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DEPARTMENT OF HEALTH AND  
HUMAN SERVICES

Administration on Aging  
45 CFR Parts 1321 and 1327  
RIN 0985-ZA01  
Grants for State and Community Programs on Aging  
Grants for Vulnerable Elder Rights Protection Activities

**AGENCY:** Department of Health and Human Services (HHS), Administration on Aging (AoA).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This Notice of Proposed Rulemaking (NPRM) requests comments from the public on proposed changes to 45 CFR Part 1321, deleting certain references to the Long Term Care Ombudsman Program and amending one provision regarding this program, and to a proposed new rule, 45 CFR Part 1327, to clarify and implement the new Title VII for Vulnerable Elder Rights Protection Activities enacted in the 1992 Amendments to the Older Americans Act (Act). The references to the Ombudsman Program being deleted have either been superseded in the law or are superseded by provisions in the proposed new rule. One provision pertaining to ombudsman confidentiality requirements is retained in 45 CFR Part 1321 and amended based on changes made in the 1992 amendments to the Act.

**Dates:** In order to be considered, comments on this proposed rule must be received on or before \_\_\_\_\_, 199\_\_\_. [60 days from publication in the Federal Register].

**ADDRESSES:** Please address comments to: John F. McCarthy, Deputy Assistant Secretary on Aging, Administration on Aging, 330 Independence Ave., SW., Washington, DC 20201.

Beginning 14 days after close of the comment period, comments will be available for public inspection in room 4745, 330 Independence Ave., SW., Washington, DC 20201, Monday through Friday between the hours of 9 a.m. and 4 p.m.

**FOR FURTHER INFORMATION CONTACT:**

Sue Wheaton, Telephone (202)619-7585

**SUPPLEMENTARY INFORMATION**

**I. Program Background and Purpose**

Title VII of the Older Americans Act (Act), enacted in the 1992 Amendments to the Older Americans Act, brings together into one title advocacy programs which were previously in Title III. The purpose of Title VII is to foster activities to assist vulnerable older people to exercise their rights; to secure the benefits to which they are entitled; and to be protected from abuse, neglect and exploitation. Subtitle A encompasses programs for which the State Agency on aging has leadership responsibility; Subtitle B provides a means to assist Native American organizations to prioritize the needs of their service population relating to elder rights and make grants (when this Subtitle is funded) to carry out vulnerable elder rights protection activities.

Title VII emphasizes the leadership role of the State agency in planning, implementing and coordinating statewide programs and activities designed to help older people understand their rights, know their benefits and make informed choices. Title VII provides a framework upon which States, without abrogating the particular mission and legislative and regulatory requirements of each Title VII program, can build a coordinated, integrated statewide system of advocacy and assistance for vulnerable older people.

The State leadership role for Title VII is underscored by the fact that States may use funds available under Title VII to directly carry out vulnerable elder rights protection activities. The Congressional Committees of Jurisdiction for the Act made clear that Title III requirements governing the allocation of funds within States are not applicable to funds made available under any part of Title VII and that, unlike Title III, area agencies are not the only entities eligible to receive grants from States under any part of Title VII. (138 CONG.REC., S125, 13503 (daily ed. September 15, 1992) (Joint Explanatory Statement of the Committees of Jurisdiction, Older Americans Act Amendments of 1992))

### **The Four Programs Under Title VII**

Title VII authorizes funding for four advocacy programs previously included in Title III. Establishing each program in a separate chapter of Title VII underscores the distinct mission and strengthens the definition and function of each program; and combining them under a single title fosters increased collaboration among advocates within a State — and between States — to assist individual older people and their families and representatives.

**The Long-Term Care Ombudsman Program (Chapter 2, Sections 711, 712 and 713 of the Act)** requires States to establish and operate an Office of the State Long-Term Care Ombudsman, headed by the State Long-Term Care Ombudsman. The Ombudsman Program identifies, investigates and resolves complaints made by or on behalf of residents of nursing, board and care and similar adult care homes; addresses major issues which affect residents; works to educate residents, nursing home personnel and the public about residents rights and other matters affecting residents; and performs other functions specified in the Act to protect the health, safety, welfare and rights of residents.

Building upon established law, the 1992 Amendments to the Act clarified and strengthened State ombudsman programs in the following areas: the functions of the State Ombudsman; criteria for the designation and duties of local ombudsman entities designated by the State Ombudsman; procedures for ombudsman access to residents and records, disclosure of ombudsman records, and ensuring against conflicts of interest; legal assistance for ombudsmen; reporting on ombudsman activities and providing recommendations; training of ombudsman representatives; and non-interference with the performance of ombudsman responsibilities.

The 1992 Amendments emphasized the role of local ombudsman programs and the State Ombudsman's leadership of the statewide program; established detailed requirements for identifying and resolving real and potential conflicts of interest; and reinforced the role of the Ombudsman as an advocate for change to improve the quality of care and quality of life for residents of long-term care facilities.

The 1992 Amendments also added important Title II provisions to the Ombudsman Program, including requirements for: the establishment in AoA of an Office of Long-Term Care Ombudsman Programs headed by an Associate Commissioner for Ombudsman Programs, with

specific criteria for appointment and detailed definition of duties; funding of a National Ombudsman Resource Center at no less than the level at which it was funded in 1990, to establish a national program to recruit ombudsman volunteers, conduct research and assist State ombudsmen; establishment of model ombudsman training standards; a study on the effectiveness of the State long-term care ombudsman programs; and expansion of the requirements for the annual ombudsman report to Congress.

New provisions in Title III require State and area agencies to fund their ombudsman programs at not less than the level at which the programs were funded in Fiscal Year 1991.

**The Chapter entitled Programs for Prevention of Elder Abuse, Neglect, and Exploitation** (Chapter 3, Section 721) requires States to develop and enhance programs for the prevention of elder abuse, neglect and exploitation. The section enumerates activities which States may undertake, including but not limited to providing funding for public education, ensuring the coordination of services provided by area agencies on aging and adult protective services programs, promoting the development of information and data systems, and training of individuals and professionals in the identification, prevention and treatment of abuse, neglect and exploitation.

This chapter does not require the State agency on aging to establish a State protective services system. Rather, the State agency is expected to work to enhance and improve the State's overall system for the prevention and treatment of elder abuse, neglect and exploitation, including protection of individual elders' dignity and rights in the delivery of protective services. In this way, the State agency on aging should be an ally of the State protective services agency in working for more and better services for vulnerable older people through enlisting the support and participation of other agencies and networks in preventing elder abuse.

**The State Elder Rights and Legal Assistance Development Program (Chapter 4, Section 731)** builds upon State legal and elder rights development programs which were initiated through AoA Title IV discretionary funds and addressed in Title III, Section 307(a)(18). Section 731 requires the State agency to establish a program to provide leadership for improving the quality and quantity of legal and advocacy assistance as a means for ensuring a comprehensive elder rights system. The State is to establish a focal point for conducting policy review, analysis and advocacy on such issues as guardianship, age discrimination, pension and health benefits, insurance, consumer protection, surrogate decision-making, protective services, public benefits and dispute resolution. In addition, the State is to provide a legal assistance developer and other personnel sufficient to ensure State leadership in securing and maintaining legal rights of older individuals; State capacity for coordinating the provision of legal assistance; State capacity to provide technical assistance, training and other supportive functions to area agencies on aging, legal assistance providers, ombudsmen and other persons as appropriate; and State capacity to promote financial management services for older individuals at risk of conservatorship.

