

## LOCAL OMBUDSMAN ENTITY ORGANIZATIONAL LEVEL CONFLICT OF INTEREST

The purpose of this document is to assist the State Ombudsman to identify and remedy or remove conflicts of interest (COI) within an agency hosting a local Ombudsman entity (LOE) as required by the State Long-Term Care Ombudsman Programs, Final Rule.<sup>1</sup> Organizational COI are conflicts that may impact the effectiveness and credibility of the work of the Office of the State Long-Term Care Ombudsman (the Office).<sup>2</sup>

**The Rule requires five steps regarding organizational COI when using LOEs:**

- 1. Avoid COI prior to designating or renewing designation,**
- 2. Establish a process for periodic review/identification of COI,**
- 3. Require disclosure of COI and steps taken to remove/remedy,**
- 4. Establish criteria and process for review/approval of steps taken to remedy/remove COI.**
- 5. 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**

Review your state's process and provisions for identifying, removing, or remediating COIs in agencies hosting a LOE to determine whether they clearly cover the specified areas in the Rule. If your state does not have such a process, establish one. See page 5 for more information.

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

### **Avoid the Conflict of Interest Prior to Designation or Renewing Designation**

Review your state law, rule, and policies regarding local ombudsman entity COI. What processes are currently in place to avoid a COI? What remedies are currently in place? In light of current processes and the Rule, what needs to be changed?

Establish a process for periodic review of COI. For example, include a review during the monitoring visit, set up an annual tickler, and/or include a disclosure form in grant or contract language.

Require that such agencies disclose identified COI with the LOE and steps taken to remove or remedy conflicts within such agency to the Ombudsman.

### **Identification of Existing Conflicts of Interest**

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

<sup>2</sup> LTCOP Final Rule, §1324.21.

Assess the current organizational location of each agency hosting a LOE. Review the other programs, departments or divisions located within the same agency where the LOE resides. Review annual reports, agency websites, and consider additional such as responsibilities or management of departments and of the governing Board members.

If any conflicts or potential conflicts are identified, review this section of the Brief for suggestions. Review your state's process for decision-making regarding the designation, revocation of designation, or refusal to designate LOEs.

Do any of the following descriptions apply to the host agency of any LOE? 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.

1. The LOE is administratively located in the same unit, division, office, agency, or 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
  - 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
  - Receives Funds from LTC Facilities
2. The LOE is administratively located in a unit, division, office, agency or department which has a governing board with members who have COIs.
3. A representative of the Office of the Ombudsman, e.g. local ombudsman, in the LOE has responsibilities for any of the functions or programs listed in #1.
4. The Ombudsman (State Long-Term Care Ombudsman (SLTCO)) conducts a periodic review and identification of COIs with the LOE.
5. Agencies hosting a LOE disclose identified COIs with the LOE and steps taken to remove or remedy COIs to the Ombudsman.

### **Removing/Remedying COIs**

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

Before designating or renewing designation of a LOE, reasonable steps are taken to avoid COIs in an agency that may host a LOE.

There is an established process for review and criteria for approval of plans to remove or remedy conflicts with the LOE in agencies where a COI has been identified.

If an agency hosting the LOE fails to disclose a COI or is unable to adequately remove or remedy the COI, the Ombudsman may refuse to designate, suspend or remove designation of the LOE.

**Check the NORC website for resources and examples of state strategies for addressing COI, including SLTCOP policies and procedures, contract provisions, assurances, memorandum of understanding, state laws and regulations. The NORC website will continue to be updated as states develop their processes for complying with the rule. [LTCOP Rule Resources and Information](#)**

