



# New Long-Term Care Ombudsman Rule, New Opportunities

Becky A. Kurtz, JD

Director, Office of Long-Term Care Ombudsman Programs

State LTC Ombudsman Annual Training Conference

April 22, 2015 Decatur, Georgia



# Overarching ACL Goals re: LTCO Rule

- High quality ombudsman services for residents
  - Credible, person-centered problem-solvers with and for residents,
  - Effective, astute advocates for resident-centered systems change in long-term services and supports.
- Provide clarity to provisions of the Older Americans Act,
  - especially those that are uniquely applied to the LTC Ombudsman program
  - Provide flexibility for States in their establishment of the Program,
  - balanced with the need for consumers to have access to consistent, quality ombudsman services



Law =

## Older Americans Act

Public Law 109-365

42 U.S. Code Chapter 35

Regulation =

45 CFR Part  
1321  
OAA Title III

45 CFR Parts  
1326 and 1328  
OAA Title VI

45 CFR Part 1327  
OAA Title VII

Guidance;  
examples =

Program  
Instructions

Letters to  
states

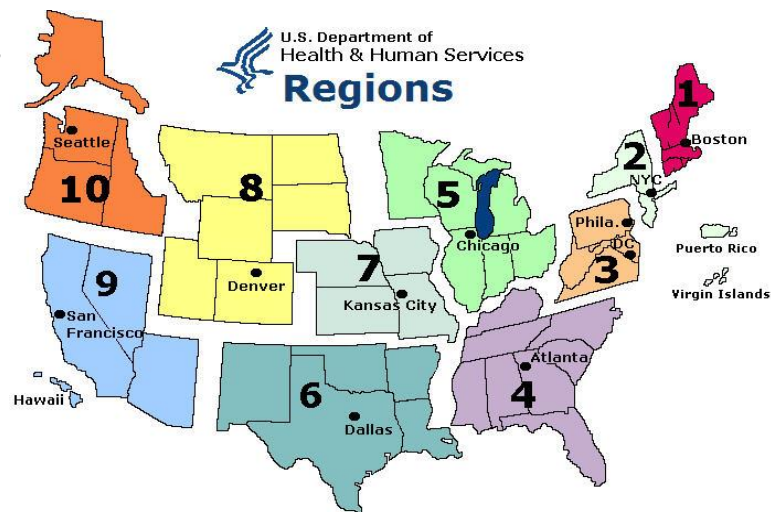
Frequently  
Asked  
Questions  
(FAQs)

# State Unit on Aging is ACL's grantee

- ACL's authority to administer State LTC Ombudsman Programs program is through Older Americans Act (OAA) grants to State Units on Aging (SUAs)
  - “In order to be eligible to receive [Title VII allotment] made available to carry out this chapter, a State agency shall . . . (Section 712(a)(1))
  - “. . . the State agency may establish and operate the Office, and carry out the program, directly, or by contract or other arrangement with any public agency . . .” (Section 712(a)(4)(A))
- ACL holds the SUA accountable for program compliance
  - even if SUA doesn't house the State LTC Ombudsman or provide LTC Ombudsman services directly
- LTCOP Rule (45 CFR Part 1327) is part of OAA grant compliance requirements.

# Now that the long-awaited Rule is published. . . what's next?

- **All** states will need to review – and some will need to revise -- their laws, regulations, policies and/or practices.
- ACL Regional Offices, National Ombudsman Resource Center, and Office of LTC Ombudsman Programs available to assist states.
- ACL is providing a delay in implementation until **July 1, 2016** in order to assist states with training and technical assistance.



# Between now and July 2016 . . . ACL Activities

- Training/Dialogues
  - Internal at ACL -- 11/4/14 (all), 1/5/15 (Regions)
  - Hosted by ACL Regions
    - III & IV – 2/23/15
    - V & VII – 3/17/15 (part of elder justice dialogue)
    - VI & VII SUA training – June (tentative)
  - Hosted by NASUAD – 3/26/15
  - Hosted by Consumer Voice -- May
- TA/Response to Questions (to Central Office, Regions, [LTCOmbudsman.Rule@acl.hhs.gov](mailto:LTCOmbudsman.Rule@acl.hhs.gov))
- Work with Regions as they prepare for state reviews
- FAQ development



# Between now and July 2016 . . . National Ombudsman Resource Center Activities

- NORC – [www.ltombudsman.org](http://www.ltombudsman.org)
  - Hosted webinar (3/2/15, archived)
  - Resources (e.g., Overview of LTCOP Rule, posted 3/23/15)
  - TODAY!
- TA/Response to Questions
  - Especially:  
“What do other States do about . . . ?”





