

## STATE LTC OMBUDMAN PROGRAM ORGANIZATIONAL LEVEL CONFLICT OF INTEREST

The purpose of this document is to assist states to identify and remedy or remove conflicts of interest (COI) within the Office of the State Long-Term Care Ombudsman (the “Office”) as required by the State Long-Term Care Ombudsman Programs, Final Rule.<sup>1</sup>

**The Rule requires three steps regarding organizational COI:**

- 1. Identify,**
- 2. Remove or Remedy, and**
- 3. Report through the National Ombudsman Reporting System (NORS).**

This brief consists of the following sections pertinent to the topic: Implementation, Key Points to Consider; and a List of Authorities.

### Implementation, Key Points to Consider

Assess the current location of the Office and the other programs, departments or agencies located within the same agency where the Office resides. Consider additional factors included in the conflicts of interest (COI) provisions such as responsibilities or ownership of departments/agencies or of governing board members. If any conflicts or potential conflicts are identified, refer to Identifying COIs and the decision chart that follow for key points and ideas.

***\*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](#).***

### Identifying COIs

Do any of the following descriptions apply to the current location of the Office? If any are present, there is a COI. The Rule requires that the COIs be remedied or removed and reported to the Assistant Secretary through the National Ombudsman Reporting System (NORS).

1. The Office of the State LTCOP is administratively located in the same unit, division, office, agency, department as any of the programs or functions listed below.
  - Licensing or Regulatory Services for LTC Facilities
  - Long-Term Care Pre-Admission Screening or Decisions regarding Eligibility, Discharge, or Admission for Residents
  - Care Coordination or Case Management for Residents in LTC Facilities
  - Adult Protective Services

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<sup>1</sup> Published in the *Federal Register*, 02/11/2015, Vol. 80, No. 28. [LTCOP Final Rule](#)

- Guardianship or Other Fiduciary or Surrogate Decision-Making Services for LTC Residents
  - An Association or Affiliate of LTC Facilities or Other Residential Facilities for Older Individuals or Individuals with Disabilities
  - Provides Long-Term Care to Residents Including Staffing or Operating Programs that Control Access to or Services for LTC Facilities
  - State LTC Facility Rate Setting
  - Receives Funds from LTC Facilities
2. The Office is not a distinct entity, separately identifiable, but is a program within a unit, division, office, agency, or department with functions included in the preceding list.
  3. The State LTC Ombudsman reports directly to a manager who is also the manager of one of the programs or has job responsibilities for a function listed above.
  4. The Office is administratively located in a unit, division, office, agency or department which has a governing board with members who have COIs.
  5. The State LTC Ombudsman has responsibility for any of the programs listed in #1.

### **Removing/Remedying COIs**

Both the State Agency (SUA) and the SLTCO have a duty to remove/remedy the COI.

Identify what options might be available to remove or remedy a COI. Does a process exist for identifying a conflict and determining effective steps to remove or remedy the conflict?

