

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #3

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: State Commission on Aging TITLE NUMBER: 76

CITE AUTHORITY W Va Code, §16-5L-21

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: Series 4

TITLE OF RULE BEING PROPOSED: West Virginia Long-Term Care

Ombudsman Program

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

William E. Lytton, Jr.

William E. Lytton, Jr.
Interim Executive Director

6-20



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Office of the Secretary
State Capitol Complex, Building 3
Charleston, West Virginia 25305

Gaston Caperton
Governor

May 18, 1993

Mr. William E. Lytton, Jr.
Interim Director
Commission on Aging
Holly Grove
Charleston, West Virginia 25305

Re: Proposed Rule, Title 76,
Series 4, West Virginia Long-
Term Care Ombudsman Program

Dear Bill:

Pursuant to West Virginia Code 5F-2-2(a) (12), I hereby consent to the proposal of the rule specified above.

You may attach a copy of this letter to your filing with the Secretary of State as evidence of my consent.

Sincerely,

A handwritten signature in cursive script that reads "Ruth Ann Panepinto".

Ruth Ann Panepinto, Ph.D.
Secretary

RAP/bjs

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia Long-Term Care Ombudsman Program

Type of Rule: X Legislative Interpretive Procedural

Agency West Virginia Commission on Aging Address 1900 Kanawha Blvd., E Capitol Complex Bldg 10 Charleston, WV, 25305

Includes Federal & State Funds

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current 1994	Next 1995	Thereafter 1995
Estimated Total Cost	\$	\$	\$ 428,610	\$	\$ 478,610
Personal Services			43,868		43,868
Current Expense			46,132		52,132
Repairs and Alterations					
Equipment					
Other (Pass-Through)			338,610		382,610

2. Explanation of above estimates. (Supplemental approp. not requested)
 FY 1994 current Federal and State budgeted above consists of a State Ombudsman and support staff at the Commission on Aging, current office expenses and employee benefits, additional training and administrative hearings expenses. "Other" costs (all pass-through) are for the regional ombudsmen and volunteer ombudsman program. Federal funding is expected to continue at least at the current level. The FY 1995 total includes 1994 amounts, plus \$50,000 submitted as an improvement request to be used for additional state office costs and volunteer training. See p 2 for detail on Federal/State budgeted.

3. Objectives of these rules:

Codification of the Long-Term Care Ombudsman Program

OFFICE OF WEST VIRGINIA
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4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

Expansion cost listed under 1995. Rule implementation does not depend on additional funding.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

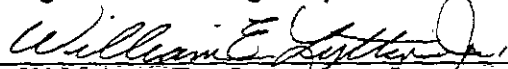
None

C. Economic Impact on Citizens/Public at Large.

None

Date 12/1/93

Signature of Agency Head or Authorized Representative



William E. Lytton, Jr.
Interim Executive Director

2. Continued from P 1

FY 1994 Budgeted -- Federal/State Detail

	Federal	State
Personnel	\$ 43,868	\$
Current Expense	26,132	20,000
Other	93,285	245,325
Total	<u>\$163,285</u>	<u>\$265,325</u>
Grand Total	\$428,610	

DATE: August 17, 1993

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: William E. Lytton, Jr, Interim Executive Director

LEGISLATIVE RULE TITLE: West Virginia Long-Term Care Ombudsman Program

1. Authorizing statute(s) citation W Va Code §16-5L-21

2. a. Date filed in State Register with Notice of ~~Hearing~~ Comment Period
June 22, 1993

- b. What other notice, including advertising, did you give of the hearing?
Mailing to Facility providers, senior groups,
Community agencies

- c. Date of Hearing(s) 30 day comment period.

- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached X No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing:
(be exact)
August 17, 1993

- f. Name and phone number(s) of agency person(s) to contact for additional information:
William E. Lytton, Jr 558-3317
Carolyn S. Riffle 558-3317

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: _____

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached _____

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: West Virginia Long-Term Care Ombudsman Program

Type of Rule: X Legislative Interpretive Procedural

Agency: West Virginia Commission on Aging

Address: 1900 Kanawha Blvd., East - State Capitol Complex
Charleston, WV 25305

1. Effect of Proposed Rule N/A

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	REC.	DEFERRED
<u>ESTIMATED TOTAL COST</u>	\$	\$	\$	\$	\$
PERSONAL SERVICES					
CURRENT EXPENSE					
REPAIRS & ALTERNATIONS					
EQUIPMENT					
OTHER					

2. Explanation of above estimates:

Current funding is expected to cover costs.

3. Objectives of these rules:

Rule Title: West Virginia Long-Term Care Ombudsman Program

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

No additional

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of Citizens.

None

C. Economic Impact on Citizens/Public at Large.

None

Date: 6/17/93

Signature of Agency Head or Authorized Representative

William E. Lyttle, Jr.

Summary of Proposed Rule

The long-term care ombudsman program is administered by the State Commission on Aging. The rule establishes the Office of the State Long-term Care Ombudsman. The rule delineates duties of the State, regional and volunteer long-term care ombudsman and further clarifies certification and continuing education requirements. Conflict of interest is defined. The rule also establishes the authority of the State Commission on Aging to designate regional long-term care ombudsman programs. Confidentiality and complaint investigation procedures are specified. The process for the State long-term care ombudsman to establish Interagency Agreements is defined. Procedures for complaints filed against regional and volunteer long-term care ombudsman are stipulated. Finally, penalties for willful interference and retaliation are established.

[PROPOSED]

TITLE 76

WEST VIRGINIA LEGISLATIVE RULES
STATE COMMISSION ON AGING, DHHR

LONG-TERM CARE OMBUDSMAN PROGRAM

Series 4

1993

[PROPOSED]
WEST VIRGINIA LEGISLATIVE RULES
STATE COMMISSION ON AGING
WEST VIRGINIA LONG-TERM CARE OMBUDSMAN PROGRAM
76 CSR 4

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TITLE 76
WEST VIRGINIA LEGISLATIVE RULES
STATE COMMISSION ON AGING

SERIES 4
WEST VIRGINIA LONG-TERM CARE OMBUDSMAN PROGRAM

§76-4-1. General Purpose.

1.1. Scope -- This legislative rule establishes the structure, powers and goals of the West Virginia long-term care ombudsman program. This program was created to effectively assist residents of long-term care facilities in the assertion of their civil and human rights.

1.2. Authority -- W. Va. Code, §16-5L-21.

1.3. Filing Date --

1.4. Effective Date --

§76-4-2. Application and Enforcement.

2.1. Application -- This rule applies to State, regional and volunteer long-term care ombudsman programs as defined by this rule.

2.2. Enforcement -- This rule is enforced by the State Commission on Aging.

§76-4-3. Definitions.

3.1. "Government Agency" -- means any department, division, office, bureau, board, commission, council, authority, or any other agency or instrumentality created by the State or political subdivision thereof or to which the State is a party or by any county or municipality which is responsible for the regulation, visitation, inspection, or supervision of long-term care facilities or which provides services to residents or long-term care facilities.

3.2. "Guardian" -- means a person lawfully vested with the power and charged with the duty of taking care of another person and managing the property and rights of another person who for some peculiarity of status or defect of age, understanding or self control is considered incapable of administering his or her own affairs, to include committees or other references under the code.

3.4. "Identity Information" -- means information which contains the identity of a complainant or resident, or which reasonably could reveal the identity of any complainant or resident.

3.5. "Immediate Family" -- means spouse, children, mother, father, brothers, or sisters.

3.6. "Long-term Care Facility" -- means nursing home, personal care home, or residential board and care home as defined in W. Va. Code, §16-5C-2; nursing homes operated by the Federal government or the State government; extended care facilities operated in connection with hospitals; and any similar institution, residence or place, or any part or unit thereof, however named, in this State which is advertised, offered, maintained or operated by the ownership or management for consideration, for the express and implied purpose of providing accommodations and care or personal assistance to one or more persons who are ill or otherwise incapacitated or are dependent upon the services of others by reasons of physical or mental impairment and who are not related within the degree of consanguinity of second cousin to the owner or manager of the institution, residence or place.

3.7. "Office of the State Long-Term Care Ombudsman" -- means the office which includes the State long-term care ombudsman, regional long-term care ombudsmen and volunteer ombudsmen all of whom are representatives of the office.

