

FINAL RULES: Long-Term Care Ombudsman Program¹

REGULATORY LANGUAGE AND PERTINENT PREAMBLE LANGUAGE

**Note: Effective July 1, 2016 the Administration for Community Living (ACL) consolidated their regulations into one subchapter resulting in the LTCOP rule number changing from 45 CFR 1327 to 45 CFR 1324. We are in the process of revising our resources to reflect that change. Information about the consolidation is available [here](#).*

Section	Regulatory Language	Pertinent Preamble Language
<p>§1321</p>	<p>1- The authority citation for Part 1321 continues to read as follows: Authority: 42 U.S.C. 3001 et seq.; Title III of the Older Americans Act, as amended.</p> <p>2- Section 1321.11 is amended by revising paragraph (b) to read as follows:</p>	
<p>§1321.11</p>	<p>State Agency Policies. ***** (b) The policies developed by the State agency shall address the manner in which the State agency will monitor the performance of all programs and activities initiated under this part for quality and effectiveness. The State Long-Term Care Ombudsman shall be responsible for monitoring the files, records and other information maintained by the Ombudsman program. Such monitoring may be conducted by a designee of the Ombudsman. Neither the Ombudsman nor a designee shall disclose identifying information of any complainant or long-term care facility resident to individuals outside of the Ombudsman program, except as otherwise specifically provided in § 1324.11(e)(3) of this</p>	<p>We proposed revision to § 1321.11(b) in order to clarify the responsibility of the State agency on aging (also referred to as “State unit on aging” and, for purposes of these regulations, “State agency”) regarding appropriate access to the files, records and other information maintained by the Ombudsman program in its monitoring of the Ombudsman program. We substituted the term “files” with “files, records and other information” in order to accommodate the increased use of digital information and incorporate information obtained verbally and by other means, as well as to clarify that the disclosure provisions of the Act at section 712(d) are not limited to information that is contained in case (<i>i.e.</i> complaint resolution) records. For example, information collected during individual consultation activities which are not part of case files also would be subject to this provision.</p>

¹ Published Federal Register, vol. 28, no. 28, pp.7704 (Feb.11, 2015)

	chapter.	
§1324.1	Definitions.	
	<p>The following definitions apply to this part:</p> <p>Immediate family, pertaining to conflicts of interest as used in section 712 of the Act, means a member of the household or a relative with whom there is a close personal or significant financial relationship.</p>	<p>We proposed to define the term “immediate family” because it is used repeatedly, but not defined, in section 712(f) of the Act related to conflict of interest. We proposed that “immediate family, pertaining to conflicts of interest as used in section 712 of the Act, means a member of the household or a relative with whom there is a close personal or significant financial relationship.”</p> <p>We selected this definition to describe relationships that could impair the judgment or give the appearance of bias on the part of an individual who is responsible to objectively designate an individual as the Ombudsman (under section 712(f)(1) of the Act) or on the part of the Ombudsman or officers, employees or representatives of the Office (under section 712(f)(2) of the Act). In developing the definition, we were informed by the Federal standards of ethical conduct related to impartiality in an employee’s conduct. See 5 CFR 2635.502(a),(b).</p> <p>We also note, that, under ACL’s April 21, 2014 Guidance on Federal Recognition of Same-Sex Marriage (http://www.acl.gov/Funding_Opportunities/Grantee_Info/Index.aspx), an immediate family member who is a member of the household or a relative includes a spouse in a same-sex marriage. (pp. 7708-7709)</p>
	<p>Office of the State Long-Term Care Ombudsman, as used in sections 711 and 712 of the Act, means the organizational unit in a State or territory which is headed by a State Long-Term Care Ombudsman.</p>	<p>AoA proposed a definition of the “Office of the State Long-Term Care Ombudsman” due to inconsistencies among States and confusion regarding which individual or individuals constitutes the “Office.” For example, we believe that States will benefit from clarification regarding who is responsible for making determinations specifically required of the Office by the Act. ... In the final rule, we have modified the definition to clarify that the Office is the organizational unit in a State or territory which is headed by the Ombudsman. We have provided an additional definition for “State Long-Term Care Ombudsman program” in order to distinguish this term from the “Office” since the “Office,” in some States, is organizationally separate from local Ombudsman entities. We recognize that in other States where the Ombudsman does not designate local Ombudsman entities, the Office will be identical to the “State Long-Term Care Ombudsman program.” Regardless of the organizational</p>

		<p>structure, the definition of “State Long-Term Care Ombudsman program” in § 1324.1 is inclusive of the Ombudsman, the Office, and the representatives of the Office. (p. 7709)</p>
	<p>Representatives of the Office of the State Long-Term Care Ombudsman, as used in sections 711 and 712 of the Act, means the employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1324.19(a), whether personnel supervision is provided by the Ombudsman or his or her designees or by an agency hosting a local Ombudsman entity designated by the Ombudsman pursuant to section 712(a)(5) of the Act.</p>	<p>In proposing a definition of “Representatives of the Office of the State Long-Term Care Ombudsman,” we intended to clarify that the representatives of the Office, including employees and volunteers designated by the Ombudsman, represent the Office (as opposed to the entity by which they may be employed or managed) when they are carrying out duties of the Office set forth at § 1324.19.</p> <p>We further intended to clarify that the “representatives of the Office” are to be accountable to the head of the Office (<i>i.e.</i> the Ombudsman) for purposes of Ombudsman program operations. For all programmatic operations, the representative represents the Office (for example, they must follow the policies, procedures and guidance of the Ombudsman regarding complaint processing and other Ombudsman program activities). Simultaneously, those representatives of the Office who are organizationally located within local Ombudsman entities also represent the agency hosting the local Ombudsman entity, as this agency oversees them for personnel management matters (for example, the representative of the Office must follow the agency’s personnel policies so long as those policies do not conflict with Ombudsman program law and policy). (p.7709)</p> <p>Comment: One commenter asked the question whether, since the definition of “Office” includes representatives, only the Ombudsman can determine these positions and whether a State agency or an Ombudsman could establish a policy that prohibits representatives of the Office from taking positions without approval or that prohibits positions that are different than the Office. (p.7710)</p> <p>Response: We have revised the definition of “Office of the State Long-Term Care Ombudsman” in the final rule so that it does not include the representatives of the Office. The Act indicates that “The State agency shall require the Office to . . . recommend any changes in . . . laws, regulations, and policies as the Office determines to be appropriate;” Section 712(h)(2) of the Act. We interpret this provision to mean that it would be inappropriate for a State agency to prohibit the Office from taking a particular position related to a recommendation in changes to relevant laws, regulations, and policies. Doing so would interfere with the responsibility of the Office to make such</p>

		<p>determinations. See §§ 1324.11(e)(8); 1324.13(a)(7); 1324.15(k)(2).</p> <p>The Act provides that the Office shall be headed by the Ombudsman in section 712(a)(2) and specifically defines the word “Ombudsman” as the “individual described in section 712(a)(2).” Section 711(2) of the Act. Taken together, we read the statute to indicate that, as the head of the Office, the Ombudsman has the authority to determine the positions of the Office as well as the processes by which such determinations are made within the Office. Therefore, we believe the Act would not prohibit an Ombudsman from establishing a policy that limits the ability of representatives of the Office from taking positions without approval of the Ombudsman or that are different than that of the Ombudsman. ...</p> <p>AoA encourages each Ombudsman to solicit and consider the views of representatives of the Office, to encourage dialogue among representatives of the Office in formulating the positions of the Office, and to empower representatives of the Office to carry out their duties under section 712(a)(5) of the Act,...</p> <p>We further intended to clarify that the “representatives of the Office” are to be accountable to the head of the Office (i.e. the Ombudsman) for purposes of Ombudsman program operations. For all programmatic operations, the representative represents the Office (for example, they must follow the policies, procedures and guidance of the Ombudsman regarding complaint processing and other Ombudsman program activities). Simultaneously, those representatives of the Office who are organizationally located within local Ombudsman entities also represent the agency hosting the local Ombudsman entity, as this agency oversees them for personnel management matters (for example, the representative of the Office must follow the agency’s personnel policies so long as those policies do not conflict with Ombudsman program law and policy).</p> <p>Comment: One commenter indicated that the proposal did not go far enough to address the risks to the individual representative of the Office who is organizationally located within local Ombudsman entities, given that the individual is reporting to one authority for programmatic matters and another for personnel management matters. (p. 7710)</p> <p>Response: We acknowledge that representatives of the Office who are employed by or who volunteer for a local Ombudsman entity can be in a difficult position when reporting to one authority for programmatic matters and another for personnel management matters. The OAA sets up a distinctive and</p>
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		<p>highly unusual structure in which the Ombudsman is responsible for designating all representatives of the Office but is (depending on the State’s chosen programmatic structure) not necessarily the authority for personnel management matters.</p> <p>We believe that those States which choose to utilize local Ombudsman entities may operationalize the requirements of the Act by dividing the authority between the personnel functions of the agency hosting the local Ombudsman entity, including hiring and firing, and the programmatic functions of the Ombudsman, including designation and de-designation. Despite the fact that the State agency (and/or the Office of the State Long-Term Care Ombudsman, depending on the organizational structure) contracts with an agency hosting the local Ombudsman entity to provide Ombudsman program services, the relationship is more complex than a typical contractual one. In addition to contract oversight for programmatic issues, the Ombudsman is also responsible for designation of the representatives of the Office. Further, the employees and volunteers of the local Ombudsman entity (<i>i.e.</i> representatives of the Office) have a direct representational relationship to the Office. As a result, this relationship between the Ombudsman and the agency hosting the local Ombudsman entity is not limited to merely a contract oversight function.</p> <p>... We believe that the proposed definition, and the context of the entire rule, provides clarity that directly relates to the cause of the risks identified by the commenter.</p>
	<p>Resident representative means any of the following:</p> <p>(1) An individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;</p> <p>(2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;</p>	<p>Comment: Seven commenters recommended that we add a definition for the term “legal representative” and/ or clarify the distinction between “legal representative” and “resident representative.” One indicated that a reader might mistakenly interpret the term “legal representative” to mean a resident’s lawyer. (p. 7711)</p> <p>Response: We agree that it would be helpful to use one term consistently. While the Act uses the term “legal representative,” we agree that the term “resident representative” may be less confusing; since a reader is unlikely to interpret the use of “resident representative” to an attorney or court-appointed representative unlike “legal representative.” In response to these comments, we have consistently used the term “resident representative” throughout the final rule, and we have added a definition of the term in § 1324.1. We also note that, under ACL’s April 21, 2014 Guidance on Federal Recognition of Same-Sex Marriage (available at http://www.acl.gov/</p>

	<p>(3) Legal representative, as used in section 712 of the Act; or</p> <p>(4) The court-appointed guardian or conservator of a resident.</p> <p>(5) Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction.</p>	<p>Funding_Opportunities/Grantee_Info/Index.aspx), a spouse in a same-sex marriage could serve as a resident representative.</p> <p>We intend for our definition of “resident representative” to be consistent with the person-centered approaches to Ombudsman program services. The “resident representative” is authorized to provide permission for a representative of the Office to perform the certain tasks when a resident is unable to communicate informed consent or prefers to have a representative act on his/her behalf. Those tasks include: Access to resident records; disclosure of the resident identifying information; and initiation of the investigation a complaint, coordination of the investigation and resolution approach, and determination of the resolution of the complaint. Relevant provisions are found in the regulations related to complaint processing at § 1324.19(b) and related to disclosure of resident-identifying information at § 1324.11(e)(3).</p>
	<p>State Long-Term Care Ombudsman, or Ombudsman, as used in sections 711 and 712 of the Act, means the individual who heads the Office and is responsible to personally, or through representatives of the Office, fulfill the functions, responsibilities and duties set forth in §§ 1324.13 and 1324.19.</p>	
	<p>State Long-Term Care Ombudsman program, Ombudsman program, or program, as used in sections 711 and 712 of the Act, means the program through which the functions and duties of the Office are carried out, consisting of the Ombudsman, the Office headed by the Ombudsman, and the representatives of the Office.</p>	
	<p>Willful interference means actions or inactions taken by an individual in an attempt to intentionally prevent, interfere with, or attempt to impede the Ombudsman from performing any of the functions or responsibilities set forth in § 1324.13, or the Ombudsman or a representative of the Office from performing any of the duties set forth in § 1324.19.</p>	<p>Comment: Ten commenters recommended that the final rule define the term “willful interference.” (p. 7711)</p> <p>Response: We have added a definition of “willful interference” at § 1324.1. We have also developed new provisions regarding interference, retaliation, and reprisals in response to these and other comments at § 1324.15(i).</p>

§1324.11	Establishment of the Office of the State Long-Term Care Ombudsman	
	<p>(a) The Office of the State Long-Term Care Ombudsman shall be an entity which shall be headed by the State Long-Term Care Ombudsman, who shall carry out all of the functions and responsibilities set forth in § 1324.13 and shall carry out, directly and/or through local Ombudsman entities, the duties set forth in § 1324.19.</p>	<p>The regulations at § 1324.11 clarify for States how to appropriately establish the Office pursuant to section 712(a)(1) of the Act. This includes clarification regarding the determinations which are the responsibilities of the Office, and by the head of the Office (<i>i.e.</i> the Ombudsman), pursuant to section 712(h) of the Act. Because these determinations are frequently outside the scope of the authority of most State employees (many, though not all, Ombudsmen are State employees), we believe that this clarification will assist States in full implementation of the Act.</p> <p>Comment: One commenter inquired about an appeal process if the Office organizational structure does not permit independence or adherence to the provisions of § 1324.11. (p. 7715)</p> <p>Response: No formal Federal appeal process exists for review of the independence of the Office. State agencies may develop appeal processes for these or other grievances. The final rule does require the development of a grievance process regarding determinations or actions of the Ombudsman or the representatives of the Office. §1324.11(e)(7). Moreover, it is ACL’s intention, through this final rule, to clarify the requirements in the Act so that States, in carrying out the Ombudsman program through OAA grants, will better understand their responsibility to assure that the Ombudsman has the ability to perform all of the functions and responsibilities set forth in the Act.</p>
	<p>(b) The State agency shall establish the Office and, thereby carry out the Long-Term Care Ombudsman program in any of the following ways:</p> <p>(1) The Office is a distinct entity, separately identifiable, and located within or connected to the State agency; or</p> <p>(2) The State agency enters into a contract or other arrangement with any public agency or nonprofit organization which shall establish a separately identifiable, distinct entity as the Office.</p>	<p>Comment: Two commenters indicated that AoA should require the Office to be placed outside of the State government. Another commenter disagreed with the proposed language permitting the Office to be located within or connected to the State agency, indicating that it is difficult to imagine what an Ombudsman faces in advocating for residents where he or she has a peer at a regulatory agency. Another commenter indicated that the final rule should require that the State contract the Ombudsman program with a nonprofit entity to ensure that the Ombudsman has the ability to operate independently...(p. 7713)</p> <p>Response: Congress has indicated through the Act that it is the responsibility of the State agency to establish and operate an Office and has expressly provided the opportunity for the State agency to carry out the Ombudsman program directly or by contract or other arrangement with a public agency or nonprofit private organization. Section 712(a)(1), (4) of the Act. AoA recognizes that the</p>

		<p>advocacy function of the Office may be a difficult fit within government bureaucratic structures and under policies governing State employees in some States. It is our intent to assist States agencies, through this rule, to clarify their responsibilities to carry out all of the requirements of the Act and to assist them in considering whether their organizational structure and State employee policies can adequately support a fully functioning, effective Ombudsman program.</p> <p>We also recognize that effective consumer advocacy entities can and do successfully exist within some State governments. In some States, the Office is not the unique consumer advocacy entity located within State government. While we agree that a non-profit agency might be able to access diverse funding sources, we also note that a number of State agencies provide significant resources to the Office in addition to the Federal grant funds appropriated under the Act.</p> <p>Comment: One commenter expressed concern that the proposed rule grants excessive authority to the Ombudsman at the expense of local Ombudsman entities and that the Ombudsman is held accountable to no one. The commenter expressed concern about the ability of local Ombudsman entities to advocate for residents in States where the Ombudsman misuses this power...(p. 7713)</p> <p>Response: We believe that the proposed rule appropriately follows the provisions of the Act which clearly set forth the Ombudsman (<i>i.e.</i> State Ombudsman, not all representatives of the Office) as responsible for the leadership of the Office, as the head of the Office. Section 712(a)(2) of the Act. We disagree with the assertion that the Ombudsman is accountable to no one. State agencies and other agencies which house the Office have the authority to provide personnel supervision and the ability to take personnel actions related to the performance of the Ombudsman as they would with any other employee. Some States have also set up additional mechanisms for accountability of the Ombudsman program, including governing or advisory boards. The Act does not prohibit the State agency or the Office from establishing additional mechanisms for accountability so long as the Ombudsman can fully perform his or her functions under the Act.</p>
	<p>(c) The State agency shall require that the Ombudsman serve on a full-time basis. In providing leadership and management of the Office, the</p>	<p>Comment: One commenter, in reference in § 1324.13(a), questioned the ability of an Ombudsman to serve on a full-time basis if other populations are served beyond the scope of the Act. (p. 7713)</p>

