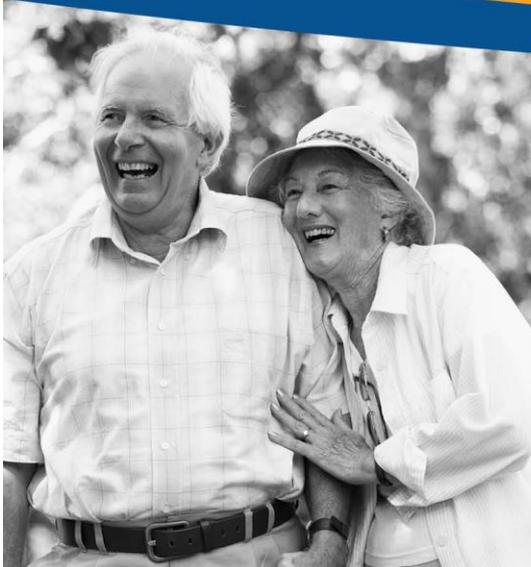




# 2015 Long-Term Care Ombudsman Rule: Guidance to Strengthen States' Services to Long- Term Care Residents

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# Presenters

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at

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Director, National Ombudsman Resource Center

at

The National Consumer Voice for Quality Long-Term Care



# Presenters

**James (Jay) Bulot**

Director, Division of Aging Services

at

Georgia Department of Human Services

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State Long-Term Care Ombudsman

at

Virginia Department for Aging and Rehabilitative Services

# Administration for Community Living

(includes Administration on Aging)

## **Mission:**

Maximize the independence, well-being, and health of older adults, people with disabilities, and their families and caregivers.



# LTC Ombudsman Program Description

- The Older Americans Act (OAA) establishes the Long-Term Care (LTC) Ombudsman program
- The program is a person-centered consumer protection service that resolves problems and advocates for the rights of individuals.
- The mission: to maximize the independence, well-being, and health of individuals residing in:
  - Nursing facilities
  - Assisted living
  - Board and care
  - Other similar adult care facilities.



# LTC Ombudsman Program Origins



- **1970s**--Nursing Home Ombudsman program created as part of President Nixon's initiative to improve conditions and respond to widespread reports of resident abuse in nation's nursing facilities.
- **1980s**—LTC Ombudsman program expanded to board and care and similar adult care facilities (widely interpreted to include assisted living).
- **1992**—LTC Ombudsman program became part of Title VII of OAA, the "Elder Rights" Title.
- **2000**—Assisted living expressly added to the definition of "long-term care facility" in OAA.

## Since inception:

- Envisioned as an independent entity able to represent consumer interests.
- No regulations to fully implement the program and provide consistent level of consumer protection across states.

Law =

## Older Americans Act

Public Law 109-365

42 U.S. Code Chapter 35

Regulation =

45 CFR Part  
1321  
OAA Title III

45 CFR Parts  
1326 and 1328  
OAA Title VI

45 CFR Part 1327  
OAA Title VII

Guidance;  
examples =

Program  
Instructions

Letters to  
states

Frequently  
Asked  
Questions  
(FAQs)

