



State Long-Term Care Ombudsman Programs NPRM: Consumer Voice Briefing

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Older Americans Act: 42 USC §§ 3001 et seq.

- Creates the Aging Network – State units on aging, area agencies on aging, service providers, and advocates;



- Provides core services:
 - Title III (social and nutrition services),
 - Title VI (services for tribes), and
 - Title VII (elder rights, includes Long-Term Care Ombudsman programs); and
- Leverages other federal, state and local funds and resources to deliver an array of long-term and social supports and services to older Americans.

LTC Ombudsman Program Origins

- Created in 1970s -- Nursing Home Ombudsman Program created as part of President Nixon's initiative to improve conditions and respond to widespread reports of resident abuse in nation's nursing facilities.
- Expanded in 1980s – Long-Term Care Ombudsman Program to serve individuals in other long-term care facility settings (i.e. assisted living, board and care, and other similar adult care facilities.)
- Since inception:
 - Vision: an independent entity able to represent consumer interests.
 - A person-centered consumer protection service that resolves problems and advocates for the rights of individuals
 - No regulations to fully implement the Program and provide consistent level of consumer protection across States.
 - Challenges to full implementation due to bureaucratic structures and/or political environment of many States.



Program description

A person-centered consumer protection service that provides:

- Individual complaint resolution
- Policy level advocacy

An elder justice service:

- 11% of older adults report being a victim of abuse or neglect within the past year (2009, DOJ)
- LTC Ombudsman Programs investigate and work to resolve abuse, neglect, and financial exploitation complaints for/with the consumer
- LTC Ombudsman Programs worked to resolve over 18,283 abuse, neglect, exploitation complaints for/with victims (9% of 200,000 complaints) (FY 2011)

Assistant Secretary for Aging Kathy Greenlee:

“I have one priority that rises above all others: address and end elder abuse. This is not solely a federal issue, this is a national crisis. I accept the challenge to commit myself professionally and personally to this cause. What about you?”



LTC Ombudsman Functions: OAA Section 712

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—
 - (I) providers, or representatives of providers, of long-term care services;
 - (II) public agencies; or
 - (III) health and social service agencies

Inform the residents about means of obtaining services

Ensure that the residents have **regular and timely access** to the services . . . and that the residents and complainants receive timely responses . . . to complaints

LTC Ombudsman Functions (continued)

Represent the interests of the residents before governmental agencies and **seek administrative, legal, and other remedies** to protect the health, safety, welfare, and rights of the residents

Analyze, comment on, and **monitor the development and implementation of** Federal, State, and local laws, regulations, and other **governmental policies and actions**, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care

Recommend . . . changes in such laws, regulations, policies, and actions



LTC Ombudsman Functions (continued)

Facilitate public comment on laws, regulations, policies, and actions

Promote the development of citizen organizations to participate in the program

Provide technical support for the development of resident and family councils



Program structure: Staff and volunteers

- Each state has one State Long-Term Care Ombudsman
- The State LTC Ombudsman has the authority to designate representatives
- Both centralized and de-centralized (often through area agencies on aging) program structures
- Representatives may be staff or volunteers (and are often called “ombudsmen”)
- Nationally, there are:
 - 1,185 FTE staff ombudsmen
 - 9,065 certified ombudsmen volunteers
 - 3,320 other volunteers

Source: Administration on Aging, FFY 2011



Program Structure: State LTCO Location

In State Unit on Aging (36 states; 2 territories)

In Independent SUA:

Alabama, Florida, Idaho, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, New Mexico, West Virginia

In (or attached to) SUA inside umbrella agency:

Arizona, Arkansas, Connecticut, Guam, Hawaii, Indiana, Kentucky, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, Utah

Separate office, reporting to SUA director: California, Georgia, Iowa, Minnesota

Elsewhere in state government (7 states)

Alaska, Delaware, Kansas, New Hampshire, New Jersey, Oregon, Wisconsin

In non-profit agency (7 states; DC)

