



August 19, 2013

Administration for Community Living
Administration on Aging
US Department of Health & Human Services
Attention: Becky Kurtz, Director, Long-Term Care Ombudsman Programs

RE: Administration on Aging Proposed Rule Change for State Long-Term Care Ombudsman Programs, 45 CFR Parts 1321 and 1327, 06/18/2013

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) submits the comments below on the Proposed Regulations for the Long-Term Care Ombudsman Program (LTCOP). The Consumer Voice, founded in 1975 as the National Citizens' Coalition for Nursing Home Reform (NCCNHR), advocates to improve long-term care and services in all long-term care settings. For more than 38 years, the Consumer Voice has been recognized as the only national organization to bring long-term care consumers' voices directly to federal policy discussions and services as a leader in empowering consumers. Our membership includes consumers of long-term care services and supports and their families, consumer advocates, long-term care ombudsmen and others advocating for quality care and quality of life in all long-term care settings.

The Consumer Voice commends the Administration on Aging for its work on these rules. Overall, the proposed regulations would clarify long-standing issues facing the long-term care ombudsman program, strengthen the program's ability to advocate at the systems level, and improve the program's effectiveness.

Comments on provisions of the proposed regulations are as follows:

§1321.11 State Agency Policies

The Consumer Voice supports the language as written in §1321.11(b). Confidentiality of LTCOP records is paramount to the integrity of the program and they should not be disclosed except as provided in §1327.17(b)(2)(C), even to those individuals and agencies that oversee the LTCOP at the state and local level. We believe that AoA has found an acceptable balance between LTCO protection of confidential information and State oversight responsibilities in the proposed language, which would allow aggregate data on Ombudsman program activities to be shared with the State agency for monitoring purposes.

§1327.1 Definitions

Immediate family

The Consumer Voice supports the definition of immediate family as contained in the proposed regulations.

Office of the State Long-Term Care Ombudsman

The Consumer Voice strongly supports the definition of Office of the State Long-Term Care Ombudsman in the proposed regulations. We think it provides needed clarity that not only pertains to the State Ombudsman, but also representatives of the Office.

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

The Consumer Voice strongly supports the definition of representatives of the Office of the State LTCO in the proposed regulations. It is important to recognize that representatives of the Office not only include employees, but also volunteers, whether they are supervised directly by the State Ombudsman or by a local entity designated to operate a LTCOP. This definition, as well as that of the Office of the State LTC Ombudsman, enhances the concept that the SLTCOP is intended to be a unified state program.

Additional Comments on this Section

The Consumer Voice recommends that AoA include additional definitions to this section, including:

- Interference

There is lack of clarity on the meaning of the term “interference” with the LTCOP, and as such, the Consumer Voice recommends that AoA include the following definition –

Interference, as set forth in §1327.15(a)(8), means an act of obstructing or preventing an ombudsman from performing any official duties by means of threat, coercion, or other deliberate action.

- Legal Representative & Resident Representative

The Consumer Voice recommends that there be additional clarity as to who constitutes a “legal representative” and a “resident representative” as used throughout the proposed regulation. It appears that the terms may be used synonymously (see §1327.17(b)(2)(i)), but this is an area that tends to be quite troublesome for ombudsmen. We further recommend that the definition be broad enough to include individuals with legal authority such as a guardian or power of attorney, but in the absence of those legal documents, as determined by “next of kin” provisions in state law.

While it would be ideal for all residents to have executed the necessary documentation to identify someone to represent their interests in the event they are unable to do so, we recognize that many individuals have not completed advanced health care directives, powers of attorney, nor have a guardian.

§1327.11 Establishment of the Office of the State Long-Term Care Ombudsman

The Consumer Voice strongly supports the language of this section in the proposed regulations, as we believe it provides needed clarity that the Office of the State Ombudsman is intended to be a separate identifiable Office, whether housed within or outside of the State Unit on Aging. This language is also important for clarifying that the LTCOP is intended to be an independent Office that has the ability and authority, as well as the responsibility, to independently make determinations and establish positions relating to disclosure of program information, recommendations to changes in laws, regulations, and policies, and sharing of information and concerns about resident issues with policymakers. The Consumer Voice is well aware that some State Ombudsmen – present and past – have been prohibited from engaging in such activities out of concern that the Ombudsman would support issues or positions contrary to their host agency or the State’s Administration. Such language as is contained in the proposed regulations is necessary to address these concerns.