<p>functions, responsibilities, and duties, as set forth in §§ 1324.13 and 1324.19 are to constitute the entirety of the Ombudsman’s work. The State agency or other agency carrying out the Office shall not require or request the Ombudsman to be responsible for leading, managing or performing the work of non-ombudsman services or programs except on a time-limited, intermittent basis.</p> <p>(1) This provision does not limit the authority of the Ombudsman program to provide ombudsman services to populations other than residents of long-term care facilities so long as the appropriations under the Act are utilized to serve residents of long-term care facilities, as authorized by the Act.</p> <p>(2) [Reserved]</p> <p>(d) The State agency, and other entity selecting the Ombudsman, if applicable, shall ensure that the Ombudsman meets minimum qualifications which shall include, but not be limited to, demonstrated expertise in:</p> <p>(1) Long-term services and supports or other direct services for older persons or individuals with disabilities;</p> <p>(2) Consumer-oriented public policy advocacy;</p> <p>(3) Leadership and program management skills; and</p> <p>(4) Negotiation and problem resolution skills.</p>	<p>Response: We have added clarity to a new provision at § 1324.11(c) in the final rule by indicating that full-time shall mean that the functions and responsibilities set forth in this section are to constitute the entirety of the Ombudsman’s work. AoA does not object to a State choosing to utilize non-OAA resources for the Ombudsman program to provide services to additional populations (for example, to recipients of in-home long-term services and supports), so long as the functions and responsibilities relating to the expanded population are consistent with the services of an ombudsman. The State agency or other agency carrying out the Ombudsman program shall not require or request the Ombudsman to be responsible for leading, managing or performing the work of non-ombudsman services or programs except on a time-limited, intermittent basis. This provision is not intended to limit the ability of an Ombudsman to access grants or otherwise perform special projects so long as the activities of the grant or project are consistent with the functions and responsibilities of the Ombudsman.</p>
<p>(e) Policies and procedures. Where the Ombudsman has the legal authority to do so, he or she shall establish policies and procedures, in consultation with the State agency, to carry out the Ombudsman program in accordance with the Act. Where State law does not provide the Ombudsman with legal authority to establish policies and procedures, the Ombudsman shall recommend policies and</p>	

procedures to the State agency or other agency in which the Office is organizationally located, and such agency shall establish Ombudsman program policies and procedures. Where local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman and/or appropriate agency shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities and with representatives of the Office. The policies and procedures must address the matters within this subsection.

(1) Program administration. Policies and procedures regarding program administration must include, but not be limited to:

(i) A requirement that the agency in which the Office is organizationally located must not have personnel policies or practices which prohibit the Ombudsman from performing the functions and responsibilities of the Ombudsman, as set forth in § 1324.13, or from adhering to the requirements of section 712 of the Act. Nothing in this provision shall prohibit such agency from requiring that the Ombudsman, or other employees or volunteers of the Office, adhere to the personnel policies and procedures of the entity which are otherwise lawful.

(ii) A requirement that an agency hosting a local Ombudsman entity must not have personnel policies or practices which prohibit a representative of the Office from performing the duties of the Ombudsman program or from adhering to the requirements of section 712 of the Act. Nothing in this provision shall prohibit such agency from requiring that representatives of the Office adhere to the personnel policies

	<p>and procedures of the host agency which are otherwise lawful.</p> <p>(iii) A requirement that the Ombudsman shall monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.</p>	
	<p>(iv) A description of the process by which the agencies hosting local Ombudsman entities will coordinate with the Ombudsman in the employment or appointment of representatives of the Office.</p>	<p>Comment: One commenter suggested that the Ombudsman should have the authority to make autonomous hiring and firing decisions and should be solely responsible for determining the qualifications and positions necessary for the Ombudsman program to fulfill its mission...(p. 7716)</p> <p>Response: The Act specifically gives the Ombudsman the authority to designate local Ombudsman entities and to designate representatives of the Office. Section 712(a)(5) of the Act. It does not, however, require an arrangement where representatives of the Office are directly hired or fired by the Ombudsman. In many States, local Ombudsman entities are hosted by an agency that is not the same agency that employs the Ombudsman. This arrangement is envisioned by the Act, not prohibited by it...</p> <p>In light of the Ombudsman responsibility to designate representatives of the Office, we encourage Ombudsmen and State agencies to develop policies and procedures that: (1) Coordinate the hiring and firing of individuals by agencies hosting local Ombudsman entities with the Ombudsman and (2) incorporate minimum qualifications. Such coordination will enable the Ombudsman to make designation and de-designation determinations in ways that are coordinated with the employing agency which hosts the local Ombudsman entity. In addition, we require Ombudsmen or State agencies, in this final rule, to develop policies and procedures regarding conflicts of interest in employing or appointing representatives of the Office. § 1324.11(e)(4)(ii). We have also added a new section regarding responsibilities of agencies hosting local Ombudsman entities at § 1324.17.</p>
	<p>(v) Standards to assure prompt response to complaints by the Office and/or local Ombudsman entities which prioritize abuse, neglect, exploitation and time-sensitive</p>	<p>Comment: Five commenters indicated a need for a national standard or additional guidance for what is considered a “prompt response.” (p.7728)</p> <p>Response: We believe creating one national standard of promptness would be unrealistic, given the extremely different variables among States. Some States</p>

	<p>complaints and which consider the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.</p> <p>(vi) Procedures that clarify appropriate fiscal responsibilities of the local Ombudsman entity, including but not limited to clarifications regarding access to programmatic fiscal information by appropriate representatives of the Office.</p>	<p>have developed standards of promptness related to complaint response that are responsive to the realities in that State. We strongly encourage the development of minimum standards to provide consumers, providers and others with an expectation of what constitutes a timely response to a complaint. We note that these standards provide an important mechanism for Ombudsman program accountability. We are available to provide technical assistance to States and Ombudsmen as they develop these standards.</p> <p>Comment: Eight commenters suggested that we use the term “neglect” instead of “gross neglect” or provide further clarification of “gross neglect” in § 1324.15(a)(2)(ii) and in other places where it occurs. (p.7728)</p> <p>Response: We have adopted this recommendation within § 1324.11(e)(1)(v). In both the proposed rule and the final rule, the Ombudsman program is required to respond to and work to resolve complaints of neglect. In contrast, this provision specifically relates to what AoA requires of State agencies and Ombudsmen as they develop standards of promptness to respond to these and other types of complaints. The final rule, rather than distinguishing between “gross neglect” and “neglect” for purposes of triage, requires development of standards of promptness which can guide the Ombudsman program to prioritize abuse, neglect, exploitation, and time-sensitive complaints. The rule also requires consideration of the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident by providing services of the Ombudsman program in response to a complaint. Rather than distinguishing between “neglect” and “gross neglect” in this provision, this rule provides States with the latitude to consider the use of the terms (and accompanying definitions) that are most appropriate to their State’s Ombudsman program.</p> <p>For purposes of determining standards of promptness, States may choose to use “gross neglect,” which is defined in NORS instructions, or “neglect.” We note that, “neglect” is defined in the Act at section 102(38) and by the Centers for Medicaid & Medicare Services (CMS) regarding nursing facilities at 42 CFR 488.301. Alternatively, States may choose to rely on their relevant State definition of “neglect” in developing their standard of promptness.</p> <p>Comment: Two commenters disagreed with the proposed language that the Ombudsman program be required to prioritize abuse complaints, indicating that investigation of abuse is a protective services responsibility... Another commenter requested clarification regarding establishing policy and procedure for the Ombudsman program to respond to abuse complaints, as required in the</p>
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		<p>proposed rule at § 1324.11(a)(2)(ii), in light of the fact that the State agency that, in their State, serves as the official finder of fact related to allegations of abuse, neglect and exploitation. (p.7729)</p> <p>Response: The Act requires the Ombudsman program to “identify, investigate, and resolve complaints that . . . relate to action, inaction or decisions that may adversely affect the health, safety, welfare, or rights of the residents.” Section 712(a)(3)(A) and (5)(B)(iii) of the Act. Abuse, neglect and exploitation of residents are among the complaints that fall within this purview. Through NORS, States report on the types of complaints processed by the Ombudsman program, specifically including complaint codes and definitions related to abuse, gross neglect and exploitation. “Long-Term Care Ombudsman Program Complaint Codes,” OMB 0985–0005, at pp. 1–3, 17–18.</p> <p>The services of the Ombudsman program are distinct from, and as indicated in § 1324.21(c), may even conflict with the responsibilities of protective services. An individual resident, may, for example, have a complaint about protective services or may seek support from the Ombudsman program to realize a goal that is inconsistent with his or her protective services plan.</p> <p>While the complaint resolution function of the Ombudsman program requires “investigation,” an Ombudsman investigation is not for the same purposes as an investigation by protective services, licensing and regulatory agencies, law enforcement or other entities. This may result in confusion regarding the appropriate investigatory role of such entities. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), the goal is to resolve the complaint to the resident’s satisfaction, rather than to substantiate whether the abuse or other allegation occurred. The Ombudsman program does not have a duty to collect sufficient evidence to meet the higher legal standards of proof that protective services, licensing or regulatory agencies, or law enforcement may need to meet their respective purposes. The Ombudsman program investigates solely for the purpose of gathering necessary information to resolve the complaint to the resident’s satisfaction, not to determine whether any law or regulation has been violated for purposes of a potential civil or criminal enforcement action.</p> <p>With the Ombudsman program fulfilling its duties, the priorities and interests of the individual resident can be supported and advocated for. If the protective services and other government systems charged with taking protective or enforcement actions are not providing the outcomes that serve the health, safety, welfare or rights of residents, the Ombudsman program is available to</p>
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		<p>address the larger systemic problems. Therefore, it is critically important that each of these agencies is able to fully and distinctly fulfill their duties.</p> <p>The provisions related to disclosure of resident identifying information, including exclusion from abuse reporting requirements, are set forth in § 1324.11(e)(3).</p>
	<p>(2) Procedures for access. Policies and procedures regarding timely access to facilities, residents, and appropriate records (regardless of format and including, upon request, copies of such records) by the Ombudsman and representatives of the Office must include, but not be limited to:</p> <ul style="list-style-type: none"> (i) Access to enter all long-term care facilities at any time during a facility’s regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated; (ii) Access to all residents to perform the functions and duties set forth in §§ 1324.13 and 1324.19; (iii) Access to the name and contact information of the resident representative, if any, where needed to perform the functions and duties set forth in §§ 1324.13 and 1324.19; (iv) Access to review the medical, social and other records relating to a resident, if— <ul style="list-style-type: none"> (A) The resident or resident representative communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services; (B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented 	<p>Comment: One commenter indicated the need for the final rule to have a provision implementing section 712(b) of the Act (“Procedures for Access”) requiring States to have policies on Ombudsman program access to facilities, residents, and records and providing guidance on how to appropriately implement this statutory requirement.... (p.7729)</p> <p>Response: We agree that the rule is strengthened by incorporating provisions related to Ombudsman program access to facilities, residents and records and have added § 1324.11(e)(2) to require policies and procedures related to access. We have also added a provision in §1324.15(b) to clarify the State agency’s responsibility...In addition, we have incorporated a provision at § 1324.11(e)(2)(vi) related to access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities, reflecting the statutory requirement in section 712(b)(1)(D) of the Act. While we are not suggesting that representatives of the Office be prohibited from this access, we anticipate that the Ombudsman and/or State agency will coordinate this policy and procedure development, and incorporate procedures for appropriate access of representatives of the Office, with the State agency or agencies which maintain such licensing and certification records. Ombudsman programs are not prohibited from access to unredacted licensing and certification records, which may include resident-identifying information, under the Health Insurance Portability and Accountability Act (HIPAA) of 1996. See HIPAA Privacy Rule, 45 CFR part 160 and subparts A and E of part 164; see also § 1324.11(e)(2)(vii) of this rule.</p>

	<p>contemporaneously by a representative of the Office in accordance with such procedures; and</p> <p>(C) Access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, a representative of the Office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the representative of the Office obtains the approval of the Ombudsman;</p> <p>(v) Access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities;</p> <p>(vi) Access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and</p> <p>(vii) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR part 160 and 45 CFR part 164, subparts A and E, does not preclude release by covered entities of resident private health information or other resident identifying information to the Ombudsman program, including but not limited to residents’ medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or Federal survey or inspection process.</p>	
	<p>(3) Disclosure. Policies and procedures regarding disclosure of files, records and other information</p>	<p>Comment: One commenter suggested adding a provision encouraging Ombudsman programs to share non-confidential information with advocacy</p>

<p>maintained by the Ombudsman program must include, but not be limited to:</p> <ul style="list-style-type: none"> (i) Provision that the files, records, and information maintained by the Ombudsman program may be disclosed only at the discretion of the Ombudsman or designee of the Ombudsman for such purpose and in accordance with the criteria developed by the Ombudsman, as required by § 1324.13(e); (ii) Prohibition of the disclosure of identifying information of any resident with respect to whom the Ombudsman program maintains files, records, or information, except as otherwise provided by § 1324.19(b)(5) through (8), unless: <ul style="list-style-type: none"> (A) The resident or the resident representative communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services; (B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or (C) The disclosure is required by court order; (iii) Prohibition of the disclosure of identifying information of any complainant with respect to whom the Ombudsman program maintains files, records, or information, unless: <ul style="list-style-type: none"> (A) The complainant communicates informed consent to the disclosure and the 	<p>organizations and identifying information from a complainant with complainant permission. (p. 7708)</p> <p>Response: The Act provides the Ombudsman with the authority to determine disclosure of Ombudsman program information where it is not otherwise prohibited. See Section 712(d) of the Act. ...We also note that aggregate data provided by each State’s Ombudsman program to AoA through the National Ombudsman Reporting System is posted publicly on www.agidnet.acl.gov and www.acl.gov.</p> <p>The Act provides the Ombudsman with the responsibility to determine appropriate disclosure of program information (unless it is otherwise prohibited), and this rule (at § 1324.11(e)(3)) requires development of policies and procedures regarding disclosure of program information. Beyond these requirements, AoA does not take a position on which specific information the Ombudsman should disclose to specific entities. However, we note that other provisions in this rule do require Ombudsman program coordination with other entities (see, e.g., § 1324.13(h). Depending on the goals of coordinated activities, appropriate disclosure of information may support the success of such coordination.</p> <p>Comment: One commenter requested that language be added regarding the timeframe required to capture and retain records. (p. 7708)</p> <p>Response: Since the Ombudsman program is operated by States pursuant to grants of the Department of Health and Human Services (HHS), the Federal requirements related to retention of records maintained pursuant to HHS grants apply to records retention of the Ombudsman program. In general, grant recipients and their sub-awardees under the grant must retain financial and programmatic records, supporting documents, statistical records, and all other records that are required by the terms of a grant, or may reasonably be considered pertinent to a grant, for a period of 3 years from the date the final Financial Status Report is submitted by States to HHS. The HHS requirements related to the retention of records are found at 45 CFR 75.361. This Federal grant requirement does not prohibit State agencies, the Office of the State Long-Term Care Ombudsman, and/or a local Ombudsman entity from establishing record retention policies which are provide for longer retention periods than the Federal requirements.</p>
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	<p>consent is given in writing or through the use of auxiliary aids and services; (B) The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or (C) The disclosure is required by court order; (iv) Exclusion of the Ombudsman and representatives of the Office from abuse reporting requirements, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1324.19(b)(5) through (8); and (v) Adherence to the provisions of paragraph (e)(3) of this section, regardless of the source of the request for information or the source of funding for the services of the Ombudsman program, notwithstanding section 705(a)(6)(c) of the Act.</p>	
	<p>(4) Conflicts of interest. Policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in § 1324.21, including: (i) Ensuring that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the Ombudsman is subject to a conflict of interest; (ii) Requiring that other agencies in which the</p>	<p>Comment: One commenter recommended that the final rule include a provision that identifies conflicts relating to individuals involved in the designation of the Ombudsman as required by section 712(f)(1) of the Act. (p.7755) Response: In the final rule at § 1324.11(e)(4)(i), we have added language requiring that policies and procedures ensure that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the Ombudsman is subject to a conflict of interest.</p>