District of Columbia, Colorado, Maine, Rhode Island, Vermont, Virginia, Washington, Wyoming

Need for rulemaking

USA Today/Kaiser Health News articles (January 2013):

- “Long-Term Care Ombudsmen Face Challenges to Independence”
- “Ombudsmen Face Obstacles from State Officials”
- Response from a State Ombudsman to ACL:

“[M]y current boss . . . ‘gets it’ so I’m free to speak to whoever I want to and testify on various bills. BUT he’s an appointee and when I get a new Governor I also get a new boss . . . and then we have to establish the ground rules all over again. It shouldn’t be so arbitrary. We’re so lucky [Assistant Secretary Greenlee and other AoA staff] have all ‘been there’ BUT that too can change and so what can AOA and Congress do to ‘solidify’ the original intent of being an independent advocate for our most vulnerable seniors??”

Need for rulemaking (continued)

- Need for regulations identified by:
 - AoA compliance review in one State highlighted difficulty of determining State compliance in carrying out basic program requirements and addressing operational challenges.
 - Several DHHS Inspector General reports
 - Required by OAA related to conflict of interest provisions

Need for rulemaking (continued)

Institute of Medicine: Real People, Real Problems: An Evaluation of the Long-Term Care Ombudsman Programs of the Older Americans Act:

“identified considerable barriers to effective performance that the ombudsman programs encounter. Significant among these are:

- Inadequate funding,
- Resulting staff shortages,
- Low salary levels for paid staff,
- **Structural conflicts of interest that limit the ability to act,**
- **Uneven implementation within and across states.”**

(Institute of Medicine, 1995, at p. 161)

Last two barriers addressed by NPRM.

Rulemaking history

- 1988 – current 45 CFR 1321 regulations promulgated
 - At time, LTC Ombudsman Program was included within Title III of OAA
- 1994 – NPRM for Title VII regulations
 - Designed to implement 1992 reauthorization of OAA, which created Title VII
 - Included regulations for LTC Ombudsman Program
 - No Final Rule was published
- 2013– Assistant Secretary for Aging Kathy Greenlee developed NPRM (with HHS Secretary Kathleen Sebelius' support) because of its potential:
 - As a high-impact legacy for protecting consumers and responding to abuse of vulnerable older adults
 - With minimal cost or burden

NPRM Topics:

- limited to areas of greatest inconsistency/need for regulatory guidance to States
- preamble explains rationale behind the proposed regulations

A. State Agency Policies

Definitions:

B. Immediate Family

C. Office of the State Long-Term Care Ombudsman

D. Representatives of the Office of the State Long-Term Care Ombudsman

E. Establishment of the Office of the State LTC Ombudsman

F. Functions and Responsibilities of the State LTC Ombudsman

G. State Agency Responsibilities Related to the LTC Ombudsman Program

H. Functions and Duties of the Office of the State LTC Ombudsman

I. Conflicts of Interest

OAA Terms used frequently in NPRM

Ombudsman – the individual State Long-Term Care Ombudsman

Representative of the Office -- includes individuals designated by the Ombudsman as a local, regional, or district “ombudsman” (whether staff or volunteer)

Local Ombudsman entity – area agency on aging or non-profit entity designated by the Ombudsman to operate a local, regional, or district long-term care ombudsman program

A. State Agency Policies

New language proposed at §1321.11(b):

“The State Long-Term Care Ombudsman and his or her designee shall be responsible for monitoring the files, records, and other information maintained by the Office, and shall not disclose the identity of any complainant or long-term care facility resident to individuals outside of the Office, except as otherwise specifically provided in § 1327.17(b)(2)(C) of this chapter.”

Significance:

- Replaces language which permitted the director of the State agency on aging and one other senior manager to review redacted files of Ombudsman Program.
- Digital information and information obtained verbally and by other means are protected in addition to hard copies of “files” as noted in current regulation.
- State agencies need information to oversee Ombudsman program operations and personnel and/or contract management.
- AoA invites comments to help find an appropriate balance between Ombudsman protection of confidential information and State oversight responsibilities.