3.8. "Official Duties" -- means the work assigned to the office of the State long-term care ombudsman authorized by Federal or State law and carried out under the auspices and general direction of the State long-term care ombudsman.

3.9. "Pecuniary Interest" -- means pecuniary interest in long-term care which includes, but is not limited to, employment by a home health company, employment by a long-term care facility, or by an association (or affiliate organization of association) for long-term care facilities, or by any organization or corporation that directly or indirectly legislates, owns or operates a long-term care facility.

3.10. "Personal Assistance" -- means any personal services, including, but not limited to, the following: help in walking, bathing, dressing, feeding or getting in or out of bed, or supervision required because of the age or mental impairment of the resident.

3.11. "Regional Long-Term Care Ombudsman" -- means any paid staff of a designated regional long-term care ombudsman program who has obtained appropriate certification from the State Commission on Aging and who meets the qualifications set forth in W. Va. Code, §16-5L-9 and this rule.

3.12. "Resident" -- means an older individual living in a nursing home, personal care home, a residential board and care home, or any long-term care facility as defined in W. Va. Code, §16-5L-3(b) and this rule or who has lived in such a setting, or who has made application to live in such a setting.

3.13. "Secretary" -- means the secretary of the State department of health and human resources or his or her designee.

3.14. "State Long-Term Care Ombudsman" -- means an individual who meets the qualifications of W. Va. Code, §16-5L-5 and this rule and who is employed by the State Commission on Aging to implement the State long-term care ombudsman program.

3.15. "Volunteer Long-Term Care Ombudsman" -- means any uncompensated individual who performs the duties enumerated under W. Va. Code, §16-5L-8 and this rule: Provided, that the individual has obtained appropriate certification as set forth in W. Va. Code, §16-5L-9 and this rule.

§76-4-4. Office of the State Long-Term Care Ombudsman.

4.1. The office of the State long-term care ombudsman is to be administered by the State Commission on Aging.

4.2. No individual involved in the selection of the State long-term care ombudsman (whether by appointment or otherwise) may be (1) subject to a conflict of interests as defined in Section 8 of this rule; (2) a member or staff personnel of an agency or organization which is (a) responsible for licensing or certifying long-term care services in West Virginia; (b) an association (or an affiliate organization of such an association) of long-term care facilities; or (c) a member or employee of an agency or organization which is designated as a regional long-term care ombudsman program.

4.3. The responsibilities of the office of the State long-term care ombudsman include, but are not limited to, the following:

4.3.1. Providing advocacy services on behalf of residents;

4.3.2. Responding to residents who have complaints against the system of long-term care. The system includes not only long-term care facilities, but also all involved State and local agencies;

4.3.3. Monitoring the operation of the long-term care system to assure that all laws, rules, policies and procedures are administered in the best interest of long-term care residents and potential residents;

4.3.4. Identifying, investigating and resolving complaints made by or on behalf of older individuals who are residents of long-term care facilities relating to actions, in-actions or decisions of providers, or their representatives, of long-term care services of public agencies or of social service agencies, which may adversely affect their health, safety, welfare or rights;

4.3.5. Monitoring the development and implementation of Federal, State and local laws, regulations and policies that relate to long-term care facilities in the State;

4.3.6. Continuing to expand the statewide network to ensure that residents have regular and timely access to services provided through the office and that residents and complainants receive timely responses from representatives of the office to complaints; and

4.3.7. Representing the interests of residents before governmental agencies and seek administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents.

4.4. A State, regional and volunteer ombudsman is required to carry out his or her official duties in a manner consistent with the National Association of State Long-Term Care Ombudsman Programs Code of Ethics.

§76-4-5. State Long-Term Care Ombudsman Qualifications and Continuing Education.

5.1. The State long-term care ombudsman is required to have at least a master's degree in gerontology, social work, health, or a related field.

5.1.1. The term "related field" used in this rule includes, but is not limited to, the following areas: psychology, sociology, public administration, planning, political science, nursing and community organization.

5.2. The State long-term care ombudsman is to have demonstrated experience as documented by volunteer or paid employment history related to his or her duties and responsibilities as an ombudsman.

5.3. The State long-term care ombudsman is to have expertise and experience in the fields of long-term care and advocacy.

5.4. The State long-term care ombudsman is required to have demonstrated experience in one (1) of the following areas:

5.4.1. The field of aging;

5.4.2. Health care;

5.4.3. Community programs;

5.4.4. Long-term care issues;

5.4.5. Working with health care providers;

5.4.6. Working with and involvement in volunteer programs; or

5.4.7. Administration and management.

5.5. In lieu of the educational and experience qualifications listed in Sections 5.1. and 5.4. of this rule, the State long-term care ombudsman may have a four-year degree in gerontology, social work, health or a related field plus five (5) years of full-time equivalent experience in gerontology, social work, health, or related field.

5.6. The State long-term care ombudsman is required to attend twenty-five (25) hours of initial training before beginning his or her official duties. Initial training content is required to include the long-term care ombudsman program's authority and responsibility, resident rights, long-term care facilities, special needs of the elderly, community agencies, and complaint investigation techniques.

5.7. The State long-term care ombudsman is required to attend twenty-five (25) hours of documented continuing education on long-term care, management, supervision or topics related to his or her duties or responsibilities within each calendar year before a new identification care is issued.

§76-4-6. Duties of the State Long-Term Care Ombudsman.

Duties of the State long-term care ombudsman include, but are not limited to, the following:

6.1. Establishing a mandatory statewide procedure to receive, investigate, and resolve complaints filed on behalf of a resident, or filed on the State or regional long-term care ombudsman's own initiative on behalf of residents, relating to action, inaction or decisions of providers of long-term care services, or the representatives of such providers, of public agencies, or of social service agencies, which may adversely affect the health, safety, welfare and rights of such residents;

6.2. Monitoring the development and implementation of Federal, State and local legislation, regulations and policies with respect to long-term care facilities;

6.3. Advocating for the rights of residents of long-term care facilities;

6.4. Establishing a mandatory statewide training program and certification procedures for regional long-term care ombudsmen, excluding clerical staff, which includes training in the following areas: (i) the review of medical records; (ii) regulatory requirements for long-term care facilities; (iii) confidentiality of records; (iv) techniques of complaint investigation; (v) the effects of institutionalization; (vi) the special needs of the elderly; and (vii) applicable Federal and State laws.

6.5. Establishing and maintaining a statewide uniform reporting system to collect and analyze data relating to complaints and conditions in long-term care facilities for the purpose of identifying and resolving significant problems faced by the residents as a class. Such data is required to be submitted to the office of health facility licensure and certification of the department of health and human resources on a regular basis;

6.6. Promulgating mandatory statewide rules, regulations and training related to the use of long-term care ombudsman volunteers in the program, including procedures to assure that the responsibility and authority of ombudsman volunteers is restricted to activities which do not involve access to confidential resident or facility records, which do not involve complaint investigation other than information gathering to ascertain the nature and facts of a complaint, and which do not involve the initiation or pursuit of legal proceedings, actions or remedies;

6.7. Preparing an annual report consisting of data and findings regarding the types of problems experienced and complaints received by or on behalf of residents, and providing policy, regulatory and legislative recommendations to solve such problems, resolve such complaints, and improve the quality of care and life in long-term care facilities;

6.8. Providing information and recommendations to public agencies, legislators, and the general public regarding the problems and concerns of residents of long-term care facilities;

6.9. Establishing and directing the designation and maintenance of regional and volunteer long-term care ombudsman programs including written standards and procedures for the operation of such programs;

6.10. Monitoring compliance of designated regional long-term care ombudsman programs at least annually and reporting findings and recommendations for change to the executive director of the State Commission on Aging;

6.10.1. Designated regional long-term care ombudsman programs which are the subject of the compliance review will receive copies of the finding and recommendations.

6.11. Providing technical assistance and policy clarifications and interpretations to designated regional long-term care ombudsman programs and regional and volunteer long-term care ombudsman in case handling and adherence to rules, standards, procedures and other documents established for the program;

6.12. Establishing and maintaining written priorities for the statewide long-term care ombudsman program;

6.13. Promoting the development of citizen organizations to participate in the ombudsman program; and

6.14. Other duties as mandated by the Older Americans Act of 1965, as amended.

§76-4-7. Designation of Regional Long-Term Care Ombudsman Programs.