	<p>Office or local Ombudsman entities are organizationally located have policies in place to prohibit the employment or appointment of an Ombudsman or representatives of the Office with a conflict that cannot be adequately removed or remedied;</p> <p>(iii) Requiring that the Ombudsman take reasonable steps to refuse, suspend or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, which cannot be adequately removed or remedied;</p> <p>(iv) Establishing the methods by which the Office and/or State agency will periodically review and identify conflicts of the Ombudsman and representatives of the Office; and</p> <p>(v) Establishing the actions the Office and/or State agency will require the Ombudsman or representatives of the Office to take in order to remedy or remove such conflicts.</p>	
	<p>(5) Systems advocacy. Policies and procedures related to systems advocacy must assure that the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.</p> <p>(i) Such procedures must exclude the Ombudsman and representatives of the Office</p>	<p>Comment: One commenter indicated that the proposed provisions at § 1324.11 would be difficult for States to implement and for AoA to uphold. The commenter indicated that in their State, the Ombudsman is an employee of the State agency on aging and bound by its policies regarding communications with the legislature and the media. Therefore, the Ombudsman is currently unable to independently make determinations, make recommendations for changes to policies, or provide information to the public. ...Another commenter indicated that it is unrealistic for AoA to think that an Ombudsman employed by a State agency can make recommendations which conflict with those of the State agency or the Governor. (p. 7714)</p> <p>Response: We appreciate the commenters' perspectives of the circumstances in their States. We would like to clarify that the rule does not suggest that the Ombudsman has the authority to override his or her supervisor, agency director, or Governor. However, the Act requires that any State, in order to</p>

	<p>from any State lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the Act.</p> <p>(ii) Nothing in this part shall prohibit the Ombudsman or the State agency or other agency in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office.</p>	<p>receive grant funds under the Act, assure to AoA that, among other things, it will permit the Ombudsman to fulfill all of the functions under the Act. These include the ability to make certain determinations which represent the positions of the Office, and not necessarily those of the supervisor, agency director, or Governor. A number of State agencies or other agencies in which the Office is organizationally located already include language in their personnel policies or other relevant laws or policies which implement this requirement of the Act. In order to reduce confusion at the State level where the recommendations of an Ombudsman might be mistaken for the position of the Governor or any other agency, AoA has specifically indicated in the final rule that these determinations and positions are to be those of the Office and do not represent other State entities. § 1324.13(a)(7)(vi). ..</p> <p>Comment: One commenter indicated that, in their State, the Ombudsman is organizationally located in a government umbrella agency and must adhere to State protocols related to legislative action and lobbying which apply to State employees. The commenter recommended that AoA consider differences in structure from State to State in finalizing this rule. Another commenter indicated that the Ombudsman in their State is a State employee and is therefore bound by policy that does not exclude the Ombudsman from State lobbying prohibitions. The commenter anticipates significant challenges in their State in upholding this proposed provision based on current State policy. (p.7734)</p> <p>Response: We appreciate the commenters bringing these issues to our attention. The Act is clear that Congress intends for the Office to have the authority to make recommendations regarding changes to laws, regulations, and policies pertaining to the interests of long-term care facility residents. This is both a required function of the Ombudsman (at section 712(a)(3)(G) of the Act) and an expectation of the State agency to require of the Office (section 712(h)(2) of the Act).</p> <p>Should a State not wish to have a State employee in the role of fulfilling the Ombudsman functions of the Act, the Act provides States with options to carry out the program by contract or other arrangement with another public agency or a nonprofit private organization. Section 712(a)(4)(A) of the Act. AoA plans to assist State agencies and Ombudsmen to comply with this rule.</p> <p>Comment: One commenter indicated that the proposed language at § 1324.15(a)(2)(v)(A) essentially negates the wisdom of input of others and questioned the wisdom of one person having unilateral authority to express</p>
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		<p>their opinion about any legislative bill or legal matter. The commenter indicated that the State aging network is to be a comprehensive, coordinated system of care for older adults and that this proposed rule pits one part of the network against another. The commenter also questioned how the State agency can be required by the Act to advocate for older adults except where the Ombudsman program exists, describing this as an inconsistent message. (p.7734)</p> <p>Response: It is not the intent of AoA to negate the wisdom of input of others in the work of the Ombudsman program. On the contrary, we expressly provide (at newly numbered § 1324.11(e)(5)(ii)) that policies which promote consultation regarding the determinations of the Office are not prohibited and we require that the Office coordinate its activities with a large number of relevant entities (at § 1324.13(h)). We strongly encourage collaboration between the Ombudsman and the State agency, as well as with other stakeholders.</p> <p>We intend to clarify in this rule how both the State agency and the Ombudsman program can successfully fulfill all of the functions and duties required by the Act. AoA is available to provide technical assistance to any State in its implementation of the final rule.</p>
	<p>(6) Designation. Policies and procedures related to designation must establish the criteria and process by which the Ombudsman shall designate and refuse, suspend or remove designation of local Ombudsman entities and representatives of the Office.</p> <p>(i) Such criteria should include, but not be limited to, the authority to refuse, suspend or remove designation a local Ombudsman entity or representative of the Office in situations in which an identified conflict of interest cannot be adequately removed or remedied as set forth in § 1324.21.</p> <p>(ii) [Reserved]</p>	<p>Comment: Four commenters suggested that the Ombudsman be required to have policies, protocols, and/or criteria in place regarding designation and de-designation actions to which the Ombudsman should be held accountable. (p.7722)</p> <p>Response: We have adopted this recommendation by adding a new provision to § 1324.11(e)(6) requiring procedures which set forth the criteria and process implementing the Ombudsman responsibility to designate, or to refuse, suspend or remove designation, of representatives of the Office and local Ombudsman entities. We recognize that many States already have such procedures in place. In addition, the grievance process required by § 1324.11(e)(7) can be utilized by any individual or entity with reason to believe that the procedures were not adhered to by the Ombudsman.</p>
	<p>(7) Grievance process. Policies and procedures related to grievances must establish a grievance</p>	<p>Comments: Two commenters indicated that the scope of complaint investigations indicated in § 1324.13(a)(1) should include complaints regarding</p>

	<p>process for the receipt and review of grievances regarding the determinations or actions of the Ombudsman and representatives of the Office.</p> <p>(i) Such process shall include an opportunity for reconsideration of the Ombudsman decision to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office. Notwithstanding the grievance process, the Ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.</p> <p>(ii) [Reserved]</p>	<p>a representative of the Ombudsman program. (p. 7718)</p> <p>Response: ...We have included, in the final rule, a new provision at § 1324.11(e)(7), to require the establishment of a grievance process within the Ombudsman program so that individuals served by the Ombudsman program have a clear process for filing a grievance, having their concern investigated, and receiving a response to the grievance. We note that some States already have such processes in place.</p>
	<p>(8) Determinations of the Office. Policies and procedures related to the determinations of the Office must ensure that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, without necessarily representing the determinations or positions of the State agency or other agency in which the Office is organizationally located, regarding:</p> <p>(i) Disclosure of information maintained by the Ombudsman program within the limitations set forth in section 712(d) of the Act;</p> <p>(ii) Recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and</p> <p>(iii) Provision of information to public and private agencies, legislators, the media, and other persons, regarding the problems and</p>	<p>Comment: One commenter indicated that the proposed language regarding Ombudsman determinations could be interpreted to mean that the Ombudsman must individually approve all disclosures, testimony or information provided by any local Ombudsman representative on a public policy issue. The commenter indicated that an Ombudsman might choose to delegate some determinations to local Ombudsman entities. (p. 7715)</p> <p>Response: We do not intend for the proposed provision to limit ability of Ombudsman to utilize representative of the Office for appropriate tasks in order carry out the determinations of the Office. We do not believe that the proposed or final rule, at § 1324.11(e)(8), limits this ability.</p> <p>Comment: With respect to § 1324.11(c)(2) (moved in the final rule to § 1324.11(e)(8)), regarding recommendation to changes in laws, regulations, etc., one commenter indicated that in their State, the Ombudsman is organizationally located within an umbrella State government structure and must adhere to State government protocols related to legislative action and lobbying. The commenter requested consideration for differences in structure of the Office from State to State. (p. 7715)</p> <p>Response: The language in the final rule at § 1324.11(e)(8) is derived directly from the Act which states that making recommendations to changes in laws, regulations, etc. is a function of the Ombudsman. Section 712(a)(3)(G)(ii) of the Act. Further, the Act requires State agencies to require the Office to analyze,</p>

	<p>concerns of residents and recommendations related to the problems and concerns.</p>	<p>comment on, monitor and recommend changes to laws, regulations, and policies, and provide information to, among others, legislators. Section 712(h)(2),(3) of the Act. We do not believe that AoA has the authority under the Act to make this provision optional for some States and not others. The Act creates the Ombudsman program to resolve problems for residents of long-term care facilities on individual as well as systemic levels. Therefore, the ability to take positions and make recommendations that reflect the interests of residents is critical to the effectiveness of the Ombudsman program.</p> <p>Comment: One commenter recommended that we add “the media” to the list of persons to whom information can be provided by the Office... (p. 7715)</p> <p>Response: We have accepted this recommendation in the final rule, revising § 1324.11(c)(3) (moved in the final rule to § 1324.11(e)(8)(iii)). We believe it further clarifies implementation of the Act. Further, it is consistent with the AoA 2011 finding of non-compliance regarding information dissemination in a State which required State agency and Governor prior approval of Ombudsman program press releases and which used orders and intimidation to ensure the cancellation of press conference activities. As we indicated in the AoA compliance review of this State, while we encourage Ombudsman programs to have excellent lines of communication with their State agency to avoid blind-side surprises, the Ombudsman must have the option to communicate with the media in order to advocate for residents and their interests.</p>
<p>§1324.13</p>	<p>Functions and responsibilities of the State Long-Term Care Ombudsman</p>	
	<p>The Ombudsman, as head of the Office, shall have responsibility for the leadership and management of the Office in coordination with the State agency, and, where applicable, any other agency carrying out the Ombudsman program, as follows.</p> <p>(a) Functions. The Ombudsman shall, personally or through representatives of the Office—</p> <p style="padding-left: 20px;">(1) Identify, investigate, and resolve complaints that—</p> <p style="padding-left: 40px;">(i) Are made by, or on behalf of, residents; and</p> <p style="padding-left: 40px;">(ii) Relate to action, inaction, or decisions, that may adversely affect the health, safety,</p>	<p>Comment: One commenter recommended that we omit the language “in coordination with the State” in § 1324.13. The commenter indicated that there is no mention of coordination with the State agency in the list of Ombudsman functions in the Act at section 712(a)(3). In addition, using the word “coordination” only prolongs the enmeshing of the Ombudsman and the Office with the State agency. The commenter contrasted the provision in section 712(a)(5)(B) of the Act related to local Ombudsman entities which are to act “in accordance with the policies and procedures of the Office and the State agency.” (p. 7716)</p> <p>Response: The Act sets forth a grantee relationship between AoA and the State agency, making the State agency accountable to the AoA for the appropriate establishment and operation of the Ombudsman program. See Section 712(a)(1) of the Act. We believe that there must, therefore, be a coordinated relationship</p>

	<p>welfare, or rights of residents (including the welfare and rights of residents with respect to the appointment and activities of resident representatives) of—</p> <p>(A) Providers, or representatives of providers, of long-term care;</p> <p>(B) Public agencies; or</p> <p>(C) Health and social service agencies.</p> <p>(2) Provide services to protect the health, safety, welfare, and rights of the residents;</p> <p>(3) Inform residents about means of obtaining services provided by the Ombudsman program;</p>	<p>between the State agency and the Ombudsman in order for the State agency to be able to fulfill its responsibilities as grantee. We further believe that coordination is only successful if all involved parties take responsibility for its success. Therefore, we believe that coordination with the State agency should be a responsibility of the Ombudsman as well as of the State agency and have not adopted these recommendations.</p> <p>We have made a revision in the final rule, changing “State” to “State agency” to clarify that we are specifically referring to the State agency on aging as the AoA grantee. Should coordination with other State agencies be involved in carrying out the program, the rule directs the Ombudsman to coordinate with them as well.</p>
	<p>(4) Ensure that residents have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses from representatives of the Office to requests for information and complaints;</p>	<p>Comments: Three commenters suggested a need for additional guidance or definition of “regular access” in § 1324.13(a)(4), indicating that the presence of a representative of the Office in facilities is critical for ensuring resident access, and recommending at least quarterly visits to each facility as a minimum standard. (p.7719)</p> <p>Response: Currently there is wide variation among States’ Ombudsman programs in providing “regular visits.”... Some Ombudsman programs have minimum standards related to frequency of these visits that are responsive to the variables in that State. We strongly encourage development of minimum standards to provide consumers, providers, and others with an expectation of the frequency of regular visits. We note that standards also provide an important mechanism for Ombudsman program accountability. ... We also encourage Ombudsman programs and States to consider, in developing minimum standards, that providing “regular access” requires more than providing visits to facilities by representatives of the Office. Ombudsman programs should be easily accessible to residents, complainants, and others—including individuals with limited English proficiency—because, among other things, they have multiple methods of communication available to the public (such as telephone, email, facsimile, Web site, TTY (text telephone) and other communication services, and mail, as well as in-person visits).</p> <p>Comments: One commenter suggested the need for a national standard on what constitutes “timely access” in § 1324.13(a)(4). (p.7719)</p> <p>Response: The Act requires the Ombudsman to ensure that residents have timely access to the services of the Office. Section 712(a)(3)(D) of the Act. We</p>

		<p>interpret this provision to mean that a resident or other individual who reaches out to the Ombudsman program is able to communicate with the program to file a complaint or otherwise make a request in a reasonably prompt manner. Timely access is provided, for example, when the Ombudsman program returns telephone calls or emails in a reasonably prompt manner and a resident request for an in-person discussion with a representative of the Office is met in a reasonably prompt manner.</p> <p>We believe creating one national minimum standard for timely access would be unrealistic, given the extremely different variables among States,...</p> <p>We note that the Act and this rule also require that “residents and complainants receive timely responses from representatives of the Office to complaints,” distinguished from “timely access.” After a resident has received access and the opportunity to file a complaint, the “timely response” requirement envisions that a response (for example, initiating a complaint investigation) is done in a reasonably prompt manner. Some States have developed standards of promptness related to complaint response that are responsive to the realities in that State. Again, we strongly encourage the development of minimum standards to provide consumers, providers and others with an expectation of what constitutes a timely response to a complaint.</p>
	<p>(5) Represent the interests of residents before governmental agencies, assure that individual residents have access to, and pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;</p>	<p>Comment: One commenter indicated that most Ombudsman programs are not adequately equipped to undertake the requirement to pursue “administrative, legal, and other remedies.” (p. 7720)</p> <p>Response: We note that this is not a new requirement, but has long been required by the Act at section 712(a)(3)(D) and (g)(2). Our intent in finalizing this rule is to help provide additional clarity around this expectation. To further clarify the meaning of § 1324.13(a)(5), we provide the following examples of ways States can fulfill this requirement:</p> <ol style="list-style-type: none"> 1. Ombudsman assures individual resident access to an administrative remedy: A resident receives an involuntary discharge notice that provides a notice of right to a fair hearing. The Ombudsman makes sure the resident knows how to request the hearing and is informed of available supports to make sure his/her interests are represented in the process. The Ombudsman program could, for example, refer the resident to a non-profit legal services program to file the appeal and represent the resident interests at the hearing, or provide in-house legal counsel to represent the resident, and/or provide a representative of the Office to accompany the resident to the hearing as emotional support.

		<p>Alternatively, a representative of the Office could serve as a spokesperson for a resident in a hearing as provided in 42 CFR 431.206(b)(3).</p> <p>2. Ombudsman assures individual resident access to a legal remedy: A resident wishes to have a power of attorney revoked to remedy financial exploitation by agent. The Ombudsman could, for example, refer the resident to a non-profit legal services program to provide legal advice to the resident and to execute the revocation of the power of attorney, or provide in-house legal counsel to provide legal advice to the resident and to execute the revocation of the power of attorney, and/or provide protocols to representatives of the Office regarding what actions could be taken directly by the representative consistent with State laws relating to revocations of powers of attorney and avoiding the unauthorized practice of law.</p> <p>3. Ombudsman pursues an administrative remedy to protect resident interests: The Ombudsman advocates before State-level policy makers to create a fair hearing process where the State that lacks a fair hearing process for involuntary transfer or discharge of nursing home residents (as required in Federal regulation at 42 CFR 431.200 <i>et seq.</i>) or for board and care/ assisted living residents (as regulated under State law).</p> <ol style="list-style-type: none"> 1. Ombudsman pursues a legal remedy to protect resident interests: The Ombudsman program serves as the Patient Care Ombudsman in a long-term care facility bankruptcy filing pursuant to the Federal Bankruptcy law. 2. Ombudsman pursues a legal remedy to protect resident interests: The Ombudsman program files a mandamus action against the State, representing the collective interest of residents, to ask a court to require the State to enforce its regulatory requirements related to long-term care facilities. <p>The above examples are some of the many possible ways that Ombudsman programs can, and currently do, fulfill this requirement. We are available to provide technical assistance to States to assist them in further meeting the requirements of § 1324.13(a)(5).</p> <p>Comment: One commenter indicated the importance of the language in § 1324.13(a)(5) related to assisting residents who face end-of-life decisions, indicating the important role of the Ombudsman program in assisting residents so that their wishes, as expressed in advance directives, are adhered to.</p> <p>Response: We appreciate the comment and note that Ombudsman program support for residents related to end-of-life decision-making is yet another example of ways that Ombudsman programs can, and currently do, fulfill the</p>
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		requirements of § 1324.13(a)(5).
	(6) Provide administrative and technical assistance to representatives of the Office and agencies hosting local Ombudsman entities;	
	<p>(7)(i) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;</p> <p>(ii) Recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and</p> <p>(iii) Facilitate public comment on the laws, regulations, policies, and actions;</p> <p>(iv) Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office; and</p> <p>(v) Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.</p> <p>(vi) Such determinations and positions shall be those of the Office and shall not necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.</p> <p>(vii) In carrying out systems advocacy efforts of the Office on behalf of long-term care facility residents and pursuant to the receipt of grant funds under the Act, the provision of information, recommendations of changes of</p>	Refer to 1324.11(e)(5), <i>Systems Advocacy</i> , for comments and responses regarding analyze, comment on, and monitor the development and implementation....responsibilities delineated in (7).