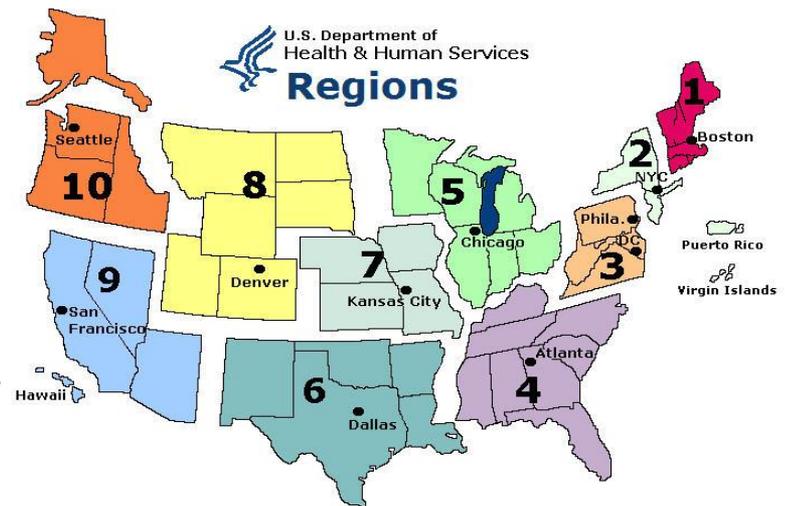
# Overarching ACL Goals re: LTCO Rule

- High quality ombudsman services for residents
  - Credible, person-centered problem-solvers with and for residents,
  - Effective, astute advocates for resident-centered systems change in long-term services and supports.
- Provide clarity to provisions of the Older Americans Act,
  - especially those that are uniquely applied to the LTC Ombudsman program
  - Provide flexibility for States in their establishment of the Program,
  - balanced with the need for consumers to have access to consistent, quality ombudsman services



# Implementation by States

- Administered by ACL through OAA grants to State Units on Aging (SUAs)
  - Even if SUA doesn't provide LTC Ombudsman services directly
- LTCOP Rule is part of OAA grant compliance requirements of states.
- **All** states will need to review – and some will need to revise -- their laws, regulations, policies and/or practices.
- ACL Regional Offices and Office of LTC Ombudsman Programs available to assist states.
- ACL is providing a delay in implementation until **July 1, 2016** in order to assist impacted states with training and technical assistance.



# Final Rule: Table of Contents

1321.11(b) State agency policies. (revises existing rule)

## **New Rule**

1327.1 Definitions.

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

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

1327.15 State agency responsibilities related to the Ombudsman program.

1327.17 Responsibilities of agencies hosting local Ombudsman entities.

1327.19 Duties of the representatives of the Office.

1327.21 Conflicts of interest.

# Terms Used in OAA and Rule

- **Ombudsman** -- For consistency with the OAA, Rule uses the term “Ombudsman” to specifically refer to one individual: the State LTC Ombudsman.
- **Representatives of the Office** -- Used to describe staff and/or volunteers designated by the Ombudsman to perform LTC Ombudsman program duties.
  - Rule does not use following terms: “local ombudsman” or “volunteer ombudsman.”
  - Many States and other stakeholders commonly use the word “ombudsman” to describe staff and volunteers at every level of the program. This Rule does not require a change in the usage of those terms.

# Terms Used in OAA and Rule (continued)

**Local Ombudsman entity** – Entity designated by the Ombudsman to carry out LTC Ombudsman program duties

- Used in a decentralized program model, including:
  - Within a AAA;
  - AAA may contract with a non-profit; or
  - State-level Office may contract directly with a non-profit
- Many States and other stakeholders commonly use: “local (regional) Ombudsman program (office)” to describe operations housed at a AAA or local/regional level.
- This Rule does not require a change in the usage of those terms.

# Today's Areas of Focus

1. Fiscal management
2. Disclosure of LTCO information
  - Abuse reporting
3. Public policy/systems advocacy
4. Conflicts of interest (organizational)
5. Decentralized models: the Ombudsman and local Ombudsman entities/representatives of the Office
  - Designation/de-designation of local Ombudsman entity
  - Monitoring performance
  - Coordinating with SUA and AAAs
  - Designation/de-designation vs. hiring/firing
  - Programmatic vs. personnel oversight
  - Communications, training, and technical assistance

# 1. Fiscal Management

**OAA:** The Office shall be headed by an individual, to be known as the State Long-Term Care Ombudsman  
Section 712(a)(2)

**Rule:** The Ombudsman shall:

- determine the use of the fiscal resources appropriated or otherwise available for the operation of the Office;
- approve allocations [to local Ombudsman entities];
- determine that program budgets and expenditures are consistent with the laws, policies and procedures governing the Ombudsman program.

45 CFR 1327.13(f)

# 1. Fiscal Management (continued)

## Why this matters:

- Ombudsman cannot be “head of” program without being involved in management of fiscal resources
- Does mean Ombudsman involvement in/coordination with:
  - Understanding budget, grants/contracting processes
  - Decisions related to distribution of LTCO program funds
  - Approving allocation formula to local Ombudsman entities
    - Note: ACL/AoA does not require States to use intrastate funding formula (IFF) to distribute Title III and Title VII funds for LTCO (P.I. 94-2, 94-5)
- Doesn't eliminate SUA role of budgeting, processing grants, contracting to AAAs/local Ombudsman entities, etc.

