

## *Older Americans Act: Understanding Section 212*

### **1. Introduction**

The Administration for Community Living applauds and encourages the efforts of our aging services network to expand its infrastructure, capacity, and financial sustainability by leveraging resources beyond those provided through the Older Americans Act (OAA, or “the Act”). This includes the development of contracts and commercial relationships with health care payers and other funders, which enable the aging services network to provide more older adults with supportive, nutrition, and other services. These activities are authorized by section 212 of the OAA.

This guidance was developed in response to questions ACL has received from the aging services network and to clarify provisions in the 2024 OAA final rule<sup>1</sup> related to section 212 of the OAA. It is intended to assist state agencies (also known as state units on aging, or SUAs) and area agencies on aging (AAAs) in streamlining existing processes and developing policies and procedures to implement section 212 of the OAA. (See Appendix A for a sample SUA policy and procedure to assist SUAs and AAAs in understanding how to implement requirements related to section 212.)

### **2. Defining contracts and commercial relationships**

In the 2024 OAA final rule, we use “contracts or commercial relationships” consistently as a broadly encompassing phrase. Whether something is a “contract,” “business arrangement,” “agreement,” “business transaction,” or any other term that an organization might use to describe a business arrangement between one or more entities, it is broadly encompassed within the statutory term “contracts or commercial relationships.”

Similarly, ACL does not distinguish between a “contract” and a “commercial relationship”; the same requirements apply, regardless of how an organization defines the agreement.<sup>2</sup> For the purposes of this guidance, we may refer to “contracts and commercial relationships” as “agreements.”

When we are not referring to all “contracts and commercial relationships,” we explain which subset is relevant. For example, the phrase “contracts and commercial relationships that fall under section 212 of the Act” would refer to the agreements described in section 212 of the Act. We refer to agreements authorized by section 212 of the Act as “section 212 agreements.”

### **3. State approval of AAA activities**

As recipients of federal funding under the OAA, SUAs ultimately bear responsibility for determining whether AAAs, as the designated subrecipients of federal funding, comply with federal requirements.

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<sup>1</sup> 89 FR 11566 (Feb. 14, 2024), available at <https://www.govinfo.gov/content/pkg/FR-2024-02-14/pdf/2024-01913.pdf>.

<sup>2</sup> 89 FR 11587.

Beyond general oversight responsibilities, the OAA establishes two mechanisms for SUAs to provide advance approval of AAA activities.

First, SUAs must develop a policy and process for approving section 212 agreements. This process must be readily available for AAAs seeking approval for activities. Opportunities related to section 212 may arise outside of standard area plan timeframes, and requests for prior approval do not need to meet the same expectations for public input, advisory council review, and other area plan requirements. AAAs can only successfully establish contracts and commercial relationships that require prior approval if SUAs approve them in a timely fashion.<sup>3</sup>

Second, in addition to an approval process specific to section 212 agreements, we also encourage SUAs to incorporate approval of section 212 agreements into the area plan approval process.

The area plan approval process is described in section 306(a) of the Act.<sup>4</sup> Area plans describe the AAA’s plans to facilitate the provision of OAA services during a specific timeframe within a planning and service area. Once the SUA approves the area plan, the AAA can then establish agreements with service providers to achieve the goals laid out in the area plan during the approved period.

In order to incorporate section 212 approval into the area plan process, SUAs would need to collect certain minimum information about prospective section 212 agreements, which we discuss elsewhere in this guidance.

The chart below describes the similarities and differences between the requirements for area plan approval and the requirements for prior approval of section 212 agreements under the Act.

	SECTION 212 REQUIREMENTS	AREA PLAN PROCESS
<b>Prior approval</b>	<p>If AAAs want to enter into section 212 agreements, they must receive prior approval. Through section 212, AAA may support a single activity or a category of activities through contracts with other entities.</p> <p>OAA funding may or may not be involved in these agreements.</p>	<p>AAAs must receive prior approval through the area plan to use OAA funding to support a category of activities through contracts with service providers.</p>
<b>Providing direct services</b>	<p>After receiving prior approval for section 212 agreements, AAAs may directly provide services.</p>	<p>For AAAs to directly provide certain Title III services using OAA funding, prior approval is required from the SUA, consistent with sections 307(a)(8)(A) of the OAA and 45 CFR 1321.65(b)(7).</p>

<sup>3</sup> 89 FR 11588-11589.

<sup>4</sup> Section 306(a) of the Older Americans Act; 42 U.S.C. 3026(a).

