August 15, 2023

Alison Barkoff
Acting Administrator and Assistant Secretary for Aging
Administration for Community Living
330 C St SW
Washington, DC 20201

RE: 2023 Older Americans Act Proposed Regulations (45 CFR Parts 1321, 1322 and 1324)

Dear Administrator Barkoff:

USAging commends the U.S. Administration for Community Living (ACL) for its comprehensive efforts in updating the Older Americans Act regulations. USAging and its members are looking forward to having clear and formal guidance that reflects the intent of the statute as well as the realities that the Aging Network—and more importantly, older adults and caregivers—face today.

As you know, USAging is the national association representing and supporting the network of Area Agencies on Aging (AAAs) and advocating for Title VI Native American Aging Programs (Title VI programs) that help older adults and people with disabilities live with optimal health, well-being, independence and dignity in their homes and communities. Our members are the local leaders that develop, coordinate and deliver a wide range of home and community-based services, including information and referral/assistance, case management, home-delivered and congregate meals, in-home services, caregiver supports, case management, long-term care ombudsman programs and more to millions of Americans each year.

Our comments are a result of extensive discussions with and a detailed survey of our members and our leadership. Although we have several serious concerns about specific sections and will address them shortly, we want to start by commending ACL's efforts to hew closely to the statute, provide clarifications in numerous cases, find ways to reflect current realities where possible, and take, in most cases, an approach that allows for the state and local flexibility that is a core value of the OAA. We greatly

appreciate the many instances of preserved flexibility throughout the proposed rule, although many of our members have expressed concern that too many policies and procedures have been left for State Units on Aging (SUAs) to solely determine, with few federal guidelines. We also want to note at the start that ACL did an excellent job incorporating references to caregivers throughout the rule and not just in the sections directly pertaining to the Title III E or Title VI Part C programs.

The limited timeline for comments does not allow us to say that we have no additional comments on this regulation beyond what is captured in this letter, however, so any absence of comment in the sections not noted here should not be construed to imply total support nor lack of support.

Below is an overview of the components of the proposed regulation we will be responding to, followed by our comments. This list is in order of appearance in our letter, and, after the first four sections, in the order of the proposed rule.

- § 1321.9(c)(2)(xiv) Contracts and Commercial Relationships
- § 1321.47, § 1321.67 Conflicts of Interest (COI) Policies and Procedures for States, AAAs
- § 1321.93 Legal Assistance and Guardianship
- § 1321.87 Nutrition Services
- § 1321.9(c)(ii) Non-Federal Share Match
- § 1321.9(c)(2)(viii) Rural Minimum Expenditures
- § 1321.9(c)(2)(xi) Cost Sharing
- § 1321.9(c)(2)(xiii) Private Pay Programs
- § 1321.13 Designation of and Designation Changes to Planning and Service Areas
- § 1321.21 Withdrawal of Area Agency Designation
- § 1321.27(c) Content of State Plan
- § 1321.27(h)(1) Program Development and Coordination Activities
- § 1321.55 Mission of the Area Agency, Board of Directors, Focal Points
- § 1321.57 Organization and Staffing of the Area Agency
- § 1321.59 Area Agency Policies and Procedures
- § 1321.63 Area Agency Advisory Council
- § 1321.69, § 1322.31 Title III and Title VI Coordination
- § 1321.75 Confidentiality and Disclosure of Information
- § 1321.85 Supportive Services
- § 1321.99 Setting Aside Funds to Address Disasters

- Part 1322 Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition and Caregiver Services
- § 1324.303 Legal Assistance Developer
- Implementation Timeline

§ 1321.9(c)(2)(xiv) Contracts and Commercial Relationships

AAAs' missions are larger than just OAA. To serve more older adults; to address individual health-related social needs and community-level social drivers of health; to extend their services to reach deeper into the community; to support populations for whom OAA services are not available or adequate; to create specialized services for people living with dementia, or the socially isolated or those with chronic conditions or complex care needs—all while federal OAA funding has eroded even as the population of older adults has grown dramatically—AAAs have had to turn to other funding streams and relationships that enable them to supplement their OAA funding to better meet their missions. In fact, ACL has championed and supported the Aging Network's ability to do this and to be excellent partners with health care over the past dozen years. Thanks in part to ACL's funding and encouragement, the Network has successfully expanded into the contracting arena: 47 percent of AAAs reported at least one health care contract in the 2021 USAging Request for Information survey on CBO–health care contracting. AAAs are also working with their networks of local providers (often, but not always, in partnership with their local OAA providers) on these contracts, with AAAs often serving as Community Care Hubs/Network Lead Entities. In the same 2021 survey, 44 percent of AAAs reported contracting with health care entities as part of networks of AAAs and CBOs.

Overreach of State Authority:

Sec. 1321.9(c)(2)(xiv) of the proposed rule is of tremendous concern to USAging. We disagree with the interpretation by ACL and HHS of the statute in this rule, which we believe proposes a significant overreach of states' authority over AAA activities.