# What happens after July 2016?

- As granting agency, ACL will work with grantees (SUAs) to support compliance
  - The current focus: How to apply the rule in your state?
- Efforts typically include coordination between:
  - ACL Central Office and Region
  - State Unit on Aging
  - State LTC Ombudsman
  - Host Agency (where applicable)





# What happens after July 2016?

- ACL/AoA monitors/determines compliance through:
  - TA/Meetings with grantees
  - State Reviews
    - Expect questions re: issues identified as result of LTCO rule and any plans for changes needed in your State
  - Letters to grantees
  - Compliance Reviews
- Consequence if out of compliance:
  - In violation of State Plan on Aging
  - Remedies available under 45 CFR 75.371



# Selected Topics of Focus – 45 CFR 1327

## .11 Establishment

- Full time State Ombudsman -- (c)
- Grievance Process -- (e)(7)

## .13 State Ombudsman Functions and Responsibilities

- Designation/de-designation -- (c)

## .15 SUA responsibilities

- Legal Counsel -- (j)

## .19 Representative of the Office duties

- Abuse investigations and reporting -- (b)(3)(iii), (5)-(8); .11(e)(3)(iv)  
re: Disclosure P&P
- Residents unable to communicate consent -- (b)(2)(iii), (5)-(7)

## .21 Conflicts of Interest – Organizational -- (a)–(b)

How does your state fulfill -- or plan to fulfill -- the requirements?



## 1327.11(c) Full-Time Ombudsman

Law: “The Ombudsman shall serve on a fulltime basis. . . .” (712(a)(3))

Rule: SUA must require that the Ombudsman serve on a *full-time basis*:

- Functions, responsibilities and duties listed in .13 and .19 constitute the entirety of the Ombudsman’s work
- SUA shall not require or request the Ombudsman to be responsible for leading, managing, or performing the work of non-ombudsman services or programs
  - Exception: time-limited, intermittent
- Not prohibited from serving additional populations (e.g., in-home, adult day services, dually eligible, managed care), but OAA appropriations utilized to serve LTC facility residents





# How does your state fulfill the full-time Ombudsman requirement?



## 1327.11(e)(7) Grievance Process

Law: Not required

Rule: Policies and procedures must establish a grievance process:

- For the receipt and review of grievances . . .
- Regarding the determinations or actions . . .
- Of the Ombudsman or representatives of the Office.
- Must include opportunity for reconsideration of Ombudsman designation decisions.
- Ombudsman retains authority to make final designation decisions.

# How does your state fulfill the grievance process requirement?





## 1327.13(c) Designation

Law: “the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity.” (712(a)(5))

-Training procedures (712(h)(4)) and required of representatives prior to carrying out activities (712(h)(5))

Rule: The Ombudsman shall determine designation, and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office.

- Where designate local Ombudsman entities:
  - Review and approve plans or contracts governing local Ombudsman entity operations.
  - Monitor Ombudsman program performance on regular basis.

## 1327.13(c) Designation (continued)

- Ombudsman shall establish training requirements (i.e. certification and continuing education) of representatives of the Office.
- Prohibit representative of Office from carrying out duties unless trained and approved by Ombudsman as qualified
- Duty to investigate allegations of misconduct (links back to grievance process requirement)
- Grounds for de-designation: policies, procedures, practices Ombudsman determines to be in conflict with the laws, policies, procedures governing the LTC Ombudsman program

# How does your state fulfill the designation-related requirements?



## 1327.15(j) Legal Counsel

Law: The State agency shall ensure that adequate legal counsel is available and is able, without conflict of interest, to:

- Provide advice and consultation needed to protect the health, safety, welfare and rights of residents;
- Assist the Ombudsman and representatives in the performance of official duties; and
- Represent any representative of the Office against whom suit or other legal action is brought or threatened.
- State shall ensure that the Office pursues administrative, legal and other appropriate remedies on behalf of residents. (712(g))

## 1327.15(j) Legal Counsel (continued)

Rule: The State agency shall ensure that:

- Legal counsel is adequate, available, has competencies relevant to the legal needs of the program and of residents, and
- Is without conflict of interest (as defined by State ethical standards governing the legal profession), in order to:
- Provide consultation and representation as needed to protect the health, safety, welfare and rights of residents;
- Provide consultation and/or representation to assist the Ombudsman and representatives in the performance of official duties, including complaint resolution and systems advocacy; and

## 1327.15(j) Legal Counsel (continued)

Rule: The State agency shall ensure that:

- The Ombudsman and representatives of the Office assist residents in seeking administrative, legal and other appropriate remedies.