<b>Frequency of approval</b>	Prior approval process should be available at any time.	Occurs every 2-4 years, as determined by the SUA, with annual updates and adjustments as needed.
<b>Public input</b>	Does not require public input or advisory council review.	Requires public input and advisory council review.
<b>Disclosure of specific information</b>	Prior to approval, requires disclosure of certain minimum information, but <b>not necessarily the identity of an entity.</b>	After approval of the area plan, requires the <b>annual</b> disclosure of the <b>identity of all entities</b> with which AAA has contracts or commercial relationships to provide services to older adults. This disclosure requirement applies to section 212 agreements as well.
<b>Minimum information required for approval</b>	<p><b>Disclosure of specific minimum information</b> is required before an agreement can be established:</p> <ul style="list-style-type: none"> <li>• Name or type of entity or entities with which AAA intends to contract</li> <li>• Nature of the agreement(s) (including specific services or types of services to be provided)</li> <li>• Estimate of the proposed costs to be incurred</li> </ul> <p>This information would need to be incorporated into the area plan process in order to use that process to approve of section 212 agreements.</p>	<p>Typically, SUAs approve <b>general activities</b> in the area plan, rather than approving of specific agreements to facilitate the provision of Title III services.</p> <p>Disclosure of specific information about agreements to conduct area plan activities generally occurs <b>after</b> an agreement has been established.</p>

#### 4. Determining which agreements require prior approval

Section 212 of the OAA permits AAAs to enter into agreements “**to provide services to individuals or entities not otherwise receiving services under this Act,**” subject to a number of conditions. One of those conditions is the requirement that the AAA receive prior approval from the SUA before entering into the agreement. Section 212 applies equally to contracts and commercial relationships executed with and without OAA resources.<sup>5</sup>

#### Understanding what it means to provide “services to individuals or entities not otherwise receiving services under this Act.”

AAAs serve many individuals under the OAA. However, the OAA is not intended to fund all services to meet all the needs of all older individuals and family caregivers. Through section 212, the OAA

<sup>5</sup> 89 FR 11589.

encourages AAAs to expand their services beyond the needs that OAA funding can meet, as part of their responsibility to facilitate the provision of services in their planning and service area.

SUAs are ultimately responsible for determining whether a contract or commercial relationship is an agreement that requires prior approval under section 212. However, below are a few guiding questions to help SUAs and AAAs better understand when an agreement is “to provide services to individuals or entities not otherwise receiving services” under the OAA. Section 212 only requires prior approval for those kinds of agreements.

### **Question 1: What is the funding source?**

#### Non-OAA Funding

- An agreement **is** subject to prior approval under section 212 if a AAA is receiving a non-OAA source of funding to provide or facilitate the provision of services.
  - *Example:* A AAA seeks to provide home-delivered meals through a contract with funding from a local hospital system or health plan.
  - *Example:* A AAA seeks to provide direct services under private pay arrangements.
  - In both of these examples, the AAA is seeking to provide direct services in return for reimbursement from non-OAA funding. Therefore, the agreements require prior approval.

#### OAA Funding

- An agreement **is not** subject to prior approval under section 212 if a AAA is using OAA funding to pay another entity (i.e., a service provider) to provide OAA services to OAA clients, in accordance with its area plan.
  - *Example:* A AAA provides transportation services with OAA and other matching funding to clients in its planning and service area by contracting with a transportation service provider.
  - *Example:* A AAA is a direct service provider of home-delivered meals using OAA funding. The AAA establishes agreements with service providers to help support its home-delivered meals program. The SUA approves this arrangement as part of the area plan process.<sup>6</sup>
    - In this example, the AAA sought and received approval from the SUA to provide direct services using OAA funding. Any contracts necessary to support that program **are not** subject to prior approval under section 212.
  - In both of these examples, the AAA’s activities are already approved under the area plan. These are not section 212 agreements.
- An agreement **is not** subject to prior approval under section 212 if a AAA is using OAA funding to pay an entity to meet the administrative needs necessary to enable the AAA to fulfill its obligations under the OAA.
  - *Example:* The AAA has contracts for utility, janitorial, and other services for the AAA’s primary office building.

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<sup>6</sup> Consistent with section 307(a)(8)(A) of the Act and 42 CFR 1321.65(b)(7).

- These agreements are required for a AAA to fulfill its responsibilities under the area plan. They are not section 212 agreements and do not require prior approval.

## **Question 2: Who are the clients that will be served through the agreement? How is the AAA determining who is eligible for these services?**

### Clients are identified by another entity:

- If the AAA is arranging for services to be provided to a group of clients identified by another entity, the agreement **is** subject to prior approval under section 212. This is true even if the clients would be eligible for the AAA's Title III OAA services under the Act.
  - *Example:* A AAA makes home-delivered meals available to older adults through Title III funding. They have enough capacity to make additional home-delivered meals available to participants in a Medicare Advantage plan who need time-limited assistance. The plan seeks to contract with the AAA to provide home-delivered meals for clients identified by the plan.
    - In this example, the AAA must receive prior approval before entering the contract.
- If the AAA is arranging to provide specific services to a subset of existing OAA clients, but a third-party entity establishes the criteria for determining who among the clients will receive services, the agreement **is** subject to prior approval under section 212.
  - *Example:* The AAA provides caregiver support services to eligible individuals under the Act. Some clients who receive home-delivered meals under the Act are seeking caregiver support. Several of these clients are members of a health plan. The health plan arranges to pay the AAA to provide caregiver support to those clients.
    - In this example, the AAA must receive prior approval before entering the contract. Even though the same clients could have received the same services through the use of OAA funding, in this example the clients "jump" to the front of the line and receive services immediately, regardless of any potential waitlist, because the health plan is paying for the service.