	<p>laws to legislators, and recommendations of changes of regulations and policies to government agencies by the Ombudsman or representatives of the Office do not constitute lobbying activities as defined by 45 CFR part 93.</p>	
	<p>(8) Coordinate with and promote the development of citizen organizations consistent with the interests of residents; and (9) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils to protect the well-being and rights of residents; and (b) The Ombudsman shall be the head of a unified statewide program and shall: (1) Establish or recommend policies, procedures and standards for administration of the Ombudsman program pursuant to § 1324.11(e); (2) Require representatives of the Office to fulfill the duties set forth in § 1324.19 in accordance with Ombudsman program policies and procedures.</p>	<p>Comment: One commenter indicated that “citizen organization” should be inclusive of family councils. (p.7721) Response: While we agree that the term “citizen organizations” could be inclusive of groups consisting of or representing family members, we have not made a change to the final rule. Family councils are more specifically addressed at § 1324.13(a)(9).</p>
	<p>(c) Designation. The Ombudsman shall determine designation, and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act and the policies and procedures set forth in § 1324.11(e)(6). (1) Where an Ombudsman chooses to designate local Ombudsman entities, the Ombudsman shall: (i) Designate local Ombudsman entities to be organizationally located within public or non-profit private entities; (ii) Review and approve plans or contracts</p>	<p>Comment: One commenter asked whether this provision permits the Ombudsman to override the decision of an AAA to terminate an employee. Another commenter indicated concerns regarding lines of responsibility since, in the commenter’s State, representatives of the Office are employees of AAAs who provide direct oversight and monitoring of their employees. (p.7722) Response: This provision is not intended to provide the Ombudsman with authority to override a personnel decision made by any other entity. However, we do expect that Ombudsmen who designate AAAs or other entities to operate as local Ombudsman entities have procedures in place to clearly delineate how the Ombudsman responsibilities to designate, or to refuse, suspend or remove designation of, representatives of the Office are coordinated with the personnel decisions of the agency hosting the local</p>

	<p>governing local Ombudsman entity operations, including, where applicable, through area agency on aging plans, in coordination with the State agency; and</p> <p>(iii) Monitor, on a regular basis, the Ombudsman program performance of local Ombudsman entities.</p>	<p>Ombudsman entity. A number of States have developed procedures to address this question, and we are available to provide States with technical assistance as needed.</p>
	<p>(2) Training requirements. The Ombudsman shall establish procedures for training for certification and continuing education of the representatives of the Office, based on model standards established by the Director of the Office of Long-Term Care Ombudsman Programs as described in section 201(d) of the Act, in consultation with residents, resident representatives, citizen organizations, long-term care providers, and the State agency, that—</p> <p>(i) Specify a minimum number of hours of initial training;</p> <p>(ii) Specify the content of the training, including training relating to Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State; investigative and resolution techniques; and such other matters as the Office determines to be appropriate; and</p> <p>(iii) Specify an annual number of hours of in-service training for all representatives of the Office;</p> <p>(3) Prohibit any representative of the Office from carrying out the duties described in § 1324.19 unless the representative—</p> <p>(i) Has received the training required under paragraph (c)(2) of this section or is performing such duties under supervision of the</p>	<p>Comment: Five commenters recommended that we add specific guidance regarding training requirements for certified representatives of the Office in the final rule. ... (p.7720)</p> <p>Response: We appreciate the importance of consistent access to quality training by the Ombudsman and representatives of the Office. In §§ 1324.13(c)(2) and 1324.15(c) of the final rule, we have clarified requirements related to training, including requiring State agencies to provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents. Further, we clarify that State agencies may utilize funds appropriated under Title III and/or Title VII of the Act in order to provide access to such training opportunities.</p> <p>While AoA has not incorporated training standards into this rule, it intends to develop training standards for the Ombudsman program. In the meantime, we recommend that Ombudsman programs refer to the AoA-funded National Ombudsman Resource Center for training resources and a core curriculum designed for certification training of representatives of the Office.</p>

	<p>Ombudsman or a designated representative of the Office as part of certification training requirements; and</p> <p>(ii) Has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;</p>	
	<p>(4) The Ombudsman shall investigate allegations of misconduct by representatives of the Office in the performance of Ombudsman program duties and, as applicable, coordinate such investigations with the State agency in which the Office is organizationally located, agency hosting the local Ombudsman entity and/or the local Ombudsman entity.</p> <p>(5) Policies, procedures, or practices which the Ombudsman determines to be in conflict with the laws, policies, or procedures governing the Ombudsman program shall be sufficient grounds for refusal, suspension, or removal of designation of the representative of the Office and/or the local Ombudsman entity.</p>	
	<p>(d) Ombudsman program information. The Ombudsman shall manage the files, records, and other information of the Ombudsman program, whether in physical, electronic, or other formats, including information maintained by representatives of the Office and local Ombudsman entities pertaining to the cases and activities of the Ombudsman program. Such files, records, and other information are the property of the Office. Nothing in this provision shall prohibit a representative of the Office or a local Ombudsman entity from maintaining such information in accordance with Ombudsman program requirements.</p>	
	<p>(e) Disclosure. In making determinations regarding</p>	<p>Comment: One commenter suggested adding a provision encouraging</p>

<p>the disclosure of files, records and other information maintained by the Ombudsman program, the Ombudsman shall:</p> <p>(1) Have the sole authority to make or delegate determinations concerning the disclosure of the files, records, and other information maintained by the Ombudsman program. The Ombudsman shall comply with section 712(d) of the Act in responding to requests for disclosure of files, records, and other information, regardless of the format of such file, record, or other information, the source of the request, and the sources of funding to the Ombudsman program;</p> <p>(2) Develop and adhere to criteria to guide the Ombudsman’s discretion in determining whether to disclose the files, records or other information of the Office; and</p> <p>(3) Develop and adhere to a process for the appropriate disclosure of information maintained by the Office, including:</p> <p>(i) Classification of at least the following types of files, records, and information: medical, social and other records of residents; administrative records, policies, and documents of long-term care facilities; licensing and certification records maintained by the State with respect to long-term care facilities; and data collected in the Ombudsman program reporting system; and</p> <p>(ii) Identification of the appropriate individual designee or category of designee, if other than the Ombudsman, authorized to determine the disclosure of specific categories of information in accordance with the criteria described in paragraph (e) of this section.</p>	<p>Ombudsman programs to share non-confidential information with advocacy organizations and identifying information from a complainant with complainant permission. (p.7724)</p> <p>Response: We do not agree that AoA should encourage Ombudsman programs to share information with any particular type of entity. We believe the Act leaves that determination up to the Ombudsman where it does not otherwise prohibit the disclosure of resident-identifying information. The circumstances under which the Ombudsman program is permitted to disclose resident-identifying information with any outside entity is more fully described in § 1324.11(e)(3).</p> <p>Comment: Six commenters recommended that language be added to provide for Ombudsman program disclosure to protection and advocacy systems (P&As)...(p.7731)</p> <p>Response: As ACL is the entity that administers grants to States both for the P&As and the Ombudsman program, we appreciate the significant value of both programs and understand the distinctions between them. We strongly support coordination of these programs, noting that such coordination is required in § 1324.13(h) of this rule.</p> <p>Nothing in this rule prohibits the Ombudsman from making a determination to disclose information in response to a P&A request where the information:</p> <ul style="list-style-type: none"> • Does not provide resident-identifying information (for example, aggregated complaint trends); • provides resident-identifying information where the resident indicates his or her consent to the Ombudsman to do so; or • is provided consistent with a court order requiring such disclosure... <p>In implementing the OAA, ACL seeks to assist Ombudsman programs to fulfill their duty to protect resident and complainant privacy and to honor the preferences of residents and complainants to reveal (or not reveal) identifying information. In addition, ACL seeks to implement the statutory requirement that Ombudsman program files and records “may be disclosed only at the discretion of the Ombudsman.” OAA Section 712(d)(2)(A)...</p> <p>Comment: One commenter recommended that some entity must have access to review basic file information to be sure that records are kept up to date and proper information maintained...(p.7730)</p> <p>Response: We agree that regular monitoring of the records and reporting of the representatives of the Office is important. It is the responsibility of the Ombudsman to monitor the performance of local Ombudsman entities in</p>
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		<p>fulfilling their Ombudsman program duties, including maintaining updated and accurate records and reporting their work in a timely and accurate manner. See § 1324.13(c)(1)(3).</p> <p>The State agency is required to monitor the performance of the Ombudsman program for quality and effectiveness; in so doing, it may request and review reports of aggregate data (see § 1324.15(e)). However, we believe the Act is clear in limiting access to the identifying information of residents and complainants to the Office (<i>i.e.</i> the State Ombudsman and representatives of the Office) with very limited and specified exceptions. Section 712(d)(2)(B) of the Act.</p>
	<p>(f) Fiscal management. The Ombudsman shall determine the use of the fiscal resources appropriated or otherwise available for the operation of the Office. Where local Ombudsman entities are designated, the Ombudsman shall approve the allocations of Federal and State funds provided to such entities, subject to applicable Federal and State laws and policies. The Ombudsman shall determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies and procedures governing the Ombudsman program.</p>	<p>Comment: One commenter recommended that the rule at § 1324.13(i) not prohibit the ability of the Office or local Ombudsman entities from seeking additional funds to support the Ombudsman program. (p.7725)</p> <p>Response: We agree with the comment, but we do not read the proposed language, nor that of the final rule at § 1324.13(f), to prohibit fundraising efforts. We do note, however, that fundraising efforts need to be consistent with the policies and procedures established by the Office. For example, the Office might appropriately have a policy prohibiting the receipt of funds from a source that would pose a conflict of interest to the local Ombudsman program.</p> <p>Comment: Three commenters requested additional clarification on the extent of Ombudsman involvement in fiscal monitoring of local Ombudsman entities anticipated by the proposed provision at § 1324.13(i). One commenter recommended that we require transparency in the management of the financial resources of the Office, including of local Ombudsman programs. (p.7725)</p> <p>Response: We believe that the organizational location of the Office as well as the nature of the relationship between the Office and the local Ombudsman entities will determine whether the Ombudsman should be responsible for fiscal monitoring of local Ombudsman entities. Depending on the organizational structure used to host the Office and local Ombudsman entities, the State agency or other agency may be most appropriately responsible for fiscal monitoring of area agencies on aging or other agencies hosting local Ombudsman entities.</p> <p>Rather than make one approach that may not adequately cover all States' organizational structures, we have clarified in § 1324.13(f) that the unique Ombudsman responsibility, regardless of organizational structure, is to determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with policies and procedures established by</p>

		<p>the Office. In order to assure that the Ombudsman has access to the information needed to perform this function, we have amended § 1324.15(b) to require the State agency to assure that the Ombudsman has access to information needed to perform required functions and responsibilities. We encourage the Ombudsman to be involved in the fiscal monitoring of local Ombudsman entities. Where applicable, we encourage the State agency or other entity in which the Office is organizationally located to provide opportunities to the Ombudsman to be involved in its fiscal monitoring activities related to agencies hosting local Ombudsman entities.</p> <p>Comment: Two commenters asked whether this provision will apply to funds raised locally. One of the commenters indicated that, while local fundraising should not be discouraged, it should be clarified what level of control the Ombudsman should have over locally raised funds. The other commenter recommended that the provision state that the Ombudsman should have control over only those funds allocated by the State agency, and not to funding for local Ombudsman entities. This commenter indicated that it would be inappropriate to give the Ombudsman control over funds raised locally to support the work of the local Ombudsman entity. (p.7726)</p> <p>Response: The Ombudsman is responsible with respect to fiscal management, as described in the final rule at § 1324.13(f), for: (a) Determining the use of the fiscal resources appropriated or otherwise available for the operation of the Office, (b) where local Ombudsman entities are designated, approving the allocations of Federal and State funds provided to such entities, and (c) determining that program expenditures of the Office and local Ombudsman entities are consistent with policies and procedures established by the Office. We do not believe that this language limits the ability of local Ombudsman entities to seek diversified funding or other resources to support the operations of the Ombudsman program at the local or regional level.</p>
	<p>(g) Annual report. The Ombudsman shall independently develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act and as otherwise required by the Assistant Secretary.</p> <p>(1) Such report shall:</p> <p>(i) Describe the activities carried out by the Office in the year for which the report is prepared;</p>	

	<p>(ii) Contain analysis of Ombudsman program data;</p> <p>(iii) Describe evaluation of the problems experienced by, and the complaints made by or on behalf of, residents;</p> <p>(iv) Contain policy, regulatory, and/or legislative recommendations for improving quality of the care and life of the residents; protecting the health, safety, welfare, and rights of the residents; and resolving resident complaints and identified problems or barriers;</p> <p>(v) Contain analysis of the success of the Ombudsman program, including success in providing services to residents of, assisted living, board and care facilities and other similar adult care facilities; and</p> <p>(vi) Describe barriers that prevent the optimal operation of the Ombudsman program.</p> <p>(2) The Ombudsman shall make such report available to the public and submit it to the Assistant Secretary, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-term care facilities, and other appropriate governmental entities.</p>	
	<p>(h) Through adoption of memoranda of understanding and other means, the Ombudsman shall lead state-level coordination, and support appropriate local Ombudsman entity coordination, between the Ombudsman program and other entities with responsibilities relevant to the health, safety, well-being or rights of residents of long-term care facilities including, but not limited to:</p> <p>(1) Area agency on aging programs;</p> <p>(2) Aging and disability resource centers;</p>	<p>Comment: Three commenters indicated that the proposed language is unclear. Two of the commenters questioned whether AoA is requiring a new, additional responsibility with respect to other programs and with no resources. Since the Act already requires the State agency to coordinate programs for vulnerable adults, the commenter indicated that this responsibility is more appropriate for the State agency than the Ombudsman. Another commenter indicated that the proposed language is unclear whether the expectation for the Ombudsman to lead the statewide coordination or to lead the Ombudsman program-specific portion of that effort. (p.7726 -7727)</p> <p>Response: This provision is not intended to require a new undertaking of the</p>

