

**National Association of State Long Term Care Ombudsman Programs**  
**PROPOSED REGULATIONS FOR THE LTCOP**

**August 2007**

Revised and Approved October 2008

**INTRODUCTION**

The federal Older Americans Act (the Act) designed the Long Term Care Ombudsman Program (LTCOP) to be distinct and independent voice for residents of long-term care facilities, not a voice for State government. Therefore, the LTCOP carries the messages of long term care residents and works directly in response to residents. This unique role allows the LTCOP to take a different role or position than that of State government whenever necessary to represent residents and their interests.

**§1327.3 Definitions**

**Facility:** means any facility subject to registration or licensure as a nursing facility, board and care facility and other similar adult care facility, such as assisted living. This definition does not prohibit states from funding the LTCOP to provide services beyond those defined here.

**Full-time basis:** means a position which is full time and with no duties other than those directly related to the LTCOP as defined in Section 712 of the Act.

**Immediate Family:** means spouse, or similarly committed relationship, parents, children and siblings.

**State Long-Term Care Ombudsman (Ombudsman):** means an individual who heads the Office of the State Long-Term Care Ombudsman in a particular state and carries out the LTCOP statewide as set forth in Section 712 of the Act.

**Long-term care services:** means services provided to residents and applicants of long-term care facilities including, but not limited to, assessment, placement, case management, and determinations regarding benefits, personal care, and health care, but for purposes of these regulations does not mean care or services provided in the applicant's or resident's home outside of a long-term care facility.

**Regular and timely access:** means that all residents of long term care facilities have access to information about the LTCOP and how to contact the LTCOP, and that residents' contacts to the LTCOP are responded to in a timely manner.

**Representative:** means an individual, whether paid or volunteer, who represents the Office of the State Long-Term Care Ombudsman in identifying, investigating, and resolving complaints and in providing other ombudsman services as set forth in Section 712 of the Act.

**Response:** means a conversation regarding the complaint or inquiry brought to the attention of the ombudsman, which may be initiated by means of telephone, a visit, electronic or other means.

### **§1327.21 Establishment**

- (a) The Ombudsman shall perform the duties specified in federal law.
- (b) The State must ensure that the Office of the State LTC Ombudsman has direct access to State governmental officials and entities with responsibilities which impact on residents of long-term care facilities.
- (c) Governmental officials shall not interfere in the performance of official duties of the Ombudsman or representatives.
- (d) All of the records of the LTCOP are the property of the Office of the Ombudsman.
- (e) The State shall provide adequate funding for conducting an effective ombudsman program and the fiscal resources of the LTCOP must be expended on the LTCOP as follows:
  - (1) The State may fund the Office of the State LTC Ombudsman through Title III funds before such funds are distributed to the area agencies through the Title III intrastate funding formula. Such funds may be used for statewide ombudsman activities at the state or local level.
  - (2) The State shall expend on its statewide ombudsman program no less than was expended in Title III funds for federal fiscal year 2000, plus no less than was appropriated for Ombudsman activities from any other federal or state funding source during federal fiscal year 2000, plus 100% of Title VII (Ombudsman Activity) funds allocated to the State. This amount should be expended annually on ombudsman services to residents of long-term care facilities.
  - (3) The State shall not use Title VII Ombudsman Activities funds to fund activities which are not authorized under Section 712 of the Act or which are not conducted by the LTCOP or a grantee or contractor of the LTCOP.
  - (4) Area agencies shall expend on activities of the LTCOP not less than the total amount of Title III funds (including federal funds plus the required non-federal match) received under Section 304(d)(1)(D) and expended by the area agency in carrying out the LTCOP under Title III in federal fiscal year 2000.
  - (5) No state agency, local government, or area agency on aging may use Title VII ombudsman activity funds to supplant, replace, or substitute for, any other federal, state or local funding expended on the LTCOP prior to the date of the reauthorization of the Act.
  - (6) The State may allocate Title VII elder abuse prevention funds to the LTCOP for allowable abuse prevention activities.
  - (7) The State agency is not required to apply the intrastate funding formula to Title VII Ombudsman Activity funds.
- (f) The Ombudsman shall have responsibility for making decisions about the use of the fiscal resources of the Office of the State LTC Ombudsman, subject to applicable federal and state laws and policies.
- (g) In carrying out the duties of the Office, the Ombudsman may designate an entity as a local ombudsman entity and if so, shall designate employee(s) and/or volunteer(s) to represent the Office of the State LTC Ombudsman. The Ombudsman shall establish criteria and a process for

participation in the statewide LTCOP by local ombudsman entities and representatives. The criteria must:

