



# The National Long-Term Care Ombudsman Resource Center

## LONG-TERM CARE OMBUDSMAN PROGRAM FINAL REGULATIONS OVERVIEW

The information contained in this document is an overview of the Final Regulations for the Long-Term Care Ombudsman Program (amending 45 CFR Parts 1321 and 1324), published in the Federal Register, Vol. 80, No. 28, 7704-7767 (February 11, 2015). The purpose of this overview is to provide a quick reference to the provisions included in the regulation. To access the regulatory language, click [here](#).

### Definitions (§1324.1)

Contains several definitions including: *Immediate Family*; *Office of the State LTC Ombudsman*; *Representatives of the Office of the SLTCO*; *Resident Representative*; *State LTC Ombudsman program*, *Ombudsman program*, or *program*; and

- *State LTC Ombudsman*, or *Ombudsman* – the individual who heads the Office and is responsible to fulfill the functions, responsibilities, and duties of the Office him/herself or through program representatives.
- *Willful Interference* – actions or inactions taken by an individual to intentionally prevent, interfere with, or impede the Ombudsman, or representatives of the Office, from performing any of the functions, responsibilities, or duties of the Office.

### Office of the State LTC Ombudsman (§1324.11)

The State Long-Term Care Ombudsman (SLTCO) heads the Office of the State LTC Ombudsman. The Office must be a distinct entity, separately identifiable within the State Unit on Aging (State agency) or other agency or organization in which it is housed.

#### State LTC Ombudsman

The State LTC Ombudsman is required to serve on a full-time basis; performing the leadership, management, and Ombudsman program functions and duties; and is not to be responsible for the work of non-ombudsman services or programs except on a time-limited, intermittent basis. The Ombudsman may oversee ombudsman services provided to individuals other than LTC facility residents as long as OAA appropriations designated for use by the Ombudsman program are only used to serve residents.

Minimum qualifications for the SLTCO include expertise in: long-term services and supports or other direct services for older persons or individuals with disabilities; consumer-oriented public policy advocacy; leadership and program management skills; and negotiation and problem resolution skills.

### SLTCOP Policies & Procedures [§1324.11(e)]

State LTC Ombudsman Program policies and procedures must address Program Administration; Access to facilities, residents, and records; Disclosure of files, records, and other information; Conflicts of interest; Systems Advocacy; the Designation process; a Grievance process; and Determinations of the office.

### Program Administration

The State Ombudsman is responsible for monitoring the local ombudsman entity performance of Ombudsman duties, where applicable. Policies and procedures must be developed for assuring prompt response to complaints; timely access to facilities, residents, and appropriate records. A process is to be developed for coordination between the local host agency (where applicable) and the SLTCO regarding employment or appointment of local ombudsman representatives and procedures to clarify fiscal responsibilities of the local entity. Host agencies must not have policies and practices that prohibit performance of Ombudsman functions and responsibilities.

### Access provisions must include Ombudsman program access:

#### to Facilities

Access to LTC facilities during regular business hours or regular visiting hours; and at any other time required by the circumstances to be investigated.

#### to Residents

Access to all residents; and access to the name and contact information of resident representatives when necessary.

#### to Records

Access to medical, social, and other records relating to a resident with informed consent of resident or resident representative; or if no informed consent, with reasonable cause that representative is not acting in resident's best interest, and with approval of the Ombudsman. Access to facility's administrative records, policies, documents to which the resident or the general public has access. Access to all LTC facility licensing and certification records maintained by the State. HIPAA does not prevent release of information to the Ombudsman.

### Disclosure of files, records, other information

Disclosure of LTCOP files, records, or other information is only at the discretion of the SLTCO or designee in accordance with developed criteria. Disclosure of resident identifying information is prohibited without consent of the resident or resident representative (or disclosure of complainant-identifying information without consent of the complainant), or required by court order. The SLTCO and representatives of the Office are excluded from abuse reporting requirements including when the reporting would disclose identifying information of a resident or complainant without consent or court order.