**The Outreach, Counseling, and Assistance Program for Insurance and Public Benefits (Chapter 5, Section 741)** requires the States to establish programs of outreach, counseling and assistance to older individuals related to obtaining insurance benefits and public benefits to which they may be entitled. This chapter envisions a statewide network of informed staff, including volunteers, who are informed about insurance and public benefits and can assist older people and their advocates — including the advocates working under the other Title VII programs — to obtain needed benefits and make informed decisions on insurance and pension matters.

## **II. Purpose of the NPRM**

Prior to the 1992 amendments, the Long-Term Care Ombudsman Program and parts of the other three programs in the new Title VII were in Title III of the Older Americans Act. However, in most States, only the Ombudsman Program was established and operating according to the basic design provided in Title VII. In most States, the other three program areas are still in a developmental stage. For this reason, the proposed rule for part 45 CFR Part 1327 addresses only the Title VII mission of the State and area agencies, general Title VII State plan and funding requirements, consultation requirements, the Long-Term Care Ombudsman Program (Title VII, Chapter 2), specific requirements for the Elder Abuse, Neglect and Exploitation Prevention section of the Elder Rights part of the State plan, and the requirement that States employ a Legal Assistance Developer. AoA will develop more comprehensive regulations for the programs under Title VII, Chapters 3, 4 and 5 at a later date, based upon the regulatory needs identified as the activities under these programs are implemented by the States.

Due to the transfer of the Ombudsman Program to Title VII and in order to conform current regulations to the 1992 Amendments to the Act, the proposed regulations would make the following changes in the Title III regulations, 45 CFR Part 1321, Grants to State and Community Programs: deletion of reference to the Ombudsman Program in three sections, amendment of one section pertaining to confidentiality, and deletion of another entire section which has been superseded by the 1992 Amendments pertaining to award of Title III funds to the area agencies on aging.

The Ombudsman Program regulations (Subpart C, Sections 1327.21 through 1327.29) address areas where the States' experience in administering the program indicates the need for amplification of the statutory requirements and/or the 1992 amendments to the Act require further clarification.

### **III. Summary of the Provisions of the NPRM**

#### *PART 1321 — Grants to State and Community Programs on Aging*

Due to the transfer of the program requirements for the Long-Term Care Ombudsman Program from Title III of the Act to the new Title VII, references to the Ombudsman Program are deleted from 45 CFR PART 1321, Grants to State and Community Programs on Aging, Sections 1321.9, 1321.11 and 1321.17. The definition of "official duties" pertaining to the Ombudsman Program is deleted from Section 1321.3 and not transferred to the Title VII regulation, as the statute sufficiently defines the duties of the Ombudsman.

Section 1321.51, Confidentiality and disclosure of information — is amended to prohibit a State or area agency on aging from requiring information related to reports of neglect, abuse and exploitation of individuals to be divulged except as provided under Sections 705(a)(6)(C) and 721(e)(2) of the Act or an ombudsman or ombudsman representative to disclose the identity of a complainant or resident except as permitted under the Act and under section 1327.24 of these regulations.

Section 1321.63, Purpose of service allotments under Title III — subsection (b) pertaining to award of Title III funds to area agencies on aging is deleted in its entirety because it is superseded by Sections 304(d) and 308 of the Act, as amended in 1992.

*PART 1327 - VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES UNDER TITLE VII OF THE OLDER AMERICANS ACT, AS AMENDED*

Subpart A - General Provisions

1327.1 Basis and purpose — This section emphasizes the Title VII mandate that States develop a conceptual framework for, and provide leadership in implementing, comprehensive and coordinated statewide elder rights systems to assist vulnerable older people to understand their rights, know and secure their benefits and make informed choices. It lists the types of programs and agencies that State agencies on aging are expected to work with and through to develop statewide elder rights systems.

Title VII is a new addition to the Act. Prior to the 1992 amendments, the Ombudsman Program and parts of the other three programs now included under Title VII were in Title III. However, in most States, only the Ombudsman Program was established and operating according to the basic design provided in the new Title VII. In most States, the other three program areas are still in a developmental stage. For this reason, the proposed rule for this part addresses only the Title VII mission of the State and area agencies, general Title VII State plan and funding requirements, consultation requirements, the Long-Term Care Ombudsman Program, specific requirements for the Elder Abuse, Neglect and Exploitation Prevention section of the Elder Rights part of the State plan, and the requirement that States employ a Legal Assistance Developer. AoA will develop more comprehensive regulations for Chapters 3, 4 and 5 at a later date, based upon the regulatory needs identified as the activities under these programs are implemented by the States.

Section 1327.3 Definitions — the definitions apply to the Ombudsman Program. They explain the meaning of the statutory requirement that the Ombudsman serve on a "full-time basis," stipulate that the Ombudsman Program is to be statewide in scope and define "statewide ombudsman coverage." They also amplify the meaning of "immediate family" related to conflict of interest requirements, "other similar adult long-term care facility" related to ombudsman coverage, "regular and timely access" to the Ombudsman Program, "timely response" to complaints and "willful interference" with the representatives of the Office of the Ombudsman in the performance of the representatives' official duties.

Section 1327.5 Applicability of other regulations — this section requires compliance with the statutory and regulatory requirements of the Medicare and Medicaid programs, including the Omnibus Nursing Home Requirements; the Developmental Disabilities Assistance and Bill of Rights Act; the Civil Rights Act; the Americans With Disabilities Act; and other relevant Federal requirements.

Section 1327.7 Mission of the State agency — this section underscores the leadership role of the State agency to develop and carry out throughout the State a system of programs, services and protections to assist individual older persons and to advocate for policy, regulatory and legislative changes to protect the rights, dignity and benefits of vulnerable older individuals as a group.

Section 1327.9 Mission of the area agency — this section emphasizes the mission of the area agency to assure that viable, effective systems of both individual and collective advocacy are established and operating within their planning and services areas to protect the rights and address the needs of vulnerable older individuals.

## Subpart B — General Title VII Requirements

1327.11 Title VII State Plan Requirements — this section requires States, by March 31, 1995, to describe, in an addendum to their State plan, the manner in which they will carry out Title VII and stipulates the content for the description, including: a conceptual framework for a comprehensive, coordinated statewide system; the process by which Title VII activities were identified and prioritized in consultation with parties specified in the Act and in accordance with these regulations; a description of the roles, processes and activities for elder abuse, neglect and exploitation prevention activities specified in Subpart D, Section 1327.31; a brief description of the activities carried out for the other Title VII programs; and outcomes expected and methods by which the State will periodically assess the status of elder rights in the State. In accordance with Section 705(a)(4) of the Act, States are also required to provide assurances and documentation that Title VII funding has not been used to supplant funds from other sources.

1327.13 Consultation — this section stipulates that the State agency on aging shall develop policies governing the programs contained in Title VII in consultation with specified individuals, agencies and interested parties within the State.

1327.15 Funding requirements — this section specifies rules for State and area agencies (where applicable) regarding utilization of Title III funding, minimum required ombudsman funding levels, and allowable uses of funding provided for programs under Title VII. It also clarifies that the Title III provisions related to funding for State and area plan administration and intrastate distribution of Title III funding are not applicable to Title VII funds. That is, States may not include any Title VII funds in their calculation of Federal funds available for State plan administration, and Title VII funds allotted to the States may not be included in the base amount used to calculate the ten percent limitation on the use of funds for area plan administration under the provisions of Section 304(d)(1)(A) of the Act. However, the regulation clarifies that Title VII funds may be used to support any activity directly related to implementing the chapter for which they are appropriated.