After scrutiny of the relevant sections of the OAA statute, including Sec. 212, Sec. 306(g) and Sec. 306(a)(13)(B)(i), we assert that ACL's regulatory language that interprets Sec. 212 as applying when no OAA funds are used

is incorrect. Sec. 306(g) makes clear that "nothing in the Act shall restrict [AAAs] from providing services not provided or authorized by the Act, including through 1) contracts with health care payers; 2) consumer private-pay programs; or 3) other arrangements with entities or individuals that increase the availability of home and community-based services and supports." This text reflects the most recent congressional change to the Act in 2020 and thus holds precedent in the event of a lack of clarity between Sec. 306(g) and Sec. 212. **If nothing restricts a AAA "from providing services not provided or authorized by this Act," then Section 212 should not create a requirement for SUA approval in the case of contracts for services outside of the Act. Requiring the SUA's approval on non-OAA-funded contracts would in essence be a restriction.**

When Congress added this language in 2020, the intention was to clarify that a AAA's role within the Act did not limit its activities outside of the Act, and that AAAs have autonomy over those other activities if they are outside the Act. Requiring AAAs to seek SUA approval for activities and partnerships that do not involve OAA funds would restrict AAA activity related to health care contracting and is contrary to the stated intent of the draft rule that proposes these provisions "to promote and expand the ability of the aging network to engage in business activities" (page 39578). If the proposed rule aims to expand the existing ability of the Aging Network to engage in business activities, then it should not add a layer of approval that is not clearly required by the statute.

We interpret Sec. 212 to only apply to situations in which OAA funding is being used to support those contracts and relationships and then only if the contracting entity is "profitmaking organization."

Additionally, we believe Sec. 212 *has always and only* applied to situations in which OAA funding is being used. The title of this section of the statute (CONTRACTING AND GRANT AUTHORITY; PRIVATE PAY RELATIONSHIPS; APPROPRIATE USE OF FUNDS) indicates that all sections refer to activities that involve OAA authority and funding.

Also, Sec. 212 (a) 1 through 3 are joined by an "and." That is an "all of these must be true" not a "does one of these fit," as it's clearly written to describe

private pay programs which need a) some state protocols to ensure that any OAA start-up funds can be replenished to the agency once a profit is turned; b) that the agency's rates must be reasonable in terms of market for OAA and other services, and c) that the leveraged funding must be returned as OAA program income so it can fund additional OAA services. The rest of Section 212's language only reinforces this interpretation; it focuses on the fact that, because the services provided under this section have in some way been supported by OAA money, there needs to be accountability and reporting.

To interpret all contracts as under the SUA's purview, regardless of authority or funding, defies logic, contradicts the statute and neglects consideration of the many roles that AAAs and service providers play today, beyond their OAA roles, in order to meet their missions to serve older adults and enable them to age well at home and in the community, as well as supporting caregivers and people with disabilities. A SUA cannot be responsible for approving a AAA's commercial or contracting relationships that are outside of the SUA's oversight of the AAA. The SUA has no stake in the contracts and activities, has no authority to deny the activities and does not fund the activities through OAA dollars—therefore, they should not have approval. We raise a practical matter as well: involving SUAs in the contracting process will create significant conflicts, delays and complications, swiftly leading to a reduction in AAAs' ability to expand services through contracting and other relationships.

We respect and support the fact that the statute gives SUAs oversight over *OAA-related* activities of the AAAs and support regulations to ensure that both SUAs and AAAs are clear on all statutory and regulatory obligations and responsibilities to deliver the highest-quality services to older adults and caregivers. SUAs already have ample authority and recourse in the event that a AAA is, for any reason, noncompliant with the assurances it has provided to the SUA about its OAA work.

However, in the past decade, some SUAs have discouraged or created barriers to AAAs' and providers' outside-of-OAA contracting, which is all done to be able to serve more older adults and support their ability to age well at home—something the state should be supportive of. Such behavior is an

overreach of authority and not in the best interest of the populations served by the Aging Network. The SUA already has all it needs to ensure the highest quality service delivery of OAA services by the AAA—but states should not get to decide what other funding, programs or business relationships AAAs engage in unless they can prove that those activities have undermined the financial, conflict-of-interest (COI) and other assurances the AAA (or providers) has already given regarding their critical OAA role.

AAAs are not state entities and are not beholden to any state beyond specific obligations they make in exchange for state-administered funding. They are independent nonprofits (roughly 41 percent), or part of county, municipal or councils of government (roughly 53 percent), or housed in other institutions (roughly 7 percent). The OAA gives AAAs clear roles and responsibilities under the Act, and the SUA has oversight of that work within OAA. It is egregious to presume that a state's OAA authority somehow extends to *all* the functions of a AAA or an OAA service provider, regardless of statutory authority or a funding stream. We note that the AAA National Survey, funded by ACL and conducted by USAging in partnership with Scripps Gerontology Center in 2022 with results to be released later this month, indicates that OAA funding represents only 39 percent of the median AAA's budget. It does not diminish the importance of the AAA's OAA role to secure additional funding streams, and this multiple-funding-source reality is, in fact, a testament to the charge given by the OAA to create as many options as possible for aging well at home—but that doesn't mean a state's authority over those other activities automatically extends beyond OAA.