## **Question 3: What are the services being provided?**

### Non-OAA Funded Services

- If the services are only available to private pay clients or entities, the agreement **is** subject to prior approval under section 212.
  - *Example:* A AAA seeks to expand its congregate meals program and make medically-tailored meals available to private pay clients with diabetes, cardiovascular conditions, and other health needs (or entities on their behalf).
    - In this example, the private pay program requires prior approval under section 212, because these medically-tailored meals would not otherwise be available as part of the congregate meals program due to funding constraints, and individuals would not otherwise be able to receive these services. However, the AAA would seek approval for the whole private pay program, and not for each individual arrangement.

- If the AAA is providing (or facilitating the provision of) allowable OAA services to individuals who do not meet the eligibility requirements under the Act, the agreement **is** subject to prior approval under section 212.
  - *Example:* A AAA provides care coordination to eligible adults age 60 and older and family caregivers using OAA funding, consistent with its approved area plan. The AAA wants to provide this service for a fee to individuals seeking services who do not meet OAA eligibility requirements (for example, individuals under age 60).
    - In this example, the AAA would seek prior approval under section 212 for this private pay program.

#### OAA Funded Services

- If the AAA is providing (or facilitating the provision of) allowable OAA services and making them available through OAA funds to individuals that meet the eligibility requirements under the Act, the agreement **is not** subject to prior approval under section 212.
  - *Example:* A AAA provides physical activity classes to adults age 60 and older using OAA funding, consistent with its approved area plan.
    - In this example, section 212 does not require prior approval for any arrangement to provide new or different physical activity classes with the same attendee criteria; other SUA policies and procedures regarding OAA-funded activities would apply.

### **5. Determining who is responsible for seeking prior approval for section 212 agreements**

AAAs must receive prior approval from the SUA to establish agreements between the AAA and another entity or type of entity for section 212 agreements. After receiving approval, the AAA may then also contract with service providers to fulfill its obligations under the approved agreement(s). **Only the AAA needs to seek prior approval in such an arrangement.**

A group of AAAs may also collaborate as part of a larger arrangement (e.g., through a community care hub), with one “lead” AAA primarily engaging with the third-party funder. In this case, at the discretion of the SUA, the AAAs could collectively seek prior approval so long as the specific actions being taken by each AAA and the consent of each AAA to participate in the arrangement are clearly laid out.

### **6. Section 212 agreements with non-profit entities**

SUAs have the discretion to extend the opportunities and obligations available under section 212 of the Act for agreements with for-profit entities to agreements with non-profit entities. In other words, if an agreement would be permitted under section 212 with a for-profit entity, an SUA could determine that a similar agreement with a non-profit entity is also permissible so long as the other requirements of section 212 are met. We encourage SUAs to take this approach to expand services and supports or otherwise to explain why they decline to do so in their policies and procedures.<sup>7</sup>

### **7. Using OAA funds to support section 212 agreements**

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<sup>7</sup> 89 FR 11587.

Section 212 permits AAAs to use OAA funds in a way that would not otherwise be allowable—a AAA can use OAA funding to help support or develop an initiative that will then be supported by another funding source. If a AAA uses OAA funds in this way, any OAA funds must be reimbursed after the agreement becomes profitable, and any subsequent profits must be reinvested in OAA services.<sup>8</sup> ACL is available to provide technical assistance to assist SUAs in supporting these initiatives. In understanding what “costs” qualify as “OAA funding,” it is also important to quantify (and reimburse) other kinds of OAA-supported resources that were used to contribute to the new initiative. Some commonly overlooked OAA-funded resources include administrative overhead costs, use of OAA data systems, staffing and training costs that are wholly or partially funded by the OAA, and access to OAA client lists.

It is important to remember that section 212 agreements require SUA prior approval regardless of whether OAA funding is used to support them.

## **8. SUA considerations in developing prior approval processes**

SUA oversight policies and procedures should be streamlined, transparent, not overly burdensome to either the state or AAAs, and commensurate to the degree of risk associated with a specific contract or commercial relationship.<sup>9</sup>

In developing their policies and procedures, SUAs should consider the relevant government interests associated with reviewing a potential contract or commercial relationship, including, among others:

- any potential conflicts of interest (COI) and if appropriate firewalls exist to mitigate them;
- if the AAA is meeting existing obligations under the OAA; and
- potential risks to the AAA, the aging services network, or to the individuals served by the AAA associated with the proposed contract or commercial relationship.<sup>10</sup>

Section 306(a) of the Act sets forth many relevant government interests in the form of assurances that AAAs must offer for area plan approval.<sup>11</sup> SUAs might consider incorporating these assurances into their prior approval process, in addition to the requirements laid out in section 212(b) of the Act.<sup>12</sup>

SUAs are not parties to section 212 agreements. However, they are responsible for receiving sufficient information to approve of certain contracts and commercial relationships, consistent with sections 305(a)(1)(C), 306(a) 306(b), and 212(b)(1) of the Act. SUAs are also responsible for ensuring that the use of federal funds is reasonable and allocable, consistent with 45 CFR Part 75.<sup>13</sup> Engaging in these

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<sup>8</sup> Section 212(a)(3) of the Older Americans Act; 42 U.S.C. 3020c(a)(3); 89 FR 11589.

<sup>9</sup> 89 FR 11587.

<sup>10</sup> 89 FR 11588.

<sup>11</sup> 89 FR 11588; 42 U.S.C. 3926(a).

<sup>12</sup> 89 FR 11588; 42 U.S.C. 3020c(b).

