

PA LTC Ombudsman Program Compliance Manual

A Guide to Addressing Conflicts of Interest, Abuse Reporting, and Complaint Processing under the new Federal Rule 45 CFR 1321 and 1327

On February 11, 2015, the Administration for Community Living (ACL), released final regulations for the LTC Ombudsman Program in the Federal Register. This is the first time comprehensive regulations for the LTC Ombudsman Program have ever been issued. They provide much needed clarity and interpretation for States around the provisions of the Older Americans Act (OAA) and implementation of the Long-Term Care Ombudsman Program. As a result, the Pennsylvania Ombudsman Office was required to review – and revise – its policies and/or practices ahead of the implementation date, July 1, 2016.

An Overview

The new regulations:

- Contain expanded definitions;
- Provide clarity around who/what constitutes the Office of the State LTC Ombudsman;
- List the elements that must be included in State LTC Ombudsman Program policies and procedures;
- Describe the functions and responsibilities of the State LTC Ombudsman, the State Unit on Aging (as related to the State LTC Ombudsman Program), the agencies hosting Local Ombudsman Entities, and the representatives of the Office of the State LTC Ombudsman (Program Representatives), as well as;
- Identify potentially challenging issues like conflicts of interest (both individual and organizational), designation of Program Representatives, legal counsel for ombudsman programs, disclosure of information, access (to consumers, records, and facilities), willful interference with ombudsman responsibilities, and more.

Neither the Aging Program Directive File Number: 16-10-01 nor this Compliance Manual can anticipate every potential conflict of interest or challenging scenario you will face in your Ombudsman work.

Rather, we hope you will utilize this manual to guide your problem solving, in addition to the situational technical assistance the Office is always prepared to provide.

1. Has the role of the Host Agency (AAA) changed?

Yes. The Host Agency is more than where the **Local Ombudsman Entity (LOE), staffed by Program Representatives, both paid and volunteer** is located. The Host Agency continues to have oversight of personnel responsibilities for Program Representatives, but not the programmatic oversight. It is, however, responsible for ensuring that the Program Representatives are able to carry out their duties without conflict. In some cases, they may now have less of a role in how ombudsman activities are conducted, but in other cases, they may have greater autonomy/flexibility/more of a role in determining how to carry out ombudsman activities in a manner consistent with, but not identical to, other regions of the Commonwealth. This will largely be determined by the resources of the Host Agency, its LOE and the size of the community to be served.

2. Who is considered to be part of the Local Ombudsman Entity affected by the Final Rule?

The LOE is all personnel both paid and volunteer who are integral to the operation of the Ombudsman program. This could include administrative and clerical staff, in some cases. The structure of the LOE is determined by the resources of the Host Agency to ensure that organizational conflicts of interest are addressed.

3. How does the Local Ombudsman Entity (Host Agency) determine if it has an ORGANIZATIONAL conflict of interest (COI)?

The new Final Rule requires three steps regarding organizational COIs:

A. Identify

B. Remove or Remedy

C. Report

AAA's or other identified Host Agencies must assess the current organizational location between the LOE and other program areas. If any conflicts or potential conflicts are identified, refer to the Organizational Conflict of Interest Flowchart on page 4 of this manual.

A. Identify

1. Is the Program Representative 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 consumers;
- Care coordination or case management for consumers in LTC facilities;
- Adult Protective Services;

- Guardianship or other fiduciary or surrogate decision-making services for LTC consumers;
 - An association or affiliate of LTC facilities or other residential facilities for older individuals or individuals with disabilities;
 - Provides Long-Term Care to consumers; which include: staffing or operating programs that control access to, or services for, LTC facilities;
 - Receives funds from LTC facilities
2. Is the Program Representative administratively located in a unit, division, office, agency or department which has a governing board with members who have COIs?
 3. Does the Program Representative have responsibilities for any of the functions or programs listed in #1?