The consequences of an incorrect regulatory decision in this case are dramatic and will harm not only AAAs and OAA service providers, but more importantly, the older adults, people with disabilities and caregivers being served by the Aging Network outside of OAA funding streams and authorities who may lose access to these needed non-OAA services.

ACL must amend 1321.9(c)(2)(xiv) in the final rule. USAging suggests at least one of the following approaches:

1) ***Amend the regulation to make clear that the contracting language in 1321.9 only pertains to approvals of contracts that use OAA***

funding and are with a profitmaking entity. Our suggested edits follow (in red).

(xiv) Contracts and Commercial Relationships. The State agency shall maintain requirements for contracts and commercial relationships that are, in part or full, supported by OAA funding, where:
(A) State agencies, area agencies on aging, and service providers may enter into contracts and commercial relationships, subject to State and/or area agency policies and procedures and guidance as set forth by the Assistant Secretary for Aging, including through:
(1) Contracts with health care payers;
(2) Private pay programs; or
(3) Other arrangements with entities or individuals that increase the availability of home- and community-based services and supports;
(B) The State agency shall require area agencies and service providers under the Act that establish contracts and commercial relationships that are supported by OAA funding to develop policies and procedures to:
(1) Promote fairness, inclusion, and adherence to the requirements of the Act, including
(i) Meeting conflict of interest requirements;
(ii) Meeting financial accountability requirements; and
(iii) Aligning with guidance as set forth by the Assistant Secretary for Aging.
(2) With the approval of the State and/ or area agency, allow use of funds for direct services under Title III to support provision of service via contracts and commercial relationships when:
(i) All requirements for direct services provision are maintained, as set forth in this part and the Act, or
(ii) In compliance with the requirements of the Act, as set forth in section 212 (42 U.S.C. 3020c), and in guidance as set forth by the Assistant Secretary for Aging.
(C) The State agency shall, through the area plan or other process, develop policies and procedures for area agencies on aging and service providers to receive approval to establish contracts and commercial relationships and participate in activities related to contracts and commercial relationships when such contracts and relationships are supported by OAA funding;

2) Given the debate over what the statute indicates and the extraordinary high risk that getting this regulation wrong will undo more than a decade's worth of work and disrupt or eliminate services for millions of older adults, caregivers and people with disabilities, ***we also urge ACL to strike***

1321.9(c)(2)(xiv) entirely if the above changes are not incorporated into the final rule. This allows time for Congress to weigh in on the intent of the statute and what the OAA needs to look like in 2023 and beyond.

3) If neither is acceptable to ACL, ***USAging urges ACL to set a longer implementation period for this portion of the regulation*** so that Congress may be consulted during its 2024 reauthorization period and the Act aligned accordingly.

It should be clear from the previous paragraphs that USAging does not support ACL's suggestion that such approval processes—*if applied to non-OAA-funded activities*—be aligned with the area plan process. While we support the idea of an ambitious, broad area plan, too many SUAs require AAAs to use the area plan as more of a contract or workplan, restrict what AAAs can include in the area plan, or dictate what should go in the plan based on the state's plan (which is supposed to be informed by the area plans of the AAAs in the state before being created, we must note). Therefore, since it is often if not usually restricted to the activities funded by the OAA, this is not an appropriate place to build on a blanket approval of activities *outside* of the OAA, should ACL continue to insist on that broad interpretation.

Contracting Using OAA Funds:

USAging does support, as was mentioned, SUA approval of AAAs' ability to engage in commercial relationships and contracts *when OAA funding is involved.* ***If our suggested changes under Recommendation 1 are accepted by ACL, we would make the following additional changes to that section of the rule (in blue):***

> (C) The State agency shall, through the area plan or other process, develop policies and procedures for area agencies on aging and service providers to receive blanket approval to establish contracts and commercial relationships and participate in activities related to contracts and commercial relationships when such contracts and relationships are supported by OAA funding; such policies and procedures around blanket approval should not be onerous, impede or cause undue delays in securing such contracts or engaging in contracting relationships;

Approval Processes:

As we have stated, we do not agree with ACL that SUAs have the authority to require that AAAs and providers gain their permission to engage in activities beyond the OAA. And we argue that SUAs already have mechanisms within the Act to protect the Act's goals and dollars. AAAs make numerous assurances to SUAs (and providers do in turn to AAAs) that they will uphold all of the responsibilities under the OAA—either in the area plan or in contracts states have them sign before distributing funding. This set of assurances, on top of the SUA's existing oversight of OAA programs and services, is sufficient to protect the interests of the older adults and caregivers the Act is intended to serve, as well as the state's own OAA responsibilities to the federal government.

Even when the SUA needs to broadly approve the AAA's ability to use OAA funds to leverage commercial relationships or contracts, the process should be simple, clear, non-onerous to AAAs, OAA providers or the state. The approval should focus on ensuring that the AAA is already in compliance with the Act and the state's OAA policies rather than focus on the individual contracts or arrangements themselves. The latter approach is not an efficient method of using a SUA's (or AAA's) time and resources, as the AAA already has to provide information about how it has used OAA funding as part of its usual reporting, and the SUA already has sufficient oversight to ensure that it is using the OAA funding in appropriate ways to serve older adults.