- (1) Stipulate that the Ombudsman has the authority to designate local ombudsman entities and representatives, participate in the hiring of representatives, and revoke designation if necessary;
- (2) Ensure that local ombudsman entities have experience in advocating for the individual and collective rights of vulnerable people
- (3) Establish a procedure for hiring, supervising, training, designating (or certifying) evaluating, and de-designating (or de-certifying) representatives;
- (4) Ensure that local ombudsman entities and representatives have no unremedied conflict of interest, as defined in section 1327.24.
- (5) Provide for an appeal procedure for local ombudsman entities or representatives whose designation is revoked by the Ombudsman.
- (6) Ensure that the local ombudsman entity:
  - (A) Is a tax-exempt organization.
  - (B) Has a governing structure to ensure integrity and stability of the entity. Governing members of the entity shall not have an unremedied conflict of interest with the LTCOP.
  - (C) Has no staff with an unremedied conflict of interest with the LTCOP.
  - (D) Submits to the Ombudsman a plan addressing goals and objectives for carrying out ombudsman duties no less than biennially, which is subject to the approval of the Ombudsman.
- (7) Ensure that complainants receive timely and appropriate response to their complaints. The State agency shall provide for standards of promptness to assure timely and appropriate response to complaints. At a minimum, ombudsmen shall respond to complainants within two working days when the ombudsman has reason to believe that the resident is at risk of harm. However, the LTCOP is not intended to be an emergency response service.
- (8) Ensure that the Ombudsman or the Ombudsman's designee(s) shall evaluate the performance of the local ombudsman entity on at least a biennial basis and additionally as needed.
  - (A) The review shall include evaluation of the local ombudsman entity's performance in all areas of ombudsman responsibility. The evaluation shall be based on designation standards established by the Ombudsman and include, but not be limited to, the criteria and standards provided in this section.
  - (B) Subsequent to the review, the Ombudsman shall issue a report to the local ombudsman entity that details areas for correction or improvement.
  - (C) The Ombudsman shall consult with the appropriate area agency on aging in performing the evaluation and shall inform the State agency and appropriate area agency on aging of the results of the review.

### **§1327.22 Access to Residents and Resident Information**

- (a) The State shall ensure that:
  - (1) The Ombudsman and representatives have access to long-term care facilities, residents and resident information; provide penalties and enforcement for denial of ombudsman access

to facilities or residents; and ensure that residents receive information on how to access the LTCOP.

(A) The Ombudsman shall establish procedures for representatives to provide such access, including procedures to ensure confidentiality of Ombudsman and representative interactions with residents and complainants.

(2) Each local ombudsman entity provides regular access to residents as follows:

(A) A representative shall visit every facility at least quarterly and more frequently where problems exist.

(B) The local ombudsman entity shall maintain LTCOP staff at no less than a ratio of full-time equivalent staff to long-term care beds of 1:2000. If the entity fails to meet this standard, it must request a waiver from the Ombudsman, providing justification for lower staff levels.

(C) The local ombudsman entity shall maintain a telephone line to be staffed during normal business hours.

(D) If a local ombudsman entity is unable to meet any of these standards, it must request a waiver from the Ombudsman, providing justification for a modification in the standard, and subject to Ombudsman approval.

(3) The Ombudsman and representatives have appropriate access to review and photocopy the medical and social records of a resident when access to the records is necessary to investigate a complaint, when:

(A) the representative has permission of the resident or the legal representative of the resident; or

(B) the resident is unable to consent to the review and has no legal representative; or

(C) a legal guardian of the resident refuses to give the permission and a representative has reasonable cause to believe that the guardian is not acting in the best interests of the resident; and the representative obtains the approval of the Ombudsman.

The basis for the representative's authority to review the records shall be documented in the case record.