<sup>13</sup> The Department of Health and Human has adopted the Office of Management and Budget’s Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, effective October 1, 2025. From that date, ACL grantees should refer to 2 CFR Part 200 instead of 45 CFR Part 75. 89 FR 80055, available at <https://www.federalregister.gov/documents/2024/10/02/2024-21984/health-and-human-services-adoption-of-the-uniform-administrative-requirements-cost-principles-and>.

responsibilities does not make the SUA a party to the contract or commercial relationship under review.<sup>14</sup>

Although SUAs have the discretion to request to review contract documents if they deem it necessary to determine whether the contract or commercial relationship may be approved, it should not generally be necessary to do so. As we state in the final rule, we expect SUA approval processes to be flexible, reflecting the needs of the older individuals served and the abilities of AAAs to engage in contracts and commercial relationships.<sup>15</sup> We remind SUAs that 45 CFR 1321.9(c)(2)(xiv)(C) requires policies and procedures that permit AAAs to “receive approval to establish contracts and commercial relationships;” it generally does not require review of contract documents in order to provide that approval.

The SUA, as the direct recipient of OAA funding, always has the ability to engage in oversight for subrecipients, including the ability to audit or request supporting documentation if concerns arise, and to take remedial steps as appropriate. Consequently, SUAs should not view the prior approval process as their only opportunity to course-correct, and the prior approval process should not be unnecessarily burdensome.

## **9. Examples of prior approval policies**

At a minimum, SUAs must receive the following information from subrecipients prior to approving the contract(s) or commercial relationship(s):

- The name(s) or type(s) of entity (or entities) with which the AAA intends to partner;
- The nature of the agreement(s), including the specific service(s) or types of services to be provided, and the proposed individuals to be served (or criteria to identify those individuals);
- Information about all specific or estimated costs incurred;<sup>16</sup> and
- Specific assurances related to other requirements under section 212(b).<sup>17, 18</sup>

Beyond that minimum information, we outlined several potential policies in the 2024 final rule that SUAs might adapt or adopt:

- An SUA could adopt standard assurances related to COI to be adopted into all AAA agreements to provide services and decide not to review case-by-case information related to COI outside of periodic monitoring.
- An SUA could pre-approve a AAA to engage in a general category of contracts and commercial relationships with a certain type of organization, subject to certain conditions and a commitment to provide information about the agreement annually, as required under section 306(a).
- An SUA could decide as a matter of policy that all contracts and commercial relationships to expand the reach of services are approved unless certain concerning conditions exist (for

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<sup>14</sup> 89 FR 11588.

<sup>15</sup> 89 FR 11587.

<sup>16</sup> Section 212(b) of the Older Americans Act; 42 U.S.C. 3020c(b).

<sup>17</sup> In deference to non-disclosure agreements, this may include the type of organization and not the identity of the specific entity. However, the State agency may require the AAA to attest that the proposed agreement is not with a specific entity.

<sup>18</sup> 89 FR 11588.

example, if a AAA is under a corrective action plan). Under such a policy, AAAs would provide assurances that proposed agreements do not meet any exclusionary criteria.

- SUAs could decide that certain kinds of arrangements pose more risk than others. For example, contracts that involve a AAA on a corrective action plan or contracts that are disproportionately large compared to a AAA's overall budget may be considered to pose more risk. As we discussed in the rule, SUAs could consider the potential risks of different kinds of contracts and commercial relationships as they develop and implement the most efficient and least burdensome approval processes possible.
- SUAs also have the discretion to decide whether to require AAAs to incorporate template language or standard assurances into agreements that require prior approval under section 212, or to use other methods to standardize agreements.<sup>19</sup>

SUAs similarly have the discretion to determine whether a contract amendment would materially alter an agreement in a way that requires new approval from the state. The SUA may determine that unless the amendment revises the minimum information a AAA is required to submit, no new review is required.

We strongly encourage SUAs to seek input on proposed approval processes from AAAs to help achieve a balanced and feasible approach that will support the goal of minimizing risks while enabling the expansion of services to reach older adults with unmet needs.<sup>20</sup>

## **10. Oversight, liability, and addressing challenges**

Many SUAs and AAAs have asked questions about the scope of state liability in the event of an issue related to a section 212 agreement. Every situation is unique, and we cannot give definitive answers that address specific circumstances through general guidance. However, it is important to remember that an issue with a section 212 agreement will not necessarily result in disallowed costs or financial harm to the SUA. The SUA must establish and follow policies and procedures that are compliant with the 2024 final rule and comply with any other applicable requirements for recipients of federal grants. If the SUA has compliant policies that address fiscal and programmatic control issues, abides by other applicable federal grant requirements, and otherwise acts in good faith, section 212 agreements that do not successfully result in reimbursement of OAA funds may be considered an allowable cost under the OAA grant.<sup>21</sup>

The structure of the Act is such that SUAs (as federal grantees) are ultimately responsible for ensuring the appropriate use of funds, while AAA subrecipients are predominantly responsible for using those funds to develop the aging services network. This framework may lead SUAs to err on the side of caution (which is appropriate in overseeing the use of federal funds) so as not to be held responsible for risky subrecipient activities. However, too much caution in this area may inhibit the provision of vital services and the sustainable growth of the network at a time when there is a growing population of older

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<sup>19</sup> 89 FR 11587-11588.