### Conflicts of Interest

Policies and procedures must establish mechanisms to identify and remove or remedy conflicts of interest, including relating to the employment or appointment of the SLTCO, and regarding the designation of an individual as a representative of the Office. The methods used by the SLTCO and/or State Unit on Aging to review and identify conflicts of interest must be established, along with the actions to be taken to remove or remedy the conflicts.

### Systems Advocacy

Policies and procedures must assure that the Office of the SLTCO is required and has sufficient authority to analyze, comment on, and monitor the development and implementation of laws, regulations, policies, and actions pertaining to residents; and recommend any changes as the Office determines to be appropriate. The SLTCO and representatives of the Office must be excluded from State lobbying prohibitions that conflict with OAA provisions. Consultation with the hosting agency regarding positions or determinations of the

Office of the SLTCO can be promoted in policies and procedures, but they must not require a right to review or pre-approve positions or communications of the Office.

#### Designation

Criteria and processes must be established for designation, refusal to designate, and suspension or removal of designation of local Ombudsman entities and representatives of the Office, including situations where an identified conflict of interest cannot be removed or remedied.

#### Grievance Process

A grievance process must be established for the receipt and review of grievances regarding determinations or actions of the SLTCO and representatives of the Office. The process is to include an opportunity for reconsideration of the SLTCO decision to refuse, suspend, or remove designation of a local ombudsman entity or representative. Notwithstanding the grievance process, the SLTCO shall make the final determination to designate or to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.

#### Determinations of the Office

The SLTCO must have the ability to make independent determinations and establish positions of the Office, without representing the positions of the State agency or other entity housing the Office, regarding disclosure of information maintained by the long-term care ombudsman program (LTCOP); recommendations to changes in laws, regulations, policies, and actions; provision of information to public and private agencies, legislators, the media, and others, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

### **Functions and Responsibilities of the SLTCO (§1324.13)**

The SLTCO, as head of the Office, has responsibility for the leadership and management of the Office in coordination with the State agency or other hosting agency. S/he is required, personally or through representatives of the Office, to investigate and resolve complaints; inform residents about obtaining LTCOP services; ensure regular and timely access to LTCOP services and response to complaints and requests for information; represent resident interests before governmental agencies; assure residents access to administrative, legal, and other remedies; provide administrative and technical assistance to representatives of the Office and host agencies; analyze, comment on, and monitor the development of laws, regulations, policies, and actions, and recommend changes as appropriate; coordinate with and promote the development of citizen organizations; promote and support resident and family councils.

The SLTCO is the head of a unified, statewide program, and is to establish or recommend policies, procedures, and standards for administration of the Program; and require representatives of the Office to fulfill the duties of the Program in accordance with LTCOP policies and procedures.

#### Designation of Local Ombudsman Entities (where appropriate) and Representatives of the Office

The SLTCO determines designation, and refusal, suspension, or removal of designation of local Ombudsman entities (where appropriate) and representatives of the Office. The designation process includes approving plans and/or contracts governing local Ombudsman entity operations, and monitoring the Ombudsman program performance of local Ombudsman entities.

Allegations of misconduct of representatives of the Office in the performance of LTCOP duties are to be investigated by the SLTCO in coordination with the State agency or other host agency. Policies, procedures, or practices which the SLTCO determines to be in conflict with the laws, policies, or procedures governing the SLTCOP shall be sufficient grounds for refusal, suspension, or removal of designation of the representative of the Office and/or the local Ombudsman entity.

### Training Requirements

The SLTCO is to establish procedures for training for certification and continuing education of the representatives of the Office that specify a minimum number of hours of initial training; the content of the training; and an annual number of hours of in-service training for all representatives of the Office. Representatives of the Office are prohibited from carrying out LTCOP duties unless they have met the training requirements and have been approved by the SLTCO as qualified.

### State LTCO Program (SLTCOP) Information Management

Files, records, and other information, regardless of format (physical, electronic, etc.) are the property of, and are to be managed by, the Office of the SLTCO. This includes information maintained by representatives of the Office and local ombudsman entities pertaining to cases and activities of the SLTCOP.