§1327.13 Functions and Responsibilities of the State Long-Term Care Ombudsman

The Consumer Voice supports the language in this section and offers the following suggestions:

- **§1327.13(a)(4)** – Provide additional guidance or a definition as to what is meant by “regular” access to ombudsman services. Ombudsman presence in a facility is critical for ensuring resident access to ombudsman services. The Consumer Voice recommends that “regular access” mean at least quarterly visits to each facility not in response to a complaint, which is consistent with the standard contained in the National Ombudsman Reporting System (NORS).

- **§1327.13(a)(8)(iii)** – It is recommended that the language in this section be revised to read:

(iii) Actively promote and provide technical support for the development of resident and family councils to protect the well-being and rights of residents; and carry out such other activities as the Assistant Secretary determines to be appropriate.

Rationale: Far too frequently, family members do not even know what a council is or that a council can be formed, and both residents and families often need support and encouragement to join or create independent councils. The Ombudsman, in an effort to support and empower consumers, can offer information about starting a council as well as initial and ongoing support and encouragement. Additionally, it is consistent with the requirement under §1327.13(a)(8)(ii) that the Ombudsman promote the development of citizen organizations.

- **§1327.13(b)** – Consumer Voice strongly supports this language which clarifies that representatives of the Office are accountable to the State Ombudsman regarding Ombudsman program functions and duties. Local Ombudsmen are often torn between responsibilities to their host agency, which employs them, and the Office of the SLTCO, which provides guidance, training, and support on program

operations. This language provides clarity for local ombudsmen and their host agencies about responsibilities to the LTCOP.

- **§1327.13(c)** – Consumer Voice supports the proposed language that the Ombudsman determines both designation and de-designation of local Ombudsman entities and representatives of the Office. This authority should rest with the SLTCO as head of the Office of Ombudsman. We believe that the LTCOP’s policies and procedures should include processes for designation, de-designation, and due process, and have indicated such below in comments to section 1327.15(a)(2).

Consumer Voice recommends that AoA provide a definition or additional guidance as to what “designation” means, for example, being trained to handle complaints and look at confidential information. Included should be a distinction between “designation” and “certification,” as these terms and their meaning have been the source of confusion and inconsistency among state programs.

- **§1327.13(d)** – Consumer Voice strongly supports the language requiring the State Ombudsman to review and approve plans or contracts relating to Ombudsman program operations. As head of the Office of the SLTCO, and responsible for designation of representatives of the Office, the State Ombudsman needs this authority in order to coordinate an effective program.

- **§1327.13(e)** – Consumer Voice strongly supports this language clarifying that Ombudsman program files, records, and information are the property of the Office of the SLTCO. Because the State Ombudsman has responsibility for the information’s disclosure and the program’s statewide operations, responsibility for the records and information must lie with the Office. The requirement also ensures consistency with access to the information, should the agency within which the program is housed change (at either the state or local level).

Further, regardless of what form they are in, all program files, records, and information should be subject to these requirements.

-**§1327.13(g)** – Consumer Voice recommends that this section be revised to read:

(g) The Ombudsman shall develop policies, procedures, and standards for the administration of the Ombudsman program and share them with the State agency.

Rationale: As head of the independent Office, it should be incumbent upon the State Ombudsman to establish the policies, procedures, and standards for administration of the statewide Ombudsman program. Sharing these policies with the State agency ensures that the State agency can fulfill its monitoring responsibilities.

- **§1327.13(i)** – Consumer Voice strongly supports this provision in the proposed regulation and recommends that the language be revised to read as follows:

(i) The Ombudsman shall determine the use of the fiscal resources appropriated or otherwise designated for the Office, subject to applicable Federal and State laws and policies; and shall determine that program expenditures of the Office and local Ombudsman entities are consistent with policies established by the Office.

Rationale: Consumer Voice agrees that the Ombudsman, as head of the Office, should be responsible for managing the Office’s fiscal resources and should also have the ability to approve allocations of State and Federal funds to local ombudsman programs. We would like to assert, however, that this provision should not prohibit the ability of State or Local programs from seeking additional funds to support the program, such as through grants or other fundraising and that funds raised for the program be expended consistent with applicable program policies.

- **§1327.13(j)** – The Consumer Voice strongly supports this section and recommends that it be revised to say the following:

(j) Where applicable, the Ombudsman shall monitor, on a regular basis, the Ombudsman program performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

Rationale: We agree that monitoring of the local Ombudsman programs by the Ombudsman will encourage accountability to the Office, and assert that the monitoring should be done on a periodic or regular basis.