<sup>20</sup> 89 FR 11588.

<sup>21</sup> 89 FR 11588.

adults and greater demand for services. Sections 212 and 306(g) highlight the importance of leveraging existing knowledge, expertise, and relationships to expand the reach of the aging services network.

All new business endeavors represent some degree of risk; the policies and procedures required by the 2024 final rule are intended to help mitigate, not eliminate, that risk. The intent of sections 212 and 306(g) can only be realized if the full financial risk of the potential failure of new contracts and commercial relationships does not fall on SUAs. For this reason, we clarified in the 2024 final rule that activities under section 212 are allowable costs so long as they comply with SUA policies and procedures.<sup>22</sup>

SUAs have a range of options available to them to address challenges with sub-grantees. In addition to other oversight activities, the SUA can offer to provide technical assistance to a AAA to explain what would be necessary for the SUA to approve a specific agreement, including discussing any acceptable firewalls or other remedies for conflicts of interest that might be required. In rare circumstances, the SUA might determine that no remedy is available that could mitigate the risks associated with a specific agreement. The SUA's determination would be final.

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<sup>22</sup> 89 FR 11588.

## ***APPENDIX A: Sample SUA Policy and Procedure for Prior Approval of Section 212 Agreements***

*The following policy, procedure, and prior approval forms are not required documents. They are sample documents for state units on aging (SUAs), in consultation with area agencies on aging (AAAs), to consider adapting as they develop or revise policies and procedures required to implement section 212 of the Older Americans Act (OAA, or “the Act”). Specifically, this appendix provides an example of a policy (and corresponding form) through which the SUA may approve both broad categories of contracts and commercial relationships, as well as individual contracts or commercial relationships. We recommend SUAs work with their legal counsel, when necessary, to adapt these forms for their own use. Text in blue indicates explanatory text and alternative policies and procedures an SUA, in consultation with AAAs, may consider.*

### **Sample SUA Policy**

The SUA encourages AAAs to establish comprehensive and coordinated systems for supportive, nutrition, and other services for older adults in our state by leveraging resources beyond OAA funding. In doing so through contracts and commercial relationships (“agreements”), AAAs can use both government and private funding to serve more older adults in need. Through this policy, the SUA intends to facilitate increased access to aging services in our state while ensuring responsible oversight of federal funds and protecting the integrity of our aging services network.

Consistent with section 212 of the OAA, AAAs who seek to establish agreements to serve individuals or entities not otherwise receiving services under the Act must obtain prior approval from the SUA. This policy applies to agreements with any entity (both for-profit and non-profit) for a AAA to provide goods or services in exchange for reimbursement or other financial consideration, with the expectation that the agreement will result in profit and reimbursement of initial costs.

For agreements involving multiple AAAs, one entity may submit information for prior approval on behalf of the group. The anticipated contractual expectations of each AAA must be clear in the information submitted. Service providers sub-contracted for work to execute an approved agreement are not required to separately seek prior approval. AAAs must incorporate standard language related to conflicts of interest and compliance with SUA data use policies into each of the prospective agreements for which they are seeking approval.

The SUA has established this streamlined policy and procedure to expedite the prior approval process as much as possible.

### **Use of Older Americans Act Funding**

Consistent with section 212 of the OAA, AAAs may use OAA funding to develop or initiate section 212 agreements. All 212 agreements must incorporate a guarantee that any OAA costs used in the development will be reimbursed to the AAA by the third-party entity. In addition, the OAA requires that any amount of payment to the AAA that exceeds this initial reimbursement will be used to provide, or support the provision of, OAA services.

## **Types of Agreements**

Through this policy, the SUA categorically pre-approves the following types of agreements, contingent on **receipt** of the minimum information outlined in the prior approval form:

- Agreements with local, state, and federal governmental entities;
- Agreements with other AAAs or AAA associations; and
- Agreements with entities with which a AAA has a long-standing existing business relationship (of three years or more).

Note: AAAs that have received an audit report with financial findings within the previous twelve months are not eligible for the categorical approval of agreements, including the types of agreements listed above. Instead, AAAs in such situations must submit requests for approval of each prospective individual agreement.

*The SUA, in consultation with AAAs, may decide to offer blanket prior approval for categories of contracts and commercial relationships that pose very little risk, such as those listed above. Of course, there will be wide variation in whether a state considers any of these categories to be low risk. The SUA also always retains the ability to audit or request supporting documentation if concerns arise. In addition to categorical approval, the SUA might decide to offer a review and approval process for distinct categories of contracts and commercial relationships, such as those listed below. In all cases, SUAs must still **receive** minimum information about the contracts and commercial relationships prior to their establishment.*

The SUA will also approve the following types of agreements, subject to **review** of the required prior approval forms:

- A single agreement with an entity (or multiple entities) to provide specific services;
  - For example: an agreement with a health plan for a AAA to provide meals to individuals identified by that plan;
- A category or type of agreement with a specific entity or a type of entity for the AAA to provide specific services (including through private pay arrangements);
  - For example: agreements to provide home-delivered meals to individuals and/or any health plan, generally;
- A category or type of agreement with a type of entity (or multiple entities) for the AAA to provide a broad category of services;
  - For example: agreements to provide a broad category of services to clients of hospitals and hospital systems, generally.