Our edits to the 1321.9(c)(2)(xiv)(C) language regarding additional guidance on the approval process when OAA funds are used is above. Should ACL choose to continue to interpret the statute to apply to non–OAA-funded activities in this section, ***we urge ACL to make clear that the only approval needed from the state for a AAA or provider to engage in business activities outside of OAA is an attestation that the agency is in compliance with all OAA obligations.*** This blanket approval should apply to all non-OAA contracts broadly and not be required for each individual relationship or contract, as that is beyond the state's purview since it is not a party to the contracts and, therefore, cannot approve them.

Fundamentally, this is still a redundant activity since AAAs already make these assurances regularly to states, but it is certainly the least invasive way to address states' concern that they have to "approve" such contracts or activities. A blanket approval of assurances that a AAA is in compliance and that outside contracting work will not interfere with or harm their OAA efforts and responsibilities is the only acceptable form of approval given ACL's interpretation. **We are willing to work with ACL and others in the post-rulemaking period to suggest models that states and AAAs could use.**

Additionally, ACL should also describe the appeal process available to AAAs (and in turn providers) should their SUA not approve of their third-party contract.

And finally, our members have raised additional concerns including that the regulation is at risk of being applied too broadly in other ways, and that it will pull every type of business relationship or contract into the approval process, regardless of funding source, given the lack of clarity around a "profitmaking entity." Numerous profitmaking entities are performing a public good, usually via a contract with a governmental organization, such as in the case of Medicare Advantage plans and the federal government or Medicaid Managed Care Plans and the state government.

§ 1321.47, 1321.67 Conflict of Interest Policies and Procedures for States, AAAs

Both sections reinforce the importance of preventing or mitigating perceived or actual conflicts of interest (COI), both individual and organizational, at the state, AAA or provider level, a worthy goal that is important to USAging and its members.

We are concerned that ACL's proposed rulemaking, especially the narrative, asks whether there is a COI when a state or AAA operates multiple programs, such as Adult Protective Services or guardianship programs, in addition to maintaining OAA roles such as legal assistance provision or the Long-Term Care Ombudsman Program. USAging believes any real or perceived organizational COI between these two or other functions can be

remedied by clear COI policies and firewalls. In fact, ACL suggests as much on page 39589 of the proposed rule.

The final regulation should not suggest or state that these or similar potential organizational COIs can't be prevented or remedied. We do not believe this is ACL's intention, but many in the field are concerned about a) whether saying something is a COI is enough to prevent a state or AAA from operating multiple programs at all and b) that subsequent state policies and procedures could treat potential conflicts as irremediable rather than focusing on conflict prevention with well-proven tools such as firewalls and clear policies.

§ 1321.93 Legal Assistance and Guardianship

USAging is generally supportive of the section of the proposed regulations on legal assistance, but we have concerns specifically related to limiting AAAs' important screening roles for legal assistance and the question posed by ACL around the provision of guardianship *outside of* OAA Title III B legal services.

While a large number of AAAs indicated to USAging that the newly proposed regulations around legal assistance would not create any issues for the coordination, contracting or provision of legal assistance by their agency, a significant minority had concerns about the breadth of the revised regulations, including the potential to be burdensome and further restrict access to legal assistance.

USAging appreciates ACL's intention to ensure that the highest quality legal assistance is provided under the Act. However, we fear the robust regulations—which are far more detailed than any other part of the rule except Title VII and much longer than existing regulation and the statute—will make it difficult to find legal providers that can meet all the proposed regulatory requirements, especially in rural or underserved areas, and as a result, limit access to legal assistance in those areas.

We suggest that some or all the new additions to the regulation be softened to better accommodate the range of state, AAA and provider experiences in different parts of the country. Specifically:

- ***Sec. 1321.93 (d)(2): We recommend adding "wherever possible" after "including" but before "income and public entitlement benefits…"***
- ***Provide flexibility for providers on meeting the language and accessibility requirements, which only apply to this section of the OAA.*** *Philosophically, this is important, but given the resource limitations in certain areas of the country, flexibility would be welcome.*

We also are concerned that in one instance, the legal assistance language does not reflect the AAA's important role in providing Information and Referral (I&R) and other screening or assessment roles, even as related to access to legal services. Legal assistance is just one of many services coordinated by AAAs and it should not be so siloed and weighed down by regulations that it limits the holistic and person-centered approach to all OAA services that the Act demands. ***ACL should strike the language in 1321.93 (e)(3)(i) that precludes the AAA from pre-screening older adults seeking legal assistance.***

We are also very concerned by ACL's request for feedback on "if operating a guardianship program or accepting a guardianship appointment of an older person should be a prohibited conflict for AAAs, since the Act requires AAAs to advocate for the rights of older people, including in guardianship arrangements." (pages 39590-91) As already noted in the COI section of our comments, these concerns can be mitigated with appropriate COI policies and firewalls. AAAs already work diligently to prevent real or perceived COI across their agencies.

USAging agrees that it is reasonable for ACL to regulate that the vast majority of OAA legal assistance dollars being spent on guardianship issues be limited to "defense of guardianship."

