

June 6, 2022

Administration for Community Living
330 C Street, SW
Washington, DC 20201

RE: OAA Regulations Comments
Submitted via Email to OAAregulations@acl.hhs.gov

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) appreciates the opportunity to submit comments on the Administration for Community Living's *Request for Information: Older Americans Act Regulations* (Federal Register, Vol. 87, No. 88, Friday, May 6, 2022, pp. 27160). The Consumer Voice is a national non-profit organization that works with, and represents the interests of, individuals receiving long-term care and services in both congregate and home and community-based settings.

PART I

Challenges faced by older adults, elders, and family caregivers in receiving services under the Older Americans Act

45 CFR 1324 Subpart A - Long-Term Care Ombudsman Program

- **Residents, their families, and other consumers often do not know about the Long-Term Care Ombudsman Program (LTCOP).** Because the program is generally underfunded and understaffed, Ombudsman program representatives are not always able to visit residents routinely. Onsite presence at a long-term care facility increases the interaction between the Ombudsman representatives, residents, and family members, giving them an opportunity to know each other better and foster not only a relationship, but also increased trust. Further, increased presence in a facility means that Ombudsmen are more likely to be aware of changes occurring, or problems that may be arising.
- **Residents have difficulty contacting the LTCOP.** Despite a federal requirement that long-term care facilities post the Ombudsman program contact information, our experience is that it may not be as accessible to residents or families as it should be. For example, signs with LTCOP information have been placed on bulletin boards with

The National Consumer Voice for Quality Long-Term Care (formerly NCCNHR) is a 501(c)(3) nonprofit membership organization founded in 1975 by Elma L. Holder that advocates for quality care and quality of life for consumers in all long-term-care settings.

many other papers and information, posted high on walls instead of at a level for easy viewing from a wheelchair, and posted in remote areas of a facility, such as in an entranceway to the building. Additionally, many residents do not have personal telephones or computers they can use to reach out. If they have to use the facility's phone or ask for assistance in dialing the Ombudsman program's number, the resident may not feel comfortable reaching out for assistance.

- **Residents and families often express reluctance to reach out to an Ombudsman program representative because they are afraid of retaliation.** While federal regulations are intended to protect residents from actual or threatened retaliation, in reality there is very little accountability in this area. Complaints are not investigated in a timely manner by survey and licensing, and facilities are rarely cited or held accountable for retaliation.
- **Residents and families often do not understand how the LTCOP works.** They often don't understand the role of the Ombudsman program, or what the program can and cannot do. For example, consumers do not understand that Ombudsman program representatives do not enforce requirements and do not impose penalties against facilities. As a result, consumers may express frustration at what they believe to be the LTCOP's lack of response.
- **The assistance residents and families receive from the LTCOP may not be as robust as it could/should be due to lack of legal support – both for the LTCOP and for residents.** Access to legal resources is important for solving many problems residents experience – including support during the discharge process, protection of rights, including when faced with diminished capacity, etc. While most State LTC Ombudsman programs can point to its legal counsel of record, LTCOPs need a range of legal support including representation and advice related to legal proceedings, subpoenas, court orders, lawsuits, etc. Additionally, the program needs legal counsel that provides substantive support and technical assistance related to the issues LTCOPs face when advocating for residents, such as rights issues, guardianship, capacity, discharge, legal analysis, etc. Further, Ombudsman program representatives need legal services to whom they can refer residents who themselves need legal assistance.

PART II

How OAA programs can advance equity

- Improve and increase data collection by Older American Act programs, including demographics around diverse populations. Support outreach to underserved and unserved communities. (See recommendation in Part III)
- Fund and expand OAA Resource Centers to support program efforts to reach diverse groups.

- Require State Plans to include a plan for advancing equity with goals and benchmarks. (See recommendation in Part III)

PART III

Submission questions – Recommendations

GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

Advocacy duties of State Unit on Aging, Area Agency on Aging, and Long-Term Care Ombudsman Program

Recommendation: Recognize the role of the LTCOP in being the leader relative to issues concerning older persons residing in long-term care facilities in the state and in each planning and service area.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.7(a); 45 CFR § 1321.53(a); 45 CFR § 1321.13(a)(1); 45 CFR § 1321.61(a)-(b)
3. **Nature of comment:** Change
4. **Reason for consideration:** These four provisions do not take the advocacy duties of the LTCOP into consideration and are not in line with the program’s responsibilities and authorities. The SLTCO and its representatives have the expertise and knowledge about interests and needs of older adults in facility settings and should be the leaders in advocating on their behalf.
5. **Any benefits:** This change would better support the duties and responsibilities of the LTCOP and lessen confusion and misunderstanding.