B. Remove or Remedy

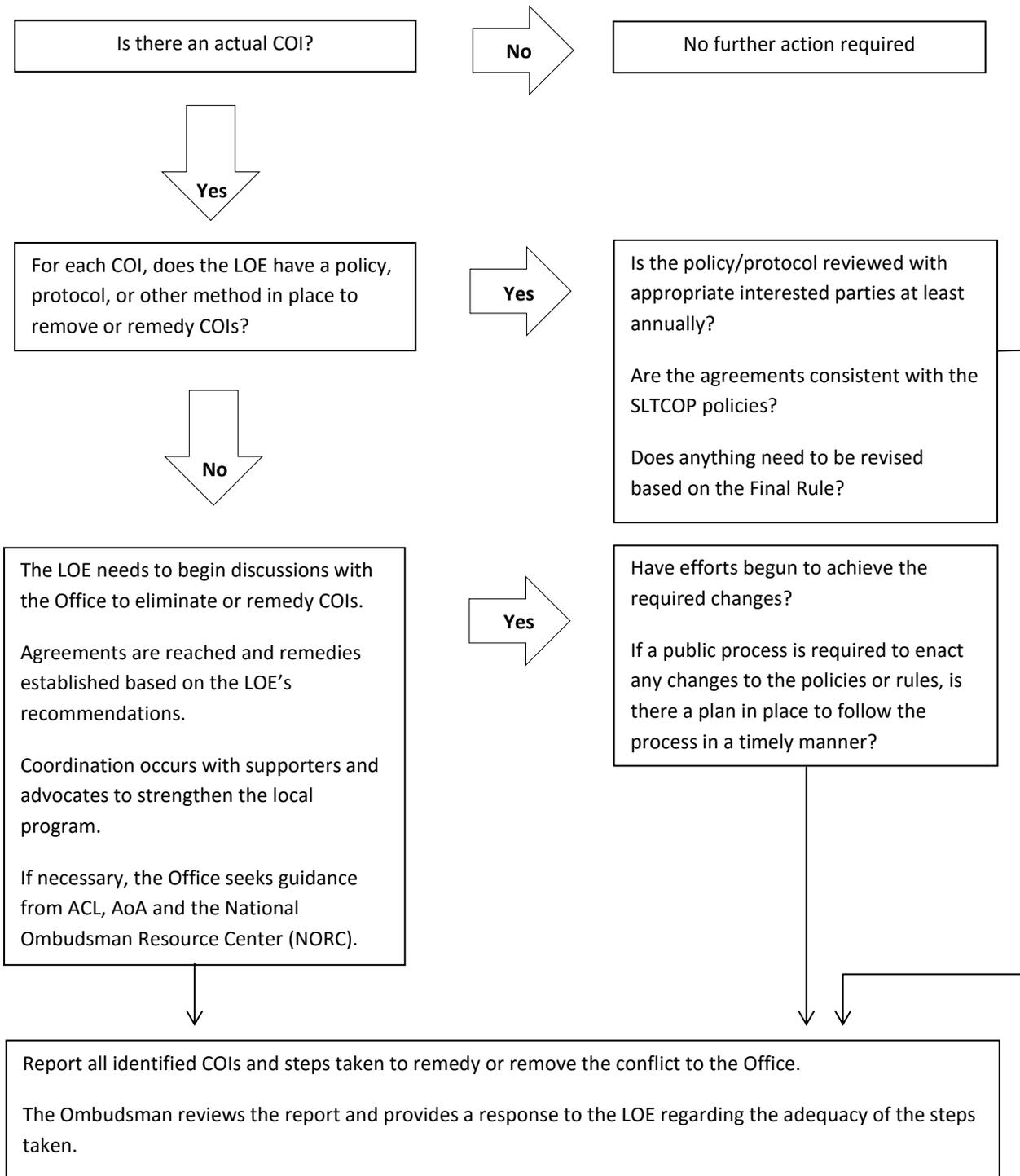
1. Both the Local Ombudsman Entity and the Office have a duty to remove/remedy the COI.
2. The Local Ombudsman Entity must establish a plan for how to remove or remedy conflicts where a COI has been identified.
3. If a Local Ombudsman Entity fails to disclose a COI or is unable to adequately remove or remedy the COI, the Ombudsman may elect to:
 - a. Refuse to designate;
 - b. Suspend; or
 - c. Remove designation of the LOE.