7.1. The State Commission on Aging has the authority to designate and maintain regional long-term care ombudsman programs encompassing all planning and development areas of the State under the direction of the State long-term care ombudsman.

7.2. In order to be designated, a regional long-term care ombudsman program must meet the following requirements:

7.2.1. The program cannot have a pecuniary, licensing, or organizational interest in long-term care facilities or an association thereof;

7.2.2. The program must maintain a private, nonprofit status as defined under the Internal Revenue Code of 1986 or function as a local or regional government agency;

7.2.3. The program must agree to create and be capable of maintaining a clearly definable unit to function as a regional long-term care ombudsman program; and

7.2.4. The program must have the capability to carry out the responsibilities of the program.

7.3. The program is required to submit on a yearly basis a completed designation proposal and budget for a regional long-term care ombudsman program to the State Commission on Aging.

7.3.1. This proposal is reviewed by the State long-term care ombudsman and other staff as the executive director of the State commission on aging deems necessary.

7.4. Upon approval by the State commission on aging, the designated regional long-term care ombudsman program is operated as a component of the office of the State long-term care ombudsman.

7.5. No individual involved in the designation of a regional long-term care ombudsman program may be (1) subject to a conflict of interest as defined in Section 8 of this rule; (2) a member or staff personnel of an agency or organization which is (a) responsible for licensing or certifying long-term care services in West Virginia, or (b) an association (or an affiliate organization of such an association) of long-term care facilities; or (c) a member or employee of an agency or organization which is designated as a regional long-term care ombudsman program.

7.6. A regional long-term care ombudsman program may not operate in conflict with objectives and policies of the office of the State long-term care ombudsman.

7.6.1. Any complaints that the organization or agency designated as the regional long-term care ombudsman program has violated the Older Americans Act, as amended, the Long-Term Care Ombudsman Program Act, or applicable regulations is to be reported to the State long-term care ombudsman.

§76-4-8. Conflict of Interest.

8.1. A conflict of interest, as used in this rule, occurs when:

8.1.1. A State, regional or volunteer ombudsman or any member of his or her immediate family has a pecuniary interest in long-term care facilities or an association thereof within the last two years.

8.1.2. A State, regional or volunteer ombudsman or any member of his or her immediate family has a pecuniary interest adverse to long-term care facilities or an association thereof.

8.1.3. A State, regional or volunteer ombudsman solicits contributions or seeks employment from a long-term care facility which he or she monitors.

8.2. Potential and existing State, regional or volunteer long-term care ombudsmen are to disclose information regarding himself/herself and his or her immediate family in order to assess a conflict of interest at the time of employment and at least annually.

8.2.1. Regional and volunteer long-term care ombudsman's information is reviewed by the State long-term care ombudsman at the time of certification and during the annual program review.

8.2.2. The State long-term care ombudsman reports potential or apparent conflicts of interest from the review to the executive director of the State Commission on Aging.

8.2.3. The executive director of the State Commission on Aging reviews potential or apparent conflicts of interest of the State long-term care ombudsmen.

8.2.4. The residence of a member of a State, regional or volunteer long-term care ombudsman's immediate family in a long-term care facility is not, in and of itself, construed as a conflict of interest. However, a State, regional or volunteer long-term care ombudsman may not be assigned to a long-term care facility in which an immediate family member is a resident.

8.3. No long-term care ombudsman volunteer may perform his or her duties in any specific facility at which, within the proceeding two (2) years, an immediate family member of the volunteer is or has been a resident or an applicant for resident. Placing a name of a family member on a waiting list is not a formal application.

8.4. Upon allegation, discovery or disclosure of a conflict of interest the executive director of the State Commission on Aging is required to identify and to remedy a conflict of interest. Failure to abide by the remedy defined by the Director is grounds for termination of certification of a State, regional or volunteer ombudsman and is grounds for termination as a designated regional long-term care ombudsman program.

§76-4-9. Regional and Volunteer Long-Term Care Ombudsman Qualifications.

9.1. A regional long-term care ombudsman is required to have at least a four-year degree in gerontology, social work, health or a related field (the term "related field" includes but is not limited to the areas listed in 5.1.1. of this rule) and demonstrated experience in one (1) of the following areas:

- 9.1.1. The field of aging;
- 9.1.2. Health care or social service programs;
- 9.1.3. Community programs; or
- 9.1.4. Long-term care issues.

9.2. A regional long-term care ombudsman is to have knowledge of long-term care or advocacy.

9.3. Consistent with the provisions of W. Va. Code, §16-5L-7 persons employed in a regional long-term care ombudsman program may be given a waiver by the State long-term care ombudsman from the four-year degree requirement.

9.4. A long-term care ombudsman volunteer is to have demonstrated interest in the field of aging and long-term care issues and be able to communicate effectively orally and in writing.

§76-4-10. Duties of the Regional and Volunteer Long-Term Care Ombudsman.

10.1. The regional long-term care ombudsman's duties include, but are not limited to, the following:

10.1.1. Monitoring long-term care facilities and investigating complaints filed on behalf of a resident, or filed on the regional long-term care ombudsman's own initiative, relating to the health, safety, welfare and rights of such residents, in accordance with complaint investigation procedures developed by the State long-term care ombudsman program.

10.1.1.1. Nothing in this section is to be construed so as to grant a regional long-term care ombudsman the right of entry to a long-term care facility's drug rooms, or to treatment rooms occupied by a resident unless prior consent has been obtained from the resident or legal representative if the resident is unable to consent;

10.1.2. Monitoring the development and implementation of Federal, State and local laws, regulations and policies with respect to long-term care facilities;

10.1.3. Training volunteers in accordance with the training and certification program developed by the State long-term care ombudsman program;

10.1.4. Encouraging, cooperating with, and assisting the development and operation of referral services which can provide current, valid and reliable information on long-term care facilities and alternatives to institutionalization to persons in need of these services and the general public;

10.1.5. Submitting reports as required by the State long-term care ombudsman program;

10.1.6. Other duties as mandated by the Older Americans Act of 1965, State law and the State long-term care ombudsman.

10.2. The long-term care ombudsman volunteer is to perform only those duties assigned by the regional long-term care ombudsman, including, but not limited to, the following:

10.2.1. Regularly visiting and talking with residents of long-term care facilities, and inspecting all public areas of the facility;

10.2.2. Interviewing residents, family members and employees of long-term care facilities to ascertain the nature and facts of a complaint;

10.2.3. Preparing reports for the regional long-term care ombudsman's review or approval relating to complaint interviews and the health, safety, welfare and rights of residents of long-term care facilities;

10.2.4. Informing residents as to the availability of ombudsman services;

10.2.5. Establishing and maintaining a cooperative working relationship with employees of long-term care facilities;

10.2.6. Working to establish and maintain resident and family councils to encourage interaction among residents, their families and long term care facility staff;

10.2.7. Performing other duties as assigned by the regional long-term care ombudsman which are not contrary to this article, to any applicable Federal law, or to rules promulgated by the State long-term care ombudsman and the State Commission on Aging.

§76-4-11. Certification and Continuing Education.

11.1. The State long-term care ombudsman is required to develop and implement procedures for training and certification of regional and volunteer long-term care ombudsmen.

11.1.1. Regional and volunteer long-term care ombudsmen who satisfactorily complete the training requirements are to be certified by the State Commission on Aging.

11.1.2. Regional and volunteer ombudsman are given identification cards which are presented to the administrator or other available employee when entering a long-term care facility and to employees, residents and others thereafter if requested.

11.1.3. Consistent with the provisions of this rule, certified regional and volunteer long-term ombudsmen are to be representatives of the office of the State long-term care ombudsman;

11.2. No regional or volunteer ombudsman is permitted to perform his or her official duties prior to the completion of certification training except as a supervised portion of that training program.

11.3.1. Training content will include, but is not limited to:

11.3.1.1. Review of medical records;

11.3.1.2. Regulatory requirements for long-term care facilities;

11.3.1.3. Confidentiality of records;

11.3.1.4. Techniques of complaint investigations;

11.3.1.5. Effects of institutionalization;

11.3.1.6. Special needs of the elderly;

11.3.1.7. Applicable Federal and State laws.

11.4. An individual is to attend, at a minimum, twenty-five (25) hours of training to be initially certified as a regional or volunteer ombudsman.