# 1. Fiscal Management (continued)

## State Examples –

- Georgia



## • Other states –

- What National Ombudsman Resource Center (NORC) is hearing



## 2. Disclosure of LTCO Information

### **OAA:**

- State agency shall establish procedures for disclosure.
- Ombudsman discretion regarding disclosure of program files and records
- Prohibits disclosure of resident/complainant identity unless:
  - Consent by resident/complainant or representative
  - Disclosure by court order

Section 712(d)

### **OAA does not provide for:**

- Exception for abuse reporting
  - regardless of state mandatory abuse reporting laws
- Disclosure where there is no one available to provide consent
  - i.e. resident cannot communicate consent and has no representative

## 2. Disclosure (continued)

### **Rule provisions: abuse reporting**

- Rule requires State to develop policy consistent with OAA
- State laws mandating abuse reporting by LTC ombudsmen are not consistent with OAA
  - Consistent with long-standing AoA interpretation
- This policy supports a person-centered approach
  - Residents – not Ombudsman program or State representatives -- determine what of their information can be shared with whom
- Does NOT mean ombudsman work to support resident should end if resident doesn't consent to disclosure

45 CFR 1327.11(e)(3)(iv)

## 2. Disclosure (continued)

### **Rule provisions: exceptions to disclosure prohibition**

- Ombudsman program representatives MAY disclose resident-identifying information under some circumstances:
    - No one available to communicate consent
      - or resident representative has taken action to harm resident;
    - Reasonable cause to believe that an action may adversely affect the resident's health, safety, welfare, or rights;
    - No evidence that resident would not wish a referral;
    - Reasonable cause to believe a referral is in residents' best interest;
- AND
- Ombudsman approval (or otherwise follows Office policies)

## 2. Disclosure (continued)

### **Rule provisions: exceptions to disclosure prohibition**

Ombudsman program representatives SHALL report abuse under some circumstances:

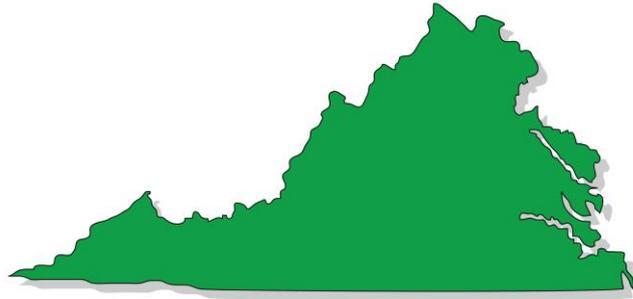
- Ombudsman or representative of the Office “**personally witnesses**” suspected abuse;
  - No one available to communicate consent
    - or resident representative has taken action to harm resident;
  - No evidence that resident would not wish disclosure;
  - Reasonable cause to believe disclosure is in residents’ best interest;
- AND
- Ombudsman approval (or otherwise follows Office policies).

45 CFR 1327.19(b)(8)

## 2. Disclosure (continued)

### State Examples –

- Virginia

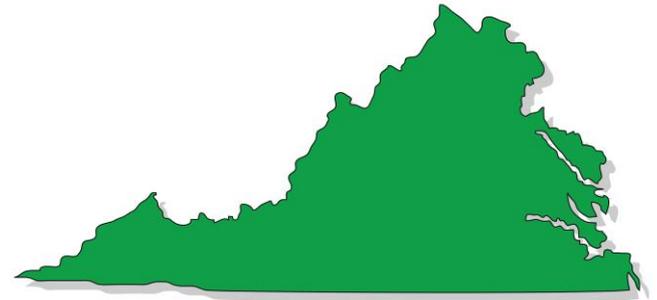


### • Other states –

- What NORC is hearing
- Available resources



## 2. Disclosure (continued)



Virginia -- Comment & Example:

### Disclosure/Mandated Abuse Reporting

- Historically a highly contentious issue
- Goes to core principles of the program
  - Resident-directed philosophy & practice
  - Unique relationship of trust between resident & ombudsman
- Divisiveness derives largely from over-simplification

## 2. Disclosure (continued)

### Mandated Reporting Exception

- Not a black & white issue
  - Ombudsman never abandons resident to abuse
  - Ombudsman program designed to employ a wide array of tools & strategies
  - Ultimately about resident direction & dignity of choice
  - Confidential disclosure to the ombudsman opens the door to informed discussion of options
  - Reporting does not automatically translate to protection