### Disclosure of Files, Records, and Other Information

The SLTCO has sole authority to make or delegate determinations concerning disclosure of files, records, and information maintained by the SLTCOP. All requests for disclosure must comply with OAA requirements, regardless of the format of the information (physical, electronic, etc.), the source of the request, and the sources of funding to the SLTCOP. The SLTCO shall establish criteria to guide the SLTCO's discretion in determining whether to disclose the information, as well develop a process for the appropriate disclosure of information maintained by the Office.

### Fiscal Management

The SLTCO is to determine the use of appropriated or other fiscal resources available for the operation of the Office and approve the allocations of Federal and State funds provided to local Ombudsman entities.

### Annual Report

The SLTCO is to independently develop and provide final approval of an annual report. The report is to be made available to the public and submitted to the Assistant Secretary, the CEO of the State, the State legislature, the State Licensing & Certification Agency, and other appropriate entities.

### State Level Coordination

The SLTCO is responsible for state-level coordination, and support of local Ombudsman entity coordination with entities with responsibilities relevant to the health, safety, well-being, or rights of residents, including: Area Agency on Aging (AAA) programs; Aging and Disability Resource Centers (ADRCs); Adult Protective Services (APS) programs; Protection & Advocacy (P&A) Systems; Facility and provider licensure and certification programs; State Medicaid Fraud Control Units (MFCU); Victim Assistance Programs; State and local law enforcement agencies; Courts of competent jurisdiction and State Legal Service Developer and Legal Assistance Programs.

### **State Agency Responsibilities Related to the SLTCOP (§1324.15)**

The State Unit on Aging (State Agency), as a condition of receiving OAA funds, must: ensure that the SLTCOP has sufficient authority and access to facilities, residents, and information needed to fully perform all the functions, responsibilities, and duties of the Office; provide opportunities for training for the SLTCO and representatives of the Office, which may be funded with Title III and Title VII appropriations; provide personnel supervision and management for the SLTCO and representatives of the Office who are employees of the State Agency; monitor, including fiscal monitoring, when the Office and/or local Ombudsman entity is located within another agency under contract or agreement; integrate the goals and objectives of the SLTCOP into the State plan and coordinate them with those of those of other programs; provide elder rights leadership; and require the coordination of SLTCOP services with the activities of other Title VII programs and entities with responsibilities relevant to the health, safety, well-being or rights of older adults.

#### **Interference, Retaliation, and Reprisals**

The State Agency must ensure that mechanisms exist to prohibit and investigate allegations of interference, retaliation, and reprisals with respect to any resident, employee, or complainant, as well as against the SLTCO or representatives of the Office for performance of responsibilities or duties, and provide for appropriate sanctions.

#### **Legal Counsel**

The State Agency must ensure that Legal Counsel for the SLTCOP is adequate, available, has competencies relevant to the legal needs of the program and of residents, and is without conflict of interest to provide consultation and representation for the SLTCO and representatives of the Office. Legal Counsel may be provided by one or more entities, depending on the legal need; however at a minimum, the Office of the SLTCO must have access to an attorney knowledgeable about Federal and State laws protecting residents and governing LTC facilities. Legal representation of the SLTCOP by the SLTCO or a representative of the Office who is a licensed attorney does not, by itself, constitute adequate legal counsel. Communications between the SLTCO and legal counsel are subject to attorney-client privilege.

The SLTCO and representatives of the Office must assist residents in seeking administrative, legal, and other appropriate remedies; the SLTCO is to coordinate with the legal services developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents.

### **Responsibilities of Agencies Hosting Local Ombudsman Entities (§1324.17)**

The hosting agency is responsible for the personnel management, but not the programmatic oversight, of representatives of the Office, including employee and volunteer representatives. Host agency policies, procedures, and practices that the SLTCO determines constitute a conflict with the laws or policies governing the LTCOP are grounds for the refusal, suspension, or removal of the agency's designation.

### **Duties of the Representatives of the Office (§1324.19)**

The SLTCO may designate an entity as a local Ombudsman entity and may designate an employee or volunteer of the local Ombudsman entity as a representative of the Office. Representatives of the Office may also be designated employees or volunteers within the Office.

