Social Security Act [§ 1324.21(a)(11)]

Similarly, we strongly support ACL’s proposals noting that an individual conflict of interest when any of the following actions occurs:

- direct involvement in the licensing, or certification of a provider of long-term care services, in addition to long-term care facilities [§ 1324.21(c)(2)(i)]
- ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care service, in addition to a long-term care facility [§ 1324.21(c)(2)(ii)]
- employment of an individual by, or participation in the management of, an organization related to a long-term care facility [§ 1324.21(c)(2)(iii)]
- management responsibility for, or operating under the supervision of an individual with management responsibility for, adult protective services creates an individual conflict of interest, [§ 1324.21(c)(2)(ix)]
- serving as a guardian or in another fiduciary capacity for residents of long-term care facilities in an official capacity (as opposed to serving as a guardian or fiduciary for a family member, in a personal capacity) creates an individual conflict of interest [§ 1324.21(c)(2)(x)].

Furthermore, NASW supports ACL’s proposal to replace the phrase “conducts preadmission screening for long-term care facility placements” in current § 1324.21(a)(10) to “conducts preadmission screening for long-term care facility admissions.” We concur wholeheartedly that the proposed language reflects person-centered language.

Effective Date

NASW observes that the NPRM does not propose an effective date. We urge ACL to incorporate in the final rule a date that enables state agencies, area agencies, and other service providers to reach compliance. Such timing should account for state legislative, regulatory, and budgetary processes, among other policy and procedural considerations state agencies and area agencies will need to address.

In conclusion, NASW affirms ACL for its work to revise the OAA regulations. We believe that implementation of the NPRM provisions we have addressed in these comments would advance the policy goals of the OAA, including equity in service delivery, accountability for funds expended, and clarity of administration for ACL and its grantees. We look forward to working with you and our interdisciplinary colleagues in the advocacy community to facilitate improved

service delivery and enhanced benefits for OAA participants—particularly those in greatest economic need and greatest social need, consistent with the statute.

Thank you for your consideration of NASW's comments. Please contact me at MColeman.nasw@socialworkers.org if you need additional information.

Sincerely,

Mirean Coleman, LICSW, CT

Mirean Coleman, LICSW, CT
Director of Clinical Practice