However, we do not agree that a state or AAA's role in providing OAA legal assistance presents an irremediable COI with playing a role in the state or local guardianship system, assuming the proper firewalls and COI policies are in place.

This unduly limits the ability of AAAs to serve as many older adults as possible in the appropriate manner determined by their state, county or agency. AAAs serve in the role of public guardian or guardians of last resort because they are the best option in that community to provide high-quality services when guardianship cannot be avoided. While guardianship is never ideal, it is necessary in some cases, including when individuals are living with dementia or facing other significant barriers in functioning without support such as guardianship as a last resort.

Banning AAAs from ever serving as a public guardian does not align with the realities of the field, is not in the best interest of the limited number of older adults who are currently under a AAA's guardianship, and is not dictated by the statute. ACL should avoid any regulatory language that indicates that these two different roles cannot, with appropriate firewalls, be managed ethically and efficiently by a AAA. Anything else would be an overreach and could potentially put the older adults currently receiving guardianship services from a AAA at risk of receiving a less appropriate and supportive guardian, if one is even available.

§ 1321.87 Nutrition Services

USAging commends ACL for listening to our members and other Aging Network entities such as states and nutrition providers about the need for enhanced flexibility in the nutrition program since the COVID-19 pandemic transformed service delivery and created new innovations.
We strongly support ACL's recommendation to allow for "grab-and-go"–style meal delivery under the OAA Title III C1 congregate meals program, as it allows AAAs more flexibility to meet the nutritional and social needs of older adults in a person-centered way.
However, we ask ACL to consider altering this C1 improvement to:

- ***Allow AAAs to offer this service regardless of the SUA's interest in mandating or offering it statewide.*** This is too important of a flexibility to be fully at the state's discretion, as it is a great example of customizing services to meet the current needs of AAA clients at the local level and being as responsive as possible to offering older adults a range of service options including those they actually want to receive.

- ***Increase the percentage of funding that is allowed to be spent on this alternative format to 25 percent.*** If the goal is flexibility and given the tremendous expansion of this form of service delivery during COVID-19, USAging believes a slightly higher cap is needed in order to respond to local and changing needs.
- ***Make it easier to use this new flexibility by reducing the amount of documentation the SUA, AAA and providers need to manage.*** We appreciate the intent behind this given the congregate meal program's focus on socialization, but a modestly staffed SUA may be reluctant to take up the option due to the added paperwork or complexity, which limits the AAA's ability to take a person-centered approach with its clients. We also desire a lighter approach to documentation as we are cognizant of the burden of tracking on the providers as well as AAAs.

USAging is calling on ACL to clarify, in the final rule or in subregulatory guidance, whether the proposed 20 percent of C1 funding is calculated based on the total allocation to the state or AAA, or the allocation *after* any transfers have been made (i.e., C1-C2 transfers, as well as C-B).

USAging supports ACL's clarification that an individual does not need to be homebound to receive an OAA Title III C2 home-delivered meal and that a AAA or provider may be allowed to encourage a home-delivered meal client to attend a congregate setting for other activities—both of which reflect a person-centered approach. We trust AAAs will continue to be judicious and thoughtful as they prioritize those most in need of services and adjust to local resources and conditions. The limited funding available for all OAA services should not be a justification for overly strict guidelines that do not reflect the roles of AAAs to determine local needs and leverage local resources to meet those needs.

We also appreciate ACL's updating of Sec. 1321.9 (c)(2)(iii)(F) to include language that makes explicit that a SUA does not have to apply equal limitations on transfers to each AAA. This allows AAAs with higher need to execute transfers greater than the statewide limit to better meet the needs of older adults in their PSAs.

§ 1321.9(c)(ii) Non-Federal Share (Match)

USAging has concerns with ACL's proposed language in the Non-Federal Share Match section that imposes a new policy in which funding sources would only be eligible for the non-federal share match if they are not means tested. This new requirement is not currently part of the OAA statute, meaning ACL is setting new policy and thus new requirements for SUAs and AAAs.

A majority of AAAs responding to our survey felt this newly imposed requirement would make it much more difficult for their agencies to meet the match requirements. Many AAAs currently use match funding sources that are means tested, and without access to those sources would have a much harder time raising match. Some AAAs have noted that raising match funds is presently a difficult process without this proposed requirement. Numerous AAAs have noted the non-federal share match is an important part of ensuring vital programs stay afloat due to a lack of federal funding, and that if match-raising becomes more difficult it could impact their ability to provide programs or services.

USAging believes this new requirement would place an undue burden on AAAs, adding unnecessary barriers to the match-raising process for the non-federal share. To address this, ***USAging recommends ACL remove the new language requiring that match sources are not from means-tested programs by striking (c)(2)(ii)(C) and reordering the rest of the section accordingly.***

§ 1321.9(c)(2)(viii) Rural Minimum Expenditures

USAging is concerned that ACL's proposed language in 1321.9(c)(2)(viii) excludes AAAs from the process that would determine the definition of a "rural area" within a state and the creation of a rural service plan. We believe that ACL's proposed language, in overlooking the input of AAAs, would result in an overall less effective rural service plan.

