

## CONSIDERATIONS FOR IDENTIFYING AND ADDRESSING INDIVIDUAL CONFLICTS OF INTEREST

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

**The Rule requires four steps regarding individual COIs:**

- 1. Establish and implement policies and procedures related to COI,**
- 2. Identify COIs,**
- 3. Avoid appointing or designating individuals with COI, or**
- 4. Remove or Remedy the conflict.**

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

### Implementation, Key Points to Consider

The LTCOP Rule requires the establishment and implementation of policies and procedures related to conflicts of interest. The Rule<sup>2</sup> also requires that reasonable steps be taken to avoid individual conflicts of interest for the State Ombudsman and all representatives of the Office. Ombudsman program policies and procedures must establish a process to identify and remove or remedy conflicts of interest. This brief is based on the Rule and is intended to provide Ombudsman program management considerations related to identifying actual and potential individual conflicts of interest (refer to the [Rule](#) for the complete language in the requirements).<sup>3</sup>

*The State Agency and the Ombudsman are responsible for identifying conflicts that “may impact the effectiveness and credibility of the work of the Office” [§1324.21(c)(1)].*

### Policies and Procedures

**Develop and implement policies and procedures to ensure that no Ombudsman or representative of the Office is required or permitted to hold positions or perform duties that would constitute a conflict of interest.**

- Does the program, including local Ombudsman entities, where applicable have established policies and procedures to implement the conflict of interest provisions of the LTCOP Rule?
- Do the policies and procedures establish mechanisms, such as screening questions on applications, interview questions, disclosure of conflicts form to assist with identification of conflicts?
- Do the policies and procedures outline mechanisms to remove or remedy the conflicts of interest? Do these mechanisms include:

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

<sup>2</sup>§1324.11(e), Policies and procedures, and §1324.21, Conflicts of Interest, LTCOP Final Rule, February 11, 2015. All section citations in this document refer to the Rule. <http://ltcombudsman.org/uploads/files/library/2015-01914.pdf>

<sup>3</sup> Additional information and resources regarding the LTCOP Rule are available on the NORC website: [http://ltcombudsman.org/library/fed\\_laws/ltcop-final-rule](http://ltcombudsman.org/library/fed_laws/ltcop-final-rule).

- 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?
- 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
- 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?<sup>4</sup>

### Identify Conflicts of Interest (COIs)

- Consider COIs that may impact the effectiveness and credibility of the work of the Office.
  - What is the likely impact on consumers’ perspectives on the effectiveness and credibility of the Ombudsman or the representative of the Office?
  - What is the likely impact on long-term care service providers’ perspectives on the effectiveness and credibility of the Ombudsman or the representative of the Office?
  - What is the likely impact on the effectiveness and credibility of the Ombudsman program’s systemic advocacy?
- Does the individual who is responsible for designating, appointing, selecting, or terminating the Ombudsman have an individual COI?
- Do any of the following descriptions exist for the Ombudsman or a representative of the Office, and members of their immediate family? If so, a COI exists. Conflicts of interest include, but are not limited to<sup>5</sup>:
  - Direct involvement in the licensing or certification of a long-term care facility;
  - Ownership, operational, or investment interest in an existing or proposed long-term care facility;
  - 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;
  - Receipt or, 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;
  - Accepting gifts or gratuities of significant 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);
  - 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;

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<sup>4</sup> §1324.11(e)(4), Establishment of the Office of the State Long-Term Care Ombudsman, Policies and procedures, Conflicts of Interest, LTCOP Final Rule, February 11, 2015. All section citations in this document refer to the Rule, <http://ltombudsman.org/uploads/files/library/2015-01914.pdf>

<sup>5</sup> §1324.21(c), LTCOP Rule.

- 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
- Serving residents of a facility in which an immediate family member resides.
- Other possible conflicts to consider:
  - Does a representative of the Office hold a professional license from an organization that has mandatory reporting requirements that do not comport with the disclosure provisions in the Older Americans Act (OAA)?<sup>6</sup>
  - Are representatives of the Office required or permitted to hold other positions or perform other duties not listed above, that would constitute a COI?
  - Are there other conflicts included in the program policies that would impact the effectiveness and credibility of the work of the program?<sup>7</sup>
  - Are there program prohibitions related to length of time from being employed by, or participating in the management of, a long-term care facility?
- Are any new COIs identified during the periodic review?
- Did any COIs arise between the periodic reviews? Is there a procedure to notify the Ombudsman?

**Avoid the conflict based on criteria in the policies of the Ombudsman program and consistent with the LTCOP Rule<sup>8</sup>**

- When appointing an individual as the Ombudsman or as a representative of the Office, the State agency or other employing or appointing entity shall:
  - Take reasonable steps to avoid employing or appointing an individual:
    - who has an unremedied COI *or*
    - who has a member of the immediate family with an unremedied COI;
  - Take reasonable steps to avoid assigning an individual to perform duties which would constitute an unremedied COI.