Section 1327.15 (a)(1), (2)(ii) and (4)(iv) clarify that ombudsman funding provided under Title III, Section 304(d)(1)(B), the ombudsman minimum required funding level comprised of funds from all sources and States' Title VII ombudsman allotments are to be used only for the Ombudsman Program as it is defined in the Act. We are aware of a few ombudsman programs which conduct activities not directly related to the Ombudsman Program as it is defined in Section 712 of the Act. For example, some statewide ombudsman programs respond to complaints about in-home care and hospital services.

However, it should be emphasized that there is no basis in the law, nor does the legislative history support, States use of the funding provided to conduct ombudsman services, as defined in Section 712 of the Act, to fund ombudsman or advocacy services for individuals living in their own homes (including homes in public housing units) or receiving acute medical care in facilities not covered under the definition of long term care facilities in the Older Americans Act.

AoA recognizes that there are abuses which occur in these other settings. However, the law is clear about the scope of the Ombudsman Program and the use of Ombudsman Program funding. Further, AoA is concerned that when ombudsmen are required to provide coverage in private homes, hospitals, public housing complexes or other non-long-term care facility settings without sufficient staff resources, coverage of long-term care facilities may be lessened and the entire State ombudsman program may be weakened.

Both institutional long term care and these other residential or care settings involve complicated and usually different sets of rules and regulations and different benefit and oversight systems. It is unlikely that the State Long-Term Care Ombudsman, and local ombudsman representatives in areas where there are numerous long term care facilities, could be involved in areas other than institutional long-term care without compromising services to residents of long-term care facilities and diverting the limited resources available to the program designed to serve residents of nursing, board and care and similar adult care facilities. An additional concern is that conflicts of interest could arise if ombudsman programs investigate complaints about in-home services which are provided by the same agency which funds the Ombudsman Program.

If a State wishes to establish advocacy or ombudsman programs for recipients of home or acute care services, or for older people living in public housing units, the State should ensure that there are sufficient, additional resources to provide these services. Additional staff should be provided to carry out these expanded responsibilities. The State should also ensure that any regional or local components of ombudsman programs which investigate home-care complaints are located outside of the organizational entities which provide the services the ombudsmen are expected to monitor.

#### Subpart C - Long-Term Care Ombudsman Program

The sections on the Ombudsman Program are listed in the same order and with the same headings as the ombudsman sections in Title VII of the Act. Not all sections in the Act are covered in the regulation, as the regulation addresses only those areas where the provision in the Act requires clarification or amplification.

##### Section 1327.21 Establishment —

1327.21(a) Ombudsman Access to Decision-Making Officials - In order to increase the ability of the State Ombudsman Program to effectively represent the interests of residents of long-term care facilities in policy-making at the State level, the rule requires that the Ombudsman have direct access to directors of governmental entities with responsibilities which impact on residents of long-term care facilities. Without such access, the Ombudsman's ability to "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" as required under Section 712(a)(3)(E) of the Act would be diminished. The statutory organization of the program into an office indicates that Congress intended it to have a high level of visibility and an effective voice in policy deliberations affecting residents.

1327.21(b) Local Ombudsman Entities and Ombudsman Representatives — The rule outlines five areas in which the State agency must establish criteria and develop policy for participation in the statewide Ombudsman Program by local ombudsman entities and representatives. The overall objective of the criteria and policies is to strengthen, through the designation process, the working relationship between the State ombudsman and local ombudsman entities and the effectiveness of the local entities as part of the statewide Ombudsman Program.

1327.21(c) Representation of Residents' Interests — The Act requires ombudsmen to represent the interests of residents before governmental agencies, but administrative law judges in some States have barred ombudsmen from carrying out this duty because the ombudsman's involvement was interpreted as representing the client, a function reserved for attorneys. The rule

clarifies that the Ombudsman and ombudsman representatives have the right and authority to advocate on behalf of residents in transfer, discharge and other administrative hearings by serving as a witness and presenting information and testimony.

1327.21(d) Additional Ombudsman Duties — The rule specifies that, in addition to the ombudsman functions outlined in the Act, the Assistant Secretary determines it appropriate for Ombudsmen to work to ensure that board and care and similar adult care facilities are licensed and that licensing standards are enforced.

1327.22 Procedures for Access - the rule requires the State agency to ensure, through administrative policy, regulation or securing legislation, if needed, that ombudsmen have the right and an established procedure for access to: facilities; residents, including residents with guardians; residents' records; facility records and death certificates and records, when these are necessary in the investigation of complaints.

1327.24 Disclosure/Confidentiality — this section replaces the current rules at 45 CFR 1321.11 and 1321.51 promulgated in the 1988 regulation, which permit the director of the State agency on aging and one senior manager to have access to ombudsman files, minus the identity of any complainant or resident of a long-term care facility, for program monitoring purposes. The new rule stipulates that the director or a senior manager of the agency or organization in which the Ombudsman Program is administratively located may have access to ombudsman files for program monitoring purposes; that the individual who performs the program monitoring must have no conflict of interest; and that confidentiality requirements concerning any complainant or resident must be strictly followed. This rule applies to ombudsman files at the State and local level. As previously stated at the beginning of this preamble, this NPRM proposes to delete the current reference to the Ombudsman Program in 45 CFR Section 1321.11 and to amend 45 CFR 1321.51 to conform with confidentiality provisions in Sections 705, 712 and 721 of the Act and section 1327.24 of this proposed regulation.

This section also clarifies that Section 705(a)(6)(C) of the Act pertains to information provided to the agencies and programs specified in this statutory provision and does not require the Ombudsman Program to abridge the confidentiality requirements specified in Section 712(d) of the Act. The rule stipulates that representatives of the Ombudsman Program may not be required to disclose the identity of a complainant or resident except under conditions outlined in section 712(d) of the Act.

Some State abuse reporting laws mandate the reporting of all incidents of abuse. These State laws may conflict with the Section 712(d) requirement that ombudsmen not reveal the identity of complainants or residents unless the complainant, resident or the resident's legal representative consents to the disclosure or the disclosure is required by court order. The rule clarifies that Federal law supersedes State law in such instances and that ombudsmen must follow the disclosure procedure outlined in Section 712(d). Section 1327.27(b)(3) of these regulations requires the State Ombudsman, in coordination with the State Adult Protective Services agency, to establish a protocol for reporting complaints involving alleged abuse and exploitation which ensures prompt response to those in need while protecting confidentiality, in accordance with statutory and regulatory requirements.

1327.25 Conflict of Interest — Subparagraph (a), Designation of the Ombudsman and ombudsman entities and representatives - The organizational location of State and local ombudsman programs is crucial to those programs' independence and access to decision-makers. Most State



ombudsman programs are located in State agencies on aging, and more local programs are located in Area agencies on aging than in any other organizations. While the Act prohibits contracting the Ombudsman Program to agencies or organizations which regulate, own or operate long-term care facilities, in the past AoA has permitted State agencies on aging which regulate, own or administer long-term care facilities to also operate the Ombudsman Program. This previous policy, stated in the preamble to the 1988 regulations, was based on the construction of the law.