State agency policies

Recommendation: The role of the SLTCO in setting policies for the LTCOP and monitoring the program needs to be indicated. As it currently reads, the SUA develops policy for all aspects of the LTCOP, and the only aspect of monitoring for which the SLTCO is responsible is monitoring the files, records, and other information.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.11(a)-(b)
3. **Nature of comment:** Change
4. **Reason for consideration:** This regulation appears to contradict the LTCOP federal regulations in two critical ways: a) the LTCOP regulations state that “where the Ombudsman has the legal authority to do so, he or she shall establish policies and procedures, in consultation with the State agency” – in opposition to what this regulation states. Even if the SLTCO does not have the legal authority, the SLTCO is

to recommend policies to the SUA Director, which the regulation also does not acknowledge; and b) 1321.11(b) states that these policies will address how the SUA monitors the performance of all programs for quality and effectiveness, even though the LTCOP regulation requires the SLTCO to monitor Ombudsman program performance of local Ombudsman entities.

5. **Benefit:** Addressing these contradictions will strengthen the LTCOP and enhance the independence and autonomy of the program.

Recommendation

Improve and increase data collection by Older American Act programs, including demographics of diverse populations including but not limited to race, ethnicity, sex (including gender identity and sexual orientation), disability, income, veteran status, and other key demographic variables.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.17(f)(9)
3. **Nature of comment:** Addition
4. **Reason for consideration:** Collection of this data will help identify disparities that exist in serving older adults.
5. **Any benefits:** Identification of disparities will permit targeted efforts for improving service delivery to diverse populations.

Recommendation

Support outreach to underserved and unserved communities.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.17(f)(8)
3. **Nature of comment:** Addition
4. **Reason for consideration:** The terms “underserved or unserved” are broader and more inclusive than the existing language.
5. **Any benefits:** Expanding the language will promote delivery of services more equitably.

Recommendation

Require State Plans to include a plan for advancing equity with goals and benchmarks.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.17
3. **Nature of comment:** Addition

4. **Reason for consideration:** Including a plan for advancing equity in the State Plan better ensures that attention will be focused on eliminating disparities at all levels in the aging network.
5. **Any benefits:** Such a plan would increase access to OAA services for all older adults and help address longstanding disparities.

Public Participation

Recommendation

Require public hearings held as part of the development of State Plans to include people that live in nursing facilities and residential care communities as well as home and community-based services.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.27
3. **Nature of comment:** Addition
4. **Reason for consideration:** Since individuals in residential care communities also need and use services provided by Older Americans Act programs, they should have input into the plan's development.
5. **Any benefits:** The plan will be more inclusive and better represent the needs of older adults in the plan's service area.

Area agency advisory council

Recommendation

Expand the council composition to include a representative of the LTCOP from the area.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.57(b)
3. **Nature of comment:** Change
4. **Reason for consideration:** Including a representative of the LTCOP on the council will help ensure that the needs and interests of those living in facilities are also considered and addressed.
5. **Any benefits:** This will permit the area agency on aging to better serve all older adults in its service area.

Service priority for frail, homebound, or isolated elderly

Recommendation

Require service priority to include individuals of any age living in long-term care facilities.

1. **Regulation:** 45 CFR § 1321—Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.69(a)
3. **Nature of comment:** Addition
4. **Reason for consideration:** The stated service priorities are not clear about whether they include people residing in long-term care facilities and do not apply to residents of facilities who are under 60. While many individuals living in nursing homes and assisted living facilities may be frail and isolated, it is not clear whether the current regulation applies to people residing in long-term care facilities. Further, the needs of residents under age 60 are no less critical than those age 60 or over.
5. **Any benefits:** This addition would help ensure that the needs of individuals in facilities are better addressed.

LEGAL ASSISTANCE

Conflicts of interest

Recommendation: Identify and remedy, or at least disclose, conflicts of interest of legal assistance provider.

1. **Regulation:** 45 CFR § 1321 – Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.71(b)
3. **Nature of comment:** Addition
4. **Reason for consideration:** There are times when legal assistance providers may have to advocate on behalf of a client in opposition to an area agency on aging or the State unit on aging - a situation which can place them at odds with their own funding source. This could have a chilling effect on the robustness of the legal assistance provider's representation of the client. This conflict of interest should be identified and remedied if possible. At a minimum the client should be informed of the conflict.
5. **Any benefits:** Disclosure of the existence of a conflict is fairer to the client and gives them an opportunity to take a different course of action, if available.