*The key distinction between these categories and those listed above is that the SUA must **review** information submitted by AAAs prior to approval of these agreements, whereas for agreements that are “categorically approved” under this policy, the SUA need only **receive** information from the AAA.*

## **Prior Approval Procedure**

AAAs must submit the following information for any new potential agreements that require prior approval. AAAs may submit the prior approval form whenever necessary to receive approval prior to establishing an agreement subject to prior approval under section 212 of the OAA:

1. The name of OR type of the entity (or entities) with which it intends to establish agreement(s);
2. The nature of the agreement(s), including the specific service(s) OR the types of services to be provided under the agreement(s);
3. An estimate of the proposed costs incurred from all sources, including the estimated amount of OAA and state funds that will be used in implementing the agreement (e.g., administrative overhead, data systems, and/or staff time);
4. The duration of the agreement;
5. The completed risk-screening form; and
6. Signed assurances.

*Items in 1., 2., and 3. above represent the minimum information that the SUA **must** receive to provide prior approval of an agreement under section 212. The SUA may request additional information (for example, the items in blue text). Whether or not the SUA requires AAAs to provide risk-screening information or sign the assurances provided in this example guidance, AAAs have ongoing obligations under the OAA to identify and address conflicts of interest and must operate consistent with the assurances in section 212, section 306, and elsewhere in the OAA. SUAs have the discretion to determine whether to incorporate these requirements into the prior approval process to reinforce the ongoing, underlying obligations associated with all AAA activities, and as a means of assessing the risk of any given agreement that requires prior approval.*

Note: If a non-disclosure or other confidentiality agreement prevents the AAA from disclosing required information, the AAA should submit publicly available information and attach a copy of the confidentiality agreement (redacted if necessary) to the submission for prior approval.

### **Risk-screening**

AAAs must assess prospective agreements for risk, according to the criteria identified below. If one or more of the identified risks are present, the SUA will not approve without discussion with **or the** provision of further information from the AAA.

*The SUA, in consultation with AAAs, might decide to require AAAs to provide additional information when specific risks are identified. The SUA might alternatively decide not to assess specific risks at all. The scenarios below are **examples** of potential risks that may lead SUAs to review a potential agreement more closely. SUAs should adapt any risk screening to the specific needs of their state. SUAs could also decide not to incorporate these specific criteria into their policy, and instead only list them in the prior approval form.*

Under the following circumstances, the AAA must discuss (**or provide information described in the SUA's policy**) the prospective agreement(s) with the SUA before prior approval can be obtained:

- The AAA does not have an approved area plan;
- The AAA is on a corrective action plan or has received notice of being out of compliance with its area plan and is in the process of entering into a corrective action plan;

- The AAA has not fully expended its OAA funding allocations, resulting in carryover exceeding the SUA's policy and/or reallocation of funds within the last three fiscal years;
- The AAA has failed to complete a required audit in a timely manner;
- There has been turnover of AAA leadership or vacancies in key positions (defined as CEO/Executive Director, COO/Operations Director, CFO/Fiscal Director, or equivalents) within the last 12 months;
- The state (or other compliance entity) has recently audited the AAA and made significant audit findings;
- The AAA is involved in contracts to provide multiple services across multiple jurisdictions/state lines;
- There is current or pending litigation involving the AAA;
- There are conflicts of interest involving the AAA that have not been removed or remedied;
- The proposed agreement to deliver services represents more than 25% percent of the AAA's total budget;
- The prospective agreements are with an entity that:
  - Lacks sufficient liability insurance;
  - Is not appropriately incorporated, as applicable;
  - Is not in good standing with state and/or local licensing boards, as applicable;
  - Is under investigation by the Internal Revenue Service and/or state and local tax revenue entities;
  - Is under investigation by the State Medicaid agency, Medicaid Fraud Control Unit, State or U.S. Department of Health & Human Services Office of Inspector General (or equivalent), or the U.S. Department of Justice;
  - Has been recently (within the last five years) sanctioned by the Internal Revenue Service, state and/or local tax revenue entities;
  - Has recently (within the last five years) lost its state or local license due to non-compliance with state and/or local law;
  - Has recently (within the last five years) lost its status as a Medicaid provider due to non-compliance with Medicaid law or regulation.

### **Assurances**

AAAs must provide assurances of compliance with certain requirements under the Act, which are listed in the prior approval form. AAAs must also incorporate standard language related to conflicts of interest into each of the prospective agreements for which they are seeking approval.