	<p>(3) Adult protective services programs;</p> <p>(4) Protection and advocacy systems, as designated by the State, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 <i>et seq.</i>);</p> <p>(5) Facility and long-term care provider licensure and certification programs;</p> <p>(6) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));</p> <p>(7) Victim assistance programs;</p> <p>(8) State and local law enforcement agencies;</p> <p>(9) Courts of competent jurisdiction; and</p> <p>(10) The State legal assistance developer and legal assistance programs, including those provided under section 306(a)(2)(C) of the Act.</p> <p>(i) The Ombudsman shall carry out such other activities as the Assistant Secretary determines to be appropriate.</p>	<p>Ombudsman, nor is it intended to detract from the State agency leadership role with respect to elder rights activities as set forth in section 721(d) of the Act. We have, therefore, revised this provision in order to further clarify our intent to implement the provisions of the Act which require coordination of Ombudsman program services with protection and advocacy networks, legal assistance programs, law enforcement agencies and courts of competent jurisdiction, as well as other entities with responsibilities which relate to the health, safety, welfare, or rights of residents of long-term care facilities. See section 712(h)(6)–(8) of the Act.</p> <p>AoA’s intent in this provision is for the Ombudsman to lead the coordination at the state level between the activities of the Ombudsman program and of the enumerated entities, not to be responsible for the statewide leadership of broader elder rights coordination, which is more appropriately the role of the State agency. We have revised language in the final rule at §§ 1324.13(h); 1324.15(h), and (k)(5) to reflect this intent.</p> <p>Comment: One commenter recommended that the final rule expressly acknowledge the existing relationship between protection and advocacy systems and Ombudsman program and should reflect the reality that the leadership of the coordination effort may lie in other entities. (p.7727)</p> <p>Response: We acknowledge and appreciate the existing coordination between many States’ Ombudsman programs and protection and advocacy systems, as well as Ombudsman program coordination with the other entities listed in this provision. This provision is not intended to imply that such coordination does not exist, but rather to reflect the statutory requirement as well as to reinforce that such coordination is absolutely critical to the well-being of residents served by the respective entities. It is, therefore, an AoA expectation of the Ombudsman in every State.</p> <p>We also acknowledge and appreciate that the leadership for such coordination could happen in a variety of ways. Our intent in this provision is to indicate that the Ombudsman is responsible for providing state-level leadership within the statewide Ombudsman program, but not that the Ombudsman is to exclusively provide leadership across all of the entities in this coordinated effort, nor that this duty is to exclude leadership opportunities at the local or regional level of local Ombudsman entities.</p>
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§1324.15	State agency responsibilities related to the Ombudsman program.	
	<p>(a) In addition to the responsibilities set forth in part 1321 of this chapter, the State agency shall ensure that the Ombudsman complies with the relevant provisions of the Act and of this rule.</p> <p>(b) The State agency shall ensure, through the development of policies, procedures, and other means, consistent with § 1324.11(e)(2), that the Ombudsman program has sufficient authority and access to facilities, residents, and information needed to fully perform all of the functions, responsibilities, and duties of the Office.</p> <p>(c) The State agency shall provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents. The State agency may utilize funds appropriated under Title III and/or Title VII of the Act designated for direct services in order to provide access to such training opportunities.</p>	<p>In § 1324.15, AoA provides clarification regarding the State unit on aging (State agency) and its responsibilities as OAA grantee in relation to the Long-Term Care Ombudsman Program. (p.7727)</p> <p>Comment: One commenter recommended the need for additional guidance regarding minimum hours for initial training and continuing education as well as the content of such training. The commenter noted that training requirements vary widely among States and that this is a detriment to Ombudsman program consistency. (p.7739)</p> <p>Response: We appreciate the commenter’s perspective on the importance of consistency and minimum standards related to training for the Ombudsman program. In § 1324.15(c) in the final rule, we have clarified that States must provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents and that they may utilize funds appropriated under Title III and/or Title VII of the Act designated for direct services in order to provide access to such training opportunities.</p> <p>While we have not incorporated training standards into this rule, we plan to develop and implement training standards for the Ombudsman program in the future. We also recommend that Ombudsman programs refer to the National Ombudsman Resource Center for training resources and a core curriculum.</p>
	<p>(d) The State agency shall provide personnel supervision and management for the Ombudsman and representatives of the Office who are employees of the State agency. Such management shall include an assessment of whether the Office is performing all of its functions under the Act.</p>	
	<p>(e) The State agency shall provide monitoring, as required by § 1321.11(b) of this chapter, including but not limited to fiscal monitoring, where the Office and/or local Ombudsman entity is organizationally located within an agency under contract or other arrangement with the State agency. Such monitoring shall include an assessment of whether the Ombudsman program is performing all of the functions, responsibilities and duties set forth in §§</p>	

	<p>1324.13 and 1324.19. The State agency may make reasonable requests of reports, including aggregated data regarding Ombudsman program activities, to meet the requirements of this provision.</p>	
	<p>(f) The State agency shall ensure that any review of files, records or other information maintained by the Ombudsman program is consistent with the disclosure limitations set forth in §§ 1324.11(e)(3) and 1324.13(e).</p> <p>(g) The State agency shall integrate the goals and objectives of the Office into the State plan and coordinate the goals and objectives of the Office with those of other programs established under Title VII of the Act and other State elder rights, disability rights, and elder justice programs, including, but not limited to, legal assistance programs provided under section 306(a)(2)(C) of the Act, to promote collaborative efforts and diminish duplicative efforts. Where applicable, the State agency shall require inclusion of goals and objectives of local Ombudsman entities into area plans on aging.</p> <p>(h) The State agency shall provide elder rights leadership. In so doing, it shall require the coordination of Ombudsman program services with, the activities of other programs authorized by Title VII of the Act as well as other State and local entities with responsibilities relevant to the health, safety, well-being or rights of older adults, including residents of long-term care facilities as set forth in § 1324.13(h).</p>	
	<p>(i) <i>Interference, retaliation and reprisals.</i> The State agency shall:</p> <p style="padding-left: 20px;">(1) Ensure that it has mechanisms to prohibit and investigate allegations of interference, retaliation and reprisals:</p> <p style="padding-left: 40px;">(i) by a long-term care facility, other entity, or</p>	<p>Comment: Two commenters recommended the inclusion of penalties for a State agency which violates this provision. (p.7732)</p> <p>Response: We have not included penalties in this provision specifically; the broader topic of the State agency duty to provide for sanctions with respect to interference, retaliation and reprisals is addressed at § 1324.15(i). In addition, the Federal regulation provides options for HHS grant awarding agencies such</p>

	<p>individual with respect to any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of the Office; or</p> <p>(ii) by a long-term care facility, other entity or individual against the Ombudsman or representatives of the Office for fulfillment of the functions, responsibilities, or duties enumerated at §§ 1324.13 and 1324.19; and</p> <p>(2) Provide for appropriate sanctions with respect to interference, retaliation and reprisals.</p>	<p>as AoA to respond when a grantee fails to comply with any term of an award ensure compliance by its grantees. 45 CFR 75.371.</p>
	<p>(j) Legal counsel.</p> <p>(1) The State agency shall ensure that:</p> <p>(i) Legal counsel for the Ombudsman program 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 the State ethical standards governing the legal profession), in order to—</p> <p>(A) Provide consultation and representation as needed in order for the Ombudsman program to protect the health, safety, welfare, and rights of residents; and</p> <p>(B) Provide consultation and/or representation as needed to assist the Ombudsman and representatives of the Office in the performance of their official functions, responsibilities, and duties, including, but not limited to, complaint resolution and systems advocacy;</p> <p>(ii) The Ombudsman and representatives of the Office assist residents in seeking administrative, legal, and other appropriate</p>	<p>Comment: In the NPRM, we indicated that we believe the Act is adequately specific regarding what constitutes adequate legal counsel for the Ombudsman program but invited comments on the question of whether regulations are needed by States in order to more fully implement the Act’s requirements. Many commenters offered comments in response. All of them indicated the need for regulations to clarify what constitutes adequate legal counsel. No commenters indicated that a rule was unnecessary...(p.7755)</p> <p>Response: In response to these comments, we have added a provision regarding legal counsel in the final rule at § 1324.15(j).</p> <p>Comment: Two commenters recommended that the final rule require that legal counsel not be part of the State agency or limited to an Attorney General’s office. One of these commenters indicated that in-house counsel in State agencies represents the interests of the State rather than of the residents or the Ombudsman program.</p> <p>Response: We have not prohibited legal counsel from being part of the State agency or limited to an Attorney General’s office. There are some legal issues for which attorneys in these entities may be quite appropriate and the issue at hand does not present a conflict of interest. However, where an in-house counsel in a State agency or the Attorney General’s office has a conflicting interest from the interest of the Ombudsman program or the residents it serves, the final rule requires that the State agency has a duty to ensure that the OmOmOmbuOmbudsman program has access to conflict-free legal counsel.</p> <p>Comment: One commenter recommended that the Ombudsman have access to independent legal counsel of the</p>

	<p>remedies. In so doing, the Ombudsman shall coordinate with the legal services developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents; and</p> <p>(iii) Legal representation, arranged by or with the approval of the Ombudsman, is provided to the Ombudsman or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties.</p> <p>(2) Such legal counsel may be provided by one or more entities, depending on the nature of the competencies and services needed and as necessary to avoid conflicts of interest (as defined by the State ethical standards governing the legal profession). However, at a minimum, the Office shall have access to an attorney knowledgeable about the Federal and State laws protecting the rights of residents and governing long-term care facilities.</p> <p>(3) Legal representation of the Ombudsman program by the Ombudsman or representative of the Office who is a licensed attorney shall not by itself constitute sufficiently adequate legal counsel.</p> <p>(4) The communications between the Ombudsman and legal counsel are subject to attorney-client privilege.</p>	<p>Ombudsman program has access to conflict-free legal counsel.</p> <p>Comment: One commenter recommended that the Ombudsman have access to independent legal counsel of the Ombudsman’s choosing. The commenter described how the legal counsel in their State has been extremely important to the success of the Ombudsman program in providing credible, effective services at both the systemic and individual levels. (p.7756)</p> <p>Response: The Act requires that the State agency shall ensure the provision of adequate and conflict-free legal counsel. While some States will choose to provide the opportunity for the Ombudsman to choose the legal counsel for the Ombudsman program, other States may choose to ensure the provision of legal counsel through a more collaborative process. We do not read the Act to require that legal counsel be selected solely by the Ombudsman but neither does it prohibit a State from providing that opportunity to the Ombudsman.</p>
	<p>(k) The State agency shall require the Office to:</p> <p>(1) Develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act and § 1324.13(g) and as otherwise required by the Assistant Secretary.</p>	
	<p>(2) Analyze, comment on, and monitor the</p>	<p>Comment: One commenter indicated that, related to the proposed language at</p>

	<p>development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;</p> <p>(3) Provide such information as the Office determines to be necessary to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of individuals residing in long-term care facilities; and recommendations related to such problems and concerns; and</p> <p>(4) Establish procedures for the training of the representatives of the Office, as set forth in § 1324.13(c)(2).</p> <p>(5) Coordinate Ombudsman program services with entities with responsibilities relevant to the health, safety, welfare, and rights of residents of long-term care facilities, as set forth in § 1324.13(h).</p>	<p>§ 1324.15(a)(2)(v)(A), some local Ombudsman entities are organizationally located within agencies funded by Legal Services Corporation (LSC) which prohibits lobbying. The commenter recommended that AoA require LSC-funded entities to comply with the Act or the Ombudsman should be required to ensure that advocacy for residents in areas served by legal services programs is being done by contracting with a separate entity to perform services prohibited by the LSC. (pp.7734-7735)</p> <p>Response: Congress has prohibited LSC-funded entities from participating in certain lobbying activities, except in limited situations. This prohibition also applies to activities performed with non-LSC funds. <i>See</i> 42 U.S.C. 2996e; section 504 (a)–(e), Public Law 104–134, 110 Stat. 1321, 1321–53—1321–57; 45 CFR parts 1610, 1612. (We note that a transfer of non-LSC funds from a LSC entity to a non-LSC sub-grantee is not subject to LSC restrictions. <i>See</i> 45 CFR part 1610; <i>see also</i> 62 FR 27695–27597.) AoA does not have the authority to require LSC-funded entities to violate Federal requirements under the LSC laws and regulations in order to carry out the requirements of the Act.</p> <p>AoA has concluded that, in light of the current LSC limitations on policy work with a legislative body or other government offices or agencies, if an Office were to be organizationally located in a LSC-funded entity, the Ombudsman would be unable to fulfill all of the functions required by the Act. Therefore, it would not be appropriate for a State to select an LSC-funded entity for organizational placement of the Office under current laws and regulations governing LSC-funded entities. Nonetheless, LSC-funded entities could host local Ombudsman entities or representatives of the Office so long as the Ombudsman determines that the representatives of the Office can adequately fulfill their duties directly or in conjunction with the Office.</p> <p>We note that the functions which could violate the LSC provisions are specifically listed as required functions of the Office (<i>i.e.</i> the Office of the State Long-Term Care Ombudsman), as opposed to duties required of local Ombudsman entities or representatives of the Office. For example, the function to recommend any changes in such laws, regulations, policies, and actions (section 712(a)(3)(G)(ii) of the Act) is required of the Office, but not listed within the duties of the representatives of the Office as set forth in section 712(a)(5) of the Act. The State agency is required by the Act to require the Office to provide policy, regulatory, and legislative recommendations in its annual report (section 712(h)(1)(F)); recommend changes in laws, regulations and policies (section 712(h)(2)) and provide information to legislators regarding recommendations</p>
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		<p>related to problems and concerns (section 712(h)(3)).</p> <p>We recommend that, if the Ombudsman is considering designating (or continuing to designate) an LSC-funded entity as a local Ombudsman entity, the Ombudsman be familiar with the relevant LSC requirements that may impact the ability of the representatives of the Office to perform some systems advocacy activities.</p> <p>The Ombudsman should evaluate whether the LSC requirements limit the ability of the representatives of the Office to adequately fulfill their requirements under the policies and procedures of that State’s Ombudsman program. So long as the Office is able to fulfill all of its functions required by the Act, we do not interpret the Act to prohibit the Ombudsman from designating a local Ombudsman entity hosted by a LSC-funded entity. AoA is available to provide technical assistance to State agencies and Ombudsmen. Any LSC-funded entity which is requesting consideration to host (or continue to host) a local Ombudsman entity should similarly be familiar with these limitations, seek guidance from LSC regarding their interpretation, and evaluate its ability to support its employees and volunteers in fulfilling their duties as representatives of the Office. Ultimately, the LSC-funded entity is responsible for its compliance with LSC requirements and prohibitions. LSC has developed helpful guidance regarding these LSC lobbying restrictions that is available on its Web site at www.lsc.gov. The most recent guidance is at http://www.lsc.gov/sites/lsc.gov/files/AO-2014-005.pdf.</p>
§1324.17	Responsibilities of agencies hosting local Ombudsman entities	
	(a) The agency in which a local Ombudsman entity is organizationally located shall be responsible for the personnel management, but not the programmatic oversight, of representatives, including employee and volunteer representatives, of the Office.	<p>We have added a new section in the final rule, § 1324.17, in order for AoA to provide clarification regarding the responsibilities of agencies in which local Ombudsman entities are organizationally located. (p. 7739)</p> <p>Comment: One commenter recommended that we incorporate into the final rule the inclusion of the concept, included in the preamble of the proposed rule, that personnel management of the local Ombudsman entity not conflict with Ombudsman law and policy. (p. 7739)</p> <p>Response: We have incorporated this concept into a new § 1324.17 regarding “Responsibilities of agencies hosting local Ombudsman entities.”</p>
	(b) The agency in which a local Ombudsman entity is organizationally located shall not have personnel policies or practices which prohibit the representatives of the Office from performing the duties, or from adhering to the access, confidentiality and disclosure requirements of section 712 of the Act, as implemented through this rule and the policies and procedures of the Office.	

	<p>(1) Policies, procedures and practices, including personnel management practices of the host agency, which the Ombudsman determines conflict with the laws or policies governing the Ombudsman program shall be sufficient grounds for the refusal, suspension, or removal of the designation of local Ombudsman entity by the Ombudsman.</p> <p>(2) Nothing in this provision shall prohibit the host agency from requiring that the representatives of the Office adhere to the personnel policies and procedures of the agency which are otherwise lawful.</p>	
§1324.19	Duties of the representatives of the Office.	
	<p>In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity and may designate an employee or volunteer of the local Ombudsman entity as a representative of the Office. Representatives of the Office may also be designated employees or volunteers within the Office.</p>	<p>At § 1324.19, AoA provides clarification regarding the duties of the representatives of the Office, particularly related to the core Ombudsman program service of complaint resolution. Through this rule, AoA emphasizes the person-centered nature of the Ombudsman program and its services to residents of long-term care facilities. (p. 7739)</p> <p>Comment: One commenter recommended that introductory language to § 1324.17 be included to more closely reflect the language of the Act at section 712(a)(5)(A) and (B).</p> <p>Response: We have adopted this recommendation in the final rule, at §1324.19, so that it more closely reflects the applicable language of the Act.</p>
	<p>(a) Duties. An individual so designated as a representative of the Office shall, in accordance with the policies and procedures established by the Office and the State agency:</p> <p>(1) Identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;</p>	<p>Comment: One commenter indicated that § 1324.17(a) should include additional duties of representatives of the Office including survey involvement and transfer and discharge hearings. (p. 7740)</p> <p>Response: We have not included survey participation as a duty in § 1324.19(a) since it is not specifically required by the Act. However, we encourage Ombudsman program participation in survey process in the role of resident advocate (for example, by consulting with State survey agencies and providing relevant information to the survey agency prior to a facility survey subject to disclosure limitations, and by participating in resident group meetings or exit conferences). We note that many Ombudsman programs do participate in long-term care survey</p>

		<p>processes and that the AoA requires reporting of this activity in NORS. OMB NO.: 0985–0005. Where the representative of the Office receives a discharge or transfer complaint, he or she is required to work to resolve this complaint. In fact, this complaint category ranks among the most frequently received and processed complaints reported in NORS. OMB NO.: 0985–0005. However, whether a representative of the Office participates in a resident hearing, as part of the resolution of such a complaint, and in what capacity, depends on a number of factors, including the wishes of the resident, the availability of legal representation for the resident, and the policies and procedures of the Ombudsman program in that State.</p>
	(2) Provide services to protect the health, safety, welfare, and rights of residents;	
	(3) Ensure that residents in the service area of the local Ombudsman entity have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses to requests for information and complaints;	<p>Comment: One commenter requested more clarity around the term “regular access.” (p. 7740)</p> <p>Response: We encourage Ombudsman programs to provide residents with access to the Ombudsman program through, among other means, regular visits to facilities. However, we believe creating one national minimum standard for visits to facilities would be unrealistic, given the extremely different variables among States. We strongly encourage the development of minimum standards to provide consumers, providers and others with an expectation of what constitutes regular visits. We also encourage Ombudsman programs to consider that providing “regular access” requires more than providing visits to facilities by representatives of the Office. Ombudsman programs should be easily accessible to residents, complainants, and others—including individuals with limited English proficiency—because, among other things, they have multiple methods of communication available to the public (including telephone, email, facsimile, Web site contacts, TTY (text telephone) and other communication services, and mail).</p>
	(4) Represent the interests of residents before government agencies and assure that individual residents have access to, and pursue (as the representative of the Office determines necessary and consistent with resident interest) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of	<p>Comment: One commenter indicated that the proposed language in § 1324.17(a)(4) and (5) is unclear regarding whether the Ombudsman can override a representative of the Office in its duty to carry out these duties. The commenter indicated that it would be a grave mistake if the Ombudsman is the only one who is able to determine the positions of the Office or if the Ombudsman could prohibit representatives of the Office from taking positions without approval or from taking positions that are inconsistent</p>