Training

Recommendation: Require periodic training for legal assistance attorneys around the issues faced by older adults served by Older Americans Act programs, including long-term care facility residents. Examples include nursing home regulations,

transfer/discharge, including the appeals process, guardianship, the role and responsibilities of the LTCOP, and more.

1. **Regulation:** 45 CFR § 1321 – Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR §1321.71(1)
3. **Nature of comment:** Addition
4. **Reason for consideration:** There are currently no requirements for ongoing training for legal assistance providers in issues that are of particular concern to those served by OAA programs. Although attorneys must obtain Continuing Legal Education training, it does not necessarily have to focus on the topics listed above.
5. **Any benefits:** Such training would enhance the ability of legal assistance providers to vigorously advocates for individuals receiving OAA services.

Core set of services

Recommendation: Require legal assistance providers to provide a core set of duties/services, including but not limited to representing residents of long-term care facilities in discharge cases, guardianship, public benefits, and financial exploitation.

1. **Regulation:** 45 CFR § 1321 – Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.71(c)
3. **Nature of comment:** Addition
4. **Reason for consideration:** Legal assistance providers vary a great deal in terms of the type of assistance and services they offer, not only from state to state, but within a state and even within an area. There is not a standard set of duties/services they must provide. As a result, not all older adults served under OAA programs can count on receiving the same assistance across the country. For instance, a nursing home resident in one part of a state may be represented at a discharge appeal hearing by the area’s legal assistance provider, while another resident facing the same situation elsewhere may not have representation because the legal assistance provider in that area does not provide that service. This causes gross inequities in the service system.
5. **Any benefits:** A core set of services to be delivered by each legal assistance provider would ensure older adults served by OAA programs are treated equally and advance equity. It would also better guarantee that they receive services which they need – and to which they are entitled.

Seeking assistance

Recommendation: Require legal assistance providers to make their intake systems easily accessible to older adults and persons with disabilities; prohibit a legal assistance

provider from requiring individuals to seek legal services on their own, including nursing home residents and others who are institutionalized or persons with disabilities.

1. **Regulation:** 45 CFR § 1321 – Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.71
3. **Nature of comment:** Addition (after (d))
4. **Reason for consideration:** Individuals often face substantial and unnecessary barriers in seeking legal assistance. In some instances, particularly in large law firms, they must try to navigate complicated automated intake systems. These systems are so complex that older adults and persons with disabilities may give up in frustration. In other situations, someone may be contacting the legal services provider on behalf of the person seeking legal assistance because the person may not be able to do so by themselves due to dementia, a physical disability or other reason. However, some legal assistance providers insist that the person needing legal assistance must request services on their own, even though that may be completely impossible.
5. **Any benefits:** Improving intake systems would make legal services more available to those in need and advance equity.

Referrals from LTCOP

Recommendation: Require legal assistance providers accept referrals from the LTCOP.

1. **Regulation:** 45 CFR § 1321 – Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.71
3. **Nature of comment:** Addition
4. **Reason for consideration:** Most ombudsmen cannot find representation for residents on issues like involuntary discharge, guardianship, public benefits, and financial exploitation. Without that legal referral option, ombudsmen are much weaker and less effective because they often can't force facilities or the state to comply with the law and they can't resolve many issues for residents. That makes residents and families less likely to consult ombudsmen ("They were really nice but they couldn't help me...."). But when ombudsmen have legal resources to which they can refer cases, they become more powerful. And they become a great team--ombudsmen often help the lawyers who are less familiar with facility practices, resident realities, etc., and ombudsmen often have more long-standing relationships with residents which can facilitate the representation. Lawyers educate ombudsmen so they are better advocates the next time the same issue arises, and they show the adverse parties that they are part of a powerful team.
5. **Any benefits:** This addition would greatly improve advocacy on behalf of residents.

Legal Assistance Developer

Recommendation: Require a legal assistance developer on a full -time basis with no other job responsibilities, who is an attorney with experience working with Older Americans Act program beneficiaries.

1. **Regulation:** 45 CFR § 1321 – Grants to State and Community Programs on Aging
2. **Citation:** 45 CFR § 1321.71, see also OAA, Title VII, Chapter 4
3. **Nature of comment:** Addition
4. **Reason for consideration:** Although the Older Americans Act mandates a legal assistance developer, there are no regulations to implement this provision. This lack of regulations undermines the importance of this position. Individuals assigned this role are frequently set up for failure - many have little or no legal training, authority, or time. The legal assistance developer is critical for leading and coordinating strong and effective legal assistance services in a state. This is not possible if the developer does not have experience with those receiving OAA program services and full-time status.
5. **Any benefits:** This addition would benefit all OAA program beneficiaries.

ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES, INCLUDING SUBPART A- STATE LONG-TERM CARE OMBUDSMAN PROGRAMS

Informed consent

Recommendation: Delete “informed” when referring to consent for receiving Ombudsman program services and ability to access records.

1. **Regulation:** 45 CFR § 1324 Allotments for Vulnerable Elder Rights Protection Activities, including Subpart A—State Long-Term Care Ombudsman Program
2. **Citation:** 45 CFR § 1324.11(e)(2)(iv)(A)-(B); 1324.11(e)(3)(ii)(A)-(B); 1324.11(e)(3)(iii); 1324.19(b)(2)-(8)
3. **Nature of comment:** Deletion
4. **Reason for consideration:** The term “informed consent” is problematic because it creates a higher standard of obtaining consent in order for an Ombudsman program representative to provide assistance and advocacy to a resident. “Informed” consent generally refers to ensuring that decisions about health and medical treatment are made with full understanding of risks and benefits, including alternatives.
5. **Any benefits:** This deletion would create a more reasonable standard of obtaining consent for providing Ombudsman services to residents and be consistent with the language of the Older Americans Act.

Conflict of interest

Recommendation: Expand disclosure of conflicts of interest to include, for example, board members, or others with influence on the activities or operations of the LTCOP. Identify and remedy conflicts of interest of additional individuals whose conflicts could impact the LTCOP.

1. **Regulation:** 45 CFR § 1324 Allotments for Vulnerable Elder Rights Protection Activities, including Subpart A—State Long-Term Care Ombudsman Program
2. **Citation:** 45 CFR §1324.21(c)
3. **Nature of comment:** Addition
4. **Reason for consideration:** Requirements related to individual conflicts of interest should not just apply to the SLTCO, representatives of the Office and members of their immediate family. There are other individuals, such as a board member or a supervisor of an agency hosting a local Ombudsman entity, who may have conflicts that influence their decisions or actions relative to the LTCOP. Their decisions/actions can negatively impact the effectiveness of the program.
5. **Any benefit:** Removing these conflicts of interest would strengthen the program and enhance its credibility.

Role of non-designated individuals in LTCOP

Recommendation: Definitively clarify whether non-designated individuals may carry out LTCO program activities or access LTCOP records or data.

1. **Regulation:** 45 CFR § 1324 Allotments for Vulnerable Elder Rights Protection Activities, including Subpart A—State Long-Term Care Ombudsman Program
2. **Citation:** 45 CFR § 1324.13(c)(3)
3. **Nature of comment:** Addition
4. **Reason for consideration:** There is long-standing confusion and lack of clarity regarding whether individuals who have not been designated may perform LTCO program activities, or access LTCOP records or data. As a result, LTCOP across the country approach this differently. For instance, some allow non-designated individuals (“friendly visitors) to visit residents while not permitting them to handle complaints. Others allow non-designated individuals to carry out administrative duties, such as data entry, even though case data reveals complainant identities. And in some host agencies, undesigned supervisors seek access to Ombudsman records and data as part of program management responsibilities. ACL has posted an FAQ about access to LTCOP records that would be helpful to draw from in updating regulations.
5. **Any benefits:** Clarifying this point would promote program uniformity and confidentiality.

Distinct Identity of Office of State Long-Term Care Ombudsman

Recommendation: Include specific examples indicating that the Office is a “distinct entity, separately identifiable”

1. **Regulation:** 45 CFR § 1324 Allotments for Vulnerable Elder Rights Protection Activities, including Subpart A—State Long-Term Care Ombudsman Program
2. **Citation:** 45 CFR § 1324.11(b)(1)
3. **Nature of comment:** Addition
4. **Reason for consideration:** The requirement that the Office of the SLTCO be a distinct entity is vague and compliance is difficult to measure. At the same time, ACL’s response to a FAQ on this topic is very helpful because it provides concrete examples of what evidence of a “distinct entity, separately identifiable” could include. However, because these examples are part of an FAQ and not a rule, states are not required to implement them. Adding these examples to the rule would make the meaning of distinct entity much clearer and result in greater compliance.
5. **Any benefits:** Residents, family members, and other stakeholders will be able to more easily distinguish the Office from other programs and services.