*As with risk-screening, the SUA has discretion to decide whether to require assurances specific to each agreement as part of the prior approval process. Regardless, AAAs have ongoing obligations under the OAA to identify and address conflicts of interest and must operate consistent with the assurances in section 306 and throughout the OAA.*

# SAMPLE FORM:

## Application for Approval of Section 212 Agreements

*This Sample Form is not a required document. It is a sample for state units on aging (SUAs), in consultation with area agencies on aging (AAAs), to consider adapting as they develop or revise policies and procedures required to implement section 212 of the Older Americans Act (OAA, or "the Act"). We recommend SUAs work with their legal counsel, when necessary, in adapting this form for their own use.*

<p><b>Contact Information:</b></p> <p>Area Agency on Aging:</p> <p style="margin-left: 40px;">Name: _____</p> <p style="margin-left: 40px;">Address: _____</p> <p>AAA Contact for Section 212 Activities:</p> <p style="margin-left: 40px;">Name: _____ Email: _____ Phone number: _____</p>
<p><b>Information Related to Prospective Agreement(s):</b></p> <p>Are you seeking approval for: <input type="checkbox"/> a single agreement or <input type="checkbox"/> a category of agreements (including private pay)?</p> <p style="margin-left: 40px;">Name or type of entity or entities: _____</p> <p style="margin-left: 40px;"><i>(If a non-disclosure agreement prevents you from disclosing the name of the entity, please disclose the type of entity).</i></p> <p style="margin-left: 40px;">Specific services OR types of services to be provided:</p> <p style="margin-left: 40px;">_____</p> <p><b>Will multiple AAAs have contractual obligations under this agreement or these agreements?</b> <input type="checkbox"/> NO <input type="checkbox"/> YES</p> <p style="margin-left: 40px;"><b>If YES, please identify the AAAs and describe the obligations of each:</b></p> <p style="margin-left: 40px;">_____</p> <p style="margin-left: 40px;">_____</p> <p><b>Will Older Americans Act funds or resources (e.g., administrative overhead, data systems, staffing) be used in implementing the agreement(s):</b> <input type="checkbox"/> NO <input type="checkbox"/> YES</p> <p style="margin-left: 40px;"><b>If YES, estimated OAA costs incurred:</b></p> <p style="margin-left: 40px;">_____</p> <p><b>Estimate of total costs incurred:</b></p> <p style="margin-left: 40px;">_____</p>

### Approval Criteria:

#### 1. Pre-approved categories of agreements

- Is this proposed agreement/are these proposed agreements (check all that apply):
  - With a local, state, or federal governmental entity or entities?
  - With other AAAs or AAA associations?
  - With an entity or entities with which the AAA has a long-standing existing business relationship (of three years or more)?

**If a AAA checked any of the items in #1, skip to #3 to review the assurances and provide a signature. No additional SUA review is required; these categories of agreements are considered approved upon submission of this form.\***

\*AAAs that have received an audit report with financial findings within the previous twelve months are not eligible for the categorical approval of agreements, including the types of agreements listed above. Instead, AAAs in such situations must complete this entire form for SUA review for each agreement for which they are seeking approval.

## 2. Risk Assessment

To assess for any potential risks associated with the proposed agreement(s), please check mark any of the potential risks below that are relevant to this application for prior approval. Please provide an attachment describing, for each potential risk that has been checked, either (a) why the AAA does not believe the criteria presents a risk in the case of the proposed agreement(s) or (b) how the AAA intends to mitigate any actual risk. The SUA may request further discussion or documentation prior to making a final determination about the agreement(s).

*The SUA could choose from a wide range of options in assessing the risk associated with agreements. The SUA could choose to ask for disclosure and proposed mitigation plans. The SUA could also decide to ask for attestations that any potential risks have been identified and mitigated.*

### Potential Risks:

- The AAA does not have an approved area plan;
- The AAA is on a corrective action plan or has received notice of being out of compliance with its area plan and is in the process of entering into a corrective action plan;
- The AAA has had carryover of OAA funding exceeding the SUA's policy and/or reallocation of funds within the last three fiscal years;
- There has been turnover in key AAA leadership (defined as CEO/Executive Director, COO/Operations Director, CFO/Fiscal Director, or equivalents) within the last 12 months;
- The state (or other compliance entity) has recently monitored the AAA and made findings;
- The AAA is involved in contracts to provide multiple services across multiple jurisdictions/state lines;
- There is current or pending litigation involving the AAA;
- There are conflicts of interest involving the AAA that have not been removed or remedied;
- The proposed agreement to deliver services represents more than 25% percent of the AAA's total budget;
- The proposed agreements are with an entity that (check all that apply):
  - Lacks sufficient liability insurance;
  - Is not appropriately incorporated, as applicable;
  - Is not in good standing with state and/or local licensing boards, as applicable;

- Is under investigation by the Internal Revenue Service and/or state and local tax revenue entities;
- Is under investigation by the State Medicaid agency, Medicaid Fraud Control Unit, State or U.S. Department of Health & Human Services Office of Inspector General (or equivalent), or U.S. Department of Justice;
- Has been recently (within the last five years) sanctioned by the Internal Revenue Service, state and/or local tax revenue entities;
- Has recently (within the last five years) lost its state or local license due to non-compliance with state and/or local law;
- Has recently (within the last five years) lost its status as a Medicaid provider due to non-compliance with Medicaid law or regulation.