In this rule, we are modifying this policy to comply with Section 712(f)(1) of the Act, which states that no individual, or member of the individual's immediate family, involved in the designation of the Ombudsman...or the designation of an entity designated under subsection (a)(5) (local ombudsman entity) may be subject to a conflict of interest. We believe that officials and employees in any office which directly licenses or certifies long-term care facilities, administers facilities or provides long-term care services are subject to an inherent conflict of interest disqualifying them from designating the Ombudsman or ombudsman representatives. Accordingly, in order to comply with Section 712(f)(1), this regulation requires that the individual who designates, whether by appointment or otherwise, the Ombudsman and ombudsman representatives may not be an official or employee of an agency, including a State or area agency on aging, which directly licenses or certifies long-term care facilities, administers facilities or provides long-term care services. The rule also requires that where State and area agencies contract the Ombudsman Program to another agency or organization, the employees who oversee the contract must have no conflict of interest.

Since the Ombudsman Program is responsible for investigating complaints which are sometimes made against the licensing agency and recommending changes in policies and procedures which frequently involve the licensing agency, this rule is designed to prevent a situation in which an individual directly involved in the licensing and certification of a facility, or one who is involved in administering a facility or providing long-term care services, is also in a position of authority or responsibility concerning the designation of the Ombudsman or ombudsman representatives.

1327.25(b) requires that where the State or area agency on aging contracts with another agency to operate the Ombudsman Program, the State or area agency staff persons who oversee the contract must not be involved in licensing, certifying or administering long-term care facilities or services.

1327.25(c) prohibits the State Ombudsman and ombudsman representatives from also serving as adult protective services (APS) workers in APS programs with responsibilities which might conflict with the Ombudsman's role as advocate for the residents' right to self-determination and/or which might result in the representatives becoming case workers for victims of abuse, neglect and exploitation and not fulfilling the many other roles and responsibilities of the Office of the Long Term Care Ombudsman. This section also prohibits the Ombudsman and ombudsman representatives from serving as a resident's agent, medical decision-maker or surrogate and from assuming other, related roles which might place them in conflict with their primary role as advocate for the rights of residents and/or consume their time to the exclusion of other important duties.

1327.26 Legal Counsel — this section requires the State agency to develop and implement written policies and procedures which stipulate how the State will fulfill its obligation to provide adequate legal counsel to the Ombudsman and ombudsman representatives to assist them in protecting the health, safety, welfare, and rights of residents and in the performance of their official duties and to provide legal representation 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 official duties. It requires the State to disseminate the policies and procedures to all representatives of the Office and regularly include the information in training provided to ombudsman representatives.

1327.27 Administration — Subparagraph (a) clarifies that the Ombudsman Program may serve disabled individuals under the age of 60 who are living in long-term care facilities, a majority of whose residents are older adults, if such service does not weaken or decrease service to older individuals covered under the Older Americans Act. The Administration on Aging takes the view that by giving the Ombudsman and ombudsman representatives discretion to serve those under age 60 and thus address the needs of all residents in a facility, the Ombudsman Program will better serve everyone living in the facility.

1327.27 (b) requires State ombudsmen to establish written agreements with the State Adult Protective Services program and the State Protection and Advocacy programs for individuals with developmental disability and mental illnesses. The agreements are to stipulate how resources shall be utilized to serve vulnerable people for which the programs are responsible and policies and procedures to be followed in referrals and investigation of complaints. The policies and procedures regarding complaint referral and investigation must include a protocol for reporting complaints involving alleged abuse or exploitation which ensures prompt response to those in need while protecting confidentiality, in accordance with statutory and regulatory requirements.

1327.27(c) requires State ombudsmen to establish written agreements with the State agencies responsible for licensing and/or certifying for participation in Titles XVIII and XIX of the Social Security Act long term care facilities covered by the statewide Ombudsman Program. The agreements must include procedures for complaint investigation, verification and resolution by both agencies; transmittal of information about facilities; ombudsman participation in facility surveys; and shared training of staff.

1327.28 Liability — this section requires the State agency to arrange for liability protection for representatives of the statewide Ombudsman Program so that any representative of the program against whom legal action is brought or threatened to be brought in connection with that individual's performance of her/his official duties will be fully indemnified for legal and other costs arising from the dispute. The State may not transfer this responsibility to provide full liability protection to the area agency or other local agency or leave the individual ombudsman representative financially vulnerable or personally responsible in case of a law suit.

1327.29(a) Noninterference — This section augments the principle enunciated in section 712(j) of the Act which requires States to ensure that willful interference with ombudsman representatives in the performance of official duties shall be unlawful. Subparagraph (a) states, as a general principle, that in the conduct of all aspects of the statewide Long Term Care Ombudsman Program, the integrity of the work of the Ombudsman and ombudsman representatives must be maintained; and there must be no inappropriate or improper influence from any individual or entity, regardless of the source, which will in any way compromise, decrease or negatively impact on the objectivity of the investigation or outcome of complaints; the Ombudsman's primary role as advocate for the rights and interests of the resident; the Ombudsman's work to resolve issues related to the rights, quality of care and quality of life of the residents of long-term care facilities; or the Ombudsman's statutory responsibility to provide such information as the Office of the Ombudsman determines to be necessary to public and private agencies, legislators and other persons regarding

the problems and concerns of residents and recommendations related to residents' problems and concerns.

1327.29(b) makes it clear that any interference with the work of the Ombudsman, as outlined in paragraph (a) of this section, by an individual who is an official or employee of the State agency on aging or of an organization or agency which operates the Ombudsman Program under grant or contract with the State agency shall be deemed to be a failure to comply with Section 705 and with the noninterference requirements of Section 712 of the Act.

#### Subpart D - Programs for Prevention of Elder Abuse, Neglect and Exploitation

Section 1327.31 Elder Abuse, Neglect and Exploitation Section of Elder Rights Plan — This section specifies that States shall provide, in the description of the Elder Rights plan, required in Section 1327.11 of these regulations, a detailed description of the involvement of other agencies, use of funds and evaluation of activities conducted with funds provided for implementing Chapter 3, Section 721 of the Act.

#### Subpart E - State Elder Rights and Legal Assistance Development Program

1327.41 Functions — This section requires States to provide, either directly or through contract, an individual to be identified as the State Legal Assistance Developer, in compliance with Sections 307(a)(18) and 731(b)(2) of the Act. It stipulates that the Developer shall not serve the employing agency as house counsel. The rationale for this requirement is that serving as house counsel prevents the Legal Assistance Developer from carrying out the legal and elder rights development duties specified under Section 731 of the Act.

#### Subpart F - State Outreach, Counseling, and Assistance Program for Insurance and Public Benefits

1327.51 Coordination - This section amplifies the requirement in Section 741(f) of the Act that outreach and counseling activities authorized under Chapter 5, Section 741 of the Act be coordinated with activities carried out by the State with funds received under the Health Insurance Information, Counseling and Assistance Grants authorized under Section 4360 of the Omnibus Budget Reconciliation Act of 1990.

### **Impact Analysis**

#### *Executive Order 12866*

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department of Health and Human Services has determined that this rule is consistent with these priorities and principles. An assessment of the costs and benefits of available regulatory alternatives (including not regulating) demonstrated that the approach taken in the regulation is the most cost-effective and least burdensome while still achieving the regulatory objectives.

#### *Regulatory Flexibility Act of 1980*

The Regulatory Flexibility Act of 1980, Pub. L. 96-354, requires that an agency prepare a regulatory flexibility analysis for a proposed or final rule if the rule would have significant

economic impact on a substantial number of "small entities", i.e. small businesses, small non-profit organizations, or small governmental jurisdictions.