§1327.15 State Agency Responsibilities Related to the Ombudsman Program

The Consumer Voice supports the language in this section and has the following recommendations:

- **§1327.15(a)(2)** – Consumer Voice recommends that the language of this section be revised to read as follows:

(2) Require the Office to establish policies and procedures, in consultation with the State Agency, to carry out the Ombudsman program in accordance with the Act. Where the designated local Ombudsman entities are grantees, and/or the representatives of the Office are employees of area agencies on aging, the Office shall develop the policies in consultation with the State Agency and the area agencies on aging. ...

Rationale: The Office of the State Ombudsman, which is intended to be an independent office, should have primary responsibility for developing its own policies, procedures, and standards of program operation.

- **§1327.15(a)(2)(i)** – Consumer Voice recommends that this section be revised to read as follows:

(i) Requirements that the Ombudsman shall periodically monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

Rationale: It is important that the monitoring of the local Ombudsman entities be ongoing.

- **§1327.15(a)(2)(ii)** – Consumer Voice suggests that AoA provide additional guidance on what is meant by “prompt response.” This is essential for program consistency. Further, we recommend that AoA use

the term “neglect” rather than “gross neglect” to better align the language with definitions and terms typically found in long-term care services and regulation.

- **§1327.15(a)(2)(iii)** – Consumer Voice supports the language of this section in the proposed regulation, particularly that in:

- Subsection (E) which clarifies that the Ombudsman and representatives of the Office are exempt from abuse reporting requirements without appropriate consent. This has been a particularly troublesome issue for ombudsmen in a number of states, who have struggled to balance the conflict between the OAA confidentiality requirements and the state’s mandatory reporting laws;
- Subsection (F) clarifies that the LTCOP provisions of the OAA under Title VII, Chapter 2 relating to disclosing the identity of a complainant or resident is the standard to be followed by LTCO regardless of disclosure provisions contained in other LTCOP funding sources, such as in Title VII, Chapter 3, which allows an exception to confidentiality requirements if the disclosure is to law enforcement or protective services.

- **§1327.15(a)(2)(v)** – Consumer Voice strongly supports the language of this section which supports independence of the Office, as well as the ability of the Ombudsman to fulfill the requirement of the Older Americans Act that s/he analyze, comment on and monitor the development and implementation of laws, regulations, policies, and actions, as well as recommend any changes in those laws, regulations, policies, and actions.

- **§1327.15(a)(4) & (5)** – Consumer Voice supports the language of these sections, specifically the clarification that the oversight of the Office by the State Agency or hosting Agency does not include review of files or information that could reveal the identity of any complainant or long-term care facility resident. However, policies and procedures should include a process for investigating complaints against the Ombudsman and representatives of the Office and a mechanism for due process in the event of disciplinary action or de-designation. We recommend that such language be added in these regulations.

We also recommend that these regulations include language specifying that allegations against the SLTCO for failure to carry out his/her duties as required in the OAA shall be filed with the SUA with concurrent notification to the Director of LTCOPs.

- **§1327.15(a)(8)** – Consumer Voice supports this section, which clarifies that the State agency’s failure to ensure the Ombudsman has the authority to carry out its functions and duties constitutes interference with the program. Ombudsmen at the state and local level have experienced limitations on their ability to act due to policies or practices of the agencies in which they are housed. In those situations, Ombudsmen have been unable to fulfill their mandates under the OAA.

We recommend, however, that the regulations include language stating that evidence of interference with the official duties and responsibilities of the Ombudsman by any agency or individual may be submitted to AOA as a grievance and include a process for AoA review and action should interference with Office activities be found.

- **§1327.15(b)** – Consumer Voice supports the language of this section clarifying that HIPAA does not preclude release of residents’ records to the Office.

- **§1327.15(c)** – Consumer Voice supports the provisions of this section and includes the following comment regarding 1327.15(c)(4) ...

We recommend that AoA provide additional clarification or guidance with respect to a minimum number of hours for initial training and annual training; and also guidance on the content and skills to be included in that training. Training procedures among states vary widely, to the detriment of program consistency. Additional guidance is needed in this area.

§1327.17 Functions and Duties of the Office of the State Long-Term Care Ombudsman

- **§1327.17(a)** – Consumer Voice supports the language of this section, although we echo recommendations made in sections 1327.13(a)(4) and 1327.13(a)(8)(iii) providing more clarity around “regular access” to ombudsman services, and requiring the ombudsman to “actively promote” and support the development of resident and family councils.