**If you check-marked any of the items in #2, please complete the rest of this form and submit it to the SUA. The SUA may contact you to discuss or request additional information on this application prior to issuing a decision.**

### 3. Assurances

By signing below and submitting this form, the AAA attests to the truth of the following assurances:

- a. All conflict of interest requirements under 45 CFR 1321.67 have been met.
  1. Individual conflicts of interest:
    - i. The AAA has performed a screening to identify any actual or perceived conflicts of interest between AAA staff, governing board and advisory council members, and/or awardees who have responsibilities related to this agreement;<sup>23</sup>
    - ii. The AAA has performed a screen to identify any actual or perceived conflicts of interest between the immediate family members of the AAA staff, governing board and advisory council members, and/or awardees who have responsibilities related to this agreement;<sup>24</sup>
    - iii. The AAA has either found that no conflicts of interest exist or has mitigated any actual or perceived conflicts of interest; and
    - iv. The AAA's officers, employees, agents, and their immediate family members have not received any gratuities, favors, or anything of monetary value related to this agreement except where allowed by the SUA and/or AAA's policies and procedures in situations where the financial interest is not substantial, or the gift is an unsolicited item of nominal value.<sup>25</sup>
  2. Organizational conflicts of interest:
    - i. The AAA has performed a screening to identify any actual or perceived conflicts of interest between the AAA's functions to advocate and carry out the objectives of the OAA and this agreement; and
    - ii. The AAA has either found that no conflicts of interest exist or has mitigated any actual or perceived conflicts of interest.

<sup>23</sup> Older Americans Act section 307(a)(7)(B); 42 CFR § 1321.47(a); 42 CFR § 1324.67(a)(2); 42 CFR § 1321.7(b)(xiv)(B)(1)(i).

<sup>24</sup> Older Americans Act section 307(a)(7); 42 CFR § 1321.47(a)(6); 42 CFR § 1321.67(a)(6).

<sup>25</sup> 42 CFR § 1321.47(a)(8); 42 CFR § 1321.67(a)(10).

- b. All required assurances and conflict of interest policies required by the SUA's policies and procedures will be memorialized in writing as a component of finalizing the proposed contract(s) or commercial relationship(s).
- c. Section 212(a) assurances.
  1. If funds provided under the OAA are initially used to pay part or all of a cost incurred by the AAA in developing and carrying out an agreement, the agreement will guarantee that the cost is reimbursed to the AAA;
  2. If an agreement provides for the provision of one or more services, of the type provided under the OAA by or on behalf of the AAA, to an individual or entity seeking to receive such services:
    - i. The individuals and entities will only be required to purchase such services at their fair market rate;
    - ii. All costs incurred by the AAA in providing such services (and not otherwise reimbursed), are reimbursed to the AAA;
    - iii. The AAA will report the rates for providing such services under the agreement in accordance with sections 212(b) and 212(c) of the OAA, and the rates will be consistent with the prevailing market rate for provision of such services in the relevant geographic area as determined by the SUA or AAA (as applicable); and
    - iv. Any amount of payment to the AAA under the agreement that exceeds reimbursement of the AAA's costs will be used to provide, or support the provision of, OAA services.
- d. Section 212(b) assurances. The prospective contract(s) or commercial relationship(s) for which the AAA is seeking approval will not:
  1. Be made without the prior approval of the SUA, after timely submission of all relevant documents related to the agreement including information on all costs incurred;<sup>26</sup>
  2. Directly or indirectly provide for, or have the effect of, paying, reimbursing, subsidizing, or otherwise compensating an individual or entity in an amount that exceeds the fair market value of the services subject to such agreement;
  3. Result in the displacement of services otherwise available to an older individual with greatest social need, an older individual with greatest economic need, or an older individual who is at risk for institutional placement; or
  4. In any other way compromise, undermine, or be inconsistent with the objective of servicing the needs of older individuals, as determined by the Assistant Secretary for Aging, U.S. Department of Health and Human Services.
- e. Section 306(a) assurances. The AAA will:
  1. Maintain the integrity and public purpose of services provided, and service providers, under the OAA in all contractual and commercial relationships;
  2. Disclose the identity of each nongovernmental entity with which they have a contract or commercial relationship relating to providing any service to older individuals and the nature of such contract or such relationship;
  3. Demonstrate that a loss or diminution in the quantity or quality of the services provided, or to be provided, under the OAA by such agency has not resulted and will not result from such contract or such relationship;

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<sup>26</sup> Submission of this form and any subsequent documentation requested by the SUA constitutes satisfaction of the obligation to submit all relevant documents related to the agreement, including information on all costs estimated to be incurred.

4. Demonstrate that the quantity or quality of the services to be provided under the OAA by such agency will be enhanced as a result of such contract or such relationship;
  5. If requested, disclose all sources and expenditures of funds such agency receives or expends to provide services to older individuals; and
  6. Avoid giving preference in receiving services under this title to particular older individuals as a result of a contract or commercial relationship that is not carried out to implement this title; and use funds provided under this title to provide benefits and services to older individuals, giving priority to older individuals identified in section 306(a)(4)(A)(i), and in compliance with these assurances and the limitations specified in section 212.
- f. The AAA will annually disclose the information required by section 306(a)(13) to the SUA, including:
1. The name and type of entity of any parties to contracts or commercial relationships with the AAA; and
  2. The services the AAA provides as a party to those contracts or commercial relationships.
- g. The AAA attests that it will comply with SUA data use policies, including maintaining confidentiality and compliance with the Health Insurance Portability and Accountability Act (HIPAA) and other state and federal laws related to privacy and confidentiality.

#### **4. Signatures**

**Submitting AAA Authorized Organizational Representative Name, Title, Date:**

**Any AAAs included in the agreement(s) described in this form:**