

TITLE 22. CALIFORNIA DEPARTMENT OF AGING
NOTICE OF PROPOSED RULEMAKING CONCERNING

Posting of Notice § 8010
Facility Entry § 8020
Interference with Actions of Office § 8040

NOTICE IS HEREBY GIVEN that the California Department of Aging (Department) is proposing to take the action described in the Informative Digest. Any person may present statements or arguments relevant to the proposed action in writing. Written comments, including those sent by mail, facsimile, or email to the addresses listed under Contact Person in this Notice, must be received by the Department at its office by 5:00 p.m. on May 5, 2020.

The Department has not scheduled a public hearing on this proposed action. The Department will, however, hold a hearing if it receives a written request for a hearing from any interested person, or their authorized representative, no later than 15 days prior to the close of the written comment period.

The Department may, after considering all timely and relevant comments, adopt the proposals substantially as described in this Notice, or may modify the proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as the contact person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Pursuant to the authority vested by sections 9102, 9105 and 9745 of the Welfare and Institutions Code (WIC), and to implement, interpret and make specific sections 9701, 9712.5, 9715, 9718, 9722, 9723, 9724, 9725, 9730, and 9732 of said Code, the Department is considering changes to sections 8010, 8020, and 8040 of Articles 1, 2 and 3 of Division 1.8 of Title 22 of the California Code of Regulations (CCR) as follows:

Informative Digest and Policy Statement Overview

Amend Title 22 CCR Section 8010, Posting of Notice

The California Office of the State Long-Term Care Ombudsman (Office), located within the Department, advocates for the health, safety, welfare and rights of individuals living in long-term care facilities. To accomplish its goals, the Office designates public and non-profit organizations throughout the state to act as local Ombudsmen in hearing, investigating and resolving complaints filed by or on behalf of long-term care residents.

Existing law, WIC section 9718, requires long-term care facilities to post a notice that identifies the names, addresses and telephone numbers of the Office and the local ombudsman organization, and a description of the services they provide. CCR section 8010(a) includes the provision that the notice be in plain view of residents, patients, visitors and individuals confined to wheelchairs. The proposed amendment will update the wording to reflect that the notice be in plain view of individuals “who use” wheelchairs or other mobility devices.

Amend Title 22 CCR Section 8020, Facility Entry

Existing law, WIC section 9722, authorizes the Office and any ombudsman coordinator access to long-term care facilities to carry out the responsibilities of the program. WIC section 9701 (b) defines “long-term care facility” and section 9701(d) defines “Ombudsman coordinator.” CCR section 8020 erroneously cites section 9701(a) instead of 9701(b) and section 9701(e) instead of 9701(d) respectively for these definitions. The proposed amendment will correct these references.

WIC Sections 9712.5 and 9726.1 describe the services provided by long-term care ombudsman representatives in the exercise of their lawful responsibilities. The proposed amendment will add these sections to clarify the full scope of services provided by the Office and its representatives.

CCR section 8020(a) sets the timeframe for reasonable access to a facility by any ombudsman coordinator, designated ombudsman or other representative of the Office as 7:00 a.m. to 10:00 p.m. CCR section 8020(b) provides that entry may be made after hours if authorization to do so is first received from the State Ombudsman or their designated representative. If they are not available, authorization may be given by an ombudsman coordinator, followed by notice to the Office. The proposed amendment will change the word “ombudsmen” to “Ombudsman representatives” to be more inclusive and clarify that notice must be given to the “Office” rather than the “State Office.”

WIC section 9701(d) defines an “Ombudsman coordinator” in part, as an individual selected by an approved organization to manage the day-to-day operation of the ombudsman program. CCR section 8020(b) references the “substate ombudsman coordinator.” The proposed amendment will delete the word “substate” to accurately reflect the definition set forth in law.

Amend Title 22 CCR Section 8040, Interference with Actions of Office

Existing law gives representatives of the Office access to long-term care facilities to hear, investigate and resolve complaints to assist residents in protecting their health, safety, welfare, rights and quality of life. Senate Bill (SB) 80 (Committee on Budget and Fiscal Review, Human Services Omnibus, Chapter 27, Statutes of 2019) amends WIC section 9712.5(d)(1) to require representatives of the Office to visit each long-term care

facility on a quarterly basis to provide residents with regular and timely access to ombudsman services.

Prior to the passage of SB 80, there was no requirement that long-term care facilities be visited on a regular basis. With the new requirement for quarterly visits, the Office seeks to set standard protocols for its representatives to minimize interference from facility personnel as they carry out their lawful responsibilities.