- **§1327.17(b)(1)** – Consumer Voice strongly supports the language of this section, specifically the clarification that in complaint investigation and resolution the Ombudsman serves the resident. As mentioned in an earlier comment, we also suggest using the term “neglect” rather than “gross neglect.”

- **§1327.17(b)(2)** – Consumer Voice supports the language of this section, although points out that AOA uses both the terms “legal representative” and “resident representative” which may be misleading. AOA should clarify in the definition section if those terms are being used synonymously, or choose only one to use.

We recommend that additional guidance be added to ensure that representatives of the Office report the complaint processing results to the complainant if the complainant is not the resident and is known. We have heard concerns from family members that after filing a complaint, they did not hear back from the representative of the Office, leading them to believe that the program failed to investigate the complaint. Guidance should address appropriate response in cases where a resident does not wish the ombudsman to act on a complaint filed by a complainant such as a family member.

Additionally, Consumer Voice recommends providing greater clarity that an Ombudsman may investigate a complaint even if resident is unable to provide consent and has no legal representative. While this is implied in 1327.17(b)(2)(ii), we believe the language should be more direct in this section.

- **§1327.17(b)(3) – (5)** – Consumer Voice supports the language of these sections with no additional comments.

- **§1327.17(b)(6) & (7)** – Consumer Voice recommends revising the language of each section to read as follows:

(6) For purposes of paragraphs (b)(1)-(3) of this section, the procedures for disclosure shall provide that, ...

(7) For purposes of paragraphs (b)(1)-(3) of this section, the procedures for disclosure shall provide that, ...

Rationale: For consistency across programs, it is important that all state policies and procedures include such provisions.

- **§1327.17(b)(8)** – The Consumer Voice disagrees with the provision in (b)(8)(i) which indicates that if an Ombudsman personally witnesses suspected abuse, neglect, or exploitation, that Ombudsman is to obtain informed consent from the resident or representative prior to reporting. While we fully support the disclosure provisions of the Older Americans Act and these proposed regulations, we believe that if an Ombudsman observes abuse, neglect, or exploitation, s/he should take steps as indicated in (b)(8)(ii) & (iii).

It is our opinion that not reporting such an incident reflects poorly on the Ombudsman and the program as it sends a message to the alleged perpetrator that the Ombudsman is looking the other way. Further, we do not believe reporting in such an instance is a violation of the confidentiality provisions of the OAA in that by witnessing the event, the Ombudsman has not been provided the information by a third party.

If the Ombudsman does not have first-hand knowledge of the incident, however, we strongly support the requirement that the Ombudsman obtain appropriate consent before reporting.

There has been longtime, although informal, guidance from AoA that an Ombudsman may report abuse, neglect, or exploitation if they witness the incident. Consumer Voice recommends that AoA formalize that policy and include it in these regulations.

- **§1327.17(d)** – Consumer Voice strongly supports the language of this section which exempts Ombudsman activities from lobbying restrictions under federal regulations. Providing information and speaking directly to legislators, as well as making recommendations for changes to laws, regulations, and policies is a critical function of the work of the Ombudsman and representatives of the Office.

§1327.19 Conflicts of Interest

The Consumer Voice believes that the language in this section needs to be strengthened to provide more clarity and support for programs facing conflicts of interest.

Generally, Consumer Voice recommends that AoA provide additional guidance either through these regulations or sub-regulatory guidance of examples of remedies that would be acceptable in conflict of interest situations, as well as situations that cannot be remedied. As Consumer Voice reached out to members and partners to solicit input on these proposed regulations, there continued to be numerous questions around the conflict of interest provisions (both organizational and individual) and how the provisions applied to specific scenarios. As a result, additional clarity and guidance is needed.

Organizational Conflict of Interest

Generally, the Consumer Voice recommends that:

- **For Local Ombudsman Programs** – the State Agency and the SLTCO should make the determination that a conflict exists, as well as whether it has been adequately removed or remedied.
- **For the State Ombudsman Program** – the State Agency and the SLTCO should describe the program’s organizational placement, identify the conflict, develop a proposal for removing or remedying that conflict, and submit the proposed plan to AoA for approval. That plan would continue until there is some change in the program, such as a new State Ombudsman is hired or the Office is moved to a different agency.
- Consumer Voice supports the reporting of all organizational conflict of interest (whether at the State or Local level) on the National Ombudsman Reporting System (NORS), however, we believe that conflict of interest at the State level should be immediately reported to AoA as well.
- **Regarding §1327.19(b)(2)** – we recommend that AoA make the determination that the State Agency is unable to adequately remedy or remove a conflict that exists.
- Language in these regulations is also needed to address failure of an agency (at the State or Local level) to identify and remedy or remove a conflict. As we see an increase in agencies and organizations at the State and Local level taking on provision of services, case management, waiver programs, and more, the concern about conflict of interest has been growing. Host agencies, including State Agencies and Area Agencies on Aging, should not turn a blind eye to actual or perceived conflicts. As such, AoA should include language that addresses these issues.