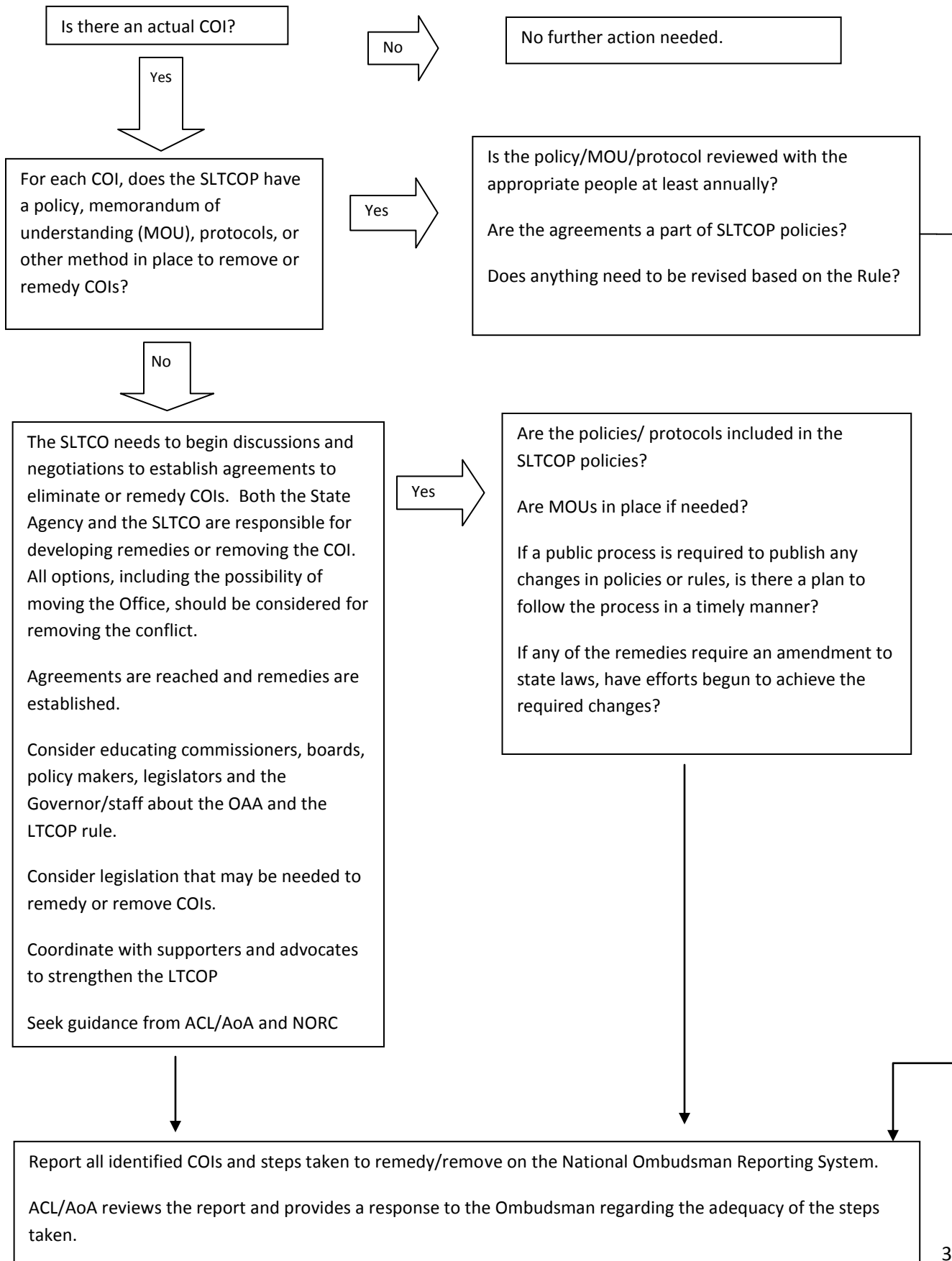
**For examples of how states have addressed this issue, check the [NORC website](#) which has examples of State strategies for addressing COI, including SLTCOP policies and procedures, memoranda of understanding, program structures, state laws and regulations. The NORC website will continue to be updated as NORC receives updated resources and processes from States.**

### **Reporting COIs through NORS**

SLTCOPs must report identified conflicts and steps taken to remove or remedy identified conflicts in NORS as directed by NORS instructions.

# CONFLICT OF INTEREST Flowchart

If any actual or potential COIs have been identified, consider the following questions and actions:



## List of Authorities

### Older Americans Act (the Act) of 1965 as amended 2006

Section 712 State Long-Term Care Ombudsman Program. (a) Establishment (1)“In order to be eligible .... (a State Agency shall) (A) establish and operate an Office of the State Long Term Care Ombudsman;...”

(4) Contracts and Arrangements. (A) Except as provided in subparagraph (B), the State agency may establish and operate the Office, and carry out the program, directly, or by contract or other arrangement with any public agency or nonprofit private organization. (B) Licensing and Certification Organizations; Associations. The State agency may not enter into the contract or other arrangement described in subparagraph (A) with (i) an agency or organization that is responsible for licensing or certifying long-term care services in the State; or (ii) an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals.

### State Long-Term Care Ombudsman Programs, Final Rule<sup>2</sup>

#### **§ 1324.1 Definitions.**

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.

#### **§1324.11 Establishment of the Office**

- (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
- (b) The State agency shall establish the Office and, thereby carry out the Long-Term Care Ombudsman program in any of the following ways:
  - (1) The Office is a distinct entity, separately identifiable, and located within or connected to the State agency; or
  - (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.

#### **§1324.21 Conflicts of Interest**

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.

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<sup>2</sup> The regulations and sections of the Preamble included in this paper are an excerpt from the Rule, highlighting the most relevant provisions. For complete information refer to the full text of the Rule.

*(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:

- (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 relationship) in, or receives grants or donations from, a long-term care facility;
- (4) Has governing board members with any ownership, investment or employment interest in long-term care facilities;
- (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;
- (6) Provides long-term care coordination or case management for residents of long-term care facilities;
- (7) Sets reimbursement rates for long-term care facilities;
- (8) Provides adult protective services;
- (9) Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;
- (10) Conducts preadmission screening for long-term care facility placements;
- (11) Makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or
- (12) Provides guardianship, conservatorship or other fiduciary or surrogate decision-making services for residents of long-term care facilities.

*(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.

- (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.
- (2) Where the Office is located within or otherwise organizationally attached to the State agency, the State agency shall:

- (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;
- (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
- (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.

(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 712(a)(4) of the Act...

(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:

- (i) Prior to contracting or making 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;
- (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:
  - (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.

### **Select Public Comment and Response from the Preamble to the LTCOP Rule**

*Comment:* Several commenters recommended that the rule should require that the Ombudsman program be completely separate and independent from State government.

*Response:* Requiring all States to place the Ombudsman program outside of State government would be inconsistent with the provisions of the OAA. The OAA establishes the Ombudsman program through grants to State units on aging and specifically provides the option for the State agency to determine where the program should be organizationally located. While providing some limitations (such as conflicts of interest), the Act indicates that "the State agency may establish and operate the Office, directly, or by contract or other arrangements with any public agency or nonprofit private organization."