A representative of the Office is required to investigate and resolve complaints; ensure regular and timely access to LTCOP services and response to complaints and requests for information; represent resident interests before governmental agencies; assure residents access to, administrative, legal, and other remedies; analyze, comment on, and monitor the development of laws, regulations, policies, and actions, and recommend changes as appropriate; coordinate with and promote the development of citizen organizations; promote and support resident and family councils.

### Complaint Processing

Regardless of the source of a complaint, the SLTCO and representatives of the Office serve the resident of the facility. Investigation of a complaint is for the purposes of resolving the complaint to the resident's satisfaction and protecting the health, welfare, and rights of the resident. The Ombudsman or representative of the Office must support and maximize resident participation in the complaint resolution process as follows: offer privacy to the resident for the purpose of confidentiality in communication; personally discuss the complaint with the resident (or resident representative if the resident is unable to communicate informed consent) in order to determine the resident's perspective of the complaint, request the resident (or resident representative, where applicable) provide informed consent for investigation of the complaint, determine the resident's wishes regarding resolution of the complaint (including whether allegations are to be reported), to advise the resident of his/her rights, work with the resident on a plan of action for complaint resolution, investigate and verify the complaint, and determine whether the complaint is resolved to the resident's satisfaction.

Where the resident is unable to communicate informed consent, and has no resident representative, the SLTCO or representative of the Office shall investigate and work to resolve the complaint to protect the health, safety, welfare, and rights of the resident.

Information regarding the complaint may be provided to another agency in order for it to substantiate the facts for regulatory, protective services, law enforcement, or other purposes so long as the SLTCO or representative of the Office adheres to disclosure rules. The SLTCO or representative of the Office must assist the resident in contacting the appropriate agency if the resident consents to share information; however, the SLTCO or representative of the Office shall not report suspected abuse, neglect, or exploitation without informed consent of the resident or resident's representative.

The SLTCO or representative of the Office may refer the matter or disclose resident-identifying information in the following situation: the resident is unable to communicate informed consent; has no legal representative; the SLTCO or representative of the Office has reasonable cause to believe that an action, inaction, or decision may adversely affect the health, safety, welfare, or rights of the resident, and has no evidence indicating the resident would not want the referral made; the SLTCO or representative of the office believes it is in the resident's best interest; and the SLTCO provides approval to disclose the information or make the referral.

If the SLTCO or representative of the Office personally witnesses suspected abuse, gross neglect, or exploitation of a resident, s/he shall seek communication of informed consent from the resident to disclose resident-identifying information to appropriate agencies and must follow the direction of the resident. If the resident is unable to provide informed consent and has no resident representative, the SLTCO or representative of the Office shall open a case as the complainant, follow the LTCOP's complaint resolution procedures, and refer the matter as appropriate, so long as the s/he has no evidence indicating that the resident would not want a referral made, has reasonable cause to believe that disclosure would be in the

best interest of the resident; and obtains approval of the SLTCO or otherwise follows the policies and procedures (P&Ps) of the Office.

### **Conflicts of Interest (§1324.21)**

Both the State Agency and the SLTCO are responsible for identifying actual and potential conflicts, and where a conflict has been identified, for removing or remedying the conflict.

#### **Organizational Conflicts of Interest**

Organizational conflicts include, but are not limited to, placement of the Office, or requiring a SLTCO or representative of the Office to perform conflicting activities in an organization that:

- Is responsible for licensing, surveying, or certifying long-term care facilities (LTCFs)
- Is an association (or affiliate) of LTCFs, or any other residential facilities for older individuals or individuals with disabilities
- Has any ownership or investment (equity, debt, or other financial relationship) in, or receives grants or donations from a LTCF
- Has governing board members with any ownership, investment or employment interest in LTCFs
- Provides LTC to residents of LTCFs, including provision of personnel for LTCFs or the operation of programs which control access to or services for LTCF
- Provides LTC coordination or case management for residents of LTCFs
- Sets reimbursement rates for LTCFs
- Provides Adult Protective Services
- Is responsible for eligibility determinations regarding Medicaid or other public benefits
- Conducts preadmission screening for LTCF placements
- Makes decisions regarding admission or discharge of individuals to or from LTCFs, or
- Provides guardianship, conservatorship, or other fiduciary or surrogate decision-making services for residents