The responsibility for meeting the requirements of the regulations proposed in this NPRM is on the State agencies and to a lesser extent on area agencies. Actual delivery of services will be provided in some circumstances by public and not-for-profit agencies or organizations under grants or contracts from State or area agencies. Although area agencies and most service delivery agencies and organizations are "small entities" within the meaning of the Act, this rule will impose no significant burdens on State agencies, area agencies or other affected parties and will provide flexibility to State and area agencies in implementing the provisions of the Act. For these reasons, the Secretary hereby certifies that these regulations will not have a significant economic impact on a substantial number of small entities.

#### *Paperwork Reduction Act*

This proposed rule contains information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980. The title, description, and respondent description of the information collection are shown below with an estimate of the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

*Title:* Vulnerable Elder Rights Protection Activities - Elder Rights Plan

*Description:* Section 705(a)(8) of Older Americans Act as amended by the 1992 amendments to the Act (Public Law 102-375) requires States to include in their State plan submitted under Section 307 a description of the manner in which the State will carry out Title VII in accordance with assurances outlined in Section 705. Based upon this statutory provision, the proposed regulations require States, by March 31, 1995, to describe, in an addendum to their State plan and to all future State plans, the manner in which they will carry out Title VII and stipulate the content of the description, including: a conceptual framework for a comprehensive, coordinated statewide system; the process by which Title VII activities were identified and prioritized in consultation with parties specified in the Act and in accordance with these regulations; a description of the roles, processes and activities for elder abuse, neglect and exploitation prevention activities specified in Subpart D, Section 1327.31; a brief description of the activities carried out for the other Title VII programs; outcomes expected and methods by which the State will periodically assess the status of elder rights in the State. In accordance with Section 705(a)(4) of the Act, States are also required to provide assurances and documentation that Title VII funding has not been used to supplant funds from other sources.

Total reporting burden is 4104 hours for FY 1995 and fewer than 4104 for subsequent years.

*Basis for estimate:*

By March 31, 1995 each State agency and the five trust territories will be required to submit to the Administration on Aging an Elder Rights Plan. Estimate of burden is determined as follows:

Activity	No. staff, per State/entity	No. hours per staff member	Total hours
Planning	5	8	40
Writing/ Editing Plan	2	16	32

72 hours x 57 States/entities = 4104 hours for FY 1995

Development of the Elder Rights Plan in years subsequent to FY 1995 will likely require fewer planning hours than the development of the initial plan will require. The statute allows States to submit their State plans every two, three, or four years. Therefore, the total burden will be considerably fewer than 4104 hours in years after FY 1995.

**List of Subjects in 45 CFR Parts 1321 and 1327**

*45 CFR Part 1321*

The Long-Term Care Ombudsman Program, confidentiality of disclosure of information, purpose of service allotments under Title III.

*45 CFR Part 1327*

Vulnerable Elder Rights Protection Activities; Title VII, Elder Rights Plan; Mission of the State and area agency on aging; Consultation; Funding requirements; Long-Term Care Ombudsman Program, including ombudsman access to decision-making officials, local ombudsman entities and representatives, representation of residents' interests, additional ombudsman duties, procedures for ombudsman access to residents and records, disclosure/confidentiality, legal counsel for ombudsmen, program administration, liability, and noninterference; Elder abuse, neglect and exploitation section of Elder Rights Plan; State Elder Rights and Legal Assistance program, including legal assistance developer.

*Description of Respondents:* State and local governments, including State and Area agencies on aging and ombudsman programs; non-profit organizations; interested individuals.

Dated:

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Fernando M. Torres-Gil  
*Assistant Secretary for Aging*

Approved:  
Dated:

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Donna E. Shalala

Secretary of Health and Human Services.  
For the reasons set forth in the preamble, 45 CFR Part 1321, Grants to State and Community Programs on Aging, is amended as follows:

1. The authority 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

Subpart A - Introduction

2. 1321.3, Definitions, is amended by deleting the definition of "official duties" pertaining to the Long-Term Care Ombudsman.

Subpart B -

3. Section 1321.9, Organization and Staffing of the State Agency, is amended by deleting subparagraphs (c) and (d) pertaining to the Long-Term Care Ombudsman Program in their entirety.

4. Section 1321.11, State agency policies, subsection (a) is amended by deleting the words "including the ombudsman program" to read as follows:

(a) The State agency on aging shall develop policies governing all aspects of programs operated under this part, whether operated directly by the State agency or under contract. These policies shall be developed in consultation with other appropriate parties in the State. The State agency is responsible for enforcement of these policies.

5. Section 1321.11(b) is amended by deleting the two sentences pertaining to the Ombudsman Program in their entirety to read as follows:

(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.

6. 1321.17, Content of State Plan, subsection (f)(7) is amended by deleting the words "including the manner in which the ombudsman program operates at the State level and the relation of the ombudsman program to area agencies where area agencies have been designated" to read as follows:

(f)(7) The State agency on aging shall develop policies governing all aspects of programs operated under this part.

Alternate to 6. In the event that an amended version of section 1321.17(f) proposed by the Administration on Aging in a Notice of Proposed Rulemaking published in the Federal Register on March 17, 1994 (59 FR 12728-12738) becomes final before this NPRM goes into effect as a final rule, section 1321.17(f)(5) in that regulation is amended to delete reference to the ombudsman program and read as follows:

(f)(5) The State agency on aging shall develop policies governing all aspects of programs operated under this part.

7. Section 1321.51, Confidentiality and disclosure of information, subparagraph (c) is amended to read as follows:

(c) A State or area agency on aging may not require

(i) a provider of legal assistance under this part to reveal any information that is protected by attorney client privilege;

(ii) information related to reports of neglect, abuse and exploitation of individuals to be divulged except as provided under Sections 705(a)(6)(C) and 721(e)(2) of the Act; or

(iii) an ombudsman or ombudsman representative providing services under Part 1327, Subpart C to disclose the identity of a complainant or resident except as provided under section 1327.24 of this regulation."

Subpart D - Service Requirements

8. Section 1321.63, Purpose of service allotments under Title III, is amended by deleting subparagraph (b) in its entirety.

For the reasons set forth in the preamble, a new part, 45 CFR part 1327, is added to read as follows:

PART 1327 — Vulnerable Elder Rights Protection Activities

The authority for part 1327 is as follows:

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

Subpart A - General Provisions

- 1327.1 Basis and purpose of this part
- 1327.3 Definitions
- 1327.5 Applicability of other regulations
- 1327.7 Mission of the State agency
- 1327.9 Mission of the Area agency

Subpart B - General Title VII Requirements

- 1327.11 Title VII State Elder Rights plan requirements
- 1327.13 Consultation
- 1327.15 Funding requirements

Subpart C - Long-Term Care Ombudsman Program

- 1327.21 Establishment
- 1327.22 Procedures for access
- 1321.24 Disclosure/Confidentiality
- 1327.25 Conflict of Interest
- 1327.26 Legal Counsel
- 1327.27 Administration
- 1327.28 Liability
- 1327.29 Noninterference

Subpart D - Programs for Prevention of Elder Abuse, Neglect, and Exploitation

- 1327.31 Abuse Prevention Requirements for Elder Rights Plan

Subpart E - State Elder Rights and Legal Assistance Development Program

- 1327.41 Functions

Subpart F - State Outreach, Counseling, and Assistance Program for Insurance and Public Benefits

- 1327.51 Coordination

PART 1327 — Subpart A

1327.1 Basis and purpose of this part

(a) This part prescribes requirements State agencies shall meet to receive grants for the establishment and development of Vulnerable Elder Rights Protection activities under Title VII of the Older Americans Act as amended (hereinafter referred to in this part as the Act). These requirements include the responsibilities of State agencies, Area agencies, and service providers.