## 2. Disclosure (continued)

### Evolution in Virginia

- Procedurally
  - Statutory change
  - Regulatory change
  - Education & partnership
- Case example

### 3. Systems Advocacy

#### **OAA:**

Ombudsman functions include:

- Represent interests of residents before governmental agencies  
Section 712(a)(3)(E)
- Analyze, comment on, monitor, and recommend changes in relevant Federal, State, local laws, regulations policies  
Section 712(a)(3)(G)
- Ombudsman program designed to provide both individual complaint resolution and systems-level problem-solving
  - A challenge in some States, especially as State employee

### 3. Systems Advocacy (continued)

**Rule:**

ACL clarifies for States the intersection between systems advocacy functions and state and federal lobbying laws:

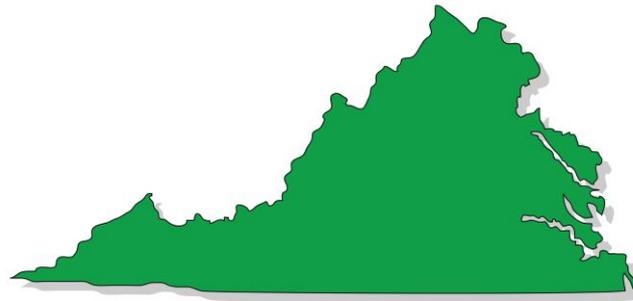
- Ombudsman program policies must exclude Ombudsman and representatives of the Office from **State lobbying prohibitions** inconsistent with OAA
- Fulfilling systems advocacy functions do not constitute lobbying activities prohibited under Federal rule (45 CFR Part 93).

45 CFR 1327.11(e)(5)(i); 1327.13(a)(7)(vii)

### 3. Systems Advocacy (continued)

#### State Examples –

- Georgia
- Virginia



### 3. Systems Advocacy (continued)

#### On-going Challenge for LTCOP in Many States

- Largest percentage of state Ombudsmen located in state units on aging
  - Conflicts of interest
  - State lobbying laws
  - Political sensitivities & culture
  - Voice of resident may conflict with state's position
  - Conundrum of independence within one's state structure
- Even for LTCOPs in non-SUA settings, hurdles exist
  - Conflicts of interest
  - Reliance on external funding sources
  - Conundrum of independence within one's host structure
  - Limited access to policy-making discussions

### 3. Systems Advocacy (continued)

#### Evolution in Virginia: A Tale of Two Programs

- Before 1995 in state unit on aging
- 1995 – 2012 in private non-profit
- Since 2012 in Virginia Dept. for Aging and Rehabilitative Services (DARS)
  - Thoughtful placement within organizational structure within DARS
  - Traditional state unit culture & constraints
  - Final rule as watershed opportunity

### 3. Systems Advocacy (continued)

- Evolution in progress:
  - Statutory change
  - Administrative changes
    - Regulatory review
    - Interdepartmental MOUs
    - Program policies & procedures
    - Internal (DARS) policies, procedures, organizational linkages
  - Education – all stakeholders
    - State administrative offices
    - Secretary
    - Partner agencies, AAAs
    - Providers
    - Residents, families, general public

## 4. Conflicts of interest (organizational)

First step: *identify the COI*

Examples include placement in an organization that:

- Licenses, surveys, or certifies long-term care (LTC) facilities;
- Is an association of LTC facilities;
- Has ownership or investment interest in a LTC facility;
- Has governing board members with ownership, investment or employment interest in LTC facilities;
- Provides long-term care to residents of LTC facilities;
- Provides case management for residents of LTC facilities;
- Sets reimbursement rates for LTC facilities;
- Provides adult protective services;
- Is responsible for eligibility determinations for residents of LTC facilities;
- Conducts preadmission screening for LTC facility placements;
- Makes decisions regarding admission/discharge to or from LTC facilities; or
- Provides guardianship or other decision-making services for residents of LTC facilities.

45 CFR 1327.21(a)

## 4. Conflicts of interest (continued)

Second step: ***remove or remedy the COI***

- Both SUA and Ombudsman have duty to remove/remedy the COIs
- ***Prohibited COI*** (i.e. cannot be remedied): Placement of the program in an organization that:
  - Is responsible for licensing, surveying, or certifying LTC facilities;
  - Is an association (or an affiliate of such an association) of LTC facilities; or
  - Has any ownership, operational, or investment interest in a LTC facility.