**Conflicts that cannot be remedied**

***State Ombudsman [1324.21(d)(3)]***

- The entity, which appoints or employs the Ombudsman, may not appoint or employ an individual as the Ombudsman who:
  - Has direct involvement in the licensing or certification of a long-term care facility;
  - Has an ownership or investment interest in a long-term care facility;
    - Divestment within a reasonable period may be considered an adequate remedy to this conflict.

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<sup>6</sup> §712(d)(2), P.L. 114-144, [OAA](#). See the Frequently Asked Questions, Administration on Aging, Administration for Community Living, [FAQs](#), for further information. The FAQ is included in the List of Authorities in this document.

<sup>7</sup> The LTCOP Rule directs Ombudsman programs to consider COIs that may impact the effectiveness and credibility of the work of the Office. The Rule does not prohibit States from imposing periods of disqualification for individual COIs. §1324.21(c) and Comments and Responses in the Preamble to the Rule, pp. 7752 – 7753.

<sup>8</sup> §1324.21(d), LTCOP Rule.

- Has been employed by or participating in the management of a long-term care facility *within the previous twelve months*;
- Receives, or has the 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.

***Representatives of the Office of the State Ombudsman [1324.21(d)(4)]***

- The State agency, other agency which carries out the Office, or an agency hosting a local Ombudsman entity cannot appoint or employ an individual and the Ombudsman cannot designate an individual as a representative of the Office who:
  - Has direct involvement in the licensing or certification of a long-term care facility;
  - Has an ownership or investment interest in a long-term care facility;
    - Divestment within a reasonable time may be considered adequate to remedy this conflict.
  - 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
  - Is employed by, or participating in the management of, a long-term care facility.

**Remove or remedy the conflict based on criteria in the policies and procedures of the Ombudsman program and consistent with the LTCOP Rule**

- Take steps to remove or remedy conflicts based on the program policies and procedures.
- Does the removal or remedy satisfy the criteria?
  - Was the Ombudsman contacted regarding the plan for removal or remedy?
  - Was the plan for removal or remedy accepted by the Ombudsman?
  - Is there a time period for follow-up to determine if the remedy is sufficient?
  - How is the effectiveness or credibility of the program impacted by the remedy?
  - Are any additional adjustments or changes in the remedy necessary?
  - Will the removal or remedy enable the individual to become or remain a designated representative of the Office (dependent upon the successful fulfillment of any additional criteria for designation)?
- Will the removal or remedy neutralize or enhance any potential impact of the COI on the effectiveness and credibility of the work of the Ombudsman program?

**Check the NORC [website](#) for resources and examples of state strategies for addressing COI, including SLTCOP policies and procedures and screening tools. The NORC website will continue to be updated as states develop their processes for complying with the Rule.<sup>9</sup>**

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<sup>9</sup> Additional information and resources regarding the LTCOP Rule are available on the NORC website: [http://ltcombudsman.org/library/fed\\_laws/ltcop-final-rule](http://ltcombudsman.org/library/fed_laws/ltcop-final-rule).

## List of Authorities

### Older Americans Act (the Act) of 1965 as amended 2016<sup>10</sup>

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

(C) ELIGIBILITY FOR DESIGNATION.—... Individuals eligible to be designated as representatives of such entities, shall— ... (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; ... and (iv) meet such additional requirements as the Ombudsman may specify.

(f) CONFLICT OF INTEREST.— (1) INDIVIDUAL CONFLICT OF INTEREST.—The State agency shall— (A) ensure that no individual, or member of the immediate family of an individual, involved in the designation of the Ombudsman (whether by appointment or otherwise) or the designation of an entity designated under subsection (a)(5), is subject to a conflict of interest; (B) ensure that no officer or employee of the Office, representative of a local Ombudsman entity, or member of the immediate family of the officer, employee, or representative, is subject to a conflict of interest; and (C) ensure that the Ombudsman— (i) does not have a direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care service; (ii) does not have an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service; (iii) is not employed by, or participating in the management of, a long-term care facility or a related organization, and has not been employed by such a facility or organization within 1 year before the date of the determination involved; (iv) does not receive, or have the 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) does not have management responsibility for, or operate under the supervision of an individual with management responsibility for, adult protective services; and (vi) does not serve as a guardian or in another fiduciary capacity for residents of long-term care facilities in an official capacity (as opposed to serving as a guardian or fiduciary for a family member, in a personal capacity).

### State Long-Term Care Ombudsman Programs, Final Rule<sup>11</sup>

#### §1324.1 Definitions

**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.

#### §1324.11 Establishment of the Office of the State Long-Term Care Ombudsman

##### (e) Policies and procedures

...establish Ombudsman program policies and procedures of the Office...The policies and procedures must address the matters within this subsection.

(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.

(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 § 1327.21, including:

(i) Ensuring that no individual, or member of the immediate family of an individual, involved in the

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<sup>10</sup> The Older Americans Act Reauthorization Act of 2016, [OAA](#)

<sup>11</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.

employment or appointment of the Ombudsman is subject to a conflict of interest;

(ii) Requiring that other agencies in which the 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;

(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;

(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

(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.