Existing law, WIC sections 9730 and 9732, provides that anyone who willfully interferes with any lawful action of a representative of the Office is to be reported to the appropriate licensing agency and is subject to a civil penalty. To interpret and make specific these sections, the Department is proposing to amend and adopt regulations to clarify what constitutes willful interference, the timeframe in which the interference is to be reported to the appropriate licensing agency and the Office, and the statutory remedies available to the Office.

Proposed amendments to CCR section 8040 delete references to “licensee”, “employee”, “agent”, “connected with a long-term care facility”, to simply state that “no person” shall willfully interfere with any lawful action of the Office.

Proposed amendments to CCR section 8040(a) delete the words “prevent”, “impede” and “or” to make the language consistent with WIC sections 9730 and 9732.

Currently, the Office certifies each representative, designating them as an Ombudsman. The Department is proposing to adopt CCR section 8040(a)(1)(A) and (B) to require representatives to have on their person clearly visible photographic identification issued by the Office and to present a copy of the laws and regulations that specify their authority to access long-term care facilities, residents, patients and their medical and personal records. If the representative fails to do both, interference by facility personnel will not be considered willful under proposed CCR section 8040(a)(1)(C).

CCR section 8040(b) specifies that no person shall willfully prevent or interfere with the interviewing of complainants, patients, residents or witnesses. Long-term care Ombudsman representatives interact with residents, patients, and others in the lawful exercise of their responsibilities in many ways, not just when interviewing them during the investigation of complaints. Proposed amendments to this section delete the words “prevent or” to be consistent with law and replace the phrase “the interviewing of” with “confidential communications with” to more accurately reflect the scope of an Ombudsman’s lawful responsibilities. Proposed amendments also replace the phrase “investigation and resolution of complaints” with “lawful exercise of their responsibilities” because the responsibilities of ombudsman representatives include more than the investigation and resolution of complaints.

CCR Section 8040(c) states that no person shall willfully prevent or interfere with the examination or copying of patients’ or residents’ medical or personal records. Proposed amendments delete the words “prevent or” to be consistent with law and add the

provision that an Ombudsman has access to residents' and patients' medical and personal records, to more accurately reflect the scope of their lawful responsibilities.

CCR section 8040(e) provides that no person shall willfully prevent, impede or interfere with the work of duly authorized representatives of the Office in the investigation and resolution of complaints. Proposed amendments delete the words "prevent, impede or" to be consistent with law. The lawful responsibilities of long-term care Ombudsman representatives include more than investigating and resolving complaints. They also include advocating for the health, safety, welfare, rights, and quality of life of residents and patients in long-term care facilities. Proposed amendments will specify that no person shall willfully interfere with the lawful work of authorized representatives of the Office and delete the phrase "in the investigation and resolution of complaints" to reflect the full scope of an Ombudsman representative's responsibilities.

CCR section 8040(d) states that no person shall willfully discriminate, discipline or retaliate against any employee, patient, resident or volunteer for information given to aid the Office in carrying out its lawful responsibilities. Proposed amendments to this section delete the word "willfully" since "discriminate, discipline, and retaliate" are sufficiently descriptive of the actions the regulation prohibits. The amendment also eliminates the provision that this regulation does not apply if the communication made or information given or disclosed was done maliciously or without good faith, because existing law, WIC section 9715(b), adequately addresses this issue.

Proposed CCR section 8040(b)(1) and (2) will specify that interference is considered willful if it continues after the Ombudsman representative provides photographic identification issued by the Office and a copy of the laws and regulations that authorize access to long-term care facilities, residents, patients and their medical and personal records; that interference will not be deemed willful if the person interfering is doing so at the direction of another person who has authority to take or recommend adverse employment actions against them; and that the person who authorizes the employee to interfere will be the one considered as willfully interfering with the lawful actions of the Office.

Proposed CCR section 8040(c) will require the Ombudsman representative who was the subject of the interference to notify the appropriate licensing agency and the State Ombudsman within 24 hours of the occurrence.

Proposed CCR section 8040(d) will specify the Ombudsman representative may seek the assistance of local law enforcement as needed in accordance with WIC section 9732(b).

Proposed CCR section 8040(e) will provide that the State Ombudsman may seek appropriate legal remedies if the person continues to interfere with lawful actions of the Office.

Finally, the Department proposes to delete the reference to WIC section 9720.5 because it addresses program requirements rather than long-term care facilities.