11.5. Regional and volunteer long-term care ombudsmen who have completed the minimum training requirements specified in Section 11.2. of this rule are to be given identification cards by the State Commission on Aging valid for one (1) year.

11.6. For each year after initial certification, a regional long-term care ombudsman is to attend twenty-five (25) hours of documented continuing education on long-term care, Federal, State, and local laws, regulations, and policies or subjects related to his or her duties or responsibilities annually in order to obtain a new identification card.

11.6.1. For each year after initial certification, a volunteer long-term care ombudsman is required to attend at least seven (7) hours of documented continuing education, on subjects related to long-term care, annually in order to obtain a new identification card.

§76-4-12. Investigation of Complaints.

12.1. Upon receipt of a complaint made on behalf of a resident, or on his or her own initiative, the State or regional long-term care ombudsman is authorized to investigate any act, practice, policy or procedure of any long-term care facility or government agency which affects the health, safety, welfare or rights of any resident. Investigative activities of the State or regional long-term care ombudsman are described in W. Va. Code, §16-5L-10.

12.2. Complaints will be investigated on behalf of residents 60 years or older.

12.3. Complaints made on behalf of residents under sixty (60) years of age will be investigated by the long-term care ombudsman program under the following circumstances:

12.3.1. There is no other advocacy available for the resident and the long-term care ombudsman program is the only viable avenue of assistance. The long-term care ombudsman will inform other advocacy organizations as appropriate.

12.3.2. The complaint, whether resolved or not, will have immediate or long-term impact on older residents in the facility.

12.4. Investigation procedures may include, but are not limited to, the following:

12.4.1. Establishing contact with the complainant, resident if different from the complainant, legal representative or other relevant persons;

12.4.2. Identifying issues by the complainant, resident and the State, regional or volunteer long-term care ombudsman;

12.4.3. Developing and implementing a strategy in consultation with the resident or complainant to resolve the complaint;

12.4.4. Referring, where applicable, to the appropriate regulatory and other agencies; and

12.4.5. Taking appropriate action pertaining to complaints regarding any government agency.

12.5. The State or regional long-term care ombudsman need not investigate any complaint upon determining that:

12.5.1. The complaint is trivial, frivolous, vexatious or not made in good faith;

12.5.2. The complaint has been too long delayed to justify present investigation;

12.5.3. The resources available, considering the established priorities, are insufficient for an adequate investigation;

12.5.4. The matter complained of is not within the investigatory authority of the long-term care ombudsman program; or

12.5.5. A real or apparent conflict of interest exists and no other ombudsman is available to investigate the complaint in an impartial manner. If a determination is made by a regional long-term care ombudsman not to investigate any complaint, then the complaint is to be referred to the State long-term care ombudsman who will make a final decision as to whether the matter warrants further investigation.

§76-4-13. Confidentiality of Information.

13.1. Identity information obtained or maintained by the State, regional or volunteer long-term care ombudsmen in the course of carrying out their official duties pursuant to the long-term care ombudsman program will remain confidential.

13.2. All other information and files maintained by the ombudsman program are to be disclosed only at the discretion of the regional ombudsman program having authority over the disclosure of such files. Prior to any destruction of the files, the State long-term care ombudsman must receive notice; this notice must be in writing and 30 days prior to the actual destruction of the files.

§76-4-14. Interagency Agreements.

14.1. The State long-term ombudsman is to establish cooperative interagency agreements, updated at least every two (2) years, with the office of health facility licensure and certification, the office of social services and other appropriate agencies.

14.2. Such cooperative agreements will, at a minimum, address the following:

14.2.1. Cooperative efforts among all concerned agencies and organizations in meeting the needs of residents of long-term care facilities;

14.2.2. Procedures for access by State and regional long-term care ombudsman to publicly discloseable records of any State government department, agency, or office reasonably necessary to any investigation carried out by the ombudsmen pursuant to this rule and W. Va. Code, §16-5L-10;

14.2.3. Procedures for notification of an observation by State and regional long-term care ombudsman of any survey conducted by government agency affecting the health, safety, welfare or rights of residents of a long-term care facility;

14.2.4. Procedures for the State and regional long-term care ombudsmen to use in referring a complaint to any appropriate State government department, agency or office;

14.2.5. Procedures to be used by the departments or agencies receiving the complaint to acknowledge receipt and disposition within thirty (30) calendar days;

14.2.6. Procedures for State or regional long-term care ombudsmen to use in making referrals to adult protective services and to the office of health facility licensure and certification of cases of suspected abuse, neglect or emergency situations or of conditions which are likely to result in abuse, neglect or emergency situations as defined in W. Va. Code, §9-6-1 of residents of long-term care facilities;

14.2.7. Procedures for coordination among the State or regional long-term care ombudsman, adult protective services, and the office of health facility licensure and certification on an investigation of suspected abuse, neglect or exploitation undertaken by those offices; and

14.2.8. Procedures the State government department, agency, or office which responds to a complaint referred to it by a State or regional long-term care ombudsman, use in forwarding to the long-term care ombudsman copies of publicly discloseable inspection reports and plans of correction, and notices of any citations and sanctions levied against the long-term care facility identified in the complaint.

§76-4-15. Immunity from Liability.

15.1. No representative of the office of the State long-term care ombudsman is liable under West Virginia law for the good faith performance of official duties.

§76-4-16. Procedure for complaints filed against a regional or volunteer long-term care ombudsman.

16.1. The organization or agency designated as the regional long-term care ombudsman program is to establish a procedural process for responding to allegations that applicable Federal or State Laws, applicable regulations or the National Association of State Long-Term Care Ombudsman Program's Code of Ethics has been violated by regional or volunteer long-term care ombudsman. The procedural process is to be provided to the State long-term care ombudsman for review and approval prior to designation as a regional long term care

ombudsman program.

16.2. All regional and volunteer long-term care ombudsman are to act in accordance with the Code of Ethics adopted by the National Association of State Long-term Care Ombudsman Programs. A copy is kept on file at the State long-term care ombudsman office. The regional long-term care ombudsman program is to provide a copy to every ombudsman.

16.3. The organization or agency designated as the regional long-term care ombudsman program is to maintain a file on every complaint filed with their office including a statement of the disposition of the complaint. This file may be reviewed by the State long-term care ombudsman at any time.

16.4. Procedure for residents and others to file complaints against regional or volunteer long-term care ombudsman.

16.4.1. Complaints alleging: (A) unsatisfactory action or inaction on behalf of residents, (B) violation of applicable laws or regulations or (C) violation of the Code of Ethics are to be filed with the organization or agency designated as the regional long-term care ombudsman program.

16.4.1.1. The organization or agency designated as the regional long-term care program is required to do the following:

16.4.1.1.a. Advise all employees of their duties and responsibilities under the applicable Federal and State laws and regulations, and under the Code of Ethics adopted by the National Association of State Long-term Care Ombudsman Programs;

16.4.1.1.b. Establish procedures for determining if an employee has violated a provision of the applicable laws or regulations or the Code of Ethics;

16.4.1.1.c. Establish a progressive disciplinary policy to determine the appropriate sanction to be imposed for a violation, including, but not limited to, administrative reprimand if a violation is found to be minor and unintentional, or otherwise affected by mitigating circumstances; suspension from employment without pay; or termination of employment.

16.4.1.1.c.1. Before suspending or terminating the employment of any ombudsman for violating a provision of the applicable laws or regulations of the Code of Ethics, the organization or agency designated as the regional long-term care ombudsman program is to consult with the office of the State Long-term Care Ombudsman to insure that its' interpretation of the laws, regulations, or Code of Ethics is consistent with the interpretation of the Office of the State Long-term Care Ombudsman.

16.4.1.1.d. Respond to the complaintant in writing of the disposition of the complaint.

16.4.2. If the complainant is not satisfied with the response or conclusion of the regional long-term care ombudsman program, the complainant may then request a review by the Office of the State Long-term Care Ombudsman.

16.4.2.1. The Office of the State Long-term Care Ombudsman is to notify all interested parties in writing of the date, time and place the review is to be held.

16.4.2.2. All of the testimony and evidence and the admissibility of testimony and evidence is to be recorded by stenographic notes and characters or by mechanical means.