Representation of residents at a discharge appeal hearing

Recommendation: Include Ombudsman program representation at a discharge hearing as an example of the duty to “represent the interests of residents before governmental agencies”

1. **Regulation:** 45 CFR § 1324 Allotments for Vulnerable Elder Rights Protection Activities, including Subpart A—State Long-Term Care Ombudsman Program
2. **Citation:** 45 CFR § 1324.13(a)(5)
3. **Nature of comment:** Addition
4. **Reason for consideration:** Although the majority of Ombudsman programs try to obtain legal counsel for residents facing a discharge hearing, they are often unsuccessful. When this is the case, residents should be able to turn to the LTCOP for representation. However, the LTCOP often will not represent residents at hearings either because they have chosen not to take on that role, or, in a smaller number of states, they are not permitted to do so. Consequently, a significant number of residents end up representing themselves or having their family do so. While some residents and families may be capable of arguing on their own or a loved one’s behalf, and may wish to do so, it is hard to imagine that this is what most residents and families would choose. Most residents and families are unfamiliar with federal and state discharge requirements and the administrative hearing process. As a result, without adequate representation, residents are more

likely to receive an unfavorable ruling from an Administrative Law Judge. Spelling out that representing residents at a hearing is part of the LTCOP's required duties removes any ambiguity about the Ombudsman program role. (Note: LTCOP representatives would need to be adequately trained to prepare them for this role.)

5. **Any benefits:** Ombudsman program representation rather than only residents or family members at a hearing creates a more level playing field for residents given the complexities of discharge cases and the fact that corporate counsel frequently represents nursing homes.

Legal counsel for LTCOPs

Recommendation: Require that the LTCOP have dedicated legal counsel

1. **Regulation:** 45 CFR § 1324 Allotments for Vulnerable Elder Rights Protection Activities, including Subpart A—State Long-Term Care Ombudsman Program
2. **Citation:** 45 CFR § 1324.15(j)(i)
3. **Nature of comment:** Addition
4. **Reason for consideration:** Far too often, the LTCOP is only one of many programs and even agencies that its legal counsel must represent. This means:
 - a. There is less time available for LTCOP issues and assistance.
 - b. Legal counsel may be busy elsewhere if a situation arises that needs immediate attention.
 - c. Legal counsel is less likely to be able to develop the in-depth knowledge and expertise necessary to robustly advocate on behalf of residents and the program.
 - d. Legal counsel may be in a position where they represent agencies and/or other programs implementing policies that would be contrary to the health, welfare, safety or rights of residents. This creates a major conflict of interest that undermines the program's ability to represent residents' interests. These problems could be avoided if the legal counsel assigned to the LTCOP is focused solely on the program.
5. **Any benefits:** Both the quality and quantity of the advocacy provided by legal counsel would be improved.

OTHER

Consumer Voice realizes and appreciates that ACL is looking to strengthen and improve the OAA program and services. Reviewing the OAA regulations is an important step in that process. We would like to offer a few additional recommendations in addition to revising the rules.

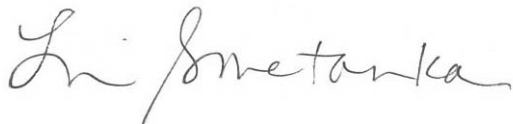
- Given ACL's authority over the LTCOP, legal assistance providers and legal assistance developers, we urge ACL to implement strategies that foster better coordination and collaboration between these programs. Examples include establishing processes for referrals and sharing of information and best practices.
- One barrier to legal assistance providers housed within the Legal Services Corporation (LSC) accepting referrals from the LTCOP is a concern about not allowing "solicitation." However, LSC regulations clearly permit referrals from the LTCOP: *This part does not prohibit representation or referral of clients by recipients pursuant to a statutory or private ombudsman program that provides investigatory and referral services....* (45 CFR 1638.4(c)). We urge ACL to educate legal assistance providers and LTCOP about this rule and encourage such referrals.

The changes we propose in the OAA regulations, and in fact, the regulations themselves, are meaningless unless they are enforced. This has been an ongoing concern for Consumer Voice and others, particularly as it relates to the LTCOP. There are still far too many LTCOP that do not have the independence mandated under the program's law and rule. This weakens the Ombudsman's ability to advocate robustly and effectively for residents.

We would encourage an expansion of ACL's ability to enforce compliance with OAA statutory and regulatory requirements. Unless its provisions are truly implemented, the LTCOP and sister programs, such as legal services, cannot achieve their full potential in serving residents as intended.

Thank you for your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Lori Smetanka".

Lori Smetanka
Executive Director