New Long-Term Care Ombudsman Rule, New Opportunities

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Overarching ACL Goals re: LTCO Rule

• High quality ombudsman services for residents
  – Credible, person-centered problem-solvers with and for residents,
  – Effective, astute advocates for resident-centered systems change in long-term services and supports.

• Provide clarity to provisions of the Older Americans Act,
  • especially those that are uniquely applied to the LTC Ombudsman program
  • Provide flexibility for States in their establishment of the Program,
  • balanced with the need for consumers to have access to consistent, quality ombudsman services
Law = Older Americans Act
Public Law 109-365
42 U.S. Code Chapter 35

Regulation =
45 CFR Part 1321
OAA Title III
45 CFR Parts 1326 and 1328
OAA Title VI
45 CFR Part 1327
OAA Title VII

Guidance; examples =
Program Instructions
Letters to states
Frequently Asked Questions (FAQs)
State Unit on Aging is ACL’s grantee

- ACL’s authority to administer State LTC Ombudsman Programs program is through Older Americans Act (OAA) grants to State Units on Aging (SUAs)
  - “In order to be eligible to receive [Title VII allotment] made available to carry out this chapter, a State agency shall . . . (Section 712(a)(1))
  - “. . . 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 . . .” (Section 712(a)(4)(A))
- ACL holds the SUA accountable for program compliance
  - even if SUA doesn’t house the State LTC Ombudsman or provide LTC Ombudsman services directly
- LTCOP Rule (45 CFR Part 1327) is part of OAA grant compliance requirements.
Now that the long-awaited Rule is published. . .

what’s next?

- **All** states will need to review – and some will need to revise -- their laws, regulations, policies and/or practices.

- ACL Regional Offices, National Ombudsman Resource Center, and Office of LTC Ombudsman Programs available to assist states.

- ACL is providing a delay in implementation until **July 1, 2016** in order to assist states with training and technical assistance.
Between now and July 2016 . . . ACL Activities

• Training/Dialogues
  • Internal at ACL -- 11/4/14 (all), 1/5/15 (Regions)
  • Hosted by ACL Regions
    • III & IV – 2/23/15
    • V & VII – 3/17/15 (part of elder justice dialogue)
    • VI & VII SUA training – June (tentative)
      • Hosted by NASUAD – 3/26/15
      • Hosted by Consumer Voice -- May

• TA/Response to Questions (to Central Office, Regions, LTCOmbudsman.Rule@acl.hhs.gov)

• Work with Regions as they prepare for state reviews

• FAQ development
Between now and July 2016 . . . National Ombudsman Resource Center Activities

- NORC – [www.ltcombudsman.org](http://www.ltcombudsman.org)
  - Hosted webinar (3/2/15, archived)
  - Resources (e.g., Overview of LTCOP Rule, posted 3/23/15)
  - TODAY!

- TA/Response to Questions
  - Especially:
    “What do other States do about . . . ?”
What happens after July 2016?

• As granting agency, ACL will work with grantees (SUAs) to support compliance
  – The current focus: How to apply the rule in your state?

• Efforts typically include coordination between:
  – ACL Central Office and Region
  – State Unit on Aging
  – State LTC Ombudsman
  – Host Agency (where applicable)
What happens after July 2016?

• ACL/AoA monitors/determines compliance through:
  – TA/Meetings with grantees
  – State Reviews
    • Expect questions re: issues identified as result of LTCO rule and any plans for changes needed in your State
  – Letters to grantees
  – Compliance Reviews

• Consequence if out of compliance:
  – In violation of State Plan on Aging
  – Remedies available under 45 CFR 75.371
Selected Topics of Focus – 45 CFR 1327

.11 Establishment

- Full time State Ombudsman -- (c)
- Grievance Process -- (e)(7)

.13 State Ombudsman Functions and Responsibilities

- Designation/de-designation -- (c)

.15 SUA responsibilities

- Legal Counsel -- (j)

.19 Representative of the Office duties

- Abuse investigations and reporting -- (b)(3)(iii), (5)-(8); .11(e)(3)(iv) re: Disclosure P&P
- Residents unable to communicate consent -- (b)(2)(iii), (5)-(7)