16.4.2.3. The Office of the State Long-term Care Ombudsman need not review a complaint if the following is determined:

16.4.2.3.a. The complaint is trivial, frivolous, vexatious or not made in good faith;

16.4.2.3.b. The complaint had been too long delayed to justify review;

16.4.2.3.c. The resources available, considering the established priorities, are insufficient to proceed with a review; or

16.4.2.3.d. The matter complained of is not within the authority of the Office of the State Long-term Care Ombudsman.

16.4.2.4. The Office of the State Long-term Care Ombudsman is to issue a written decision, including findings of fact and conclusions of law.

16.4.2.5. Whenever there is clear reason to believe that an organization or agency designated as the regional long-term care ombudsman program: (a) has violated the applicable laws, regulations, or Code of Ethics or (b) after notice, has failed to take appropriate remedial or disciplinary action to ensure compliance by its employees with the applicable laws, regulations or Code of Ethics, and (c) attempts resolution, have been unsuccessful, then the office of the State long-term care ombudsman may proceed to suspend or terminate the designation of the regional long-term care ombudsman program, or take any further action deemed appropriate.

16.4.2.6. Nothing in this rule is intended to require the individual with a complaint to exhaust administrative remedies before pursuing alternative legal rights, or otherwise to limit or diminish any other existing legal right.

§76-4-17. Willful interference; retaliation; penalties.

17.1. Any individual who willfully interferes with or impedes a State or regional long-term care ombudsman or ombudsman volunteer in the performance of his or her official duties is guilty of a misdemeanor, and upon conviction thereof, can be fined not more than one hundred dollars, or imprisoned in the county jail for not more than ninety days, or both fined and imprisoned.

17.2. Any individual who institutes or commits a discriminatory, disciplinary, retaliatory or reprisal action against any officer or employee of a long-term care facility or government department or agency, against any resident of a long-term care facility or against any guardian, attorney in fact or against any family member of any resident of a long-term care facility for having filed a complaint with or provided information in good faith to a State or regional long-term ombudsman or ombudsman volunteer to aid the long-term care ombudsman or ombudsman volunteer in carrying out the duties pursuant to this article is guilty of a misdemeanor, and, upon conviction thereof, can be fined not more than one hundred dollars, or imprisoned in the county jail for not more than ninety days, or both fined and imprisoned.

17.3. Any individual violating the provisions of subsection (1) or (2) of this section is, for the second or any subsequent offense under either of these subsections, guilty of a misdemeanor, and, upon conviction thereof, can be fined not more than two hundred fifty dollars, or imprisoned in the county jail for not more than ninety days, or both fined and imprisoned. Each day of a continuing violation after conviction is to be considered a separate offense.

17.4. There is a rebuttable presumption in any civil action that any reprisal action, as defined below, within ninety days of the incident, is discriminatory, disciplinary or retaliatory in violation of the public policy of this State. For the purpose of this section, the term "reprisal action" refers to action taken by entity involved in a complaint or report against the person making the complaint or report, or the person with respect to whom the complaint or report was made because of the complaint or report, and included, but not limited to, the following:

17.4.1. Discharge or transfer from a long-term care facility;

17.4.2. Termination of service;

17.4.3. Restriction or prohibition of access to the long-term care facility or its residents;

17.4.4. Discharge from or termination of employment;

17.4.5. Demotion or reduction in remuneration for services;

17.4.6. Any restriction of rights affecting the person's ability to perform his or her employment duties or responsibilities or affecting the person's health, safety or welfare; or

17.4.7. Any restriction against a State or regional long-term care ombudsman or ombudsman volunteer which impedes the carrying out of duties pursuant to W. Va. Code, §16-51-1 et seq. and this rule.

17.5. Nothing in this section is to be construed as to infringe upon the rights of an employer to supervise, discipline or terminate an employee for other reasons.

§76-4-18. Severability.

18.1. The provisions of this rule are declared to be severable. If any provision of this rule is held invalid, the remaining provisions will remain in effect.

In response to the thirty day comment period, comments were received by:

Mr. Raymond Dunleavy
1612 Greystone Place
Charleston, West Virginia 25314

Mr. Mark S. Hyman
Aging Program Specialist
US Administration on Aging
P.O. Box 13716 Mail Stop #23
Philadelphia, Pennsylvania 19101

Mr. Bruce G. Perrone
Litigation Director
Legal Aid Society of Charleston
1033 Quarrier Street, Suite 600
Charleston, West Virginia 25301

Mr. Robert P. Brauner, R.Ph.
Program Administrator
Office of Health Facility Licensure and Certification
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Mr. Partick D. Kelly
Steptoe and Johnson
715 Charleston National Plaza
Post Office Box 1588
Charleston, West Virginia 25326-1588

The Following Changes were made to the West Virginia Long Term Care Ombudsman Program Rule following the thirty day comment period.

Change 3.12.: " Older" is added to the definition of resident.

3.12. "Resident" -- means an older individual living in a nursing home, personal care home, a residential board and care home, or any long-term care facility as defined in W. Va. Code, §16-5L-3(b) and this rule or who has lived in such a setting, or who has made application to live in such a setting.

Reason: The proposed rule's definition of resident, as originally stated, would differ from section 711, paragraph (6) of the Older Americans Act of 1965 as amended. For the purposes of the Act, a "resident" is someone over age 60. The rule at section 12.3. articulates the instances in which ombudsman responsibilities are able to be extended to those under age 60.

Change 5.6.: Initial training content for the State long-term care ombudsman was added. This section was divided into two sections for clarity. 5.7. is a continuation of the original 5.6. no change in content was made.

5.6. The State long-term care ombudsman is required to attend twenty-five (25) hours of initial training before beginning his or her official duties. Initial training content is required to include the long-term care ombudsman program's authority and responsibility, resident rights, long-term care facilities, special needs of the elderly, community agencies, and complaint investigation techniques.

5.7. The State long-term care ombudsman is required to attend twenty-five (25) hours of documented continuing education on long-term care, management, supervision or topics related to his or her duties or responsibilities within each calendar year before a new identification card is issued.

Reason: Initial training content was not included in the proposed rule. Training content for the regional and volunteer long-term care ombudsman is provided in section eleven. Adding training content requirements for the State long-term care Ombudsman will ensure adequate training prior to beginning his or her official duties.

Change 6.10.: " At least" was added to this section.

6.10. - Monitoring compliance of designated regional long-term care ombudsman programs at least annually and reporting finding and recommendations for changes to the executive director of the State Commission on Aging.

Reason: This requirement establishes the responsibility of the State long-term care ombudsman to ensure compliance of the designated regional long-term care ombudsman program. Adding at least annually provides an additional safeguard to ensure close monitoring if problems are found. Annual monitoring would not be adequate if problems were discovered.

Change 7.2.3.: "agree to create and be capable of maintaining" is added to this section.

7.2.3. - The program must agree to create and be capable of maintaining a clearly definable unit to function as a regional long-term care ombudsman program.

Reason: The requirement of a functioning unit to be designated as a regional long term care ombudsman program is too restrictive. This section, as originally stated, would prohibit the designation of new programs and only existing regional long term care ombudsman programs would qualify because they would be the only entities which have a clearly definable unit functioning as a regional long-term care ombudsman program.

Change 8.2.: "at least" is added to this section.

8.2. - Potential and existing State, regional or volunteer long-term care ombudsman are to disclose information regarding himself/herself and his/her immediate family in order to assess a conflict of interest at the time of employment and at least annually.

Reason: Conflict of interest for the State, regional and volunteer may occur at any time. Disclosure of this information at the time of employment and at least annually ensures adequate monitoring by the State Commission on Aging.

Change 8.2.4.: "However, a State, regional or volunteer long-term care ombudsman may not be assigned to a long-term care facility in which an immediate family member is a resident." is added to this section.

8.2.4. The residence of a member of a State, regional or volunteer long-term care ombudsman's immediate family in a long-term care facility is not in and of itself construed as a conflict of interest. However, a State, regional or volunteer long-term care ombudsman may not be assigned to a long-term care facility in which an immediate family member is a resident.

Reason: The residence of a member of a State, regional or volunteer long-term care ombudsman's immediate family in a facility is not in and of itself construed as a conflict of interest which would prohibit the employment of the individual as an ombudsman. If a member of the ombudsman's immediate family is a resident that information is required to be disclosed in order to assess a conflict of interest. Further, this change will ensure that the ombudsman will not be assigned to that facility.

Change 11.1.2.: "the administrator or other available ... when entering ... and to employees, residents and others thereafter if requested."