1327.1 Definitions

Immediate Family

“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.”

Rationale:

- Definition is derived from federal standards of ethical conduct.
 - 5 CFR §2635.502(a),(b)

Significance:

- Absent a definition, this term has created uncertainty and inconsistency among States related to the scope of conflicts that are required to be identified and removed.
- Describes relationships that could impair the judgment or give the appearance of bias.
- OAA applies the term to:
 - any individual who designates the State Ombudsman,
 - the State Ombudsman, and
 - representatives of the Office.

1327.1 Definitions (continued)

Office of the State Long-Term Care Ombudsman

“Office of the State Long-Term Care Ombudsman, as used in section 712 of the Act, means the organizational unit headed by the State Long-Term Care Ombudsman, and including the representatives of the Office.”

Rationale:

- AoA proposes that the State LTC Ombudsman and his/her representatives constitute the Office.
- OAA indicates:
 - the Office shall be “headed by an individual, to be known as the State Long-Term Care Ombudsman.”
 - State LTC Ombudsman has the responsibility for designating local Ombudsman entities and employees and/or volunteers as representatives.

Significance:

- OAA indicates a number of “determinations” that are to be made by “the Office.”
 - Example: “The State agency shall require the Office to . . . recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate. . . .”

1327.1 Definitions (continued)

Representatives of the Office of the State Long-Term Care Ombudsman

“Representatives of the Office of the State Long-Term Care Ombudsman, as used in section 712 of the Act, means the employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1327.17(a), whether supervised by the Ombudsman or his or her designees or by a local entity designated by the Ombudsman pursuant to section 712(a)(5) of the Act.”

Rationale:

- Act is unclear whether the “representatives of the Office” are to represent the Office or to represent the local Ombudsman entity.
- Clarifies that the representatives of the Office, including local staff and volunteers designated by the Ombudsman, represent the Office.

Significance:

- “Representatives of the Office” are accountable to the head of the Office (i.e. the State Long-Term Care Ombudsman) for purposes of Ombudsman program operations.

1327.11 Establishment of the Office

- Clarifies which determinations are the responsibility of the State LTC Ombudsman.
- Determinations are those of the Office and do not represent other State governmental entities.
- Since these determinations are frequently outside the scope of the authority of most State employees, AoA believes that clarification would assist States in full implementation of the Act.

Significance:

- The Office [i.e. the State Ombudsman and his/her representatives] is expected to make determinations as required by OAA, including:
 - Recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents;
 - Disclosure of resident/complainant information maintained by the program;
 - Provision of information to public and private agencies, legislators, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

1327.13 Functions and responsibilities of the State Long-Term Care Ombudsman

Clarifies the appropriate role and responsibilities of the Ombudsman, as the “head of the Office,” including:

- Oversight of a unified statewide program
- Designation and de-designation of representatives of the Office
- Involvement in area plan reviews and monitoring local Ombudsman entities, where applicable
- Management and disclosure of Ombudsman program information
- Proposal of Ombudsman program policies, procedures and standards
- Leadership of statewide systems advocacy efforts of the Office
- Determining the use of fiscal resources of the Office
- Development and approval of an annual report
- Coordination with entities responsible for the protection of vulnerable adults

1327.15 State agency responsibilities related to the Ombudsman Program

- The State agency must establish the policies and procedures which enable the Ombudsman program to operate in accordance with the Act
 - Includes provisions for the Ombudsman to provide leadership of the Office
 - Requires coordination of Title VII programs and other entities responsible for protection of vulnerable adults
- **Significance:**
 - State is to exclude the Ombudsman program from state mandatory abuse reporting requirements (however, rule indicates when reporting is appropriate)
 - State is to exclude the Ombudsman and representatives of the Office from state lobbying prohibitions which are inconsistent with the Act.