(4) Representatives have access to the long-term care facility administrative records, policies, and documents to which the residents or the general public have access.

(5) Representatives have access to and receive copies of all licensing and certification records maintained by the State with respect to long-term care facilities.

### **§1327.23 Disclosure and confidentiality**

(a) All complaint-related information provided to the Ombudsman or representatives and the case records developed by the Ombudsman or representatives, including those maintained in electronic format, and maintained by the LTCOP is confidential. Any disclosure of LTCOP records is subject to the following provisions:

(1) No disclosure shall be made without the prior approval of the Ombudsman or his or her designee for the purpose of reviewing records requests.

(2) No disclosure of the identities of complainants or residents or of the fact that any individual has contacted or provided information to the LTCOP shall be made unless one of the following conditions has been met:

(A) the complainant or resident, or the legal representative of the complainant or resident, consents in writing to the disclosure;

(B) the complainant or resident gives oral consent, and that consent is documented contemporaneously in a writing made by a representative in accordance with established requirements; or

(C) the disclosure is required by court order.

(b) In monitoring the Ombudsman Program, the identity of and information provided by any complainant or resident of a long-term care facility shall be confidential. The Office of the State LTC Ombudsman shall have sole authority to review its files whether maintained by the Ombudsman or by representatives.

(1) In monitoring the Office of the Ombudsman or representatives, the State agency or the appropriate area agency on aging shall have access to summary reports related to complaint processing and activities. No state agency, area agency on aging, local ombudsman entity, or other entity shall have access to individual case files without the express permission of the resident and/or the complainant, except for individuals designated as representatives of the Office of the Ombudsman.

(c) LTCOP records are the property of the Office of the State LTC Ombudsman, which shall have immediate access to all original and unredacted records upon request.

#### **§1327.24 Conflict of interest**

For purposes of this Section, a conflict of interest includes, but is not limited to, administering the licensing and certification of long-term care facilities; owning, operating, or having a financial interest in such facilities; being affiliated with associations of long-term care providers; or providing long-term care services, by an individual or a member of the individual's immediate family.

(a) Any individual involved in the designation or removal, by appointment or otherwise, of the Ombudsman or ombudsman entities must be free of conflict of interest. The Ombudsman or ombudsman entities shall not be located within or subject to the supervision and control of any State agency or official that also directly supervises the licensing and certification of long-term care facilities, owns or operates such facilities, or provides long-term care services.

(b) Where the State agency or area agency on aging contracts with another agency to operate the LTCOP, the State or area agency staff person or persons who oversee the contract, shall be free of conflict of interest.

(c) The Ombudsman, representative, or administrative staff of the Office of the State LTC Ombudsman, and members of their immediate families:

(1) Shall not have direct involvement in the licensing or certification of a long-term care facility or of a provider of a long-term care services;

(2) Shall 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.

Ownership of shares in a mutual fund or other publicly traded pooled investment fund whose assets may include publicly traded securities of long-term care facilities or service organizations shall not generally constitute a conflict of interest, unless the investments of such fund are limited to such facilities and/or service organizations, or such investments normally form a large percentage of such fund;

(3) Shall not be employed by, or participating in the management of, a long-term care facility;