	<p>the residents;</p>	<p>with those of the Office. The commenter described a State in which the Ombudsman was not engaged with the legislature or government agencies related to resident issues but where local Ombudsman entities have made significant contributions to the interests of residents through their systems advocacy. The commenter indicated that the only reason why the Ombudsman is now able to take public positions in that State is due to the systems advocacy efforts of local Ombudsman entities. (p. 7740)</p> <p>Response: The Act sets out the Ombudsman as the head of the Office. Section 712(a)(2) of the Act. The Ombudsman has the authority to make determinations regarding the positions of the Office, including but not limited to recommendations for changes in laws, regulations and policies. See section 712(h)(2) of the Act. We note that there is nothing prohibiting the Ombudsman establishing policies that provide for representatives of the Office to also perform the function of making recommendations, and that the final rule requires procedures that exclude representatives of the Office from any State lobbying prohibitions inconsistent with section 712 of the Act. However, the duties of the representatives of the Office are to be performed in accordance with the policies and procedures established by the Office and the State agency. Section 712(a)(5)(B) of the Act. Therefore, we believe that it would be inappropriate for this rule to require the State agency or the Ombudsman to permit representatives of the Office to make recommendations which are inconsistent with the positions of the Office. Instead, we conclude that Congress intended that the Ombudsman, as head of the Ombudsman program, to provide leadership to the statewide advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of advocacy efforts carried out by representatives of the Office. See final rule at § 1324.13(a)(7)(iv) and (b).</p>
	<p>(5) (i) Review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of</p>	

	<p>residents; and</p> <p>(ii) Facilitate the ability of the public to comment on the laws, regulations, policies, and actions;</p>	
	<p>(6) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils; and</p>	
	<p>(7) Carry out other activities that the Ombudsman determines to be appropriate.</p>	
	<p>(b) Complaint processing.</p>	
	<p>(1) With respect to identifying, investigating and resolving complaints, and regardless of the source of the complaint (<i>i.e.</i> complainant), the Ombudsman and the representatives of the Office serve the resident of a long-term care facility. 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. The Ombudsman or representative of the Office may identify, investigate and resolve a complaint impacting multiple residents or all residents of a facility.</p>	<p>Comment: One commenter indicated that a resident should not have to suffer abuse or neglect to benefit from Ombudsman program services. (p. 7741)</p> <p>Response: We agree with this comment; both the proposed rule and final rule support this perspective. In fact, AoA requires Ombudsmen to report on Ombudsman program resolution using numerous types of complaint codes, only a few of which are complaints with abuse, gross neglect, or exploitation codes. OMB NO.: 0985–0005. We use the language “including but not limited to a complaint related to abuse, neglect, or exploitation” in § 1324.19(b)(1) in order to clarify that the Ombudsman program does have a role to play in complaints related to abuse, neglect and exploitation. We have included this language in response to the policies and practices of a few States in which all complaints of abuse, gross neglect or exploitation are immediately referred to protective services, law enforcement, and/or a regulatory agency, with no further Ombudsman program service made available to the resident related to such a complaint. This practice deprives the resident of the services of the Ombudsman program and we intend, through this rule, to signal that such a practice is not an appropriate interpretation of the Act.</p> <p>Comment: Five commenters recommended that the rule use the term “neglect” instead of “gross neglect” in § 1324.17(b)(1). One of these commenters indicated that Ombudsman program purview should encompass any complaint of neglect without having to meet additional elements to demonstrate “gross neglect.” Another commenter indicated that, by using the term “neglect,” the rule would better support the Ombudsman program’s ability to resolve potentially dangerous problems before they escalate, describing this as one of the hallmarks of the</p>

		<p>Ombudsman program. (p. 7741)</p> <p>Response: We agree that working to resolve “neglect” complaints are within the purview of the Ombudsman program. We also agree that one of the hallmarks of the Ombudsman program is its ability to resolve potentially dangerous problems before they escalate. To avoid any confusion on this point, we have omitted the term “gross” in the final rule at the corresponding provision, § 1324.19(b)(1).</p> <p>Comment: Six commenters indicated that the reference in § 1324.17(b)(1) that Ombudsman program investigation includes investigation of abuse complaints conflicts with their State’s requirement to separate the job duties of protective services from duties of representatives of the Office. Three of these commenters felt that, if the Ombudsman program is responsible for investigation of abuse, this is a conflict of interest. One of these commenters indicated that the provision would negatively impact the integrity of the Ombudsman program as the provision would require the Ombudsman program to substantiate abuse cases in conflict with the State protective services functions and the advocacy function of the Ombudsman program. (p. 7741)</p> <p>Response: The Act requires the Ombudsman program to “identify, investigate, and resolve complaints that . . . relate to action, inaction or decisions, that may adversely affect the health, safety, welfare, or rights of the residents.” Section 712(a)(3)(A) and (5)(B)(iii) of the Act. Abuse, neglect and exploitation of residents are among the complaints that fall within this purview. AoA requires Ombudsmen to report in NORS the types of complaints processed by the Ombudsman program, specifically including complaint codes and definitions related to abuse, gross neglect and exploitation. “Long-Term Care Ombudsman Program Complaint Codes,” OMB 0985–0005, at pp. 1–3, 17–18.</p> <p>The services of the Ombudsman program are distinct from, and as indicated in § 1324.21(a), at times may conflict with the responsibilities of protective services. An individual resident, may, for example, have a complaint about protective services or may seek support from the Ombudsman program for a goal that is inconsistent with his or her protective services plan. Some of the functions of the Ombudsman program use the same terms, such as “investigation,” which are not always used for consistent purposes among Ombudsman programs, protective services, licensing and regulatory agencies, or other programs. This</p>
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		<p>may result in confusion regarding the appropriate role of such programs. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), its goal is to resolve the complaint to the resident’s satisfaction, but not to substantiate whether the abuse or other allegation occurred. The Ombudsman program does not have a duty to collect sufficient evidence to meet the higher legal standards of proof that protective services, licensing or regulatory agencies, or law enforcement may need to meet their respective purposes. The Ombudsman program investigates solely for the purpose of gathering necessary information to resolve the complaint to the resident’s satisfaction, not to determine whether any law or regulation has been violated for purposes of a potential civil or criminal enforcement action. With the Ombudsman program fulfilling its duties, the priorities and interests of the individual resident can be supported and advocated for. If the protective services and other government systems charged with taking protective or enforcement actions are not providing the outcomes that serve the health, safety, welfare or rights of residents, the Ombudsman program is available to advocate for improvements to the system. Therefore, it is critically important that each of these agencies is able to fully and distinctly fulfill their duties.</p>
	<p>(2) Regardless of the source of the complaint (<i>i.e.</i> the complainant), including when the source is the Ombudsman or representative of the Office, the Ombudsman or representative of the Office must support and maximize resident participation in the process of resolving the complaint as follows:</p> <ul style="list-style-type: none"> (i) The Ombudsman or representative of Office shall offer privacy to the resident for the purpose of confidentially providing information and hearing, investigating and resolving complaints. (ii) The Ombudsman or representative of the Office shall personally discuss the complaint with the resident (and, if the resident is unable to communicate informed consent, 	<p>Comment: One commenter indicated that not all complaints are individual and recommended that the final rule should support the broader authority to advocate for residents for facility-wide complaints or observations. The commenter indicated that some representatives of the Office do not believe they have authority to respond to complaints regarding facility-wide problems without the written consent of the resident. (p. 7742)</p> <p>Response: We agree with the commenter that some complaints may be facility-wide. It is not our intent to imply otherwise with the proposed language. We note that some complaints may impact multiple residents, even if they are not relevant to the facility as a whole. We have added language in the final rule at § 1324.19(b)(1) in order to clarify that the Ombudsman or representative of the Office may identify, investigate and resolve a complaint impacting multiple residents or all of the residents who live in a facility. We note that the representative of the Office may be considered a complainant. In order to avoid any confusion on this point, we have modified the language in the final rule at §1324.19(b)(2) to clarify that the</p>

	<p>the resident’s representative) in order to:</p> <ul style="list-style-type: none"> (A) Determine the perspective of the resident (or resident representative, where applicable) of the complaint; (B) Request the resident (or resident representative, where applicable) to communicate informed consent in order to investigate the complaint; (C) Determine the wishes of the resident (or resident representative, where applicable) with respect to resolution of the complaint, including whether the allegations are to be reported and, if so, whether Ombudsman or representative of the Office may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies. Such report and disclosure shall be consistent with paragraph (b)(3) of this section; (D) Advise the resident (and resident representative, where applicable) of the resident’s rights; (E) Work with the resident (or resident representative, where applicable) to develop a plan of action for resolution of the complaint; (F) Investigate the complaint to determine whether the complaint can be verified and (G) Determine whether the complaint is resolved to the satisfaction of the resident (or resident representative, where applicable). <p>(iii) Where the resident is unable to communicate informed consent, and has no resident representative, the Ombudsman or</p>	<p>complainant may include the Ombudsman or representative of the Office. We further note that the provisions related to adequate evidence of resident or resident representative consent are found at §1324.19(b)(4).</p> <p>Comment: One commenter recommended the addition of a statement that, where a resident has a court-appointed guardian or conservator, the resident may have already been determined unable to give informed consent, so the Ombudsman program should check the extent of the court order. The commenter recommended that, regardless of whether the resident has a representative, the right to participate in their care and resolution of a complaint should be supported by the Ombudsman program, since the greater the involvement of the resident in the resolution of the complaint, the higher the likelihood of its success. (p. 7742)</p> <p>Response: We agree with these recommendations and have made the following revisions to the final rule as a result: (1) We have added language at §1324.19(b)(2) that requires the Ombudsman or representative of the Office to support and maximize resident participation in the process of resolving a complaint. (2) We have added a new paragraph at § 1324.19(b)(2)(iv) to clarify that the Ombudsman or representative of the Office must ascertain the extent of the authority that has been granted to the resident representative when determining whether to rely on a resident representative’s communications or determinations.</p> <p>Comment: One commenter recommended that, since advising the resident of his or her rights does not require communication of informed consent, the “or” in proposed §1324.17(b)(2)(i)(D) should be changed to an “and” so that every resident is advised of his or her rights. (p. 7743)</p> <p>Response: We believe that the suggested language helps to clarify the intent of AoA and have amended the corresponding provision at §1324.19(b)(2)(ii)(D) accordingly.</p>
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	<p>representative of the Office shall:</p> <p>(A) Take appropriate steps to investigate and work to resolve the complaint in order to protect the health, safety, welfare and rights of the resident; and</p> <p>(B) Determine whether the complaint was resolved to the satisfaction of the complainant.</p> <p>(iv) In determining whether to rely upon a resident representative to communicate or make determinations on behalf of the resident related to complaint processing, the Ombudsman or representative of the Office shall ascertain the extent of the authority that has been granted to the resident representative under court order (in the case of a guardian or conservator), by power of attorney or other document by which the resident has granted authority to the representative, or under other applicable State or Federal law.</p>	
	<p>(3) The Ombudsman or representative of the Office may provide information regarding the complaint to another agency in order for such agency to substantiate the facts for regulatory, protective services, law enforcement, or other purposes so long as the Ombudsman or representative of the Office adheres to the disclosure requirements of section 712(d) of the Act and the procedures set forth in § 1324.11(e)(3).</p> <p>(i) Where the goals of a resident or resident representative are for regulatory, protective services or law enforcement action, and the Ombudsman or representative of the Office determines that the resident or resident</p>	<p>Comment: Four commenters recommended that we require that the Ombudsman or representatives of the Office report suspected abuse. One of these commenters indicated that the Ombudsman program has a duty to all residents of a facility, not only one resident. Two commenters indicated that reporting could protect other residents in some circumstances. One commenter indicated that, by not reporting, the representative of the Office would be subject to liability if the suspected abuse put other residents at risk. One commenter indicated deep concern if the Ombudsman program is unable to fulfill its very purpose where the representative of the Office is aware of allegations of abuse but is forced to be silent if informed consent is not obtained. (p. 7744)</p> <p>Response: Through the strict disclosure limitations within the Act at section 712(d)(2)(B), Congress has indicated its intent for the Ombudsman program to</p>

	<p>representative has communicated informed consent to the Office, the Office must assist the resident or resident representative in contacting the appropriate agency and/or disclose the information for which the resident has provided consent to the appropriate agency for such purposes.</p> <p>(ii) Where the goals of a resident or resident representative can be served by disclosing information to a facility representative and/or referrals to an entity other than those referenced in paragraph (b)(3)(i) of this section, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Ombudsman program, the Ombudsman or representative of the Office may assist the resident or resident representative in contacting the appropriate facility representative or the entity, provide information on how a resident or representative may obtain contact information of such facility representatives or entities, and/or disclose the information for which the resident has provided consent to an appropriate facility representative or entity, consistent with Ombudsman program procedures.</p> <p>(iii) In order to comply with the wishes of the resident, (or, in the case where the resident is unable to communicate informed consent, the wishes of the resident representative), the Ombudsman and representatives of</p>	<p>be a safe place for residents to bring their concerns, knowing that their information will not be disclosed without their consent (or the consent of their representative). Through numerous reauthorizations of the Act, Congress has never chosen to provide an exception for abuse reporting in the Act. While we have provided, in § 1324.19(b) of the final rule, limited exceptions for reporting resident-identifying information where residents are unable to communicate informed consent, we do not believe that the Act provides us with the authority to promulgate a rule that would permit reporting of a resident's identifying information when the resident (or resident representative) who is able to communicate informed consent has not done so. Nor would we support a rule that would permit such reporting, as a matter of policy. Residents reaching out for assistance on an abuse, neglect or exploitation complaint may well want their information conveyed by the Ombudsman program to protective services, the licensing and regulatory agency, and/or law enforcement; indeed, the final rule clarifies that the Ombudsman program has a duty to make such a referral when requested by the resident (see § 1324.19(b)(3)(i)). The Ombudsman program may inform complainants who report suspected abuse that they may (and, under some circumstances, must) report the complaint information to protective services, the licensing and regulatory agency and/or law enforcement. The Ombudsman program may advise the resident of the appropriate role and limitations of the Ombudsman program, assist the resident in understanding his or her options, and encourage the resident to report—and/or consent to the Ombudsman program referral—to protective services, the licensing and regulatory agency and/or law enforcement. However, the Ombudsman program is designed to represent the interest of the resident (and not necessarily the interest of the State) in order to support the resident to make informed decisions about the disclosure of his or her own information. Residents may be concerned about retaliation if their concern is known or have other reasons why they do not want the Ombudsman program to share their information. While Congress intends for the Ombudsman program to resolve complaints related to the health, safety,</p>
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	<p>the Office shall not report suspected abuse, neglect or exploitation of a resident when a resident or resident representative has not communicated informed consent to such report except as set forth in paragraphs (b)(5) through (7) of this section, notwithstanding State laws to the contrary.</p>	<p>welfare and rights of residents, and while that intent logically includes protection from abuse, Congress provided the resident—and not the Ombudsman program—with the authority to make the decision about when and where the resident’s information can be disclosed.</p> <p>Comment: One commenter indicated that, by giving a short list of types of assistance (<i>i.e.</i> regulatory, protective, or law enforcement) available under proposed rule § 1324.17(b)(3)(i), the provision implies that the Ombudsman program could not contact various other entities who could assist the resident and whom the resident or resident’s representative wishes to contact. (p. 7745)</p> <p>Response: We believe that the language in §1324.19(b)(3) adequately provides the Ombudsman program with discretion to provide information to other agencies for “other purposes” (<i>i.e.</i> not limited to regulatory, protective, or law enforcement purposes), where disclosure limitations are met. The reference to regulatory, protective, or law enforcement assistance in §1324.19(b)(3)(i) is to require the Ombudsman program to make referrals and disclose information in certain circumstances.</p> <p>To provide further clarity, as a result of this recommendation, we have added a new provision in the final rule at §1324.19(b)(3)(ii). This provision provides authority for the provision of contact information and/or referrals to other types of entities than those indicated in paragraph (b)(3)(i).</p>
	<p>(4) For purposes of paragraphs (b)(1) through (3) of this section, communication of informed consent may be made in writing, including through the use of auxiliary aids and services. Alternatively, communication may be made orally or visually, including through the use of auxiliary aids and services, and such consent must be documented contemporaneously by the Ombudsman or a representative of the Office, in accordance with the procedures of the Office;</p>	<p>Comment: One commenter indicated that the ability of an individual to communicate consent may be difficult to ascertain and recommended inclusion of language at § 1324.17(b)(4) that permits visual consent, such as by use of video or other visual means, nods, blinks of eye, finger tapping, etc. (p. 7745)</p> <p>Response: We agree that residents with varying abilities may communicate consent in a number of ways. This is why we did not limit communication to verbal communication and have added the use of auxiliary aids and services as an appropriate aid to communication. We believe that adoption of this recommendation appropriately adapts the services of the Ombudsman program to accommodate individuals with a variety of disabilities. In light of this recommendation, we have added “visually,” to the final rule wherever “consent orally” is found.</p>
	<p>(5) For purposes of paragraphs (b)(1) throughⁱ (3) of this section, if a resident is unable to</p>	

