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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Virginia Department for Aging and Rehabilitative Services
<b>Virginia Administrative Code (VAC) citation(s)</b>	22VAC30-60; 22VAC30-140 (new)
<b>Regulation title(s)</b>	State Long-Term Care Ombudsman Program
<b>Action title</b>	Reorganization and Revisions to the State Long-Term Care Ombudsman Program Regulations
<b>Date this document prepared</b>	August 28, 2018

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

### Brief Summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).*

The current regulatory sections for the Office of the State Long-Term Care Ombudsman (OSLTCO) and the State Long-Term Care Ombudsman Program (SLTCOP) (22VAC30-60-570 through 22VAC30-60-590) will be repealed and a new, standalone chapter will be established to more clearly describe OSLTCO and the SLTCOP requirements. In addition, several additional sections within 22VAC30-60 that include SLTCOP content will be amended to fully execute the move to the newly established chapter. The new chapter, State Long-Term Care Ombudsman Program (22VAC30-140), is needed to update and better describe the requirements of the program. Revisions and details are needed to incorporate new requirements stemming from the 2006 reauthorization of the federal Older Americans Act ("OAA," Public Law 109-365) and its ensuing federal regulations (45 CFR Parts 1321 and 1324). These changes will align Virginia's regulations for the OSLTCO and the SLTCOP operations with the new federal requirements.

## Acronyms and Definitions

*Please define all acronyms or technical definitions used in the Agency Background Document. .*

AAAs = Area Agencies on Aging  
 CFR = Code of Federal Regulations  
 DARS or the Department = Virginia Department for Aging and Rehabilitative Services  
 FR = Federal Register  
 OAA = Older Americans Act  
 OSLTCO = Office of the State Long-Term Care Ombudsman  
 SLTCOP = State Long-Term Care Ombudsman Program

## Mandate and Impetus

*Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, board decision, etc.). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."*

The 2006 reauthorization of the federal Older Americans Act ("OAA," Public Law 109-365) and as amended by the 2016 reauthorization of the OAA (Public Law 114-144) combined with its accompanying 2015 regulations (45 CFR Parts 1321 and 1324) implement changes for the federal funding, administration, and oversight of SLTCOPs.

## Legal Basis

*Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity's overall regulatory authority.*

Section 51.5-131 of the *Code of Virginia* authorizes the Commissioner of the Virginia Department for Aging and Rehabilitative Services ("Department") to promulgate regulations necessary to carry out the provisions of the laws of the Commonwealth administered by the Department. Section 51.5-135 of the *Code of Virginia* gives the Department the responsibility for providing or contracting for the administration of the SLTCOP. Section 51.5-139 of the *Code of Virginia* gives the Department (or its designee) the responsibility to investigate long-term care complaints. Section 51.5-140 defines the OSLTCO's access to facilities and providers and requires the Commissioner of the Department to promulgate regulations regarding the investigation of allegations of interference, retaliation, or reprisals and the implementation of sanctions with respect to such interference, retaliation, or reprisals as required by the OAA. Sections 51.5-141 and 51.5-142 govern the confidentiality and release of long-term care ombudsman records, protections for SLTCOP representatives while exercising their duties, and mechanisms to ensure the OSLTCO may act independently for advocacy purposes.

## Purpose

*Please describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.*

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The SLTCOP provides person-centered advocacy for individuals receiving long-term care in assisted living facilities, nursing homes, and other similar long-term care facilities, or in home and community settings through community-based long-term services and supports. In keeping with its federal and state mandates, Virginia's OSLTCO, housed at the Virginia Department for Aging and Rehabilitative Services, investigates and resolves complaints on behalf of long-term care recipients and engages in systemic advocacy to help protect the health, safety, welfare, and rights of these individuals. Operating as one integrated statewide program, the OSLTCO provides oversight of its network of designated SLTCOP representatives who operate out of area agencies on aging (AAAs) or other non-profit entities throughout the Commonwealth to carry out the program's work of investigating and resolving recipients' complaints and working with stakeholders to improve the quality of long-term care.

Since its creation in the 1970s, the basic functions of SLTCOPs have been delineated in the OAA. However, there were no federal regulations promulgated that specifically focused on states' implementation of SLTCOPs. Because the U.S. Department of Health and Human Services (HHS) recognized the need for federal regulations for the long-term care ombudsman program to minimize variations in interpretation and implementation of these programs throughout the U.S., HHS promulgated regulations to provide greater clarity regarding program implementation at the state level. The federal regulations now in effect clarify specific roles and responsibilities of designated program representatives and host entities, requirements to identify and mitigate conflicts of interest, requirements to ensure the independence of the program to engage in advocacy activities to fulfill program mandates, and training requirements for representatives of the program. When HHS finalized new federal program standards to address these concerns in 2015 (81 FR 92696), there was an expectation that some states would need to update their statutes, regulations, policies, procedures and/or practices in order to be consistent with federal law and the new regulations.