(b) The requirements of this part are based on Title VII and relevant sections of Titles III and VI of the Act. Title VII provides for formula grants to State agencies on aging, under approved State plans, to carry out Vulnerable Elder Rights Protection activities.

(c) Statewide Elder Rights Systems - Title VII provides an important mandate to State agencies on aging, namely the development of an Elder Rights system which coordinates and recognizes the inter-relatedness of a variety of services, programs, and activities on the part of a number of agencies and organizations to ensure the rights of vulnerable older people in a State. Such an Elder Rights system will assist vulnerable older people to understand their rights, know and secure their benefits and make informed choices. In the development of this system, it is expected that State agencies on aging will work through and with the State Long-Term Care Ombudsman Program; State Elder Rights and Legal Assistance Development Program; State Outreach, Counseling and Assistance Program for Insurance and Public Benefits; Area agencies on aging, information and referral programs; consumer protection and advocacy agencies; guardianship programs; legal providers; adult protective services; the court system; the attorney general; the State equal employment opportunity commission; and other appropriate programs and agencies.

### 1327.3 Definitions

"Full-time basis," as used in Section 712(a)(3) of the Act with respect to the State Ombudsman position, means the State Long-Term Care Ombudsman position is full-time, and the individual who serves in the position has no duties other than those directly related to the Long-Term Care Ombudsman Program, as defined in Section 712 of the Act.

"Immediate family," as used in Sections 201(d)(2)(B) and 712(f)(1) of the Act pertaining to conflict-of-interest, means spouse, parents, children and siblings.

"Other similar adult long-term care facility," as used in Section 102(34)(D) of the Act with respect to the type of facilities which the Ombudsman Program is authorized to cover, means any group facility which provides room, board and personal care services to older individuals, and which the State includes within the purview of its statewide Long Term Care Ombudsman Program.

"Regular and timely access," as used in Section 712(a)(3)(D) and (5)(B)(ii) of the Act with respect to residents' access to ombudsmen, means that residents of long-term care facilities throughout the State have access to knowledge of the Ombudsman Program and how to contact it and that calls or letters to the program from residents or their representatives are responded to in a timely manner.

"State Long-Term Care Ombudsman Program" means a program established under Section 712(a)(1)(B) of the Act which provides statewide ombudsman coverage for residents of long-term care facilities.

"Statewide ombudsman coverage", as used in the definition of "State Long-Term Care Ombudsman Program," means that: residents of long-term care facilities and their representatives have access to knowledge of the Ombudsman Program and how to contact it; and complaints received from any part of the State are investigated and documented and steps are taken to resolve problems in a timely manner, in accordance with Federal and State requirements.

"Timely responses," as used in Section 712(a)(3)(D) of the Act with respect to ombudsman action on complaints, means that life-threatening complaints are responded to within 24 hours of

receipt and non-life threatening complaints are responded to as promptly as can reasonably be accomplished.

"Willful interference," as used in Section 712(j)(1) of the Act with respect to the work of representatives of the ombudsman office, means any action taken, or deliberate omission of action, with the intention of preventing the Ombudsman from carrying out his/her official duties, as outlined in Section 712 of the Act and pursuant to State law. Acts of retaliation, such as dismissal of the Ombudsman or ombudsman representative or the removal and transfer of such person because of conscientious performance of official ombudsman duties, are considered willful interference.

#### 1327.5 Applicability of other regulations

Several other regulations apply to all activities under this part. These include but are not limited to:

- (a) 42 CFR, Parts 483 and 488 - Medicare and Medicaid Programs; Omnibus Budget Reconciliation Act of 1987 (OBRA) Nursing Home Requirements;
- (b) 45 CFR Part 16-Procedures of the Departmental Appeals Board;
- (c) 45 CFR Part 74-Administration of Grants, except Subpart N;
- (d) 45 CFR Part 80-Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health and Human Services: Effectuation of Title VI of the Civil Rights Act of 1964;
- (e) 45 CFR Part 81-Practice and Procedures for Hearings Under Part 80 of this Title;
- (f) 45 CFR Part 84-Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Participation;
- (g) 45 CFR Part 91-Nondiscrimination on the Basis of Age in HHS Programs or Activities Receiving Federal Financial Assistance;
- (h) 45 CFR Part 92-Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments;
- (i) 45 CFR Part 100-Intergovernmental Review of Department of Health and Human Services Programs and Activities;
- (j) 5 CFR Part 900, Subpart F, Standards for a Merit System of Personnel Administration;
- (k) 45 CFR, Part 1386 - Administration for Developmental Disabilities and Developmental Disabilities Programs;
- (l) 49 CFR, Parts 27, 37 and 38 - Transportation for Individuals with Disabilities;
- (m) 28 CFR, Parts 35 and 36 - Department of Justice;
- (n) 29 CFR Part 1630 - Equal Employment Opportunity Commission.

#### 1327.7 Mission of the State agency

The State agency on aging is responsible for advocating for the rights of older individuals throughout the State. This responsibility is paramount with respect to those who are unable to secure and protect their own interests.

The Act intends that the State agency on aging shall be the leader relative to Vulnerable Elder Rights Protection activities in the State. This means that the State agency shall:

- (a) Develop and actively carry out throughout the State a system of programs, services and protections which assist older persons to:

- (1) Understand and exercise their rights;
- (2) Exercise choice through informed decision-making;
- (3) Benefit from support and opportunities promised by law;
- (4) Maintain autonomy consistent with capacity;
- (5) Resolve grievances and disputes through appropriate representation and assistance;  
and

(b) Work to secure the policy, regulatory and legislative changes which are needed to protect the rights, dignity and benefits of vulnerable older individuals.

#### 1327.9 Mission of the Area agency

The mission of the Area agency on aging under this part is to advocate for and work to establish a viable, effective system within the planning and service area to assist vulnerable older individuals living in both home and long-term care facility settings to secure and exercise their human and civil rights, protect their dignity, claim the benefits to which they are entitled and ensure the fulfillment of their contracts and covenants for care.

#### Subpart B - General Title VII Requirements

##### 1327.11 Title VII State Elder Rights Plan Requirement

By March 31, 1995 the State agency on aging shall provide, as an addendum to its current State plan, an Elder Rights plan. The Elder Rights plan shall be included in all future State plans and shall describe the manner in which the State will develop a comprehensive Elder Rights system to carry out Title VII, in accordance with the assurances in Section 705(a)(1) through (7) of the Act.

(a) The description shall include:

(i) A conceptual framework, which includes goals and priorities, for how the State agency, without abrogating the specific mission and statutory and regulatory requirements for each Title VII program, will develop a coordinated, comprehensive system described in section 1327.1(c) which is designed to fulfill the elder rights mission of the State agency, as described in section 1327.7;

(ii) The process through which the State, in consultation with the parties specified in section 1327.13, identified and prioritized statewide elder rights activities, including the process by which all interested parties were notified of public hearings held in accordance with Section 705(a)(2) of the Act and the conduct and results of such hearings; as required under Title II of the Americans with Disabilities Act, all hearings shall be accessible to the disabled;

(iii) A description of the roles, processes and activities for elder abuse, neglect and exploitation prevention activities specified in Subpart D, Section 1327.31;

(iv) A brief description of the activities carried out for the other programs under Title VII;

(v) Outcomes expected during the period covered by the plan; and

(vi) Methods by which the State will periodically assess the status of elder rights in the State, in compliance with Section 731(b)(8) of the Act.