C. Report

1. The LOE must report identified conflicts and steps taken to remove or remedy them. This will become part of the Annual Monitoring Report.
2. The Office, in turn, must report identified conflicts and steps taken by the LOE to remove or remedy identified conflicts to ACL utilizing the submission of an annual report through the National Ombudsman Reporting System (NORS).
3. ACL will review the annual report and provide a response regarding the adequacy of steps taken.

Organizational Conflict of Interest Flowchart

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



3. Has the role of the local ombudsman changed?

Yes. The focus of the Ombudsman program and the critical role we play in the continuum of consumer care is now clearer than ever. Program Representatives should carry out all of their activities based on one primary question; “What does the consumer want?”

Program Representatives will be asked to reflect at all times on whether there are any circumstances present that prevent him/her from acting *or from being perceived as acting* in a completely impartial manner, and to take steps to address it. This may mean re-assigning a case or even a facility to another Program Representative.

4. How does a Program Representative know if they have an INDIVIDUAL conflict of interest according to the final rule?

Integrity, trust, accuracy, and impartiality are some of the key elements of the Ombudsman program. Once trust is broken between a consumer and a Program Representative, it is difficult, if not impossible, to rebuild. In an effort to avoid that, all Program Representatives are now required to disclose all conflicts of interest, as well as a corrective plan of action to remedy them. On a regular basis, or as conflicts arise, the Office will require you to revisit your disclosures and monitor your program’s ability to remain a trusted resource.

Some examples of conflicts of interest:

- A. A Program Representative is not permitted to have any type of employment at any long-term care facility. A Program Representative may not perform ombudsman duties at any long-term care facility in which an immediate family member is currently employed OR resides.
- B. A Program Representative may not participate in any management of a long-term care facility. A Program Representative may not perform ombudsman duties at any long-term care facility in which an immediate family member has management responsibilities.
- C. A Program Representative may not have any part of investment or ownership of any long-term care facility (existing or proposed). A Program Representative may not perform ombudsman duties in a long-term care facility (existing or proposed) in which an immediate family member has investment or ownership.
- D. A Program Representative may not have any involvement in licensing or certifying any long-term care facility. A Program Representative may not perform ombudsman duties

in a long-term care facility in which an immediate family member is responsible for licensure or certification.

- E. A Program Representative cannot receive cash or any other form of gift, gratuity from any owner, operator, facility staff, immediate family member, consumer or a consumer representative in relationship to providing services at a long-term care facility.
- F. A Program Representative may not have responsibility of the following program areas while being a designate of the Ombudsman Program: adult protective services, older adult protective services, pre-admission screening, discharge planning, case management or serving as a (guardian, power of attorney or other surrogate decision-maker) in any facility in which the above duties are being applied.
- G. A Program Representative may not be implicated or involved in any pending legal action involving a long-term care facility.

THE BOTTOM LINE:

A Program Representative **may not** participate in any activities which:

- Negatively impact their ability to serve consumers in long-term care facilities, or
- Are likely to create a perception that the Program Representative's primary role is other than as consumer advocate.

5. How would an individual remedy a conflict of interest?

Where individual conflicts have been identified; a written remedial plan outlining the following steps shall be taken when the conflict cannot be immediately remedied:

- A written plan shall be provided to the Ombudsman within fifteen (15) calendar days of identification of the conflict.
- The plan must identify the conflict and provide assurances, which shall minimize to the greatest extent possible the negative impact of the conflict on the Program. An example of such an assurance could include prohibiting the Program Representative who has a conflict of interest from providing ombudsman services to consumers in the facility with which he/she has a conflict and arranging for another Program Representative to serve those consumers. Where appropriate, this arrangement

could be time-limited.

- The written plan must be mutually agreed upon and signed by the Local Ombudsman Entity, the Program Representative who has the conflict of interest, and the Ombudsman.
- Failure on the part of a Program Representative or the Local Ombudsman Entity to identify and report a known conflict of interest to the Office may be sufficient grounds for refusal to certify or may result in de-certification of the Program Representative by the Ombudsman.