### **Reporting COIs through NORS**

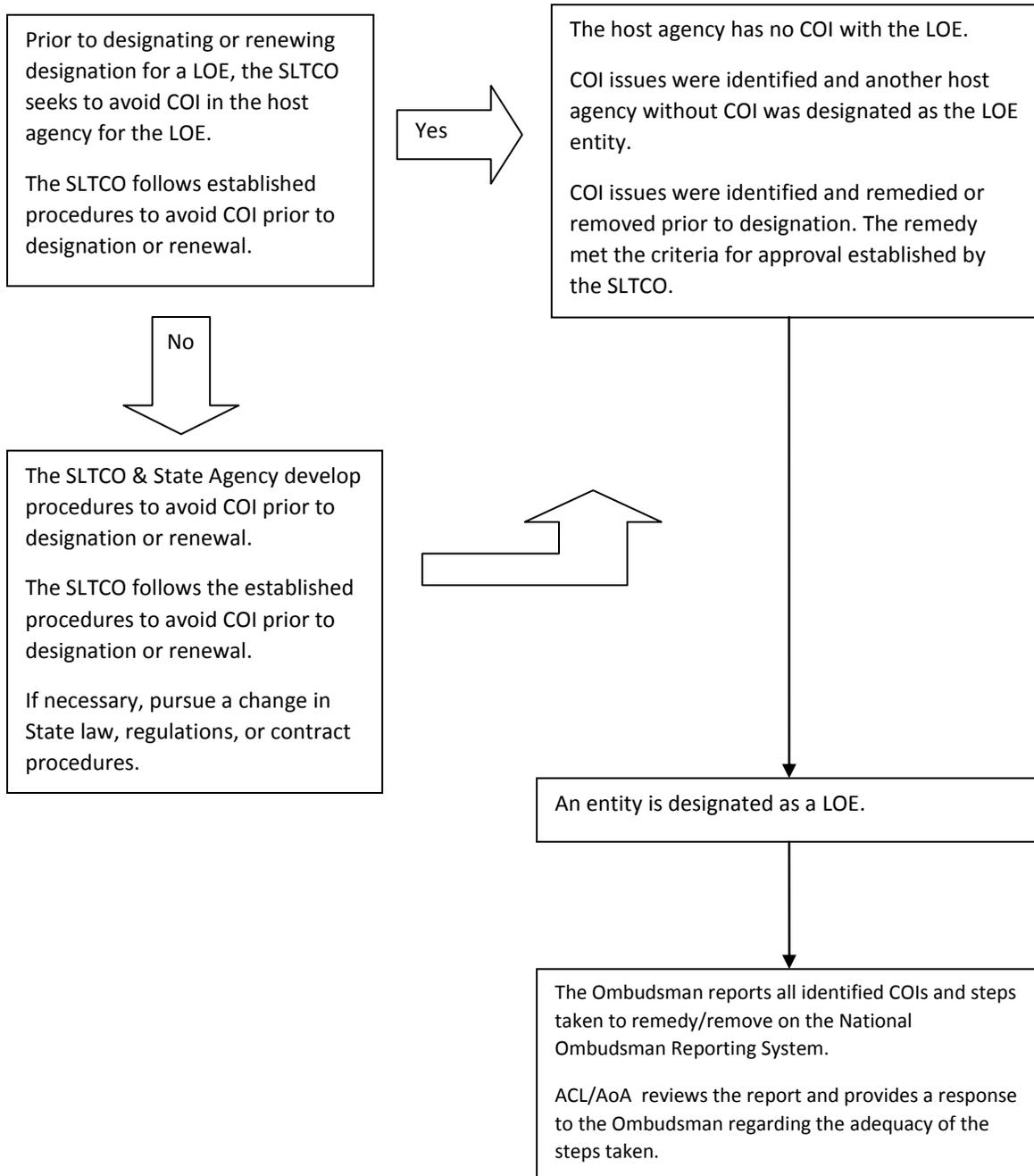
The Ombudsman must report identified conflicts and steps taken to remove or remedy identified conflicts in NORS as directed by NORS Instructions.

The Administration for Community Living, Administration on Aging will review the report and provide a response regarding the adequacy of steps taken.

## **CONFLICT OF INTEREST Flowchart**

Review your state's process for determining or avoiding COI prior to designating or renewing the designation of a local ombudsman entity.

- Is it clear?
- Does it include the elements of decision-making contained in the flow chart?
- Is further action needed to comply with the LTCOP Rule?



## Key Points to Consider

Review your state's process and provisions for identifying, removing or remedying COIs in agencies hosting a LOE to determine whether it clearly covers the specified areas in the Rule. If your state does not have such a process, establish one.

Does the process:

- Include a periodic review and identification of COIs with the LOE in the agency/organization hosting the local entity?
  - Are the definitions and criteria for determining COI consistent with the LTCOP Rule and the OAA? Are they clearly articulated?
  - Is there a stipulated time for the review?
  - Is the review process defined and consistently followed?
  - Is there an assurance form or any evidence/documentation that a review has been conducted?
- Require local entities hosting the LTCOP to disclose identified COIs to the Ombudsman and steps taken to remove or remedy conflicts?
  - Is the process for disclosure and remedying or removing a COI clearly articulated in policies or contracts?
  - Are the responsibilities of the host agency for identifying, reviewing, and removing/remedying COIs specified?
  - Is there a time frame for notification and for a response?
  - Who receives and reviews the information within the Office of the Ombudsman?
- Contain criteria for approval of steps taken to remedy or remove conflicts?
  - Are the criteria clear?
  - Who provides input into the approval process?
  - Are there time frames for the process?
  - Who receives notification of the decision regarding the adequacy of a remedy or removal?
  - Is there an ability to follow-up or revisit the solution to determine if the objective has been achieved by the remedy or removal?
- Include provisions for the SLTCO to refuse, suspend or remove designation of a LOE entity if a COI is not disclosed or is not adequately removed or remedied?
  - Are the provisions clear and disclosed to local entities hosting, or seeking to host, a LOE?
  - Are the provisions included in a contract or an agreement?
  - Do the provisions contain time frames for action?
  - Is the grievance process referenced or included in the provisions?