.21 Conflicts of Interest – Organizational -- (a)–(b)
How does your state fulfill -- or plan to fulfill -- the requirements?
1327.11(c) Full-Time Ombudsman

**Law:** “The Ombudsman shall serve on a fulltime basis. . . .” (712(a)(3))

**Rule:** SUA must require that the Ombudsman serve on a *full-time basis*:
- Functions, responsibilities and duties listed in .13 and .19 constitute the entirety of the Ombudsman’s work
- SUA shall not require or request the Ombudsman to be responsible for leading, managing, or performing the work of non-ombudsman services or programs
  - Exception: time-limited, intermittent
- Not prohibited from serving additional populations (e.g., in-home, adult day services, dually eligible, managed care), but OAA appropriations utilized to serve LTC facility residents
How does your state fulfill the full-time Ombudsman requirement?
1327.11(e)(7) Grievance Process

**Law:** Not required

**Rule:** Policies and procedures must establish a grievance process:

- For the receipt and review of grievances . . .
- Regarding the determinations or actions . . .
- Of the Ombudsman or representatives of the Office.

- Must include opportunity for reconsideration of Ombudsman designation decisions.

- Ombudsman retains authority to make final designation decisions.
How does your state fulfill the grievance process requirement?
1327.13(c) Designation

**Law:** “the Ombudsman may designate an entity as a local Ombudsman entity, and may designate an employee or volunteer to represent the entity.” (712(a)(5))
- Training procedures (712(h)(4)) and required of representatives prior to carrying out activities (712(h)(5))

**Rule:** The Ombudsman shall determine designation, and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office.
- Where designate local Ombudsman entities:
  - Review and approve plans or contracts governing local Ombudsman entity operations.
  - Monitor Ombudsman program performance on regular basis.
1327.13(c) Designation (continued)

- Ombudsman shall establish training requirements (i.e. certification and continuing education) of representatives of the Office.

- Prohibit representative of Office from carrying out duties unless trained and approved by Ombudsman as qualified

- Duty to investigate allegations of misconduct (links back to grievance process requirement)

- Grounds for de-designation: policies, procedures, practices Ombudsman determines to be in conflict with the laws, policies, procedures governing the LTC Ombudsman program
How does your state fulfill the designation-related requirements?
Law: The State agency shall ensure that adequate legal counsel is available and is able, without conflict of interest, to:

• Provide advice and consultation needed to protect the health, safety, welfare and rights of residents;

• Assist the Ombudsman and representatives in the performance of official duties; and

• Represent any representative of the Office against whom suit or other legal action is brought or threatened.

• State shall ensure that the Office pursues administrative, legal and other appropriate remedies on behalf of residents. (712(g))
Rule: The State agency shall ensure that:

• Legal counsel is adequate, available, has competencies relevant to the legal needs of the program and of residents, and

• Is without conflict of interest (as defined by State ethical standards governing the legal profession), in order to:

• Provide consultation and representation as needed to protect the health, safety, welfare and rights of residents;

• Provide consultation and/or representation to assist the Ombudsman and representatives in the performance of official duties, including complaint resolution and systems advocacy; and
Rule: The State agency shall ensure that:

- The Ombudsman and representatives of the Office assist residents in seeking administrative, legal and other appropriate remedies. In so doing, Ombudsman shall coordinate with:
  - The legal services developer,
  - Legal services providers, and
  - Victim assistance services

  . . . to promote availability of legal counsel to residents.