- (4) Shall 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;
  - (5) Shall not provide ombudsman services to residents of a facility or another facility within the corporation if the individual has been an employee of that long-term care facility or corporation within the previous year;
  - (6) Shall not provide ombudsman services to residents of a facility which is a member of an organization of long-term care providers if the individual has been an employee of such organization within the previous year; and
  - (7) Shall not provide ombudsman services to residents of a facility in which the individual has an immediate family member residing.
- (d) The Ombudsman, representatives, administrative staff of the Office of the State LTC Ombudsman, or members of their immediate family:
- (1) Shall not stand to gain financially through an action or potential action of the ombudsman, including but not limited to selling services or products to residents or to long-term care facilities;
  - (2) Shall not serve as a resident's agent, medical decision-maker or surrogate; the sole witness for Do Not Resuscitate (DNR) orders or other medical directives; or as a member of a facility's ethics committee which makes medical decisions for residents without the capacity to evidence their preference. This does not prohibit an individual from serving as surrogate decision maker for a resident where the relationship originated outside of the role as ombudsman (for example, a family member) and the individual does not provide ombudsman services to that resident or in that resident's facility.
  - (3) Shall not be directly supervised by or provide services on behalf of a program with conflicting responsibility. Conflicting responsibility includes, but is not limited to, an agency which directly administers or supervises the administration of the licensing and certification of long-term care facilities; controls access to a facility (e.g., pre-admission screener); adult protective services programs or program units which develop and carry out care plans for, provide involuntary services to, are authorized to take temporary custody of, or serve as guardians, conservators or legal representatives for any clients
- (e) Remediating conflict of interest
- (1) All individuals responsible for any aspect of the LTCOP have a duty to notify the Ombudsman of any actual or potential conflict of interest of which they have knowledge.
  - (2) Upon report of a possible conflict of interest, the Ombudsman shall determine whether an actual or potential conflict exists and whether appropriate actions have been taken or planned to sufficiently remedy the conflict. A conflict can be sufficiently removed only where the existence of the conflict does not interfere with any duties of the LTCOP and where the conflict is not likely to alter the perception of the Ombudsman, representative, or local ombudsman entity as an independent advocate for residents.

### **§1327.25 Legal Counsel**

- (a) The State shall develop and implement written policies and procedures which stipulate how the State will fulfill its obligation to:

- (1) Provide adequate, independent legal counsel to the Ombudsman and representatives to advise and assist them in protecting the health, safety, welfare, civil and human rights of residents, and in the performance of their official duties;
  - (2) Provide legal representation to any representative against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties of the Ombudsman or such representative; and
  - (3) Provide legal advice and representation in connection with all litigation, controversies and legal matters to which the Office may be a party or in which its rights and interests may be involved, and represent the Office in all proceedings or actions which may be brought by or against it before any court or administrative agency.
- (b) The policies and procedures required in paragraph (a) of this section shall be disseminated to all representatives and regularly included in training provided to representatives.

### **§1327.26 Administration**

- (a) The Office of the State LTC Ombudsman shall prepare an annual report, which shall include, but is not limited to the following:
- (1) the activities carried out by the Office during the year for which the report is prepared;
  - (2) a compilation and analysis of the data collected by the Office;
  - (3) an evaluation of the problems experienced by, and the complaints reported by or on behalf of, residents;
  - (4) recommendations for improving the quality of care and life of residents and for protecting their health, safety, welfare and rights;
  - (5) an analysis of the success of the program and identification of barriers that prevent the optimal operation of the program; and
  - (6) policy, regulatory, and legislative recommendations.
- (b) The Office of the Ombudsman shall:
- (1) provide such information as the Ombudsman determines to be necessary to public and private agencies, legislators, and other entities regarding:
    - (A) the problems and concerns of individuals residing in long-term care facilities; and
    - (B) recommendations related to these problems and concerns;
  - (2) submit a copy of its annual report to the Assistant Secretary, members of the State legislature, and any other governmental, public or private entities deemed appropriate by the Ombudsman. Such report shall also be made available to the general public.
- (c) The Office of the State LTC Ombudsman shall monitor, analyze, and comment on the development and implementation of federal, state and local laws, regulations, and other governmental policies and actions that pertain to long-term care facilities and services or have the potential to impact residents and recommend any changes in such laws, regulations, and policies, as the Office determines to be appropriate.
- (d) The Ombudsman shall develop and submit a biennial LTCOP Service Plan to the designated contact person at the Administration on Aging (AoA) for approval.
- (1) The plan shall include:
    - (A) specific measurable and scheduled objectives for each area of LTCOP function required by the Act;
    - (B) a brief analysis of progress in meeting the objectives in the previous plan; and

- (C) identification of any barriers that prevented the Office from meeting its objectives in previous years, where applicable.
- (2) The designated contact person at the AoA shall review the plans, make recommendations, and approve, as appropriate. In determining whether to approve the plan, the AoA shall consider:
  - (A) Applicable federal regulations and laws;
  - (B) Specific efforts to improve the Office's performance in previous years and plans to work toward meeting the objectives in the next plan;
  - (C) Whether the initiation of a time-limited project, consistent with the purpose of the ombudsman program, had or will have, a negative impact on the program's ability to achieve progress in all areas;
  - (D) Limitations of the resources of the Office which impede progress and any steps being pursued to minimize these limitations;
  - (E) The plan's anticipated benefit to residents; and
  - (F) The plan's anticipated impact on the provision of ombudsman services to residents.
- (e) The State agency shall ensure that the Office of the State LTC Ombudsman has a written grievance procedure to handle complaints against the LTCOP or any individual in the LTCOP.