Why it matters:

- Residents have access to a credible, resident-centered advocate without competing interests.
- Rule doesn't necessarily require relocation of the Office where a COI exists
- Rule indicates that "remedy" may be sufficient in some circumstances, i.e. the rule permits some conflicting responsibilities to co-exist in an agency so long as firewalls and other policies adequately separate conflicting program operations.

45 CFR 1327.21(b)

## 4. Conflicts of interest (continued)

Third step: *report steps taken to remove/remedy* the COI

- Ombudsman must report steps taken to remove/remedy identified COI in NORS.
- Includes organizational COIs at local Ombudsman entity level
- Accountability for remedying COI
  - Ultimately, ACL/AoA responsible for determining adequacy of removal/remedy.
- NORS reporting--Paperwork Reduction Act (PRA) notice planned in 2015.

45 CFR 1327.21(b)(1)

# Organizational COI: A Look at Policies/Procedures

## Define

- What constitutes a conflict – i.e., facility ownership, licensing agencies, provides LTC services
- Ex. “Operates programs with responsibilities conflicting with LTCOP responsibilities, for example, developing and carrying out care plans and serving as guardians over long-term care residents”

## Procedures to

- Avoid
- Identify
- Disclose – to the agency, to the SLTCO
- Remedy – specificity in the remedial plan, providing assurances to minimize negative impact, how to know when it’s been remedied
- Action if failure to identify or remedy

## 5. Ombudsman relationship with designees (i.e. local Ombudsman entities and representatives of the Office)

### **OAA:**

Ombudsman functions include:

- Designation of local Ombudsman entities and representatives
- Local Ombudsman entities are not required; used in most (but not all) States (i.e. decentralized model)

OAA – 712(a)(5)

## 5. Ombudsman relationship with designees (cont)

### Rule requires:

- Policies for Ombudsman designation of local Ombudsman entities
  - Must be in public or non-profit private entities (often AAAs)
- Ombudsman review and approval of plans or contracts governing local Ombudsman entity operations (includes area plans)
  - Coordination with SUA and AAAs = important practice
- Ombudsman monitoring of local Ombudsman entities on a regular basis

45 CFR 1327.11(e)(1)(iii), (6); 1327.13(b),(c); 1327.17

## 5. Ombudsman relationship with designees (cont)

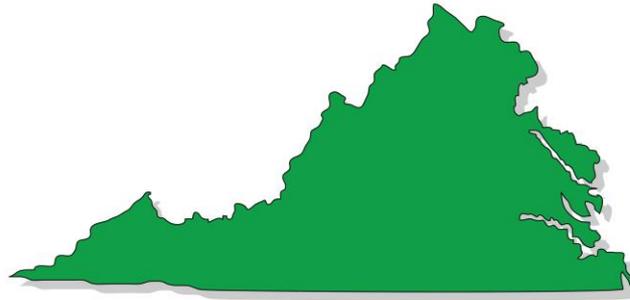
### Rule requires:

- Establishing policies for Ombudsman training and designation of representatives of the Office
- Agencies hosting local Ombudsman entities are responsible for the personnel management, but not the programmatic oversight, of representatives of the Office
- Ombudsman as head of “unified statewide program” and staff/volunteers as “representatives of the Office”
  - Hence, need for direct communications between Office and representatives

## 5. Ombudsman relationship with designees (cont)

### State Examples –

- Virginia



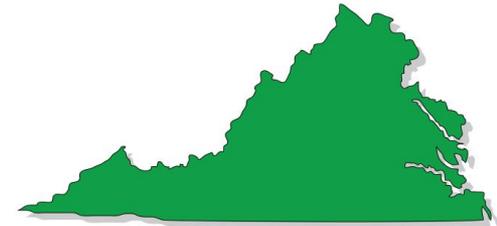
- Other States

- What NORC is hearing



## 5. Ombudsman relationship with designees (cont)

- OSLTCO & Designees – Virginia Experience
- Impacted by unique evolution
- Strengths
  - Living the Rule
    - Processes for training & designation
    - Mutually developed understandings & implementation of bifurcated program
    - Mutual respect for boundaries
    - Tool: Memorandum of Agreement
    - History of active systemic advocacy as a statewide program
      - Example: Elder law task force
      - Example: Input on laws, policies, regulation