- Legal representation, arranged by or with approval of Ombudsman, is provided to the Ombudsman or representative of the Office against whom suit or other legal action is brought or threatened.
How does your state fulfill the legal counsel requirements?
1327.19 Duties of the representatives – person-centered complaint resolution

*Person-centered* complaint processing approach—the Ombudsman or representative of the Office shall:

- Support and maximize resident participation;
- Offer privacy;
- Discuss the complaint with the resident (and/or resident’s representative) in order to:
  - Determine the perspective of the resident;
  - Request informed consent in order to investigate the complaint;
  - Determine the wishes of the resident with respect to resolution of the complaint, including:
    - whether the allegations are to be reported
    - disclosure of information to the facility and/or appropriate agencies.
- Advise the resident of his/her rights;
- Work with the resident to develop a plan of action for resolution of the complaint;
- Investigate to determine whether the complaint can be verified; and
- Determine whether the complaint is resolved to the resident’s satisfaction. (b)(2)
1327.19 Duties of the representatives of the Office – resolving abuse complaints

Law: The Ombudsman shall personally, or through representatives of the Office:
• identify, investigate, and resolve complaints
• that are made by, or on behalf of residents; and
• relate to action, inaction, or decisions, that may adversely affect the health safety, welfare, or rights of the residents, of
• providers, public agencies, or health and social services agencies. (712(a)(3))

NOTE: Act does not exclude complaints related to abuse, neglect or exploitation.
1327.19 Duties of the representatives of the Office – resolving abuse complaints (continued)

Rule: The Ombudsman or representative of the Office shall investigate a complaint, including but not limited to a complaint related to abuse, neglect, or exploitation, for the purposes of resolving the complaint to the resident’s satisfaction and of protecting the health, welfare, and rights of the resident. (b)(1)

- Including if resident unable to communicate informed consent and no resident representative (b)(2)(iii) (i.e. “unbefriended” resident)
How does your state fulfill the requirements related to:
- Ombudsman program resolution of complaints of abuse, gross neglect or exploitation?
- Serving residents who are “unbefriended”? 
1327.19 Duties of the representatives – reporting abuse

**Law:** The State agency shall establish procedures for the disclosure of Ombudsman files. Such procedures shall prohibit the disclosure of the identity of any complainant or resident unless:

- the complainant or resident (or legal representative) consents to the disclosure, or
- the disclosure is required by court order. (712(d)(2)(B))

**NOTE:** OAA silent on issue of reporting/disclosure where a resident is unable to communicate consent.
1327.19 Duties of the representatives – reporting abuse (continued)

Rule: **Prohibits** program from disclosing information regarding suspected abuse, neglect or exploitation of a resident without informed consent (if resident able and/or has resident representative).

- Regardless of state mandatory reporting laws (b)(3)(iii)

- **Ombudsman or representative:**
  - **must** assist resident with referral and/or disclose information if goals of resident or resident representative are for regulatory, protective services, or law enforcement action. (b)(3)(i)
  - **may** assist with referral, provide referral information, and/or disclose information to other entities to assist with resident goals. (b)(3)(ii)
How does your state fulfill the requirements related to abuse reporting where resident can consent?
1327.19 Duties of the representatives – reporting abuse when resident “unbefriended”

Law:

OAA silent on issue of disclosure of information/reporting where a resident is unable to consent.
1327.19 Duties of the representatives – reporting abuse when resident “unbefriended” (continued)

Rule: Ombudsman/representative may refer and disclose resident-identifying information to appropriate agencies, IF:

- Resident unable to communicate informed consent (and no resident representative);
- Reasonable cause to believe that an action, inaction or decision may adversely affect the health, safety, welfare, or rights of the resident;
- No evidence that resident would not want referral;
- Reasonable cause to believe that it is in the best interest of the resident to refer, AND
- Representative of the Office obtains Ombudsman approval (or follows Office policies and procedures) . (b)(6)
How does your state fulfill the requirements related to abuse reporting where resident cannot consent (i.e. unbefriended)?
1327.19 Duties of the representatives – reporting abuse when witnessed by Ombudsman/represented

Law: OAA silent on issue of disclosure of information/reporting when suspected abuse is witnessed by the Ombudsman or a representative of the Office.
1327.19 Duties of the representatives – reporting abuse when witnessed by Ombudsman/representative

Rule: If the Ombudsman or representative personally witnesses suspected abuse, gross neglect, or exploitation, THEN:

- Shall seek resident consent and follow direction.
- If “unbefriended” resident, shall:
  - Open a case with Ombudsman/representative as the complainant,
  - Follow complaint resolution procedures, AND
  - Refer and disclose information to facility management and/or appropriate agency if:
    - No evidence that resident would not want referral
    - Reasonable cause to believe that disclosure would be in best interest of resident, AND
    - Representative obtains Ombudsman approval (or follows program policies).
How does your state fulfill the requirements related to abuse reporting where it is witnessed by the Ombudsman/representative?
1327.21  Conflicts of interest -- organizational

**Law:** The State agency may not enter into a contract or other arrangement to operate the Office and carry out the program with:

- Agency responsible for licensing or certifying long-term care services;
- Association of long-term care facilities. (712(a)(4)(B))

The State agency shall ensure that:

- No individual, or immediate family of individual, involved in designating the Ombudsman is subject to conflict of interest. (712(f)(1))
- No representative, or immediate family of representative, is subject to COI (712(f)(2))

The State agency shall establish mechanisms to identify and remove conflicts of interest. (712(f)(4))
1327.21 Conflicts of interest – organizational (continued)

**Rule:** First step: identify the COI -- (a)

**Examples:**
- Licenses, surveys, or certifies long-term care (LTC) facilities;
- Is an association of LTC facilities;
- Has ownership or investment interest in a LTC facility;
- Has governing board members with ownership, investment or employment interest in LTC facilities;
- Provides long-term care to residents of LTC facilities;
- Provides case management for residents of LTC facilities;
- Sets reimbursement rates for LTC facilities;
- Provides adult protective services;
- Is responsible for eligibility determinations for residents of LTC facilities;
- Conducts preadmission screening for LTC facility placements;
- Makes decisions regarding admission/discharge to or from LTC facilities; or
- Provides guardianship or other decision-making services for residents of LTC facilities.
1327.21 Conflicts of interest -- organizational (continued)

Rule: Second step: remove or remedy the COI -- (b)

- Both SUA and Ombudsman have duty to identify and remove/remedy the COI.
- Prohibited COI (i.e. cannot be remedied): Placement of the Ombudsman program (includes local Ombudsman entities) in an organization that:
  - Is responsible for licensing, surveying, or certifying LTC facilities;
  - Is an association (or an affiliate of such an association) of LTC facilities; or
  - Has any ownership, operational, or investment interest in a LTC facility.

Additional information:

- Many states (especially when Office is located in SUA'; local Ombudsman entities within AAA) currently have COI.
- Rule doesn’t necessarily require relocation, but does require steps to remove or remedy the COI.
- Rule indicates that “remedy” may be sufficient i.e. the rule permits some conflicting responsibilities to co-exist in an agency so long as firewalls and other policies adequately separate conflicting program operations.
1327.21 Conflicts of interest – organizational (continued)

Rule: Where there are local Ombudsman entities, Ombudsman shall:

• Prior to designation, take steps to avoid COI
• Establish process for review and identification of COI
• Require disclosure of COI by agency hosting a local Ombudsman entity
• Establish process and criteria for approval of remedies/removals of COI (b)(6)
1327.21 Conflicts of interest -- organizational (continued)

Rule: Third step: report steps taken to remove/remedy the COI

- Ombudsman must report:
  - Identified COI and
  - Steps taken to remove/remedy identified COI in NORS
- Applies to Ombudsman program (i.e. includes local Ombudsman entities) (b)(1), (b)(2(v).

Additional information:
- NORS reporting--Paperwork Reduction Act (PRA) notice planned in 2015.
- Ultimately, ACL/AoA responsible for determining adequacy of removal/remedy.
1327.21 Conflicts of interest -- organizational (continued)

Rule: *Policies and procedures*

- COI policies and procedures required in 1327.11(e)(4)
- Where State agency contracts out the Office, State agency must have processes in place to avoid current--and to identify and address future--organizational COIs.
- Where local Ombudsman entities are designated, Ombudsman must have process in place to avoid current--and to identify and address future--organizational COIs.

Additional information:

- ACL anticipates requests for additional TA and sub-regulatory guidance regarding organizational COI.
How does your state fulfill the organizational conflict of interest requirements?
Questions or comments?

ACL has created a dedicated e-mail for Rule-related questions and requests for TA:

LTCOmbudsman.Rule@acl.hhs.gov