### **§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)<sup>12</sup> and (d) of this section.

#### **(c) Identifying individual conflicts of interest.**

(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.

(2) Individual conflicts of interest for an Ombudsman, representatives of the Office, and members of their immediate family include, but are not limited to:

(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 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);

(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;

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<sup>12</sup> Paragraph (b) refers to removing or remedying organizational conflicts. Those provisions are not included in this brief.

(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

(viii) Serving residents of a facility in which an immediate family member resides.

**(d) Removing or remedying individual conflicts.**

**(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.

**(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:

**(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.

**(3)** In no circumstance shall the entity, which appoints or employs the Ombudsman, appoint or employ an individual as the Ombudsman who:

**(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 or in kind) under a compensation arrangement with an owner or operator of a long-term care facility.

**(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:

**(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.

**(A)** An agency which appoints or employs 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.

(B) Where such individual is appointed or employed, the agency shall take steps to remedy the conflict.

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

**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)

**Response:** We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for these or other conflicts.

**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 after direct involvement with licensing or certification of a facility or provider. (p. 7752-7753)

**Response:** We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for this or other conflicts.

**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)

**Response:** We have not adopted this recommendation. However, the rule does not prohibit States from imposing periods of disqualification for this or other conflicts.

**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)

**Response:** The relevant provision in the final rule provides for a twelve-month period and is limited to the Ombudsman §1324.21(d)(3)(iii). The final rule does not require a twelve-month 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 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.

**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 at §1324.19(c)(2)(v). (p. 7753)

**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.

## **Frequently Asked Questions on the LTCOP Rule<sup>13</sup>**

### **What steps must states take if the supervisor of the Ombudsman has an individual conflict of interest?**

Regardless of the supervisory structure, states must enable the Ombudsman to fulfill his/her functions. We strongly encourage states to consider the importance of establishing reporting structures that support the Ombudsman's ability to fulfill his/her functions fully and to avoid situations in which a supervisor's conflicting (or potentially conflicting) interests makes such support difficult. If an individual who is responsible for designating, appointing, selecting or terminating the Ombudsman has an individual conflict of interest, the agency hosting the Office must take steps to remedy these conflicts, including arranging for designation, appointment, selection or termination actions to be taken by other individual(s) without individual conflicts of interest. OAA Section 712(f)(1); 45 CFR 1324.11(e)(4)(i); .21(b)(2)(iv).

### **When an Ombudsman or representative of the Office holds a professional license which compels reporting of certain information (e.g., mandatory abuse reporting), how should the Ombudsman program handle the conflicting mandates regarding disclosure of resident-identifying information?**

The OAA and implementing regulations include strict disclosure provisions. The regulations specifically prohibit the Ombudsman or representatives of the Office from reporting suspected abuse, neglect or exploitation of a resident without informed consent, *notwithstanding State laws to the contrary*. 45 CFR 1324.19(b)(3)(iii). The Preamble to the Final Rule addresses the Congressional intent "for the Ombudsman program to be a safe place for the concerns of residents to be brought, knowing that their information will not be disclosed without their consent ..." 80 Fed. Reg. 7732.

In addition, the OAA provides that the Ombudsman must consider individual conflicts of interest that may impact the effectiveness of the office. 45 CFR 1324.21. If a professional licensing organization has mandatory reporting requirements that do not comport with the disclosure provisions under the OAA, this may create a conflict of interest. ACL understands that State agencies and Ombudsmen are working to implement the LTC Ombudsman program in accordance with the Act and the Rule and to address any potential conflicts of interest. ACL encourages State agencies and Ombudsmen who identify licensing organization requirements that are in conflict to determine whether the professional licensing entity is able to provide a waiver or other type of remedy. If individual concerns remain after such State agency or Ombudsman implementation activities, ACL encourages individuals who hold professional licenses and also serve as Ombudsmen or representatives of the Office to notify their respective licensing organization of this requirement in order to determine whether the professional licensing entity is able to provide a waiver or other type of remedy in order to avoid these conflicts.

### **What should be considered by the Ombudsman when monitoring designated local Ombudsman entities, required in 45 CFR 1324.13(c)(1)(iii)?**

Ombudsman monitoring of local Ombudsman entities may include, but is not limited to:<sup>14</sup>

- Conflict of interest assessments and review of steps taken to remedy or remove conflicts.

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<sup>13</sup> Frequently Asked Questions, Administration on Aging, Administration for Community Living, [FAQs](#)

<sup>14</sup> For the purpose of this document, information regarding COI was extracted from this FAQ, the entire answer to this question is available on the ACL webpage: [https://aoa.acl.gov/AoA\\_Programs/OAA/resources/Faqs.aspx#Ombudsman](https://aoa.acl.gov/AoA_Programs/OAA/resources/Faqs.aspx#Ombudsman)