## 5. Ombudsman relationship with designees (cont)

- Strengths (continued)
  - Generally strong ties between local ombudsmen & OSLTCO
    - Commitment to technical assistance & support
    - Responsiveness to local representative needs
    - Respect & support for challenge faced by local representatives in serving two 'masters'
    - Growing understanding among AAAs regarding uniqueness of LTCOP

## 5. Ombudsman relationship with designees (cont)

- Challenges & opportunities
  - Communication
  - Monitoring
  - Specific hurdles, e.g., fiscal management, conflicts of interest
- Opportunity: Clarity, strength, partnership

## 5. Ombudsman relationship with designees (cont)

Unique among OAA programs, this “representative” relationship has implications for:

- Designation/de-designation vs. hiring/firing
- Programmatic vs. personnel oversight
- Communications, training, and technical assistance

# Designation of Entities: A Look at Policies/Procedures

## Eligibility requirements

Public/nonprofit entity; not responsible for licensing or certifying LTCFs or services; not a provider association or affiliate; no financial interest in a LTCF; capable of providing assistance to residents of each licensed facility in the service area

## Application process

AAA contracts with a provider

- RFP process with requirements
- All proposals sent to SLTCO – who designates an applicant
- AAA notifies applicants of decision and enters into contract (to coincide with the agency's multi-year plan) with a designated provider

When AAA's can apply

Application requirements include conflict of interest provisions

# Designation of Entities: A Look at Policies/Procedures

## Required contract provisions for selected entity

Staffing pattern, service area covered, support provided by the entity, assurance that all laws/regs/policies will be followed (confidentiality of records, etc.), termination provision, continuation of service, monitoring, maintenance of records/information, reporting, assurance that program representatives will following P&Ps

## Criteria and Process for De-Designation

Reasons, notification, appeal rights, continuation of service, handling of LTCO records, handling of equipment purchased with LTCO funds,

# Monitoring LLTCOs: A Look at Policies/Procedures

## Process for monitoring

How often, areas to be reviewed, notification to the AAA/Provider Agency, reporting of results/findings, process for response by the AAA/Provider Agency

## Areas Reviewed

Case review, Data, Fiscal review, Contractor Agreements, Assurances (structural requirements), Staff survey, Training, Response to Complaints, Volunteer Recruitment, Resident/Family Council Participation, Community Education, In-service Trainings

# Designation of Representatives: A Look at Polices/Procedures

## Criteria for Designation of Individuals

- Minimum qualifications (ombudsman coordinators, staff ombudsmen, volunteers), demonstrate capability, be free of unremedied conflicts, complete certification training requirements

## Agency Process for Hiring LTCO Staff

- Ability of SLTCO to review the resumes of candidates being considered and process for SLTCO to raise concerns or interview the candidate prior to hire



## Refusal to Designate, Withdrawal or Suspension of Designation

- Reasons, process, notification (to the agency, the individual, the facilities), appeal rights, continuation of ombudsman services

## Responsibilities of Representatives (Ombudsman Coordinators, Staff Ombudsmen, Volunteers)

- Language in SLTCOP P&Ps vs Agency Job Description
  - Necessity of coordination with SLTCO, AAA, Provider Agency for aspects of provision of LTCO services, daily program operations, initial and continuing education
- 

# Between now and July 2016 . . . ACL Activities

- Training for State Units, AAAs, Long-Term Care Ombudsmen, etc – including TODAY!
- TA/Response to Questions made to Central Office, Regions, [LTCOmbudsman.Rule@acl.hhs.gov](mailto:LTCOmbudsman.Rule@acl.hhs.gov)
- FAQs developed and posted on [www.acl.gov](http://www.acl.gov)
- Work with Regions as they prepare for state reviews



# Questions or comments?

Rule-related questions and requests for TA:

[LTCOmbudsman.Rule@acl.hhs.gov](mailto:LTCOmbudsman.Rule@acl.hhs.gov)

Archived webinars, tools, and additional training information:

[www.ltcombudsman.org](http://www.ltcombudsman.org)

How to find the Rule:

<https://www.federalregister.gov/articles/2015/02/11/2015-01914/state-long-term-care-ombudsman-programs>