6. *Does the final rule prohibit Program Representatives from being mandated reporters?*

Yes. The Rule (and the OAA) prohibit reporting of consumer-identifying information without the consumer's permission and, by logical extension, mandated reporting of suspected abuse which discloses such information.

When the Ombudsman Program receives any complaint (including, but not limited to, an abuse-related complaint), the goal is to resolve the complaint to consumer satisfaction, not to serve as the official finder of fact in order to substantiate whether the abuse or other allegation occurred.

7. *Does this mean that the Program Representative must ignore incidents of abuse, neglect, exploitation or abandonment?*

Our role is to serve as the consumer's advocate and stay person-directed. That means we take direction from the consumer on reporting any complaints on their behalf.

Usually, when a consumer talks with us about abuse, the consumer wants us to help them take action to report. Or, they have already reported and want help with the facility's response. In the rare case that the consumer does not want us to report, we explore their concern and offer options for them to consider and decide what to do. Most often, this results in the abuse getting reported, but still with respect to the consumer's direction.

If a consumer is not comfortable with reporting abuse, then we need to consider other strategies. We can talk with other consumers to see if they reveal that they have been abused and would be willing to report, and talk with family members and staff about any signs of abuse in the facility. If it is possible to do without compromising the consumer's wishes, we should remind family and staff members of their duty to report suspected abuse.

As a consumer advocate, it's important to empower the consumer, especially in abuse circumstances. This is similar to the role of a victims services advocate. We do not substantiate whether abuse occurred, but we listen and help them to solve any problems related to the situation.

Ombudsmen are an important part of the elder justice system. We educate the public about consumer rights and reporting requirements, respond to and support the consumer when abuse happens, and inform the public and law makers about what needs to change in the system.

We need to ensure our message offers our support as a resident advocate, but still directs the person to report to Protective Services (and the facility if applicable) for investigation of whether abuse occurred.

Should a Program Representative observe an incident of abuse or neglect *and*:

1. the consumer is cognitively or physically unable to communicate consent to report; *and*
2. no other consumer representatives have been appointed; *and*
3. with certainty that it is in the best interest of the consumer, a Program Representative may proceed to cause a report to be made, as appropriate.

8. *What is the process for filing a grievance related to the Ombudsman Program?*

To be responsive to concerns that individuals may have regarding the performance of the Ombudsman, Program Representative or the Ombudsman Program, (policies and/or procedures), all grievances shall be documented, with outcomes, and any relevant actions.

- All grievances related to a Program Representative shall be submitted in writing to the Office within 10 business days from the event or from knowledge of the event.
- The Ombudsman shall investigate the complaint within 10 business days and provide a response back to the complainant documenting the outcome of the findings.
- Notwithstanding the grievance process, the Ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a Program Representative.
- All grievances related to the State Long Term Care Ombudsman shall be submitted in writing to the Secretary of the Department of Aging within 5 business days from the event or from knowledge of the event.

- The Secretary of the Department of Aging shall investigate the complaint within 10 business days and provide a response back to the complainant documenting the outcome of the findings.

WHAT WE DON'T WANT TO LOSE

- Collaboration and cohesion of Older Americans Act services.
- An understanding of the Older Americans Act and compliance with PA Statute 71 P.S. Chapter 581-3.
- Localized expertise and prompt response.
- Focus on consumers of long-term care. They need us to be there with and for them.

WHAT WILL CONTINUE

- Staff ombudsmen are hired and fired by the AAA or subcontracted host agency. Volunteers are recruited and trained by the local ombudsman entity. Personnel management by AAAs also includes:
 - Oversight of compliance with host agency policies that do not restrict an ombudsman from performing official duties
 - Timesheet, attendance, and related
 - Determining salary and benefits
 - Assigned work space and equipment
- Ombudsmen get consent from residents and others to be able to work on their behalf. With express permission, this can include other AAA services, reporting complaints to regulatory, attorneys, law enforcement, other long-term services and work with other agencies to resolve a problem or get needed information. It applies to all situations, including abuse, neglect, and exploitation.
- Consultation with a AAA director, other supervisor, or co-worker about hypothetical situations is appropriate.
- Volunteers go to their staff ombudsman or regional specialist for advice on how to solve a problem, to consult under certain required circumstances, and to get help when problems grow.
- Staff ombudsmen generally go through their regional specialist to consult with the LTC Ombudsman, but that is up to the regional specialist to decide. Regional specialists provide guidance on cases, technical assistance and training on ombudsman actions and

documentation, and can visit with the ombudsman, staff or volunteer at a facility or become directly involved in case resolution upon request.