In so doing, Ombudsman shall coordinate with:

- The legal services developer,
- Legal services providers, and
- Victim assistance services

. . . to promote availability of legal counsel to residents.

- Legal representation, arranged by or with approval of Ombudsman, is provided to the Ombudsman or representative of the Office against whom suit or other legal action is brought or threatened.



# How does your state fulfill the legal counsel requirements?





# 1327.19 Duties of the representatives – person-centered complaint resolution

***Person-centered*** complaint processing approach--the Ombudsman or representative of the Office shall:

- Support and maximize resident participation;
- Offer privacy;
- Discuss the complaint with the resident (and/or resident's representative) in order to:
  - Determine the perspective of the resident;
  - Request informed consent in order to investigate the complaint;
  - Determine the wishes of the resident with respect to resolution of the complaint, including:
    - whether the allegations are to be reported
    - disclosure of information to the facility and/or appropriate agencies.
- Advise the resident of his/her rights;
- Work with the resident to develop a plan of action for resolution of the complaint;
- Investigate to determine whether the complaint can be verified; and
- Determine whether the complaint is resolved to the resident's satisfaction. (b)(2)

## 1327.19 Duties of the representatives of the Office – resolving abuse complaints

Law: The Ombudsman shall personally, or through representatives of the Office:

- identify, investigate, and resolve complaints
  - that are made by, or on behalf of residents; and
  - relate to action, inaction, or decisions, that may adversely affect the health safety, welfare, or rights of the residents, of
  - providers, public agencies, or health and social services agencies.
- (712(a)(3))

NOTE: Act does not exclude complaints related to abuse, neglect or exploitation.

## 1327.19 Duties of the representatives of the Office – resolving abuse complaints (continued)

Rule: The Ombudsman or representative of the Office shall investigate a complaint, including but not limited to a complaint related to abuse, neglect, or exploitation, for the purposes of resolving the complaint to the resident's satisfaction and of protecting the health, welfare, and rights of the resident. (b)(1)

- Including if resident unable to communicate informed consent and no resident representative (b)(2)(iii) (i.e. “unbefriended” resident)

How does your state fulfill the requirements related to:

- Ombudsman program resolution of complaints of abuse, gross neglect or exploitation?
- Serving residents who are “unbefriended”?



## 1327.19 Duties of the representatives – reporting abuse

Law: The State agency shall establish procedures for the disclosure of Ombudsman files. Such procedures shall prohibit the disclosure of the identity of any complainant or resident unless:

- the complainant or resident (or legal representative) consents to the disclosure, or
- the disclosure is required by court order. (712(d)(2)(B))

NOTE: OAA silent on issue of reporting/disclosure where a resident is unable to communicate consent.

## 1327.19 Duties of the representatives – reporting abuse (continued)

Rule: Prohibits program from disclosing information regarding suspected abuse, neglect or exploitation of a resident without informed consent (if resident able and/or has resident representative).

- Regardless of state mandatory reporting laws (b)(3)(iii)
- Ombudsman or representative:
  - must assist resident with referral and/or disclose information if goals of resident or resident representative are for regulatory, protective services, or law enforcement action. (b)(3)(i)
  - may assist with referral, provide referral information, and/or disclose information to other entities to assist with resident goals. (b)(3)(ii)



How does your state fulfill the requirements related to abuse reporting where resident can consent?





## 1327.19 Duties of the representatives – reporting abuse when resident “unbefriended”

### Law:

OAA silent on issue of disclosure of information/reporting where a resident is unable to consent.



## 1327.19 Duties of the representatives – reporting abuse when resident “unbefriended” (continued)

Rule: Ombudsman/representative may refer and disclose resident-identifying information to appropriate agencies, IF:

- Resident unable to communicate informed consent (and no resident representative);
- Reasonable cause to believe that an action, inaction or decision may adversely affect the health, safety, welfare, or rights of the resident;
- No evidence that resident would not want referral ;
- Reasonable cause to believe that it is in the best interest of the resident to refer, AND
- Representative of the Office obtains Ombudsman approval (or follows Office policies and procedures) . (b)(6)

How does your state fulfill the requirements related to abuse reporting where resident cannot consent (i.e. unbefriended)?



## 1327.19 Duties of the representatives – reporting abuse when witnessed by Ombudsman/representative



Law: OAA silent on issue of disclosure of information/reporting when suspected abuse is witnessed by the Ombudsman or a representative of the Office.