In 2017, § 51.5-140, § 51.5-141 and § 51.5-142 of the *Code of Virginia* were updated to reflect new OAA and federal regulatory requirements. These include provisions for the prevention of interference, retaliation and reprisals against the program or its SLTCOP representatives; mechanisms to ensure the OSLTCO may act independently for advocacy purposes; and the implementation of sanctions with respect to such interference, retaliation, or reprisals.

The current OSLTCO and SLTCOP regulations are predominantly found in 22VAC30-60-570 through 22VAC30-60-590 within Chapter 60 (Grants to Area Agencies on Aging). Upon review of the regulatory sections, the Department has found that they: 1) conflict with the new federal requirements; 2) lack sufficient detail; and 3) do not reflect current practice. In order to address these issues, the Department seeks to: 1) repeal sections 22VAC30-60-570 through 22VAC30-60-590; 2) amend certain sections within 22VAC30-60 to remove any remaining OSLTCO or SLTCOP content as appropriate; and 3) establish a new chapter (State Long-Term Care Ombudsman Program, 22VAC30-140). This action will align Virginia's regulations for the OSLTCO and the SLTCOP operations with the new federal requirements.

Virginia's OSLTCO and SLTCOP provide critical services to support the health, safety and welfare of citizens. Providing clarity and strengthening state regulations to align them with federal requirements advances the health, safety and welfare of citizens, particularly those residing in long-term care facilities or receiving long-term care services in the community.

## Substance

*Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

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The technical or minor amendments to certain sections of 22VAC30-60, the repeal of 22VAC30-60-570 through 22VAC30-60-590, and the development of a newly established chapter (22VAC30-140) will include updated regulatory text that is consistent with federal law and requirements and will be easier for SLTCOP representatives and the public to use.

Drawing mostly from new federal requirements for SLTCOPs, among the areas addressed in the new chapter will be:

- General Regulations:
  - General authority, establishment, or purpose of the OSLTCO
  - Definitions
  - Mitigation of local ombudsman entities’ organizational-level conflict of interest and SLTCOP representatives’ individual-level conflict of interest
  - Protections from interference, retaliation and reprisal
  - Departmental decisions, sanctions and grievance processes
  - Access to records and facilities
  - Confidentiality requirements and limitations regarding disclosure
  - Ombudsman liability protections and access to legal counsel
- OSLTCO:
  - Responsibilities of the Department and the OSLTCO
  - Oversight of local ombudsman entities
  - Process for receiving complaints
  - Criteria for designation or removal as a local ombudsman entity and SLTCOP representative
- Local Ombudsman Entities and Representatives:
  - Responsibilities of local ombudsman entities and SLTCOP representatives
  - Process for receiving complaints
  - Parameters for the use of volunteer SLTCOP representatives
  - Training requirements for SLTCOP representatives
  - Processes for use of cross or neighboring jurisdiction SLTCOP representatives

Additional changes may occur as a result of input received from the public or the regulatory panel.

## Alternatives

*Please describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.*

There are no viable alternatives identified that would be less intrusive or least burdensome. The new chapter and the additional requirements are needed to align Virginia’s regulations for the OSLTCO and the SLTCOP operations with the new federal requirements.

## Public Participation

*Please indicate whether the agency is seeking comments on this regulation, including ideas to assist the agency in the development of the regulation and the costs and benefits of the alternatives stated in this notice or other alternatives.*

*Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency's contact if you're interested in serving on the panel is \_\_\_\_\_; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulation.*

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The agency is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation. Also, the agency/board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the *Code of Virginia*. Information may include: 1) projected reporting, recordkeeping, and other administrative costs; 2) the probable effect of the regulation on affected small businesses; and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at <https://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to Charlotte Arbogast, 8004 Franklin Farms Drive, Henrico, VA 23229, phone number: 804-662-7093, fax number: 804-662-7663; email: [charlotte.arbogast@dars.virginia.gov](mailto:charlotte.arbogast@dars.virginia.gov). In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of the proposed stage of this regulatory action.

A panel will be assembled to provide professional specialization and technical assistance on the development of the regulations. The panel membership will include individuals who have expertise in providing long-term care services, serving as SLTCOP representatives, or advocating for older and other vulnerable adults receiving long-term care services. Members will assist the Department in the careful consideration of proposed regulation content. The Department will appoint panel members and if you are interested in serving on the panel, contact Charlotte Arbogast ([charlotte.arbogast@dars.virginia.gov](mailto:charlotte.arbogast@dars.virginia.gov)).