Anticipated Benefits of Proposal

The proposed amendments eliminate obsolete words and phrases and update the regulatory language to be consistent with law and easier to understand. As Ombudsman representatives begin quarterly visits to each long-term care facility, the proposed regulations will further clarify the role of the Ombudsman as well as lessen confusion and willful interference by facility personnel since each representative will have photographic identification issued by the State Ombudsman and will provide a copy of the laws and regulations that authorize access to long-term care facilities, residents, patients and their medical and personal records. The proposed regulations also clearly state what constitutes willful interference and what the consequences are if the law is not followed. Reducing the possibility of willful interference will help Ombudsman representatives meet their statutory obligation to advocate for the health, safety, welfare and rights of long-term care residents and patients.

Consistency and Compatibility with Existing State Regulations

During the process of developing these regulations and amendments, the Department has conducted a search of similar regulations on this topic and has concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

Fiscal Impact Estimates

Local Mandate: None

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies: The Department anticipates there may be a slight increased cost to the Office in issuing photographic identification to its representatives and providing copies of the laws and regulations that authorize access to long-term care facilities, residents, patients and their medical and personal records.

Costs/Savings in Federal Funding to the State: None

Nondiscretionary Costs/Savings to Local Agencies: None

Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability to Compete: The Department has made an initial determination that the proposed regulatory actions would have no significant adverse economic impact directly affecting businesses, including the ability of businesses to compete with businesses in other states.

Cost Impact on Representative Private Person or Business: The Department is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed actions.

Cost to any Local Agency or School District for Which Government Code Sections 17500 – 17630 Require Reimbursement: None

Effect on Housing: None

Effect on Small Business

The Department believes these regulations will have no significant impact on small businesses because the proposed amendments to the regulations delete obsolete language, correct references, simplify language to be consistent with law, and identify the scope of services provided by long-term care Ombudsman representatives. The proposed regulations also identify and make specific what constitutes willful interference with lawful actions of the Office and the statutory remedies available.

Result of Economic Impact Assessment/Analysis

Impact on Job/New Businesses: The Department concludes that it is (1) unlikely that the proposal will eliminate any jobs, (2) likely that the proposal will create an unknown number of jobs, (3) likely that the proposal will create an unknown number of new businesses, (4) unlikely that the proposal will eliminate any existing businesses, and (5) unlikely that the proposed regulations will result in the expansion of businesses currently doing business within the state.

Benefits of the Regulations:

The Department has determined that the proposed regulations will benefit residents and patients in long-term care facilities by providing accurate contact information and access to long-term care Ombudsman services without willful interference from long-term care facility personnel. Reducing the possibility of willful interference will help Ombudsman representatives meet their statutory obligation to advocate for the health, safety, welfare and rights of long-term care residents and patients.

The regulations do not affect worker safety or the state's environment.

Business Reporting Requirement

The proposed regulations do not create business reporting requirements.

Consideration of Alternatives

In accordance with Government Code section 11346.5, subdivision (a)(13), the Department has determined that no reasonable alternative it considered or that has

otherwise been identified and brought to its attention (1) would be more effective in carrying out the purpose for which each action is proposed, (2) would be as effective and less burdensome to the affected private persons than the proposals described in this notice, or (3) would be more cost effective to the affected private persons and equally effective in implementing the statutory policy or other provision of law.

Any person interested in presenting written statements or arguments with respect to alternatives to the proposed regulations may do so during the public comment period.

Availability of Initial Statement of Reasons, Text of Proposed Regulations and Rulemaking File

The entire rulemaking file will be available for inspection and copying throughout the process at the Department's office address listed below. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulations, the initial statement of reasons and the documents upon which the proposals are based.

Availability of Changed or Modified Text

After considering all timely and relevant comments received, the Department may amend and adopt the proposed regulations substantially as described in this notice. If the Department makes modifications sufficiently related to the originally proposed text, the modified text, with the changes clearly indicated, will be available to the public for a least 15 days during which written comments will be accepted before the regulations are adopted.

Availability of the Final Statement of Reasons

Upon its completion, the final statement of reasons will be available by accessing the website or contacting the person(s) listed below.

Contact Person

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name:	Gretchen Kjose
Address:	1300 National Drive, Suite 200
Phone No:	(916) 419-5261
Fax No:	(916) 928-2267
E-Mail Address:	gretchen.kjose@aging.ca.gov

The backup contact person is

Name: Carmen Gibbs
Address: 1300 National Drive, Suite 200

Phone No: (916) 419-7500
Fax No: (916) 928-2267
Email address: carmen.gibbs@aging.ca.gov

Website Access:

Copies of this Notice, the Initial Statement of Reasons, and the Text of the proposed regulations in underline and strikeout can be found at the California Department of Aging's website:

www.aging.ca.gov