(b) The Elder Rights Plan shall also contain assurances and documentation showing that Title VII funding has not been used to supplant funds from other sources, as required in Section 705(a)(4) of the Act.

#### 1327.13 - Consultation

The State agency on aging shall develop policies governing all aspects of programs operated under this part, whether operated directly by the State agency or under contract. These policies shall be developed in consultation with the State Ombudsman, State Legal Assistance Developer and other State level agencies or staff with major responsibilities for programs related to Elder Rights, including State adult protective services staff; area agencies on aging and local agencies or staff with major responsibilities for programs related to Elder Rights; older people; organizations which advocate on behalf of vulnerable older persons; and service providers, including long-term care providers.

#### 1327.15 Funding Requirements

##### (a) Requirements of State agencies

(1) The period of availability of funding for obligation is covered by 45 CFR Part 92.

(2) Use of Title III funds for Ombudsman Program - Title III funds utilized by States under Section 304(d)(1)(B) must be used to support activities of the Long Term Care Ombudsman Program, as defined in Section 712 of the Act, at either the State level or at the local level. These funds are not subject to the intrastate funding formula.

##### (3) Maintenance of FY 1991 ombudsman program funding level-

In carrying out the Ombudsman Program under Titles III and VII, States must, at a minimum, expend not less than the total amount expended by the State agency on aging from all sources in fiscal year 1991, with the exception of funds received in a State's allotment of the budget line item for abuse prevention (under the old Title III, Part G of the Older Americans Act, as amended November 27, 1987) in the FY 1991 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act which the State elected to expend on ombudsman activities in FY 1991. In addition, States should expend on their Ombudsman Program the full amount of the increase in funding between what they received and expended on ombudsman activities from the State's allotment of the budget line item for ombudsman services in the FY 1991 Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Act and their Title VII ombudsman allotment for a current fiscal year. This funding received under Titles III and VII must be used solely for ombudsman services to residents of long-term care facilities, as defined in Sections 102(19) and (34) of the Act and Section 1327.3 of these regulations and pursuant to Sections 307(a)(12) and 712 of the Act, and may not be used for any other purpose.

##### (4) Use of Title VII ombudsman and abuse prevention allotments -

(i) States may use any portion of their Title VII abuse prevention allotment to fund specific, identifiable activities conducted by any public or private non-profit program or agency, including adult protective services and ombudsman programs, which directly correspond to the abuse prevention activities outlined in Section 721(b) of the Act.

(ii) States may not provide any of their Title VII abuse prevention allotment to adult protective services agencies to conduct activities or provide services not authorized in Section 721(b).

(iii) Use of Title VII funding for involuntary services to, or coerced participation in, Title VII-funded programs by alleged victims, abusers or their households, is strictly prohibited.

(iv) Use of any of the Title VII ombudsman allotment to fund activities which are not authorized under Section 712 of the Act and conducted by the Long Term Care Ombudsman Program or a grantee or contractor of the Ombudsman Program is prohibited. This includes, but is not limited to, ombudsman services in settings other than long term care facilities, as defined in Section 102(19) and (34) of the Act and Section 1327.3 of these regulations, and activities under Title VII, Chapters 3, 4 and 5 conducted by individuals or agencies other than the Ombudsman or Ombudsman Program, or the Ombudsman's grantee or contractor.

(5) Use of Title VII, Chapter 5 funding (Outreach, Counseling and Assistance Program) - States may use funding under Chapter 5 to conduct any of the activities outlined under Section 741(c) of the Act. If a State determines that any area agency on aging are eligible to receive funding to conduct activities under Chapter 5, the State is required by Section 705(a)(7) to apply the eligibility and priority criteria set forth in the statute.

(6) Non-applicability of Title III funding provisions -

(i) Effective October 1, 1994, States may not include any Title VII funds in their calculation of Federal funds available for State plan administration. Title VII funds may be used to support any activity directly related to implementing the chapter for which they are appropriated.

(ii) Title VII funds allotted to the States may not be included in the base amount used to calculate the ten percent limitation on the use of funds for area plan administration under the provisions of Section 304(d)(1)(A) of the Act.

(b) Requirements of area agencies -

(1) Area agencies may use funds allocated under Section 304(d)(1)(D) to support ombudsman program and other elder rights activities.

(2) Area agencies must expend on local or regional ombudsman program activities for residents of long term care facilities, as defined in Sections 102(19) and (34) and 712 of the Act and Section 1327.3 of these regulations, not less than the total amount of Title III funds received under Section 304(d)(1)(D) of the Act and expended by the area agency in carrying out the Ombudsman Program under Title III in FY 1991.

#### Subpart C - Long-Term Care Ombudsman Program

##### 1327.21 Establishment

(a) Ombudsman Access to Decision-Making Officials - The State must ensure that the State Ombudsman has direct access to the directors of State governmental entities with responsibilities which impact on residents of long-term care facilities.

(b) Local Ombudsman Entities and Ombudsman Representatives - The State agency shall establish criteria and a process for participation in the statewide Ombudsman Program by local ombudsman entities and ombudsman representatives. The criteria must:

(1) Stipulate that the State Ombudsman has the authority to designate local ombudsman entities and ombudsman representatives and to revoke designation, if necessary;

(2) Ensure that local entities designated to participate in the Ombudsman Program have experience in advocating for the individual and collective rights of vulnerable people and are not primarily service providers;

(3) Establish a procedure for hiring, supervising, training, evaluating and, if necessary, dismissing ombudsman representatives and for evaluating the performance of the local ombudsman entity;

(4) Ensure that local ombudsman entities and ombudsman representatives have no conflict of interest, as described in Section 1327.25 of these regulations.

(5) Provide for an appeal procedure for local ombudsman entities or representatives whose designation is revoked by the State Ombudsman in order to ensure that ombudsman entities or designated representatives which faithfully and effectively carry out the duties outlined in Section 712(a)(5)(B) of the Act are retained as part of the statewide Ombudsman Program, except when good cause is shown warranting their removal.

(c) Representation of Residents Interests - Representatives specifically designated by the Ombudsman for such purpose shall have the right and authority to advocate on behalf of residents in transfer, discharge and other administrative hearings by serving as witnesses and presenting information and testimony.

(d) Additional Ombudsman Duties - In addition to the ombudsman functions specified in Section 712 (a)(3)(A-H) of the Act, the Assistant Secretary on Aging determines it appropriate that the Ombudsman and ombudsman representatives work to ensure that board and care and similar adult care facilities throughout the State are licensed, as appropriate and in accordance with State and Federal laws and regulations, and that licensing standards are enforced.

#### 1327.22 Procedures for Access

The State agency shall ensure through administrative policy, regulation or securing the enactment of State legislation, if necessary, that the Ombudsman and all designated ombudsman representatives have the right and an established process for access to:

(1) facilities covered by the statewide Ombudsman Program; (2) residents, including residents with legal representatives or guardians;

(3) residents records, including residents with legal representatives or guardians, with strict adherence to the consent procedures outlined in Section 712 (b)(1) of the Act;

(4) long-term care facilities' records, policies and documents to which the residents or the general public have access;

- (5) copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and
- (6) death certificates and related records, when these are required in the investigation of complaints.