11.1.2. Regional and volunteer ombudsman are given identification cards which are to be presented to the administrator or other available employee when entering a long-term care facility and to employees, residents and others thereafter if requested.

Reason: Regional and volunteer ombudsman are granted access to long-term care facilities in W. Va. Code, §16-51-11. Requiring identification upon entering a facility would ensure adequate communication to the facility of the ombudsman's presence. Employees, residents and others are presented identification if requested.

Change: Section 16 has been combined to establish a procedure for complaints by residents and others. The proposed rule, as originally written, divided the process into two procedures.

§76-4-16 Procedure for complaints filed against a regional or volunteer long-term care ombudsman.

16.1. The organization or agency designated as the regional long-term care ombudsman program is to establish a procedural process for responding to allegations that applicable Federal or State Laws, applicable regulations or the National Association of State Long-Term Care Ombudsman Program's Code of Ethics has been violated by regional or volunteer long-term care ombudsman. The procedural process is to be provided to the State long-term care ombudsman for review and approval prior to designation as a regional long term care ombudsman program.

16.2. All regional and volunteer long-term care ombudsman are to act in accordance with the Code of Ethics adopted by the National Association of State Long-term Care Ombudsman Programs. A copy is kept on file at the State long-term care ombudsman office. The regional long-term care ombudsman program is to provide a copy to every ombudsman.

16.3. The organization or agency designated as the regional long-term care ombudsman program is to maintain a file on every complaint filed with their office including a statement of the disposition of the complaint. This file may be reviewed by the State long-term care ombudsman at any time.

16.4. Procedure for residents and others to file complaints against regional or volunteer long-term care ombudsman.

16.4.1. Complaints alleging: (A) unsatisfactory action or inaction on behalf of residents, (B) violation of applicable laws or regulations or (C) violation of the Code of Ethics are to be filed with the organization or agency designated as the regional long-term care ombudsman program.

16.4.1.1. The organization or agency designated as the regional long-term care program is required at a minimum to do the following:

16.4.1.1.a. Advise all employees of their duties and responsibilities under the applicable Federal and State laws and regulations, and under the Code of Ethics adopted by the National Association of State Long-term Care Ombudsman Programs;

16.4.1.1.b. Establish procedures for determining if an employee has violated the law or a regulation or the Code of Ethics;

16.4.1.1.c. Establish a progressive disciplinary policy to determine the appropriate sanction to be imposed for a violation, including, but not limited to, administrative reprimand if a violation is found to be minor and unintentional, or otherwise affected by mitigating circumstances; suspension from employment without pay; or termination of employment.

16.4.1.1.c.1. Before suspending or terminating the employment of any ombudsman for violating a provision of the applicable laws or regulations of the Code of Ethics, the organization or agency designated as the regional long-term care ombudsman program is to consult with the office of the State Long-term Care Ombudsman to insure that its' interpretation of the laws, regulations, or Code of Ethics is consistent with the interpretation of the Office of the State Long-term Care Ombudsman.

16.4.1.1.d. Respond to the complainant in writing of the disposition of the complaint.

16.4.2. If the complainant is not satisfied with the

response or conclusion of the regional long-term care ombudsman program, the complainant may then request a review by the Office of the State Long-term Care Ombudsman.

16.4.2.1. The Office of the State Long-term Care Ombudsman is to notify all interested parties in writing of the date, time and place the review is to be held.

16.4.2.2. All of the testimony and evidence and the admissibility of testimony and evidence is to be recorded by stenographic notes and characters or by mechanical means.

16.4.2.3. The Office of the State Long-term Care Ombudsman need not review a complaint if the following is determined:

16.4.2.3.a. The complaint is trivial, frivolous, vexatious or not made in good faith;

16.4.2.3.b. The complaint had been too long delayed to justify review;

16.4.2.3.c. The resources available, considering the established priorities, are insufficient to proceed with a review; or

16.4.2.3.d. The matter complained of is not within the authority of the Office of the State Long-term Care Ombudsman.

16.4.2.4. The Office of the State Long-term Care Ombudsman is to issue a written decision, including findings of fact and conclusions of law.

16.4.2.5. Whenever there is clear reason to believe that an organization or agency designated as the regional long-term care ombudsman program: (a) has violated the applicable laws, regulations, or the Code of Ethics or (b) after notice, has failed to take appropriate remedial or disciplinary action to ensure compliance by its employees with the applicable laws, regulations or Code of Ethics, and (c) attempts at resolution, have been unsuccessful, then the office of the State long-term care ombudsman may proceed to suspend or terminate the designation of the regional long-term care ombudsman program, or take any further action deemed appropriate.

16.4.2.6. Nothing in this rule is intended to require an individual with a complaint to exhaust administrative remedies before pursuing alternative legal rights, or otherwise to limit or diminish any other existing legal right.

Reason: This section, as originally written, required a separate procedure for residents and for others to follow when a complaint was made against a regional or volunteer long-term care ombudsman. The redraft establishes one procedure which is easier to administer and understand. Requirements of the designated regional ombudsman program and the office of the State long-term care ombudsman are delineated.

The following comments are in response to the thirty (30) day comment period for the proposed rule of the Long-Term Care Ombudsman Program Act. Agency responses and appropriate changes follow comments in each section.

COMMENTS REGARDING §76-4-3

Comment: 3.5. - Nursing home licensure regulation 4.13. requires first and second cousin, aunt and uncle of an individual, whether such relationship arises by reasons of birth, marriage or adoption.

Response: The Long Term Care Ombudsman Program Act, W Va Code §16-5L et al, established the definition of immediate family as stated in the rule.
Action Required: No change recommended.

Comment: Define willful interference.

Response: §76-4-17. of this rule defines willful interference as any action against a State, regional or volunteer long-term care ombudsman which impedes the carrying out of his or her duties.

Action Required: No change recommended.

Comment: 3.12. - The proposed rule's definition of "resident" in Section 3.12 is "an individual living in a nursing home." This differs from Section 711, paragraph (6) of the Older Americans Act of 1965 as amended, which describes a resident as an "older individual who resides in a nursing home". (The Act at Section 102, paragraph (38) previously defines an "older individual" as one "60 years of age or older.") Thus, for purposes of the Act, a "resident" is someone over age 60. Because West Virginia's drafted rule does not define age parameters for "residents" or "older individuals" these terms might not be regarded as equivalent. Establishing age limits for "residents" and "older individuals" in the Definitions would make them equivalent, as they are in the Older Americans Act. Thus, using these terms interchangeably, as in 4.3.4., would be less likely to cause confusion or be regarded as inconsistent. The rule at section 12.3., 12.3.1. and 12.3.2., articulates well the instances in which ombudsman responsibilities are able to be extended to those under age 60.

Response: We agree with this comment.

Action Required: §76-4-3.12. will be changed to the following:

3.12. "Resident" -- means an older individual living in a nursing home, personal care home, a residential board and care home, or any long-term care facility as defined in W. Va. Code, §16-5L-3(b) and this rule or who has lived in such a setting, or who has made application to live in such a setting.

COMMENTS REGARDING §76-4-4

Comment: §76-4-4.3.4. - Include any individual because {you} could have {the} public or other resident{s} causing problems. LTC facilities may have young people with needs.

Response: §76-4-4.3.4. as it is now written, is established by the Long-Term Care Ombudsman Program Act, W. Va. Code, §16-5L et al. §76-4-12. in this rule establishes the standard for assisting residents under 60.

Comment: State ombudsman needs authority with regard to the lead ombudsman.

Response: The West Virginia Long-Term Care Ombudsman Program Act does not establish a "lead" ombudsman. The authority of the State long-term care ombudsman is vested in §76-4-6. et al.

Action Required: No change recommended in section four (4).

COMMENTS REGARDING §76-4-5

Comment: §76-4-5.6. - Define initial training, such as communication skills and supervisory skills.

Response: We agree with this comment.

Action Required: Replace section §76-4-5.6. and §76-4-5.7. with the following:

5.6. The State long-term care ombudsman is required to attend twenty-five (25) hours of initial training before beginning his or her official duties. Initial training content is required to include the long-term care ombudsman program's authority and responsibility, resident rights, long-term care facilities, special needs of the elderly, community agencies, and complaint investigation techniques.