Individual Conflict of Interest

- **§1329.19(b)(1)(ii)** – Consumer Voice recommends revising the language of this section to read as follows:

- (ii) Establish a process for periodic review and identification of internal conflicts.

Rationale: The process for review and identification of conflicts should be done on a regular basis.

- **§1327.19(c)(2)(v)** – Consumer Voice recommends that additional guidance be provided as to the meaning of gifts or gratuities of “significant value” so there is more clarity. Examples may be pulled from similar language for employees of state and federal agencies.
- **§1329.19(d)(1)** – Consumer Voice recommends clarifying “officer of the Office,” as that term exists in no other location in the proposed regulations and all other references are to the Ombudsman and representatives of the Office.
- **§1329.19(d)(2) & (3)** – Consumer Voice recommends that AoA include language indicating that these conflict of interest provisions apply whether the Ombudsman is hired through a competitive process or appointed by the Governor or member of the State’s Administration.

- **§1329.19(d)(5)** – Consumer Voice agrees that one year is generally a sufficient time period for separation from taking a position as an Ombudsman or representative of the Office and involvement either in the licensing of or employment by a long-term care facility. Should an individual be hired as State Ombudsman who has a conflict of interest, AoA should be notified immediately regarding the conflict and the plan by the State Agency for remedying or removing that conflict. AoA should make the determination of whether the conflict has been remedied or removed.

Legal Counsel for the Ombudsman Program

Consumer Voice strongly recommends that AoA include regulatory language regarding the provision of legal services for the Office of the State Long-Term Care Ombudsman and representatives of the Office. The OAA requires that the Ombudsman and representatives of the Office have **adequate, available** legal counsel **without conflict of interest**. Lack of adequate, available legal counsel continues to be an area of great concern for many State and Local Ombudsman programs. Evidence that current policies and practices have not fulfilled this requirement of the OAA is included in reports, articles, and surveys of ombudsman programs dating back to 1990¹. The Office must have access – when needed, to an attorney or attorneys to advise and assist the Ombudsman and its representatives in the full pursuit of its mandated duties. The attorney or attorneys must be knowledgeable and competent in the relevant areas of law and practice.

Regulatory language is also necessary regarding conflicts of interest that prevent the Office from vigorously representing the interests of residents. An example of such a conflict is when legal counsel for the Office is also responsible for representing the interests of state government programs like Medicaid that may have interests diametrically opposed to those of residents.

In addition to the OAA requiring adequate, available counsel without conflict of interest for the LTCOP, the State Agency is also charged with ensuring that the Office pursue “administrative, legal, and other appropriate remedies on behalf of residents.” Consumer Voice recommends that AOA also provide additional guidance in regulation as to the meaning and intent of this requirement, as we believe most Ombudsman programs are not equipped to undertake this requirement.

Thus Consumer Voice strongly recommends that AoA define “adequate,” “available” and “conflict of interest” and include regulatory guidance on the provision of legal counsel to the Office of the State Long-Term Care Ombudsman and its representatives.

In closing, the Consumer Voice once again applauds the Administration on Aging for publishing these long overdue proposed regulations. They will go a long way in strengthening and supporting the Long-Term Care Ombudsman Program at both the State and Local levels and in turn their work on behalf of

¹ See attached NASOP Position Paper: 1990 Older Americans Act Reauthorization: Adequate Legal Counsel for Long-Term Care Ombudsman Programs; article Legal Support to Long-Term Care Ombudsman Programs: Seven Years Later, by Lori Owen & Michael Shuster (National Clearinghouse for Legal Services, Inc. 1994); Final Report, Long-Term Care Ombudsman Program Strategy Session (Dec 2011).

long-term care residents. Questions and requests for additional information should be directed to Robyn Grant, Director of Policy and Programs, at rgrant@theconsumervoice.org, 202-332-2275 ext. 205.

Sincerely,

A handwritten signature in black ink that reads "Sarah Wells". The signature is written in a cursive style with a large, looping initial "S".

Sarah F. Wells
Executive Director