#### **Removing or Remedying Conflicts of Interest**

The SLTCO must identify organizational conflicts in the LTCOP and describe steps taken to remove or remedy them within the annual report submitted to the Administration for Community Living (ACL) through the National Ombudsman Reporting System (NORS). The State Agency must take steps to avoid conflicts, establish a process for identifying them, and take steps to remove or remedy conflicts. If unable to adequately remove or remedy a conflict, the State Agency must contract with another agency or organization to carry out the LTCOP. An agency or organization may not contract to operate the LTCOP or operate it directly if it is responsible for licensing, surveying or certifying LTC facilities; is an association (or affiliate) of LTC facilities or of residential facilities for older individuals or individuals with disabilities; or has any ownership, operational, or investment interest in a LTC facility.

Where the State agency carries out the LTCOP through contract or arrangement, it must take steps to avoid conflicts in the contracting agency, including establishing periodic review and identification of conflicts, developing criteria for remedying or removal of the conflict by the contracting agency, and the process for reviewing and approving steps taken to remove the conflict.

With regard to entities providing local LTCO services, the SLTCO is responsible, prior to designating or renewing designation for a host agency, to take reasonable steps to avoid conflicts; establish a process for review and identification of conflicts; require that agencies disclose conflicts and steps taken to remove or

remedy them; and establish a process for approval of steps taken to remedy or remove conflicts. Failure of an agency hosting a local LTCO entity to disclose a conflict or inability to adequately remove or remedy a conflict shall constitute grounds for refusal, suspension, or removal of designation.

#### Individual Conflicts of Interest

Individual conflicts of interest for the SLTCO, representatives of the Office, and members of their immediate family include, but are not limited to:

- Direct involvement in the licensing or certification of a LTCF
- Ownership, operational, or investment interest (equity, debt, or other financial relationship) in an existing or proposed LTCF
- Employment of an individual by, or participation in the management of, a LTCF in the service area or by the owner or operator of any LTCF in the service area
- 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 LTCF
- Accepting gifts or gratuities of significant value from a LTCF or its management, a resident or resident representative, of a LTCF where 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 their role as Ombudsman or representative of the Office)
- Accepting money or other consideration from anyone other than the Office, or an approved entity, for the performance of an act in the regular course of the duties of the SLTCO or representative of the Office without approval of the SLTCO
- Serving as guardian, conservator, or in another fiduciary or surrogate decision-making capacity for a resident of a LTCF in which the Ombudsman or representative of the Office provides services
- Serving residents of a facility in which an immediate family member resides

#### Removing or Remediating Individual Conflicts of Interest

The State agency or SLTCO shall develop and implement policies and procedures to ensure that no SLTCO or representatives of the Office are required or permitted to hold positions or perform duties that would constitute a conflict. Reasonable steps must be taken to avoid employing or appointing an individual who has an unremedied conflict or who has a family member with an unremedied conflict; as well as to avoid assigning duties that would constitute an unremedied conflict. A process must be established to review, identify, and remove or remedy conflicts.

In no circumstances shall a SLTCO be appointed or employed who:

- Has direct involvement in the licensing and certification of a LTCF.
- Has an ownership or investment interest (equity, debt, or other financial relationship) in a LTCF. Divestment within a reasonable period may be considered an adequate remedy to this conflict.
- Has been employed by or participating in the management of a LTCF within the previous twelve months.
- Receives, or has the right to receive, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a LTCF.

In no circumstances shall an individual be employed or appointed, or designated who:

- Has direct involvement in the licensing or certification of a LTCF.
- Has an ownership or investment interest (equity, debt, or other financial relationship) in a LTCF. Divestment within a reasonable period may be considered an adequate remedy to this conflict.



- Receives remuneration under a compensation arrangement with an owner or operator of a LTCF.
- Is employed by, or participating in the management of, a LTCF.

Efforts must be taken to avoid appointing or employing an individual who has been employed by or participating in the management of a LTCF within the previous twelve months. Where such an individual is appointed or employed, the agency must take steps to remedy the conflict.