	<p>communicate his or her informed consent, or perspective on the extent to which the matter has been satisfactorily resolved, the Ombudsman or representative of the Office may rely on the communication of informed consent and/or perspective regarding the resolution of the complaint of a resident representative so long as the Ombudsman or representative of the Office has no reasonable cause to believe that the resident representative is not acting in the best interests of the resident.</p>	
	<p>(6) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:</p> <ul style="list-style-type: none"> (i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office; (ii) The resident has no resident representative; (iii) The Ombudsman or representative of the Office has reasonable cause to believe that an action, inaction or decision may adversely affect the health, safety, welfare, or rights of the resident; (iv) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made; (v) The Ombudsman or representative of the 	<p>Comment: Eight commenters expressed concerns related to the use of the “best interest” standard referenced in several places in the proposed language of §1324.17(b). One of these commenters recommended that, in situations where the resident is unable to communicate informed consent, AoA should require that the Ombudsman program to attempt to obtain information about what the resident had expressed prior to being unable to communicate or having diminished capacity, or alternatively determine what the resident would have wanted, instead of using a “best interest” standard. Two commenters recommended that we use a “substituted judgment” or “substitute decision making” standard instead of a “best interest” standard in the final rule. One commenter indicated that the “best interest” standard weakens the relationship between the resident and the representative of the Office in their capacity as resident advocate, does not support resident choice, and will weaken the resident’s voice. Four commenters indicated that “best interest” is subjective and could be applied inconsistently. Several commenters recommended that we add an objective framework for determining “best interest.” One commenter recommended that, if we use the “best interest” standard, that we link its use to the safety of the resident. (p. 7743)</p> <p>Response: We agree with the commenters’ concern that Ombudsman programs should be cautious in using a paternalistic “best interest” standard, as opposed to a “substituted judgment” standard which is more consistent with the person-centered focus of the Ombudsman program. We agree that, where evidence exists of a resident’s previous expressions of values and choices or evidence of what the resident would have wanted, a “substituted judgment” standard is preferable. In light of this comment, in both § 1324.19(b)(6) and (7), we have</p>

	<p>Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and</p> <p>(vi) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.</p>	<p>added the language: “The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made.” However, when the Ombudsman or representative of the Office has no evidence to rely on, and has no resident representative available or appropriate, we believe that the Ombudsman or representative of the Office must consider what action is in the “best interest” of the resident. Therefore we have retained the provisions indicating that the Ombudsman or representative of the Office may make a referral, where all of the other provisions are met and where the Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral. See §1324.19(b)(6)(v) and (7)(iv). We understand that determining “best interest” does necessarily require some judgment, but we believe that Ombudsmen and representatives of the Office are required to use sound judgment in their work on a frequent basis. We further note that Ombudsman programs should be familiar with the use of this standard since the Act provides for use of the “best interest” standard in the situation where “a representative of the Office has reasonable cause to believe that the guardian is not acting in the best interests of the resident.” Section 712(b)(1)(B)(ii)(II) of the Act. Moreover, the “best interest” standard is commonly used in ethical and professional literature. We are available to provide technical assistance regarding its use in the context of Ombudsman program practice.</p> <p>Comment: Eight commenters indicated that obtaining approval from the Ombudsman for disclosure in §1324.17(b)(6)-(8) might delay referrals to law enforcement, adult protective services or the facility and suggested elimination of this requirement. One of these commenters indicated that this would especially be burdensome in a large State, recommending that standards be developed by the Office requiring the representative of the Office to notify the Ombudsman of the report. One of these commenters suggested that, alternatively, the final rule should require a time limit for Ombudsman decision on the approval. One of the commenters indicated that it is not practical, necessary or efficient to require approval of the Ombudsman for such disclosure. (p. 7746)</p> <p>Response: We believe that the circumstances in which disclosure is made without resident or resident representative permission, as described in § 1324.19(b)(6)–(8) of the final rule, should be made with great caution. Ideally, the Ombudsman would be made aware of these circumstances and</p>
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		<p>provide or deny approval. However, we understand that, particularly in States with large resident populations, this requirement could foreseeably create delays that could inhibit the ability of the representative of the Office, as well as other appropriate agencies, to protect the health, safety, welfare or rights of residents. Therefore, we have added the option, in §1324.19(b)(6) and (8), for the representative of the Office to follow the relevant policies and procedures of the Office regarding disclosure and added a new paragraph at § 1324.19(b)(9) to provide additional clarity related to these policies and procedures of the Ombudsman program disclosure approval process. The final rule maintains the requirement for Ombudsman approval, however, in § 1324.19(b)(7) in circumstances where the resident has a resident representative who is not acting in the best interest of the resident. This requirement is maintained because it is consistent with the statutory requirement for the representative of the Office to obtain Ombudsman approval prior to accessing resident records when a resident’s guardian is not acting in the resident’s best interest. Section 712(b)(1)(B)(ii) of the Act. Since these circumstances are likely to be less frequent, and since the provision related to records access already exists in the law so should be the current practice in States, we do not believe that this provision will be burdensome, even to States with large resident populations.</p> <p>Comment: One commenter recommended that the authority for the Ombudsman program to act in the circumstances described in §1324.17(b)(6) not be limited to circumstances of abuse, gross neglect, or exploitation, indicating that the Act is not similarly limiting. (p. 7746)</p> <p>Response: We agree with this recommendation and have instead more closely reflected the statutory language from section 712(a)(3)(A)(ii) and (5)(B)(iii) of the Act, to read “has reasonable cause to believe that an action, inaction or decision may adversely affect the health, safety, welfare, or rights of the resident” in the final rule at § 1324.19(b)(6).</p>
	<p>(7) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by § 1324.11(e)(3), shall provide that, the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight;</p>	

	<p>protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:</p> <ul style="list-style-type: none"> (i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office and ...ⁱⁱ the Ombudsman or representative of the Office has reasonable cause to believe that the resident representative has taken an action, inaction or decision that may adversely affect the health, safety, welfare, or rights of the resident; (ii) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made; (iii) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and (iv) The representative of the Office obtains the approval of the Ombudsman. 	
	<p>(8) The procedures for disclosure, as required by § 1324.11(e)(3), shall provide that, if the Ombudsman or representative of the Office personally witnesses suspected abuse, gross neglect, or exploitation of a resident, the Ombudsman or representative of the Office shall seek communication of informed consent from such resident to disclose resident-identifying information to appropriate agencies;</p> <ul style="list-style-type: none"> (i) Where such resident is able to communicate informed consent, or has a 	<p>Comment: Seven commenters recommended that the final rule should require implementation of policies that require the representative of the Office who witnesses abuse, gross neglect, or exploitation to report the observation. Several of these commenters indicated that, if any representative of the Office personally witnesses an event and takes no action, it gives the perpetrator permission to continue the behavior, and that the witness has the responsibility to report as a firsthand observer of the incident. One of the commenters indicated that reporting is not a violation of the Act since, by witnessing the event, the representative of the Office has not been provided information from a third party. (p. 7747)</p> <p>Response: Both the proposed language and the final rule clarify that the</p>

	<p>resident representative available to provide informed consent, the Ombudsman or representative of the Office shall follow the direction of the resident or resident representative as set forth paragraphs (b)(1) through (3) of this section; and</p> <p>(ii) Where the resident is unable to communicate informed consent, and has no resident representative available to provide informed consent, the Ombudsman or representative of the Office shall open a case with the Ombudsman or representative of the Office as the complainant, follow the Ombudsman program’s complaint resolution procedures, and shall refer the matter and disclose identifying information of the resident to the management of the facility in which the resident resides and/or to the appropriate agency or agencies for substantiation of abuse, gross neglect or exploitation in the following circumstances:</p> <p>(A) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;</p> <p>(B) The Ombudsman or representative of the Office has reasonable cause to believe that disclosure would be in the best interest of the resident; and</p> <p>(C) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.</p> <p>(iii) In addition, the Ombudsman or representative of the Office, following the policies and procedures of the Office</p>	<p>procedures for disclosure shall provide that—where the Ombudsman or representative of the Office personally witnesses suspected abuse, neglect or exploitation of a resident—the representative of the Office shall follow the direction of the resident or resident representative. We believe this approach is consistent with the Act which permits disclosure of resident identifying information only with consent or in other very limited situations. The Act is silent on how to best handle this situation when the Ombudsman or representative of the Office personally witnesses an incident and the resident at issue is unable to communicate informed consent (and has no resident representative available to do so). In these cases, we have described the circumstances in the final rule, at § 1324.19(b)(8), that the Ombudsman or representative shall refer the matter and disclose the identifying information of the resident to the facility and/or appropriate agency for substantiation of abuse and may refer the matter to other appropriate agencies.</p> <p>Comment: Five commenters indicated that the proposed language at §1324.17(b)(8) appears to require representatives of the Office to be mandatory abuse reporters, at least in certain circumstances. One of these commenters described this as contrary to their State law. Two of these commenters indicated mandated reporting runs counter to the principles of the Ombudsman program and its unique role as resident advocate under the Act. Two of these commenters requested clarification to ensure that representatives of the Office are not mandated reporters in facilities where the resident has the ability to grant or deny consent. One commenter expressed that personally witnessing abuse versus being told or otherwise discovering evidence of abuse is an artificial distinction. (p. 7747)</p> <p>Response: In the final rule at §1324.19(b)(8), we describe circumstances when an Ombudsman or representative of the Office has personal knowledge of circumstances that others may not have. This information is likely relevant to the ability of the facility to protect the resident and to the ability of the official finder of fact to determine</p>
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	<p>described in paragraph (b)(9) of this section, may report the suspected abuse, gross neglect, or exploitation to other appropriate agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.</p>	<p>whether the alleged abuse, gross neglect or exploitation can be substantiated. When an Ombudsman program receives any complaint (including, but not limited to, an abuse-related complaint), its goal is to resolve the complaint to the resident’s satisfaction, but not to serve as the official finder of other allegation occurred. In most States, the substantiation decision is made either by adult protective services and/or the licensing and regulatory agency. By contrast, when a report has been made to the Ombudsman program or when a representative of the Office discovers information through review of resident records, someone else is necessarily aware of the circumstances and can (and in many instances is mandated to) report this information to the agency which is responsible for substantiating abuse. Therefore, absent an indication from the resident or resident representative that there is not consent for this information to be shared, we believe that the representative of the Office should be required to disclose such information.</p> <p>Comment: One commenter requested definition of the term “suspected abuse, gross neglect, or exploitation” since States have differing interpretations and definitions of these terms. Some commenters recommended that we omit the term “gross” from the term “gross neglect.”(p. 7748)</p> <p>Response: The rationale for our maintaining the use of “gross neglect” in the final rule at §1324.19(b)(8)(iii) is consistent with the rationale used in AoA’s instructions for Ombudsman program reporting in the NORS. OMB NO.: 0985–0005. AoA provides a separate code for complaints of “gross neglect” (defined as “willful deprivation by a person, including a caregiver, of goods or services that are necessary to avoid physical harm, mental anguish, or mental illness”). This distinction in NORS instructions is intended to differentiate “gross neglect” from other complaint codes which the Ombudsman program receives related to facility care and practices, many of which could also reasonably be considered “neglect.”</p>
	<p>(9) Prior to disclosing resident identifying</p>	

	<p>information pursuant to paragraph (b)(6) or (8) of this section, a representative of the Office must obtain approval by the Ombudsman or, alternatively, follow policies and procedures of the Office which provide for such disclosure.</p> <p>(i) Where the policies and procedures require Ombudsman approval, they shall include a time frame in which the Ombudsman is required to communicate approval or disapproval in order to assure that the representative of the Office has the ability to promptly take actions to protect the health, safety, welfare or rights of residents.</p> <p>(ii) Where the policies and procedures do not require Ombudsman approval prior to disclosure, they shall require that the representative of the Office promptly notify the Ombudsman of any disclosure of resident-identifying information under the circumstances set forth in paragraph (b)(6) or (8) of this section.</p> <p>(iii) Disclosure of resident-identifying information under paragraph (b)(7) of this section shall require Ombudsman approval.</p>	
<p>§ 1324.21</p>	<p>Conflicts of interest.</p>	
	<p>The State agency and the Ombudsman shall consider both the organizational and individual conflicts of interest that may impact the effectiveness and credibility of the work of the Office. In so doing, both the State agency and the Ombudsman shall be responsible to identify actual and potential conflicts and, where a conflict has been identified, to remove or remedy such conflict as set forth in paragraphs (b) and (d) of this section.</p>	<p>In § 1324.21, AoA provides clarification to State agencies and Ombudsman programs regarding the process of identifying conflicts of interest with the Ombudsman program, as required by the Act. This section provides examples of conflicts of interest at both the organizational and individual levels. It also provides clarification regarding the statutorily required process of removing or remedying identified conflicts. (p. 7748)</p> <p>Comment: Seven commenters recommended that the final rule describe consequences for noncompliance with reporting or interference and indicated the need for AoA enforcement. Several of the commenters indicated that, unless AoA monitors and reinforces the requirements, compliance cannot be</p>

		<p>assured.(p. 7749)</p> <p>Response: We have addressed the State agency responsibilities related to interference, retaliation and reprisals at §1324.15(i). In addition, Federal regulation provides options for HHS grant awarding agencies, including AoA, to respond when a grantee fails to comply with any term of an award. 45 CFR 75.371.</p> <p>Comment: One commenter indicated that some AAAs which organizationally house local Ombudsman programs receive donations from long-term care facilities. Another commenter indicated that some AAAs are county agencies in counties that own, operate and/or manage long-term care facilities and where the facility and the AAA report to the same leadership. (p. 7750)</p> <p>Response: We acknowledge that conflicts of interest exist currently in some State agencies and agencies hosting local Ombudsman entities. It is our intent that the final rule will clarify the process by which State agencies and Ombudsmen can appropriately carry out their responsibilities to identify, remedy and/or remove such conflicts.</p>
	<p>(a) Identification of organizational conflicts. In identifying conflicts of interest pursuant to section 712(f) of the Act, the State agency and the Ombudsman shall consider the organizational conflicts that may impact the effectiveness and credibility of the work of the Office. Organizational conflicts of interest include, but are not limited to, placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities, in an organization that:</p> <ul style="list-style-type: none"> (1) Is responsible for licensing, surveying, or certifying long-term care facilities; (2) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities; (3) Has any ownership or investment interest (represented by equity, debt, or other financial 	<p>Comment: One commenter recommended that we include language requiring the State agency to have written policies and methods to identify and remove conflicts of interest and other influences that could limit the Ombudsman program’s ability to carry out its assigned functions. They recommended including methods by which the State agency will examine individuals and their immediate family members to identify conflicts and actions the State agency will require the individuals and such family members to take to remove such conflicts. (p. 7749)</p> <p>Response: We have included language that incorporates this recommendation in the final rule at §1324.11(e)(4) related to development of policies and procedures. We note that the recommended language is taken largely from the statutory provision at section 712(f)(4) of the Act and agree that it is appropriate to reflect that statutory language in the rule.</p> <p>Comment: Several commenters interpreted the proposed rule to prohibit the operation of the Ombudsman program in a host agency with one or more of the conflicts enumerated in §1324.19(a). One commenter indicated concern that the proposed rule would prohibit the Office from being located in a host agency responsible for public</p>