5.7. The State long-term care ombudsman is required to attend twenty-five (25) hours of documented continuing education on long-term care, management, supervision or topics related to his or her duties or responsibilities within each calendar year before a new identification card is issued.

COMMENTS REGARDING §76-4-6

Comment: 6.1. - Include disseminating policies and procedures to agencies.

Response: The State Ombudsman is required in §76-4-6.7. and §76-4-6.8. to make information available to the public agencies.

Comment: 6.4. - Under (vi) special needs should not be limited to elderly; add ill and disabled.

Response: 6.4. - (vi) Establishes the minimum requirements for training. The program serves facilities where large numbers of elderly reside.

Comment: 6.5. - The reporting system should require regional ombudsman programs to specify the number of complaints which are substantiated and unsubstantiated. All data should be submitted at least annually to OHFLAC and DHHR. The term "regular basis" is too vague. Include quarterly report as well as the annual report.

Response: The reporting system, as required by the US Administration on Aging, currently specifies numbers of complaints which are resolved, partially resolved, withdrawn, unresolved, invalid, explained or referred. Further, as major complaint issues arise they are immediately submitted to the appropriate agency. The annual report provides additional information established by complaint trends. Providing information on a regular basis allows the program flexibility to report critical issues promptly.

Comment: 6.8. - Information and recommendations should also be provided to the long-term care industry. Many issues can be resolved by improving communication between the ombudsman program and the long-term care industry.

Response: Providing information and recommendations to the general public, as now specified, would assure its availability to the long-term care industry.

Comment: 6.10. - Change annual basis to quarterly and as needed basis.

Response: 6.10. will be changed to include "at least annually".

Action Required: No changes recommended for 6.1., 6.4., 6.5., and 6.8. Replace 6.10. with the following:

§76-4-6.

6.10. - Monitoring compliance of designated regional long-term care ombudsman programs at least annually and reporting finding and recommendations for changes to the executive director of the State Commission on Aging.

COMMENTS REGARDING §76-4-7

Comment: 7.3. - Require submission of quarterly budget reports to the State LTC ombudsman.

Response: The designated regional long-term care ombudsman program submits monthly invoices for actual expenses incurred to the State Commission on Aging.

Action Required: No change recommended.

Comment: 7.2.3. - The requirement of a "functioning" unit is too restrictive. Under this requirement, only existing regional long-term care ombudsman programs would qualify because they would be the only entities which have a "functioning" unit. §76-4-7.2.3. should be amended as follows: The program must agree to create and be capable of maintaining a clearly definable unit to function as a regional long-term care ombudsman program.

Response: We agree with this comment.

Action Required: Replace §76-4-7.2.3. with the following:

7.2.3. - The program must agree to create and be capable of maintaining a clearly definable unit to function as a regional long-term care ombudsman program.

COMMENTS REGARDING §76-4-8

Comment: Regarding 8.2. - This subsection addresses conflicts of interest which exist at the time an ombudsman is employed and conflicts which may be detected during an annual review. It does not address conflicts which may arise during the course of the year. Conflicts which arise during the year must be addressed.

Response: 8.2 will be changed to "at least".

Action Required: Replace section §76-4-8.2. with the following:

8.2. - Potential and existing state, regional or volunteer long-term care ombudsman are to disclose information regarding himself/herself and his/her immediate family in order to assess a conflict of interest at the time of employment and at least annually.

Comment: 8.2.4. - The residence of a member of a State, regional or volunteer ombudsman's immediate family in a long-term care facility is a conflict of interest for the ombudsman with respect to that facility because the ombudsman's personal feelings may impair his or her judgement. A facility may agree to waive the conflict, but the presumption should be that a conflict does exist.

Response: The residence of a member of a State, regional, or volunteer ombudsman's immediate family in a long-term care facility is not in and of itself construed as a conflict. However, if a member of the ombudsman's immediate family is a resident that information is required to be disclosed in order to assess a conflict of interest.

Action Required: Replace §76-4-8.2.4. with the following:

8.2.4. The residence of a member of a State, regional or volunteer long-term care ombudsman's immediate family in a long-term care facility is not in and of itself construed as a conflict of interest. However, a State, regional or volunteer long-term care ombudsman may not be assigned to a long-term care facility in which an immediate family member is a resident.

COMMENTS REGARDING §76-4-9

Comment: 9.2. - Change "or advocacy" to "and advocacy".

Response: §76-4-9.2. as currently written permits flexibility when hiring a new regional long term care ombudsman. Knowledge of long-term care issues and advocacy would limit the field of perspective applicants.

Comment: 9.4. - Regional ombudsman needs also to communicate effectively orally and in writing.

Response: §76-4-9.1. - Requirement of a four (4) year degree exceeds this comment.

Action Required: No change recommended in section nine (9).

COMMENTS REGARDING §76-4-10

Comment: 10.1.1. - Include the right to examine a resident's clinical record. Also, include consistent with State Law.

Response: Access to medical records is detailed in W. Va. Code, §16-5L-1 et al seq. Section ten (10) of this rule establishes duties of the regional and volunteer long-term care ombudsman.

Comment: 10.2.5. - Include along with the employees of LTC facilities, interested agencies.

Response: Volunteers are not prohibited from working with agencies, however, their job functions are specific to working with the resident. The regional ombudsman develops this type of relationship.

Comment: 10.2.5. - Cooperative working relationships should also be established with facility administrators and owners.

Response: Facility Administrators are employees of the facility. Nursing home owners may be corporations with out of state headquarters. Cooperative working relationships are developed with all individuals who have regular contact with volunteers in the course of carrying out their official duties.

Comment: 10.2.6. - Change "Working to establish and maintain" to "Encourage the establishment of...".

Response: 10.2.6. as currently written, is the same requirement as in W. Va. Code, §16-5L-8(c).

Action Required: No change recommended in section ten (10).

COMMENTS REGARDING §76-4-11

Comment: Regarding 11.1.2. - Regional and volunteer ombudsman should be required to present employees, residents and interested parties with their identification cards upon entering the facility and thereafter if requested.

Response: Presenting an ID card to every resident is not an acceptable practice unless requested by the resident. We agree that identity information should be presented upon entering a facility and to employees, residents and others thereafter if requested.

Action Required: §76-4-11.1.2. will be changed to the following:
11.1.2. Regional and volunteer ombudsman are given identification cards which are to be presented to the administrator or other available employee when entering a long-term care facility and to employees, residents and others thereafter if requested.

Comment: 11.3.1. - Include "Interviewing techniques".

Response: Interviewing skills are covered in complaint investigation techniques.

Comment: 11.6. Include "to receive a satisfactory written performance evaluation by the State LTC ombudsman annually".

Response: The State ombudsman is required to monitor program performance at least annually. Contract personnel are evaluated by the designated program.

Action Required: 11.1.2. will be changed accordingly. No change recommended for 11.3.1 and 11.6.

COMMENTS: REGARDING §76-4-12

Comment: 12.3.2. - Definition needed for "immediate or long-term impact".

Response: Immediate or long-term impact sets the standard for exceptions to the requirement.

Comment: 12.3.2. - Delete "older", with regard to the complaint issue of residents 60 years or older and residents under 60 years.

Response: §76-4-12.3.2. establishes the standard for exceptions to serving residents under sixty (60). Resident is defined in the Older Americans Act as amended as an older individual.

Comment: 12.4.1. - Define "relevant persons".

Response: The complaint will dictate other relevant persons to contact.

Comment: 12.4. - Add "Written policies and procedures for investigating complaints will be established by the state LTC ombudsman.

Response: §76-4-6.9. in this rule grants the State long-term care ombudsman authority to establish written standards and procedures for the operation of regional and volunteer long-term care ombudsman programs.

Action Required: No change recommended for section twelve (12).

COMMENTS REGARDING §76-4-13

Comment: 13.2. - Change to: All other information and files maintained by the ombudsman program are to be disclosed to the State ombudsman at his/her request. Prior to any destruction of the files, the State long-term care ombudsman and interested agencies must received notice; this notice must be in writing and 30 days prior to the actual destruction of the files. (Interested agencies may need access for litigation.) Include sharing information with OHFLAC, how long the files will be maintained, and what happens to files if ombudsman if fired, resigns, etc.

Response: Disclosure of information to agencies and interested parties is defined in the Older Americans Act as amended and the West Virginia Long-Term Care Ombudsman Program Act.