1327.17 Functions and Duties of the Office

- This section includes guidance on the duties of representatives of the Office (i.e. “local ombudsmen”)
- Proposes to clarify, among other things, complaint processing, and includes:
 - Ombudsman program responsibility when the resident is unable to communicate his or her wishes, including:
 - in abuse situations
 - Responsibility of the Office when a representative of the Office personally observes abuse

1327.19 Conflicts of interest (organizational/examples)

Placement of the Office in an organization that:

- Is responsible for licensing or certifying long-term care facilities
- Is an association of long-term care facilities
- Has ownership or investment interest in or receives grants or donations from a long-term care facility
- Has governing board members with ownership, investment or employment interest in long-term care facilities
- Provides long-term care services
- Provides long-term care coordination or case management
- Sets reimbursement rates for long-term care services



Conflicts of interest (organizational/examples--continued)

Placement of the Office in an organization that:

- Provides adult protective services
- Is responsible for Medicaid eligibility determinations
- Conducts preadmission screening for long-term care residential placements
- Makes decisions regarding admission or discharge of individuals to or from long-term care facilities
- Provides guardianship, conservatorship or other fiduciary services for residents of long-term care facilities

Conflicts of interest (organizational/process)

- State must have a process for identifying and removing/remedying organizational conflicts between the Office and organization in which it is located
- Ombudsman must have a process to identify and remove/remedy conflicts in local Ombudsman entities
- State must assure Ombudsman disclosure in the National Ombudsman Reporting System (NORS) of:
 - organizational conflicts of interest of the Office and
 - steps taken to remedy or remove the conflicts
- AoA recognizes that some States and local Ombudsman entities face significant challenges in removing or remedying organizational conflicts of interest.
- AoA seeks comments on the anticipated impact of this proposal and possible solutions.



Conflicts of interest (individual/examples)

Proposes that an Ombudsman, representatives of the Office, or members of their immediate family have a conflict of interest if they :

- Have direct involvement in licensing or certification of a long-term care facility or provider
- Have ownership or investment interest in an long-term care facility or service
- Have the right to receive remuneration from a long-term care facility
- Accept gifts or gratuities from a long-term care facility, resident or resident representative
- Accept money from anyone other than the Office for the performance of duties of the Office without Ombudsman approval

Conflicts of interest (individual/examples--continued)

An Ombudsman, representatives of the Office, and members of their immediate family have a conflict of interest if they:

- Serve as guardian or other fiduciary for a resident of a long-term care facility in the service area
- Serve residents for a facility in which an immediate family member resides
- Participate in activities which negatively impact on the ability of the Office to serve residents or create a perception that the primary interest of the Office is other than as a resident advocate
- Were employed by a long-term care facility within the service area within the previous year
- Proposed rule requires a process for identifying and remedying or removing the conflict.
- AoA seeks comments on approaches that promote integrity without disqualifying excellent candidates.

Next steps in the rulemaking process

- NPRM published at:
 - http://www.regulations.gov/#!documentDetail;D=AOA_FRDOC_0001-0002
- Public comments accepted until August 19, 2013
- Comments reviewed by ACL/AoA
- Proposed rules revised as needed
- Health and Human Services (HHS) clearance
- Office of Management and Budget (OMB) clearance
- Final rule (and responses to comments) published in Federal Register
- Effective date: NPRM proposes effective date one year after final rule published
 - Purpose: Time for States and local Ombudsman entities to make any needed changes in law, policy, structure, etc.
- ACL/AoA provides technical assistance to support State, State Long-Term Care Ombudsman, and local Ombudsman entity compliance

Comment period ends August 19, 2013.

To submit comments:

- electronically (preferred): www.regulations.gov
- by mail:
U.S. Department of Health and Human Services
Administration for Community Living/Administration on Aging
Washington, DC 20201
Attention: Becky Kurtz, Director, Office of Long-Term Care Ombudsman Programs
- by express mail or by hand:
U.S. Department of Health and Human Services
Administration for Community Living/Administration on Aging
One Massachusetts Avenue, 5th Floor
Washington DC 20001
Attention: Becky Kurtz, Director, Office of Long-Term Care Ombudsman Programs