Section 712(a)(4) of the Act. Some States have effective Ombudsman programs which are organizationally located, in whole or in part, inside of the State agency. In these States, the Ombudsman program is able to fully carry out the provisions of the OAA, even when the policies of the Office differ from the general policies in place for State employees. Examples of such practices are stringent disclosure limitations, making independent recommendations to legislators and other policymakers, and having direct access to the media to discuss long-term care policy matters. We realize that some States have had difficulty in carrying out all of the Ombudsman program provisions in the OAA. It is our intention that this rule will help those States have a better understanding of the OAA requirements and come into full compliance with the law. Where they are unable or unwilling to accommodate the provisions of the OAA which are necessary to provide for an effective Ombudsman program, State agencies will need to examine whether they are able to successfully operate the Ombudsman program directly or pursue an alternative course. (p.7706)

### **ACL/AoA Program Instructions, Correspondence, Reports with Applicable Sections/Comments**

[\*AoA PI-81-8, pp. 8-9\*](#): Discusses the organizational placement of the program and its impact on the ability of the State Ombudsman. “Determination of the placement of the program, whether in-house or outside the State Agency, should consider the need for the Long-Term Care ombudsman to exercise independence in action and judgment, free from the control of significant influence by any person or organization which seeks to interfere with vigorous and impartial investigation and/or resolution of complaints.” Examples of assurances of the ability to operate without the control or significant influence from others are listed.

[\*Becky Kurtz & Leslie Green, ACL/AoA Letter to B. Duke, Pennsylvania, 10/31/13\*](#): “Programs providing protective services and ombudsman services have distinct roles which can at times lead to conflicts of interest....We are not suggesting that the State Unit on Aging or an area agency on aging would be prohibited...from operating both of these programs—or other programs that may have conflicts of interest with the LTCO Program. But we strongly recommend that your agency work to remedy the conflicts by separating the functions organizationally so that the programs can operate independently of one another.”

[\*Josefina Carbonell, AoA Letter to M.A. Haverland, Iowa, 03/12/05\*](#): “One state agency or office may not directly administer both the Ombudsman Program and the regulatory enforcement functions for facilities covered by the Ombudsman Program.”

[\*Francis Burns, AoA Letter to D.S. Durbin, Missouri, 12/29/05\*](#): “Taken together, these statutory provisions [OAA Section 712(f)(1), (f)(3)] make it clear that it would be a conflict of interest for an agency which licenses, certifies or enforces requirements pertaining to institutional long-term care services to directly operate the Ombudsman Program. One state agency or office may not directly administer both the Ombudsman Program and the regulatory enforcement functions for facilities covered by the Ombudsman Program.”

[\*Larry Brewster, AoA Email Message to H. Sanderson, Arkansas, 08/04/04\*](#): “The requirement for an Office of the Long-Term Care Ombudsman implies that the State Ombudsman should have a significant placement within the agency and have control over all aspects of the program. The placement of the Office of the LTC Ombudsman Program under the supervision of the Administrator of the APS Program may result in conflicts with Ombudsman responsibilities. These potential conflicts are detailed in the attached 1994 Symposium Report that examines the relationship between APS Programs and LTC Ombudsman Programs. The outcome of the Symposium Report is that the two programs have significant differences and should remain administratively separate.”

[Robyn Stone, AoA Letter to J. A. Thomas, Connecticut, 04/04/97, p.2](#): "...the program is organizationally placed in a variety of settings in states throughout the nation. No one setting is necessarily inherently preferable to another. What is most important is that the LTCOP be located organizationally where it is most fully and effectively able to respond to the complaints, individually and collectively, made on behalf of facility residents and to otherwise represent the interests of such residents in the manner delineated in the ombudsman provisions of the OAA. In AoA's view, the organizational location that is the most free of conflicts of interest, potential conflicts of interest, and conflicts with the mission and operations of other programs organizationally co-located is the one that will enable the program to best serve the mission and requirements of the OAA."

[Bill Benson, AoA Letter to H.L. Adams, and letter to B.L. Grandquist, Iowa, 11/28/97](#): "...special care must be taken and great consideration given to assure the protection of the Ombudsman Program on every point intended by Congress. Thus, if the Department of Elder Affairs continues to operate the Ombudsman Program, the Department must have policies which clearly and explicitly provide for the prevention of conflict-of-interest and which assure the independence of the program and its protection from conflicts and potential conflicts-of-interest."

[Bill Benson, AoA Letter to L.Nordlicht Shedd and J. Hoberman, Connecticut, 11/28/97](#): "Would the public perception of a conflict of interest between the regulatory agency and the Ombudsman and/or the Ombudsman's representatives, be contrary to the OAA? I believe it would...Those who call on ombudsmen for assistance must perceive that the ombudsman is an independent, objective party who is able to freely speak and act on behalf of the interests or residents..."p. 6

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