#### 1327.24 Disclosure/Confidentiality

(a) In monitoring the Ombudsman Program, access to files, minus the identity of any complainant or resident of a long-term care facility, shall be available only to the director or one senior manager of the organization in which the Ombudsman Program is administratively located. The individual who performs this monitoring function must have no conflict of interest, as defined in section 712(f) of the Act and paragraph 1327.25 of these regulations. In the conduct of the monitoring of the Ombudsman Program, the confidentiality of complainants and residents of a long-term care facility shall be protected, in accordance with Section 712(d) of the Act. This rule applies to ombudsman files at the State and local levels.

(b) The confidentiality provisions in Section 705(a)(6)(C) of the Act pertain to information provided to the agencies and programs specified in this section, including the Ombudsman Program. This provision does not require the Ombudsman Program to abridge the confidentiality requirements specified in Section 712(d) of the Act. Neither a State or Area agency nor any other State agency may require a representative of the State Long-Term Care Ombudsman Program to disclose the identity of a complainant or resident except under conditions outlined in Section 712(d).

#### 1327.25 Conflict of Interest

(a) Designation of the Ombudsman and ombudsman entities and representatives — As stated in Section 712(f)(1) of the Act, any individual, or member of the immediate family of an individual involved in the designation, by appointment or otherwise, of the Ombudsman or ombudsman entities or representatives (and who correspondingly has the authority to remove the Ombudsman and ombudsman representatives from office), must be free of any conflict of interest. It would be a conflict of interest for an official or employee of any agency at either the State or local level, including State and area agencies on aging, which directly administers the licensing and certification of long-term care facilities, owns or operates such facilities, or provides long-term care services to designate or remove from office the Ombudsman or ombudsman representatives.

(b) Oversight of Ombudsman contract - Where the State or area agency on aging contracts with another agency to operate the Ombudsman Program, the State or area agency staff person or persons who oversee the contract must not be involved in licensing, certifying or administering long-term care facilities or services.

(c) Prohibitions on ombudsman assignments -

(i) The State Ombudsman and ombudsman representatives may not work for or otherwise represent adult protective services programs or program units which develop and carry out care plans for; provide involuntary services to; are authorized to take temporary custody of; or serve as guardians, conservators or legal representatives for any clients.

(ii) The State Ombudsman and ombudsman representatives may not serve as a resident's agent, medical decision-maker or surrogate; the sole witness for Do Not Resuscitate (DNR) orders

or other medical directives; or as a member of a facility's ethics committee which makes medical decisions for residents without the capacity to evidence their preference, although ombudsmen may serve on such committees in an advisory capacity.

1327.26      Legal Counsel

The State agency shall develop and implement written policies and procedures which stipulate how the state will fulfill its obligation to

(a) provide adequate legal counsel to the Ombudsman and ombudsman representatives to assist them in protecting the health, safety, welfare, and rights of residents and in the performance of their official duties; and

(b) provide legal representation 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 representative.

The policies and procedures shall be disseminated to all representatives of the Office and regularly included in training provided to ombudsman representatives.

1327.27      Administration

(a) The Ombudsman and ombudsman representatives may serve disabled individuals under the age of 60 who are living in long-term care facilities, if such service does not weaken or decrease service to older individuals covered under the Act.

(b) Coordination with State Adult Protective Services programs and Protection and Advocacy programs - The State Ombudsman shall establish written agreements with the State Adult Protective Services Program and the State Protection and Advocacy Program for individuals with developmental disabilities and mental illnesses. The agreements shall stipulate:

(1) How the staff and financial resources of the various programs shall be utilized to meet needs of the vulnerable adults which the programs are responsible to serve;

(2) The policies and procedures which the statewide Ombudsman Program and the other programs will follow regarding referral of requests for assistance and investigation of complaints involving:

(i) residents of long-term care facilities who have been or may have been abused or exploited; and

(ii) developmentally disabled and/or mentally ill individuals living in long-term care facilities or in need of long-term care services;

(3) a protocol for reporting complaints involving alleged abuse and exploitation which ensures prompt response to those in need while protecting confidentiality, in accordance with statutory and regulatory requirements.

(c) Coordination with State Licensing and Certification Agencies - The State Ombudsman shall establish written agreements with the State agencies responsible for licensing and/or certifying



for participation in Titles XVIII and XIX of the Social Security Act long term care facilities covered by the statewide Ombudsman Program. The agreements shall include, but not be limited to, procedures for complaint investigation, verification and resolution by both agencies; transmittal of information about facilities; ombudsman participation in facility surveys and shared training of staff.

1327.28      Liability

The State agency must ensure that no representative of the Office will be liable under State law for the good faith performance of official duties and shall indemnify and hold harmless any Ombudsman or ombudsman representative 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 representative. In no case may the State agency on aging require any substate agency or organization to fulfill this State agency responsibility.

1327.29      Noninterference

(a)      General principles governing noninterference - In the conduct of all aspects of the statewide Long Term Care Ombudsman Program, the integrity of the work of the Ombudsman and ombudsman representatives must be maintained; and there must be no inappropriate or improper influence from any individual or entity, regardless of the source, which will in any way compromise, decrease or negatively impact on:

- (1)      the objectivity of the investigation or outcome of complaints;
- (2)      the Ombudsman's primary role as advocate for the rights and interests of the resident;
- (3)      the Ombudsman's work to resolve issues related to the rights, quality of care and quality of life of the residents of long-term care facilities; or
- (4)      the Ombudsman's statutory responsibility to provide such information as the Office of the Ombudsman determines to be necessary to public and private agencies, legislators and other persons regarding the problems and concerns of residents and recommendations related to residents' problems and concerns.

(b)      Any interference with the work of the Ombudsman, as outlined in paragraph (a) of this section, by an individual who is an official or employee of the State agency on aging or of an organization or agency which operates the Ombudsman Program under grant or contract with the State agency shall be deemed to be a failure to comply with the State's duty under Section 705(a) of the Act to carry out the Ombudsman Program in accordance with the requirements of Chapters 1 and 2 of the Act.

Subpart D - Programs for Prevention of Elder Abuse, Neglect, and Exploitation

1327.31 Elder Abuse, Neglect and Exploitation Prevention Section of Elder Rights Plan

In the Elder Rights plan required in Section 1327.11, States shall describe:

- (1)      The specific roles of the various agencies in the development and implementation of the abuse, neglect and exploitation prevention part of the Title VII plan;

(2) The process used to determine how the elder abuse prevention funds are to be spent and how this use complements, strengthens, or otherwise enhances the State's adult protective services activities; and

(3) How activities conducted with elder abuse prevention funds will be regularly monitored and evaluated for their effectiveness in preventing, reducing or remedying elder abuse, neglect and exploitation.

#### Subpart E - State Elder Rights and Legal Assistance Development Program

##### 1327.41 - Functions

The State shall provide, either directly or through contract, an individual who shall be known as the State Legal Assistance Developer to provide leadership in areas outlined in Section 731(b)(2) of the Act. This individual may not serve as house counsel to the State agency on aging or any other agency which employs the individual.

#### Subpart F - State Outreach, Counseling, and Assistance Program for Insurance and Public Benefits

##### 1327.51 - Coordination

The State unit implementing outreach and counseling activities authorized under Chapter 5, Section 741 of the Act shall coordinate their efforts with the State unit which is the recipient of funds for health insurance information, counseling and assistance authorized under Section 4360 of the Omnibus Reconciliation Act of 1990 (42 U.S.C. 1395 et seq.).