# 1327.19 Duties of the representatives – reporting abuse when witnessed by Ombudsman/representative

Rule: If the Ombudsman or representative personally witnesses suspected abuse, gross neglect, or exploitation, THEN:

- Shall seek resident consent and follow direction.
- If “unbefriended” resident, shall:
  - Open a case with Ombudsman/representative as the complainant,
  - Follow complaint resolution procedures, AND
  - Refer and disclose information to facility management and/or appropriate agency if:
    - No evidence that resident would not want referral
    - Reasonable cause to believe that disclosure would be in best interest of resident, AND
    - Representative obtains Ombudsman approval (or follows program policies).



How does your state fulfill the requirements related to abuse reporting where it is witnessed by the Ombudsman/representative?



## 1327.21 Conflicts of interest -- organizational

Law: The State agency may not enter into a contract or other arrangement to operate the Office and carry out the program with:

- Agency responsible for licensing or certifying long-term care services;
- Association of long-term care facilities. (712(a)(4)(B))

The State agency shall ensure that:

- No individual, or immediate family of individual, involved in designating the Ombudsman is subject to conflict of interest. (712(f)(1))
- No representative, or immediate family of representative, is subject to COI (712(f)(2))

The State agency shall establish mechanisms to identify and remove conflicts of interest. (712(f)(4))



## 1327.21 Conflicts of interest – organizational (continued)

Rule: First step: identify the COI -- (a)

Examples :

- Licenses, surveys, or certifies long-term care (LTC) facilities;
- Is an association of LTC facilities;
- Has ownership or investment interest in a LTC facility;
- Has governing board members with ownership, investment or employment interest in LTC facilities;
- Provides long-term care to residents of LTC facilities;
- Provides case management for residents of LTC facilities;
- Sets reimbursement rates for LTC facilities;
- Provides adult protective services;
- Is responsible for eligibility determinations for residents of LTC facilities;
- Conducts preadmission screening for LTC facility placements;
- Makes decisions regarding admission/discharge to or from LTC facilities; or
- Provides guardianship or other decision-making services for residents of LTC facilities.

## 1327.21 Conflicts of interest -- organizational (continued)

### Rule: Second step: remove or remedy the COI -- (b)

- Both SUA and Ombudsman have duty to identify and remove/remedy the COI.
- Prohibited COI (i.e. cannot be remedied): Placement of the Ombudsman program (includes local Ombudsman entities) in an organization that:
  - Is responsible for licensing, surveying, or certifying LTC facilities;
  - Is an association (or an affiliate of such an association) of LTC facilities; or
  - Has any ownership, operational, or investment interest in a LTC facility.

### Additional information:

- Many states (especially when Office is located in SUA'; local Ombudsman entities within AAA) currently have COI.
- Rule doesn't necessarily require relocation, but does require steps to remove or remedy the COI.
- Rule indicates that "remedy" may be sufficient i.e. the rule permits some conflicting responsibilities to co-exist in an agency so long as firewalls and other policies adequately separate conflicting program operations.

## 1327.21 Conflicts of interest – organizational (continued)

Rule: Where there are local Ombudsman entities, Ombudsman shall:

- Prior to designation, take steps to avoid COI
- Establish process for review and identification of COI
- Require disclosure of COI by agency hosting a local Ombudsman entity
- Establish process and criteria for approval of remedies/removals of COI (b)(6)

## 1327.21 Conflicts of interest -- organizational (continued)

Rule: Third step: report steps taken to remove/remedy the COI

- Ombudsman must report:
  - Identified COI and
  - Steps taken to remove/remedy identified COI in NORS
- Applies to Ombudsman program (i.e. includes local Ombudsman entities) (b)(1), (b)(2(v)) .

### Additional information:

- NORS reporting--Paperwork Reduction Act (PRA) notice planned in 2015.
- Ultimately, ACL/AoA responsible for determining adequacy of removal/remedy.

## 1327.21 Conflicts of interest -- organizational (continued)

### Rule: ***Policies and procedures***

- COI policies and procedures required in 1327.11(e)(4)
- Where State agency contracts out the Office, State agency must have processes in place to avoid current--and to identify and address future--organizational COIs.
- Where local Ombudsman entities are designated, Ombudsman must have process in place to avoid current--and to identify and address future--organizational COIs.

### Additional information:

- ACL anticipates requests for additional TA and sub-regulatory guidance regarding organizational COI.



# How does your state fulfill the organizational conflict of interest requirements?



# Questions or comments?

ACL has created a dedicated e-mail  
for Rule-related questions and requests for TA:  
[LTCOmbudsman.Rule@acl.hhs.gov](mailto:LTCOmbudsman.Rule@acl.hhs.gov)