## List of Authorities

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

#### **Section 712 (5) Designation of Local Ombudsman Entities and Representatives.**

(C) ELIGIBILITY FOR DESIGNATION.—Entities eligible to be designated as local Ombudsman entities, and individuals eligible to be designated as representatives of such entities, shall— (i) have demonstrated capability to carry out the responsibilities of the Office; (ii) be free of conflicts of interest and not stand to gain financially through an action or potential action brought on behalf of individuals the Ombudsman serves; (iii) in the case of the entities, be public or nonprofit private entities; and (iv) meet such additional requirements as the Ombudsman may specify. (D) POLICIES AND PROCEDURES.— (i) IN GENERAL.—The State agency shall establish, in accordance with the Office, policies and procedures for monitoring local Ombudsman entities designated to carry out the duties of the Office. (ii) POLICIES.—In a case in which the entities are grantees, or the representatives are employees, of area agencies on aging, the State agency shall develop the policies in consultation with the area agencies on aging. The policies shall provide for participation and comment by the agencies and for resolution of concerns with respect to case activity.

### State Long-Term Care Ombudsman Programs, Final Rule<sup>3</sup>

#### **§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.

(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;

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<sup>3</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 in the Rule. [LTCOP Final Rule](#)

- (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.
- (6) Where local Ombudsman entities provide Ombudsman services, the Ombudsman shall:
  - (i) Prior to designating or renewing designation, take reasonable steps to avoid conflicts of interest in any agency which may host a local Ombudsman entity.
  - (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,
  - (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,
  - (iv) Establish criteria for approval of steps taken to remedy or remove conflicts in such agencies, and
  - (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.
- (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.

## Select Public Comments and Responses from the Preamble to the LTCOP Rule

***Comment:*** One commenter indicated that co-locating care coordination services, protective services, guardianship services, and a local Ombudsman entity within an AAA has been positive and has strengthened working relationships. Another commenter indicated that co-location of protective services and a local Ombudsman entity has allowed for greater advocacy and efficiency. (p. 7750)

***Response:*** We believe that positive relationships between the individuals who work for various programs and agencies—even those which provide potentially conflicting services—can be extremely beneficial for recipients. In fact, Ombudsman program coordination with many of these entities is required in the final rule at § 1324.13(h).

***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)

***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.

***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). (p. 7750)

***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<sup>4</sup>). 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).

***Comment:*** Several commenters recommended approaches to remedying identified organizational conflicts... Another indicated that separating out AAA staff functions could help remedy conflicts with a local Ombudsman entity. One commenter recommended that all local Ombudsman entities have their own brand identity (*e.g.*, signage, stationary, business cards, outreach materials) separate from the AAA to reduce perceived conflicts of interest and confusion (including questions from residents about why representatives of the Office wear name tags with the AAA name on them). One comment recommended that the final rule include criteria for steps that should be taken by the State agency as evidence of a process to remedy or remove conflicts. The commenter noted that some of these are included in the preamble to the proposed rule and proposed additional criteria. (p. 7751)

***Response:*** We acknowledge that administrative structures, such as firewalls, may be appropriate remedies in some circumstances. AoA plans to provide additional technical assistance to States as they develop plans to remove and remedy existing conflicts of interest....

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<sup>4</sup> 1324.21(b)(3): (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.

**Comment:** One commenter recommended clarity on enforcement actions that might be taken where conflicts exist. (p. 7751)

**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.

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

*AoA PI-81-8, p. 16:* "Criteria to be used in identifying, soliciting and selecting organizations or agencies to carry out ombudsman functions on the local level include; (a) The proposed unit or principal members of its staff or membership have no conflicts of interest which would impair its ability to vigorously and impartially investigate complaints in the interest of elderly long-term care residents."

*Kurtz, B. & Otte, K, AoA Letter to C. Crossdale, New York, 02/23/15:* "...A state unit on aging is prohibited from entering into an arrangement which places a local Ombudsman entity within an organization that owns or operates a long-term care facility."

*Josefina Carbonell, AoA Letter to M.A. Haverland, Iowa, 03/12/05:* "...These statutory provisions 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."

*Benson, B, AoA Letter to F. Miller, California, 09/25/97:* .."The only special considerations when contracting directly with [local] ombudsman programs are to ensure that the host agency has no conflict of interest (i.e., does not license facilities, own or operate facilities, or administer long-term care services for residents of long-term care facilities (such as Medicaid)..."

*McCarthy, J, AoA Letter to N. Pooser, Florida, 03/22/93:* The importance of avoiding or resolving conflict-of-interest issues for individuals and the LTCOP is discussed. "There must be no inappropriate or improper influence from any individual or entity, regardless of the source, which will impact on the objectivity of the investigation or outcome of complaints or the ombudsman's work to resolve major issues..."

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