Within this section, the definition of "rural area" would be core to ACL's proposed requirement that an SUA must develop a state plan to provide OAA

services to older individuals residing in rural areas. These rural areas, once defined, would serve as the blueprint for the plan and inform which areas of a state would be served by the plan. Furthermore, determining these rural areas would be instrumental in projecting the cost of the services outlined within the plan for meeting the needs of rural areas. Since costs are likely to be determined by the number of older individuals residing in those areas, among other factors, defining rural areas that provide the most accurate snapshot of the number of older individuals within an area is critical to a successful plan.

As AAAs are the local leaders on developing services for the older individuals in these areas, it is imperative that AAAs are consulted by the SUA to give input on the process for designating "rural areas" within a state and the rural area service plan.

Currently, ACL's proposed language requires state agencies to "establish a process and control for determining the definition of ''rural areas'' within their State." However, the proposed regulation lacks any requirement for the state to consult with AAAs in the process to define rural areas or the creation of the plan for meeting the needs of rural areas. As such, USAging is encouraging ACL to require state agencies to consult with AAAs to gain input as they develop these processes.

USAging recommends ACL amend Sec. 1321.9(c)(2)(viii) before publishing a final rule. USAging suggests the following approach, with our additions in red, but any language that requires SUAs to consult AAAs in the process to determine rural areas and the creation of the plan to meet the needs of rural areas would be acceptable:

- *§ 1321.9(c)(2)(viii). Rural Minimum Expenditures.* The State agency shall maintain minimum expenditures for services for older individuals residing in rural areas, where:

  (A) The State agency, in consultation with AAAs, shall establish a process and control for determining the definition of ''rural areas'' within their State;

  …

  (C) The State agency must project the cost of providing such services for each fiscal year (including the cost of providing access to such services) and must specify a plan, in consultation with AAAs and via

the area plans, for meeting the needs for such services for each fiscal year;

§ 1321.9(c)(2)(xi) Cost Sharing

ACL's proposed regulation specifies that "if a State agency chooses to establish a cost sharing policy, it must be implemented statewide at all AAAs in the State, with limited exceptions, where a State agency approves a waiver request from a AAA where the AAA demonstrates that a significant proportion of persons receiving services under the OAA have incomes below a certain threshold or that applying the cost sharing policy would place an unreasonable burden upon the AAA." USAging is asking ACL to change the language to allow AAAs to make the decision of whether to cost share, rather than have the decision imposed by the SUA.

USAging strongly believes that AAAs should be able to make their own decisions on implementing cost sharing rather than SUAs requiring AAAs statewide to cost share or not. Feedback from dozens of AAAs highlighted the fact that many AAAs are currently not permitted to implement cost sharing but would like to do so, and conversely that some AAAs currently required to cost share would prefer not to do so. Statewide implementation of cost sharing clearly is not working for every AAA, and rather than the SUA imposing a cost sharing requirement or ban, it would be more beneficial for AAAs to have the option to implement cost sharing on a case-by-case basis.

USAging urges ACL to make the following change before publishing a final rule. USAging suggests the following approach but any language that allows AAAs to make the decision to implement cost-sharing would be acceptable:

- *"Section 1321.9(c)(2)(xi) Cost Sharing.* A state is permitted under section 315(a) of the Act (42 U.S.C. 3030c–2(a)), to implement cost sharing for services funded by the Act by recipients of the services, except as provided for in § 1321.9(c)(2)(xi)(D). ~~If the State agency allows for cost sharing, the~~ State agencies may implement cost sharing statewide or allow at the option of each area agency on aging. In either case, the State agency shall address these requirements:…"

§ 1321.9(c)(2)(xiii) Private Pay Programs

USAging appreciates that ACL is requiring SUAs to establish requirements for private pay programs, enabling AAAs and providers that wish to leverage OAA funding to create additional options for older adults can do so with appropriate guidance from the SUA that is based on this rule and the statute. It's important to note that not only do private pay programs extend the AAA's ability to serve more older adults overall, these programs also leverage additional funding that is used to serve more clients under the OAA.

§ 1321.13 Designation of and Designation Changes to Planning and Service Areas

USAging appreciates the clarity of this section including:

- subsection (b) which makes clear that a AAA-model state cannot decide to become a single-PSA state; and
- the detail provided to states regarding what their policies and procedures must include, such as notice to interested parties and provisions for including AAAs, providers and older adults in the action or proceeding.

§ 1321.21 Withdrawal of Area Agency Designation

USAging thanks ACL for the update made in (a)(4) and we are in general support of ACL's proposed regulatory language on the protocols that states must follow when withdrawing a AAA designation, with one exception. Under (d)(3), which aims to address when a SUA is unsuccessful in procuring a new applicant to serve as the AAA, the rule indicates that reasonable attempts "include conducting a procurement [for a AAA] no less than once per State plan on aging period." USAging believes this is too long of a period for a SUA to remain as the functional AAA for that planning and service area, given that state plans are often not updated for three or more years. While we appreciate the need for flexibility for states in this regard, we do not want SUAs functioning as AAAs for an extended period of time and call on ACL to include clear language in the final regulations to prevent this, as we don't believe it is in keeping with the very intentional structure of the OAA. ***We recommend striking the final sentence in (d)(3).***