The contract between the Commission on Aging and the designated program dictates the destruction of files from previous years and maintenance of confidential files for current years.

Cooperation among government agencies is outlined in W. Va. Code, §16-5L-14. which includes sharing information and making referrals on behalf of residents.

Action Required: No change recommended for section thirteen (13).

COMMENTS REGARDING §76-4-16:

Comment: §76-4-16 - The following is a redraft of the "Administrative Due Process" section for submission to replace the proposed draft in its entirety. I believe the redraft is much easier to administer and more understandable.

§76-4-16 Procedure for complaints filed against a regional or volunteer long-term care ombudsman.

16.1. The organization or agency designated as the regional long-term care ombudsman program is to establish a procedural process for responding to allegations that applicable Federal or State Laws, applicable regulations or the National Association of State Long-Term Care Ombudsman Program's Code of Ethics has been violated by regional or volunteer long-term care ombudsman. The procedural process is to be provided to the State long-term care ombudsman for review and approval prior to designation as a regional long term care ombudsman program.

16.2. All regional and volunteer long-term care ombudsman are to act in accordance with the Code of Ethics adopted by the National Association of State Long-term Care Ombudsman Programs. A copy is kept on file at the State long-term care ombudsman office. The regional long-term care ombudsman program is to provide a copy to every ombudsman.

16.3. The organization or agency designated as the regional long-term care ombudsman program is to maintain a file on every complaint filed with their office including a statement of the disposition of the complaint. This file may be reviewed by the State long-term care ombudsman at any time.

16.4. Procedure for residents and others to file complaints against regional or volunteer long-term care ombudsman.

16.4.1. Complaints alleging: (A) unsatisfactory action or inaction on behalf of residents, (B) violation of applicable laws or regulations or (C) violation of the Code of Ethics are to be filed with the organization or agency designated as the regional long-term care ombudsman program.

16.4.1.1. The organization or agency designated as the regional long-term care program is required at a minimum to do the following:

16.4.1.1.a. Advise all employees of their duties and responsibilities under the applicable Federal and State laws and regulations, and under the Code of Ethics adopted by the National Association of State Long-term Care Ombudsman Programs;

16.4.1.1.b. Establish procedures for determining if an employee has violated the law or a regulation or the Code of Ethics;

16.4.1.1.c. Establish a progressive disciplinary policy to determine the appropriate sanction to be imposed for a violation, including, but not limited to, administrative reprimand if a violation is found to be minor and unintentional, or otherwise affected by mitigating circumstances; suspension from employment without pay; or termination of employment.

16.4.1.1.c.1. Before suspending or terminating the employment of any ombudsman for violating a provision of the applicable laws or regulations of the Code of Ethics, the organization or agency designated as the regional long-term care ombudsman program is to consult with the office of the State Long-term Care Ombudsman to insure that its' interpretation of the laws, regulations, or Code of Ethics is consistent with the interpretation of the Office of the State Long-term Care Ombudsman.

16.4.1.1.d. Respond to the complainant in writing of the disposition of the complaint.

16.4.2. If the complainant is not satisfied with the response or conclusion of the regional long-term care ombudsman program, the complainant may then request a review by the Office of the State Long-term Care Ombudsman.

16.4.2.1. The Office of the State Long-term Care Ombudsman is to notify all interested parties in writing of the date, time and place the review is to be held.

16.4.2.2. All of the testimony and evidence and the admissibility of testimony and evidence is to be recorded by stenographic notes and characters or by mechanical means.

16.4.2.3. The Office of the State Long-term Care Ombudsman need not review a complaint if the following is determined:

16.4.2.3.a. The complaint is trivial, frivolous, vexatious or not made in good faith;

16.4.2.3.b. The complaint had been too long delayed to justify review;

16.4.2.3.c. The resources available, considering the established priorities, are insufficient to proceed with a review; or

16.4.2.3.d. The matter complained of is not within the authority of the Office of the State Long-term Care Ombudsman.

16.4.2.4. The Office of the State Long-term Care Ombudsman is to issue a written decision, including findings of fact and conclusions of law.

16.4.2.5. Whenever there is clear reason to believe that an organization or agency designated as the regional long-term care ombudsman program: (a) has violated the applicable laws, regulations, or the Code of Ethics or (b) after notice, has failed to take appropriate remedial or disciplinary action to ensure compliance by its employees with the applicable laws, regulations or Code of Ethics, and (c) attempts at resolution, have been unsuccessful, then the office of the State long-term care ombudsman may proceed to suspend or terminate the designation of the regional long-term care ombudsman program, or take any further action deemed appropriate.

16.4.2.6. Nothing in this rule is intended to require an individual with a complaint to exhaust administrative remedies before pursuing alternative legal rights, or otherwise to limit or diminish any other existing legal right.

Response: We agree with this comment.

Action Required: §76-4-16. will be changed accordingly.

Comment: Regarding 16.1.2. - The State long-term care ombudsman should be mandated to review a regional program's complaint file biannually, It is impossible for the State long-term care ombudsman to effectively monitor the ombudsman program in the state without being aware of complaints against the program. A summary of every complaint and a statement regarding the disposition of every complaint should be sent to the State long-term care ombudsman to ensure adequate monitoring. A similar requirement should be made for 16.2.

Response: The State ombudsman has access to the complaint file at any time. She is required to monitor the program at least annually. These provisions ensure adequate monitoring of complaints filed against the designated program.

Action Required: No change recommended.

Comment: 16.1.3. - Change "establish a process" to "follow a process for responding to allegations that are applicable to Federal or State Laws, applicable regulations of the Code of Ethics, that has been established by the State LTC ombudsman...".

Response: The designated program is to establish a procedural process for responding to complaints. The process is approved by the State long-term care ombudsman prior to signing the contract for designation as a regional long-term care ombudsman program.

Action Required: No change recommended.

Comment: 16.1.4. - Include review by the State survey and certification agency and Adult Protective System.

Response: The State long-term care ombudsman has review authority. Other agencies are not granted review authority over the long-term care ombudsman program.

Action Required: No change recommended.

Comment: 16.1.4.3.a. - Define trivial, frivolous and vexatious.

Response: Trivial, frivolous and vexatious are standards for exceptions. Complaint trends and history define outcome. The ombudsmen needs flexibility to make a decision on trivial, frivolous and vexatious.

Action Required: No change recommended.

Comment: 16.2.2.5. Under current law, the right to judicial review of an administrative decision hinges upon whether the matter is a "contested case" as defined in W Va Code 29A-1-2. Many of the complaints envisioned for handling under this "Administrative Due Process" provision would not meet that definition. In those cases, this regulation would create a right to judicial review that does not exist in present law. To avoid this problem, I suggest that the second sentence of Section §76-4-16.2.2.5. be deleted.

§76-4-16.2.2.7. I am concerned that the phrasing of this section might suggest that this rule itself creates a new right "to proceed to Circuit Court" at anytime. Therefore, I believe the section should be re-written as follows:

Nothing in this rule is intended to require the individual filing the complaint to exhaust administrative remedies before pursuing alternative legal rights, or otherwise to limit or diminish any other existing legal right.

Response: We agree with this comment.

Action Required: This section will be changed accordingly.

General Comments:

Comment: My review found no discussion regarding ensuring the availability of legal counsel to the ombudsman and his/her representatives. See Older Americans Act Section 712(g) Legal Counsel.)

Response: The contract between the designated program and the State Commission on Aging ensures the availability of legal counsel to the regional ombudsman.

Action Required: No change recommended.

Comment: The State long-term care ombudsman should be given the authority to sanction ombudsman and regional ombudsman programs and to enforce the directives and guidelines he or she has established for the ombudsman program. By statute, the State long-term care ombudsman is ultimately responsible for the proper administration of the ombudsman program in the state, yet the State long-term care ombudsman lacks the authority to enforce his or her directive. This is a fatal flaw in the program and must be addressed.

Response: We agree that the State Ombudsman is responsible for assuring proper administration of the long-term care ombudsman program. The contract with the designated program and the provisions in this rule establish program standards and requirements. Sanctions may be imposed by the State Commission on Aging when adherence to these standards is not met.

Action Required: No change recommended.

Reason for the Rule:

W Va Code §16-5L-21. mandates the State long-term care ombudsman and the State Commission on Aging to promulgate rules to effectuate the proposals and the provisions of the West Virginia Long-Term Care Ombudsman Program Act.