	<p>relationship) in, or receives grants or donations from, a long-term care facility;</p> <p>(4) Has governing board members with any ownership, investment or employment interest in long-term care facilities;</p> <p>(5) Provides long-term care to residents of long-term care facilities, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;</p> <p>(6) Provides long-term care coordination or case management for residents of long-term care facilities;</p> <p>(7) Sets reimbursement rates for long-term care facilities;</p> <p>(8) Provides adult protective services;</p> <p>(9) Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;</p> <p>(10) Conducts preadmission screening for long-term care facility placements;</p> <p>(11) Makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or</p> <p>(12) Provides guardianship, conservatorship or other fiduciary or surrogate decision-making services for residents of long-term care facilities.</p>	<p>guardianship or Medicaid assessments, given current locations of Ombudsman programs in agencies that have these responsibilities. One commenter recommended that the final rule clarify that a remedy might be found that does not require moving out of the agency with a conflicting responsibility. Another indicated that, if the Ombudsman program should be separated from the State unit on aging and its funding stream, this would have a significant financial impact on the program as significant funds do not come from Federal sources. (p. 7750)</p> <p>Response: We recognize that some States have organizationally located the Office and/or local Ombudsman entities inside agencies with duties which are identified as examples of conflicting duties under the final rule. The final rule does not prohibit the Office or local Ombudsman entities from being hosted in the entities enumerated in §1324.21(a), except for those conflicts enumerated in § 1324.21(b)(3). However, the final rule does require the State agency and Ombudsman to identify these conflicts and take steps to remove or remedy the conflicts. Further, the Ombudsman must report on these steps to AoA. See § 1324.21(b)(1).</p> <p>Comment: One commenter recommended defining “long-term care services” where it appears in § 1324.19, suggesting it be limited to services provided to residents and applicants of long-term care facilities but not services provided in the applicant or residents’ home outside of a long-term care facility. (p.7750)</p> <p>Response: We have added language in the final rule at § 1324.21(a) to clarify that a potential or actual conflict exists where the services are provided to residents of long-term care facilities, as defined by the Act at section 102(35), but not necessarily for services provided to individuals receiving long-term care (or long-term services and supports) in other settings. For consistency, we have also removed the term “long-term care services” from the other places where it was found in the proposed rule. We understand that some States have expanded the Ombudsman program’s jurisdiction to serve individuals in adult day health centers, in their own homes, and other settings, beyond the scope of the Act. While this rule does not restrict those State decisions which have expanded the Ombudsman program scope, it is equally important for the State agency and the Ombudsman program to identify and remedy or remove additional conflicts of interest that may exist where the Ombudsman program serves individuals receiving long-term care in settings other than the long-term care facilities.</p>
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	<p>(b) Removing or remedying organizational conflicts. The State agency and the Ombudsman shall identify and take steps to remove or remedy conflicts of interest between the Office and the State agency or other agency carrying out the Ombudsman program.</p>	
	<p>(1) The Ombudsman shall identify organizational conflicts of interest in the Ombudsman program and describe steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary through the National Ombudsman Reporting System.</p>	<p>Comment: One commenter requested information on how AoA intends to use the information regarding disclosure of conflicts of interest reported in the NORS. Two commenters expressed concern for possible retaliation against the Ombudsman who submits information in NORS. (p. 7751)</p> <p>Response: AoA intends to use the reports in order to assist it in assuring that State agencies and Ombudsman programs are complying with the requirements in the Act and in this rule to identify and remedy or remove conflicts of interest.</p>

		<p>We would also review the circumstances if we were to receive any reports of retaliation against an Ombudsman who truthfully submits information required by Federal rule, and we would take appropriate steps to address any such allegations.</p> <p>Comment: Four commenters indicated that, in addition to NORS reporting, conflicts at the state level should be immediately reported to AoA. One of these commenters indicated that annual reporting in NORS is untimely to report a matter of such great significance. Instead, the commenter recommended that the rule at § 1324.19(b)(1)(v) require the State agency to immediately report (in no later than ten days) conflicts to AoA, indicating that the State agency is likely to be the source of the conflict. The commenter proposed that State agency failure to immediately disclose and adequately remedy or remove conflict should be grounds to remove State agency authority to operate the Office, and that the same penalty be applied to a local Ombudsman entity under §1324.19(b)(6). Another commenter recommended that all Ombudsmen and representatives of the Office should be required in the final rule to report any perceived or real conflict of interest directly to a neutral third party. (p. 7751)</p> <p>Response: We believe that the approach we have taken in the final rule at §1324.21, which provides for annual identification of organizational conflicts and description of steps taken to remedy or remove conflicts, will provide an orderly process that will implement the requirements of the Act, enhance transparency, avoid burdensome reporting requirements on Ombudsman programs, and emphasize the importance of States providing credible, conflict-free Ombudsman programs for residents.</p>
	<p>(2) Where the Office is located within or otherwise organizationally attached to the State agency, the State agency shall:</p> <ul style="list-style-type: none"> (i) Take reasonable steps to avoid internal conflicts of interest; (ii) Establish a process for review and identification of internal conflicts; (iii) Take steps to remove or remedy conflicts; 	

	<p>(iv) Ensure that no individual, or member of the immediate family of an individual, involved in the designating, appointing, otherwise selecting or terminating the Ombudsman is subject to a conflict of interest; and</p> <p>(v) Assure that the Ombudsman has disclosed such conflicts and described steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary through the National Ombudsman Reporting System.</p>	
	<p>(3) Where a State agency is unable to adequately remove or remedy a conflict, it shall carry out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act. The State agency may not enter into a contract or other arrangement to carry out the Ombudsman program if the other entity, and may not operate the Office directly if it:</p> <ul style="list-style-type: none"> (i) Is responsible for licensing, surveying, or certifying long-term care facilities; (ii) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities; or (iii) Has any ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. 	
	<p>(4) Where the State agency carries out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act, the State agency shall:</p>	<p>Comment: One commenter recommended that the final rule address the situation of conflicts when the State agency has responsibility for oversight of a contract to operate the Office. (p. 7752)</p> <p>Response: We have accepted this recommended language in the final rule at §1324.21(b)(4)(i).</p>

	<p>another arrangement, take reasonable steps to avoid conflicts of interest in such agency or organization which is to carry out the Ombudsman program and to avoid conflicts of interest in the State agency’s oversight of the contract or arrangement;</p> <ul style="list-style-type: none"> (ii) Establish a process for periodic review and identification of conflicts; (iii) Establish criteria for approval of steps taken by the agency or organization to remedy or remove conflicts; (iv) Require that such agency or organization have a process in place to: <ul style="list-style-type: none"> (A) Take reasonable steps to avoid conflicts of interest, and (B) Disclose identified conflicts and steps taken to remove or remedy conflicts to the State agency for review and approval. 	
	<p>(5) Where an agency or organization carrying out the Ombudsman program by contract or other arrangement develops a conflict and is unable to adequately remove or remedy a conflict, the State agency shall either operate the Ombudsman program directly or by contract or other arrangement with another public agency or nonprofit private organization. The State agency shall not enter into such contract or other arrangement with an agency or organization which is responsible for licensing or certifying long-term care facilities in the state or is an association (or affiliate of such an association) of long-term care facilities.</p>	
	<p>(6) Where local Ombudsman entities provide Ombudsman services, the Ombudsman shall:</p> <ul style="list-style-type: none"> (i) Prior to designating or renewing 	

	<p>designation, take reasonable steps to avoid conflicts of interest in any agency which may host a local Ombudsman entity.</p> <p>(ii) Establish a process for periodic review and identification of conflicts of interest with the local Ombudsman entity in any agencies hosting a local Ombudsman entity,</p> <p>(iii) Require that such agencies disclose identified conflicts of interest with the local Ombudsman entity and steps taken to remove or remedy conflicts within such agency to the Ombudsman,</p> <p>(iv) Establish criteria for approval of steps taken to remedy or remove conflicts in such agencies, and</p> <p>(v) Establish a process for review of and criteria for approval of plans to remove or remedy conflicts with the local Ombudsman entity in such agencies.</p>	
	<p>(7) Failure of an agency hosting a local Ombudsman entity to disclose a conflict to the Office or inability to adequately remove or remedy a conflict shall constitute grounds for refusal, suspension or removal of designation of the local Ombudsman entity by the Ombudsman.</p>	<p>Comment: One commenter recommended clarity on enforcement actions that might be taken where conflicts exist. (p. 7751)</p> <p>Response: Determinations regarding organizational placement of the Office and/or local Ombudsman entities may remove conflicts of interest. Further, the final rule at §1324.21(b)(7) provides that failure to disclose a conflict by an agency hosting a local Ombudsman entity is adequate grounds for the Ombudsman to refuse, suspend, or remove the entity’s designation. In addition, the relationship between AoA and the State agency is one of a grant awarding agency to a grantee. Federal regulation provides options for HHS grant awarding agencies such as AoA to respond when a grantee fails to comply with any term of an award. 45 CFR 75.371.</p>
	<p>(c) Identifying individual conflicts of interest.</p>	
	<p>(1) In identifying conflicts of interest pursuant to section 712(f) of the Act, the State agency and the Ombudsman shall consider individual conflicts that may impact the effectiveness and credibility of the work of the Office.</p>	<p>Comment: One commenter recommended that individual conflicts identified in the proposed rule at §1324.19(c)(2)(i)–(vi) should have a one-year ban and that States may impose longer periods of disqualification.(p. 7752)</p> <p>Response: We have not adopted this</p>

		<p>recommendation. However, the rule does not prohibit States from imposing periods of disqualification for these or other conflicts.</p> <p>Comment: One commenter recommended that the final rule require a period of two to five years before an individual can be employed as an Ombudsman or representative of the licensing or certification of a facility or provider.(p. 7752-7753)</p> <p>Response: We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for this or other conflicts.</p> <p>Comment: One commenter recommended that the final rule require a cooling off period of two to five years for ownership or investment interest in an existing or proposed long-term care facility or service. (p. 7753)</p> <p>Response: We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for this or other conflicts.</p>
	<p>(2) Individual conflicts of interest for an Ombudsman, representatives of the Office, and members of their immediate family include, but are not limited to:</p> <ul style="list-style-type: none"> (i) Direct involvement in the licensing or certification of a long-term care facility; (ii) Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility; (iii) Employment of an individual by, or participation in the management of, a long-term care facility in the service area or by the owner or operator of any long-term care facility in the service area; (iv) Receipt of, or right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; (v) Accepting gifts or gratuities of significant 	<p>Comment: Several commenters recommended that the conflict identified in the proposed rule at §1324.19(c)(2)(iii) regarding employment in a long-term care facility, should not be limited to the service area, but statewide. One of the commenters indicated that their State has had several Ombudsmen which had been hired directly from long-term care provider employment, some of whom have exhibited sympathy with providers over consumers, and depriving residents of an autonomous and independent advocate. One commenter recommended that the final rule require a cooling off period of two to five years after employment in a long-term care facility. (p. 7753)</p> <p>Response: We have eliminated the reference to employment in a long-term care facility “within the previous year” in the final rule at § 1324.21(c)(2)(iii), as this provision relates to identification of an existing conflict of interest. However, we have maintained for the Ombudsman a cooling off period of twelve months for previous employment in a long-term care facility in the final rule at §1324.21(d)(3).</p> <p>Comment: One commenter recommended that we provide additional clarity regarding what constitutes “significant value” related to gifts or gratuities of a facility, management, resident or resident representative in the proposed rule</p>

	<p>value from a long-term care facility or its management, a resident or a resident representative of a long-term care facility in which the Ombudsman or representative of the Office provides services (except where there is a personal relationship with a resident or resident representative which is separate from the individual’s role as Ombudsman or representative of the Office);</p> <p>(vi) Accepting money or any other consideration from anyone other than the Office, or an entity approved by the Ombudsman, for the performance of an act in the regular course of the duties of the Ombudsman or the representatives of the Office without Ombudsman approval;</p> <p>(vii) Serving as guardian, conservator or in another fiduciary or surrogate decision-making capacity for a resident of a long-term care facility in which the Ombudsman or representative of the Office provides services; and</p> <p>(viii) Serving residents of a facility in which an immediate family member resides.</p>	<p>at §1324.19(c)(2)(v). (p. 7753)</p> <p>Response: Some States define “significant value” or similar terms in the context of gifts or gratuities. Rather than requiring States to replace existing definitions and standards, we have chosen to use the final rule (at §1324.21(c)(2)(v)) to establish the general expectation and defer to State agencies and Ombudsman programs to develop more specific definitions and standards as needed.</p>
	<p>(d) Removing or remedying individual conflicts.</p>	
	<p>(1) The State agency or Ombudsman shall develop and implement policies and procedures, pursuant to § 1324.11(e)(4), to ensure that no Ombudsman or representatives of the Office are required or permitted to hold positions or perform duties that would constitute a conflict of interest as set forth in § 1324.21(c). This rule does not prohibit a State agency or Ombudsman from having policies or procedures that exceed these requirements.</p>	

	<p>(2) When considering the employment or appointment of an individual as the Ombudsman or as a representative of the Office, the State agency or other employing or appointing entity shall:</p> <ul style="list-style-type: none"> (i) Take reasonable steps to avoid employing or appointing an individual who has an unremedied conflict of interest or who has a member of the immediate family with an unremedied conflict of interest; (ii) Take reasonable steps to avoid assigning an individual to perform duties which would constitute an unremedied conflict of interest; (iii) Establish a process for periodic review and identification of conflicts of the Ombudsman and representatives of the Office, and (iv) Take steps to remove or remedy conflicts. 	<p>Comment: Two commenters recommended that the final rule clarify that the provisions at §1324.19(d)(1) apply to appointment by the Governor or other State official. (p. 7754)</p> <p>Response: In light of this recommendation, we have revised the final rule at §1324.21(d) to apply to circumstances of appointment as well as employment.</p>
	<p>(3) In no circumstance shall the entity, which appoints or employs the Ombudsman, appoint or employ an individual as the Ombudsman who:</p> <ul style="list-style-type: none"> (i) Has direct involvement in the licensing or certification of a long-term care facility; (ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict; (iii) Has been employed by or participating in the management of a long-term care facility within the previous twelve months. (iv) Receives, or has the right to receive, directly or indirectly, remuneration (in cash 	<p>Comment: Five commenters expressed concerns regarding the proposed rule at §1324.19(d)(5)(iii) regarding the one-year period before employing individuals who have been employed by, or participated in the management of, a long-term care facility. Several indicated that the proposed provision unnecessarily limits the ability of a State or Ombudsman program to recruit representatives with expertise. One of these commenters recommended the ability to permit a remedy. Two commenters recommended that States be provided with latitude to determine the best candidates and self-monitor for conflict free assurance. Another recommended limiting the prohibition to the service area to avoid unduly limiting the pool of candidates. (p. 7755)</p> <p>Response: The relevant provision in the final rule provides for a twelvemonth period and is limited to the Ombudsman §1324.21(d)(3)(iii). The final rule does not require a twelvemonth cooling off period for representatives of the Office at §1324.21(d)(4)(iv) of the final rule. We note that the rule does not prohibit States from imposing periods of disqualification for these or other conflicts. AoA</p>

	<p>or in kind) under a compensation arrangement with an owner or operator of a long-term care facility.</p>	<p>realizes that this required twelve-month cooling off period serves as a proxy for avoiding conflicts of interest and does not guarantee the outcome of an Ombudsman free of potential conflicts. We also realize that this rule could—and likely would—disqualify some excellent and otherwise qualified candidates from the position of Ombudsman. However, we are convinced that the final rule will bolster the credibility of the Ombudsman program, particularly among residents and their representatives, when the Ombudsman is not selected from among individuals who are employed in long-term care facilities at or near the time of their selection. The Ombudsman is the head of a program with responsibility to identify, investigate, and resolve complaints of residents who live in these settings and to represent the interests of the residents. Residents must be able to trust that the Ombudsman has their interests as his or her primary focus, without a sense of loyalty to a previous employer or coworkers.</p>
	<p>(4) In no circumstance shall the State agency, other agency which carries out the Office, or an agency hosting a local Ombudsman entity appoint or employ an individual, nor shall the Ombudsman designate an individual, as a representative of the Office who:</p> <ul style="list-style-type: none"> (i) Has direct involvement in the licensing or certification of a long-term care facility; (ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict; (iii) Receives, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; or (iv) Is employed by, or participating in the management of, a long-term care facility. <p>(A) An agency which appoints or employs</p>	<p>Comment: One commenter described the proposed prohibitions on employment of individuals (in proposed §1324.19(d)(5)) as overly broad and precluding of significant numbers of individuals with expertise and experience in the fields of long-term care and advocacy. Another commenter indicated that when a conflict of interest exists in one facility, it should not prohibit individual representatives of the Office from serving in other facilities. (p. 7754)</p> <p>Response: In the final rule at §1324.21(d)(4), we have modified the provision to prohibit the employment or appointment of an Ombudsman or representative of the Office under some circumstances. For example, we have deleted the cooling off period for individuals with direct involvement in licensing or certification and narrowed the scope of conflicting ownership or investment interest to long-term care facilities (rather than services). The rule does not prohibit States from imposing periods of disqualification or other more stringent requirements related to these or other conflicts.</p>

	<p>representatives of the Office shall make efforts to avoid appointing or employing an individual as a representative of the Office who has been employed by or participating in the management of a long-term care facility within the previous twelve months.</p> <p>(B) Where such individual is appointed or employed, the agency shall take steps to remedy the conflict.</p>	
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ⁱ This is a technical edit (through replaces paragraph) for clarity as per email from Becky Kurtz, February 16, 2016.

ⁱⁱ This is a technical edit for clarity via a conversation with Becky Kurtz on 09/29/15. The technical edit will be posted with the Q&As/FAQs on the LTCOP Rule on the ACL/AoA website.