§ 1321.27(c) Content of State Plan

USAging applauds ACL for including language that reflects USAging's June 2022 recommendation, as well as our read of the statute, that all state plans should be built upon area plans and not the other way around. It is notable that area plans are mentioned earlier in the statute than state plans, despite other state duties being listed earlier. ***We are glad to see the inclusion of ACL's "informed by and based on" language and urge it to remain the same in the final rule.***

§ 1321.27(h)(1) Program Development and Coordination Activities

USAging requests ACL to provide further clarification on the language in (h)(1) that limits the SUA to "funding program development and coordination activities as a cost of supportive services until it has first spent 10 percent of the total of its combined allotments under Title III on the administration of area plans." This presents a logistical problem for states and AAAs. AAAs need access to funding for program development and coordination throughout the year, not just after their administrative funding has been expended. Intentional planning and development leads to better managed spending, and, as currently worded, the proposed rule discounts the fact that funding may not be spent up to the 10 percent because there is a need for program development and coordination activities to move the spending plan forward. Many SUAs allow AAAs to bill their program development funding as they use it throughout the year, and we are concerned that the proposed language would create a barrier to SUAs and AAAs.

We propose the following edit:

- "(h)(1)~~The State agency shall not fund~~ Before allocating funding for program development and coordination activities as a cost of supportive services, the State agency must have a plan to fully expend ~~until it has first spent~~ 10 percent of the total of its combined allotments under Title III on the administration of area plans."

§ 1321.55 Mission of the Area Agency, Board of Directors, Focal Points

USAging appreciates ACL's removal of the archaic focal point language that was previously in this section of the rule—it was not the appropriate place for a focal point reference and did not reflect how the Aging Network functions presently or will function in the future.

However, one change made by ACL in the updating of these regulations is of concern. In (b)(10), language was changed regarding the importance of AAAs engaging with community leaders to meet their missions. By changing "Be directed by" to "Have a board of directors comprised of" leaders, ACL has inadvertently created a problem. This term is not broad enough to apply to all AAAs since a majority of AAAs do not have a traditional board of directors governing their agency due to having a governance structure based in counties, councils of government, municipalities and other governmental entities. The governmental boards or similar structures (e.g., county board of supervisors) that govern those agencies have a much broader scope and do not provide the level of advising to the AAA that we believe the statute is calling for in this section. We believe the statute in this case refers to the advisory council set out in another section of the statute and detailed in § 1321.63 of the proposed rule.

Our recommendation, therefore, is to strike, in (b)(10), the first seven words and replace them with "Engage with."

- "(10) ~~Have a board of directors comprised of~~ Engage with leaders in the community..."

An alternative approach would be to clearly reference the advisory council:

- "(10) Use an advisory council as set forth in § 1321.63 to engage with leaders in the community…"

Whichever approach ACL selects, this is an important fix to make in the final rule.

§ 1321.57 Organization and Staffing of the AAA

USAging thanks ACL for the modest but important change made in (a)(2) that best reflects the range of AAA governance structures. We have no further edits to this section of the proposed rule.

§ 1321.59 Area Agency Policies and Procedures

USAging applauds ACL's language in this new section which reinforces the AAA's role in developing policies and procedures of its own, in compliance with the state's rules, that govern all aspects of OAA programs. We thank ACL for acknowledging the authorities AAAs have in the Act.

§ 1321.63 Area Agency Advisory Council

USAging salutes the importance of AAA advisory councils to ensure AAAs' work is informed and advised by the experiences of the diverse array of populations the agency serves. USAging commends ACL's proposed regulations to affirm the importance of advisory councils, as well as the proposed language that helps to ensure representatives of the communities served by the AAA are included on the council.

However, in some cases AAAs may need more flexibility given local recruitment challenges and nationwide declines in volunteers. USAging is proposing that ACL amend the language in (b)(1) to specify that the council should be composed of a significant number of older adults, reaching at least 50 percent *where possible.* We note that the statute does not set a minimum percentage of the council that must be older adults and, while USAging agrees that this should be the top priority in recruiting for the advisory councils, a too-rigid federal directive can create occasional difficulties or challenges in certain circumstances. We appreciate the language in (b)(9) that notes the final populations to recruit may be "as available" and urge ACL to retain that language.

Therefore, ***USAging recommends ACL amend 1321.63 before publishing a final rule.*** USAging suggests the following approach but any language that makes Area Agency Advisory Council composition requirements more flexible would be acceptable:

- "(b)(1) ~~More than 50 percent~~ Significant numbers of older persons, including minority individuals who are participants or who are eligible to participate in programs under this part, with efforts to include those identified as in greatest economic need or greatest social need in § 1321.65(b)(2); whenever possible, older persons should represent more than 50 percent of advisory council members;"

§ 1321.69, § 1322.31 Title III and Title VI Coordination

USAging supports the sections that remind SUAs, AAAs and Title VI programs of their respective responsibilities to coordinate between Title III entities and Title VI grantees. We believe the language as written is appropriate given the important role of coordination and what is reasonable to expect each party to offer the others.