- Concerns about a volunteer ombudsman's performance are often handled by the staff ombudsman without state office involvement. Upon request, or when a volunteer has a grievance, the volunteer is referred to the state office for a review of the decision. Generally in coordination with the regional specialist, the State LTC Ombudsman decides whether certification should be removed or suspended.
- Communication about general program requirements, including performance measures, and other communications from the state office go to local ombudsman entities and AAA management.
- AAA management is not included in communication between ombudsmen and state office that relates to ombudsman cases and activities.
- There are no reductions to funding for the AAAs to operate as local ombudsman entities or to subcontract the LOE.
- With permission from the person, ombudsmen should refer residents and other people to AAA services as needed.

WHAT IS EVOLVING

- Agreement between AAAs and the state office is needed on steps to take prior to hiring a potential ombudsman, and at termination.
- Complaints about volunteer ombudsman performance that cannot be resolved by at the local level need to be referred to the regional specialist or State LTC ombudsman. Notice should be given to the program representative's supervisor without identifying complainant details.
- AAA directors and other supervisors will no longer be able to serve as certified ombudsmen. They are no longer to be utilized as back-up staff. Access to OmbudsManager and confidential information of the ombudsman program cannot be disclosed without consent from the resident or other complainant. Based on federal rule and guidance from ACL/AOA frequently asked questions, AAA directors and other supervisors that are currently certified ombudsmen will have their certification status removed.
- Intake processes may need to change if a AAA is requiring all calls to come through intake. For example, the option for callers to directly reach their ombudsman needs to be available, and a process developed by the AAA intake to refer to the ombudsman program without

collection of information when the caller identifies they want help from an ombudsman, or request their ombudsman by name. Intake processes should allow for ease of transfer to the confidential phone line of an ombudsman.

- The state office may see an increase in consultation and support needed for local ombudsmen, and will need to prioritize time for calls and travel as demand for that support dictates.
- AAA policies may not interfere with ombudsman work, including systems advocacy and contact with the media (per direction from the state office). Policies will need to be reviewed for compliance.
- The role of the long-term care ombudsman in a modern system of long-term care services and supports is evolving. As Pennsylvania transforms its services for long-term care from institutional settings to more community based settings, the role of the ombudsman could expand. Historically, the role of the ombudsman has been to hold systems accountable to fulfill their responsibilities to residents. The potential role for the ombudsman in a long-term care system could be the same.

OTHER AREAS FOR CONSIDERATION

Feedback received on personnel management described some specific questions and concerns, which are addressed below.

PA Statute for provision of services is broader in scope than the Older Americans Act.

Hiring

- AAAs need flexibility and authority to hire the most qualified applicant and remain in compliance with employment law. The state office wants to ensure that individuals hired as ombudsmen meet program requirements and are qualified to perform ombudsman functions.

Firing

- At termination of a staff ombudsman, the state office needs to be promptly informed. If the decision to terminate an employee involves compliance with ombudsman policies and procedures, the host agency and state office will coordinate and share information as needed.

Staff ombudsman performance evaluations

- Aggregate data and program activities are not confidential and may be released to the host agency.
- If special analysis is needed, or if AAAs and host agencies would like to develop a form for the state office to complete upon request, an analysis of an ombudsman's performance is information that can be prepared and shared to meet the needs of local personnel management.

Compliance with performance measures

- To help us respond to concerns about a host agency being held accountable for performance measures when they do not manage the program, specific information is requested by the state office to understand what is needed by a AAA or other agency to manage contractual responsibilities and meet performance measures.