### **§1327.27 Training**

- (a) The State shall ensure that representatives of the Office who respond to complaints are adequately trained to advocate for the interests of the residents and resolve complaints.
- (b) Each paid and volunteer representative of the Office of the State LTC Ombudsman, including the Ombudsman, shall be required to complete a training program and to meet continuing education requirements, as follows:
  - (1) The Ombudsman shall establish minimum hours of training based on the duties for which representatives are hired or accepted as volunteers.
  - (2) Training shall include instruction regarding federal, state, and local laws, rules, and policies governing long-term care facilities; information about the population of residents in long-term care facilities; confidentiality; investigative techniques and problem resolution; policies of the Office of the State LTC Ombudsman; and other topics considered relevant by the Ombudsman.
  - (3) The training program shall follow a standardized curriculum and require validation, through an examination or other means, that the representative obtained the knowledge and skills required to perform ombudsman duties.
  - (4) The Ombudsman shall establish a minimum number of continuing education hours that a representative must obtain on an annual basis to maintain good standing as a representative of the Office. The requirement shall include a requirement for a certain percentage of the hours to be obtained through Ombudsman-sponsored continuing education events.
- (b) The State shall establish remedies and due process for representatives who fail to meet the training and/or continuing education requirements of the Office.



### **§1327.28 Coordination of Services**

The Office shall coordinate services with state and local law enforcement agencies and courts of competent jurisdiction, protection and advocacy systems for individuals with developmental disabilities and mental illness, and legal assistance provided under section 306(a)(2)(c), whether through memoranda of understanding or other means. The purpose of this coordination of service is to ensure that the health, safety, rights and dignity of individuals in long-term care settings are protected.

### **§1327.29 Noninterference**

(a) The State shall ensure that in the conduct of all aspects of the statewide LTCOP, the integrity of the work of the Ombudsman and representatives is maintained; and that there is no influence from any individual or entity which will in any way compromise, decrease or negatively impact on any of the following:

- (1) the Ombudsman's primary role as advocate for the rights and interests of the resident;
- (2) the objectivity of the investigative process or the outcome of complaints;
- (3) the Ombudsman's work to resolve issues related to the rights, quality of care and quality of life of the residents of long-term care facilities; or
- (4) the Ombudsman's statutory responsibility to provide information to public and private agencies, legislators and other persons regarding the problems and concerns of residents and recommendations related to residents' problems and concerns.

(b) The State shall ensure that procedures exist to prevent and redress interference with the work of the Ombudsman, as outlined in paragraph (a) of this section, by:

- (1) a State official or employee,
- (2) an employee of an organization or agency which operates the LTCOP under grant or contract with the State agency, or
- (3) any other person.

Failure to establish such prohibitions and sanctions shall be deemed to constitute non-compliance with the State's duty under the Act to carry out the Ombudsman Program in accordance with the requirements of Chapters 1 and 2 of Title VII of the Act.

(c) The State shall prohibit the following conduct by any person, facility or entity:

- (1) Discharge or other retaliation or discrimination against any person for contacting, providing information to or otherwise cooperating with the Ombudsman or representative.
- (2) Discharge or other retaliation or discrimination against any person on whose behalf another person has contacted, provided information to or otherwise cooperated with the Ombudsman or representative.

(d) Evidence of interference with the official duties and responsibilities of the Ombudsman by any agency or individual may be submitted to the AoA as a grievance.

- (1) The AoA may request evidence that the State agency previously considered the grievance and was unable to resolve it.

(2) The AoA shall review the evidence and, where interference with ombudsman duties or responsibilities is found, shall make recommendations in order to address the interference and/or to prohibit future interference.