§ 1321.75 Confidentiality and Disclosure of Information

Maintaining confidentiality is an important safeguard when operating OAA programs and services. USAging has concerns, however, that in (f), the language, while accurate, may not be clear enough for the Aging Network to consistently interpret and implement. Specifically, the naming of the Health Insurance Portability and Accountability Act (HIPAA) may be misunderstood to apply to all OAA-funded entities or activities, regardless of whether the AAA's or provider's status or activities outside of make them required to be HIPAA compliant. ***We believe the simplest way to ensure clarity is to remove the one example of HIPAA and we suggest it be amended to read:***

- "State agencies policies and procedures must comply with all applicable Federal laws, codes, rules, and regulations, ~~including the Health Insurance Portability and Accountability Act (HIPAA),~~ as well as guidance..."

§ 1321.85 Supportive Services

USAging recommends slightly amending this section by striking in (a), "which may include multipurpose senior centers" after "access services." A senior center in and of itself is not a service and is not listed as such in the statute as one of the 26 services a AAA can provide under Title III B Section 321(a). We are not challenging the use of III B funding to, as specified in

the law under Section321(b) and in the proposed rule under 1321.85(b), acquire, construct or renovate multipurpose senior centers, but we do not believe that calling out a specific type of location in the rule adds particular value when there are many other services that III B funds, as well as other types of providers or locations used to deliver those services.

§ 1321.99 Setting Aside Funds to Address Disasters

USAging is concerned that ACL's language allowing SUAs to set aside funds to address disasters is too broad and doesn't guarantee that AAAs will receive the set-aside-yet-unused funds in a manner timely enough to spend them before the end of the fiscal year.

To address this, USAging recommends ACL change the language to ensure the funds are redistributed back to AAAs if unused. Furthermore, we recommend returning the unused funds to AAAs sooner than the last month of the fiscal year to give AAAs a more reasonable timeframe to expend the funds. Thirty days does not give AAAs enough time to properly use the funds, potentially resulting in unused funds. As such, we recommend giving AAAs at least 45 days to spend the funds. We also recommend the state notify the AAA of the forthcoming redistributed funds at least 60 days in advance of the end of the fiscal year, to help the AAA plan for the infusion of funding. Finally, to ensure fairness across planning and service areas, USAging recommends ACL make clear that the SUAs must use the intrastate funding formula to redistribute any unused set-aside funding.

Our suggested changes to 1321.99 (b)(3):

- "(3) The State agency must have policies and procedures in place to award funds through the intrastate funding formula ~~or funds distribution plan~~ if there are no funds awarded subject to this provision within ~~30~~ 45 days of the end of the fiscal year in which the funds were received. Furthermore, the State agency is encouraged to notify area agencies on aging of the pending distribution no later than 60 days from the end of the fiscal year."

Part 1322 Grants to Indian Tribes and Native Hawaiian Grantees for Supportive, Nutrition and Caregiver Services

Generally, USAging supports the added definitions and updates for the Title VI Native American Aging Programs regulations. However, for Title VI programs to implement the proposed regulations, USAging believes that generous ACL technical assistance must be provided to Title VI programs, as we are concerned that some may encounter difficulty in developing the more-robust policies and procedures required of this regulatory update. Title VI programs are drastically underfunded and are chronically understaffed, with overworked staff often carrying out the responsibilities of multiple roles at once. According to USAging's National Survey of Title VI Programs 2020 Report, half of Title VI programs have two or fewer full-time staff and two or fewer part-time staff.

It is imperative that ACL provides Title VI programs with the training, technical assistance and administrative support they will need to continue serving their populations under the new rule.

§ 1324.303 Legal Assistance Developer

USAging supports the role of a statewide legal services developer and the benefit that having such a role, especially when filled by a full-time employee, can bring to state and local legal assistance efforts and the legal needs of older adults.

However, much as with the Legal Assistance section of the regulations, we are concerned that ACL's proposed language does not reflect the on-the-ground realities in some states and areas of the country. Funding for activities under OAA Title VII is extremely limited, and while we would welcome increased investments by Congress in all Title VII programs, including but not limited to the legal assistance developer, we are worried that SUAs will not be able to fulfill these new requirements for legal assistance developer without considerably increased appropriations.

Implementation Timeline

USAging recommends ACL set an implementation of three years following

the release of the final rule. Due to the complexity of these proposed regulations and the far-reaching changes they may bring to the work of AAAs and Title VI programs, an ample amount of time is necessary for state agencies to respond to the obligations brought by the final regulations—and then for AAAs and providers to rework their own policies and procedures to comply with the state's. A three-year timeline will give agencies at both levels the opportunity to map out and anticipate the changes they will need to make under the new rule, as well as give them time to gradually transition current policies and procedures to comply with the final rule.

As always, we welcome continued conversations and collaboration to advance our shared goal of ensuring older adults can age well at home and in the community. If you or your staff have any questions about our comments, please feel free to contact Amy Gotwals, Chief of Public Policy and External Affairs, at agotwals@usaging.org and Olivia Umoren, Director of Public Policy and Advocacy, at oumoren@usaging.org.

Sincerely,

Sandy Markwood
Chief Executive Officer