



U.S. ABILITYONE COMMISSION

May 11, 2015

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Advisory Committee on Increasing Competitive
Integrated Employment for Individuals with Disabilities
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, N.W.
Washington, DC 20210

Dear Ms. Sheehy:

On behalf of our Executive Director, Tina Ballard, and myself, thank you providing opportunities for the U.S. AbilityOne Commission staff to provide some information about the AbilityOne Program to the Advisory Committee and its Marketplace Dynamics Subcommittee. We have reviewed the Subcommittee's presentation for tomorrow's Advisory Committee virtual meeting, and in doing so, identified a few technical or legal clarifications to the information there.

One thing we identified is a technical correction that is needed for the references to "Ability One" with a space between the words, or the use of "A1" as an acronym or abbreviation. For the protection of our trademark, the Commission's General Counsel advises that we must insist on use of our Federal agency's registered trademark version, which is all one word, with the encircled R symbol on first use: AbilityOne®. After first use, it can be referred to as AbilityOne; however, we do not have any approved acronyms or abbreviations that can be used.

We have a few recommendations to improve the clarity and accuracy of some statements pertaining to the AbilityOne Program. We understand and respect the Subcommittee's full discretion to draw conclusions and make recommendations; thus, we focused on statements that read as factual. We also recognize that slides are often worded concisely, and as this is a public record, we want to provide some context to avoid any misunderstanding of the Javits-Wagner-O'Day (JWOD) statute or the AbilityOne Program. Our comments and rationale follow.

Slide #6 states, "Most Federal agency appointees on the A1 Commission are not experts on the employment of people who are blind or have significant disabilities." For clarity, we recommend a context statement, such as "The Commission's primary statutory responsibility is to make decisions about the suitability of products and services for the Procurement List, and to make sure that Federal procurement policy supports the AbilityOne Program." We also recommend changing "procurement specialists" as used in the first paragraph to "flag officers or members of the Senior Executive Service from various career fields, including senior procurement executives."



COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED
An Independent Federal Agency



Rationale: The background of the Federal appointees on the Commission, including those who are not disability experts, was by design according to the legislative history of the JWOD Act. The Commission relies on the Federal appointees for their Federal agency and/or procurement expertise, and these senior leaders may include small business directors, chief financial officers, labor advisors and supply chain experts in addition to acquisition executives. Likewise, the Commission relies on the Federal appointees from DOL and RSA, the private citizens and other sources for expertise in disability policy and related matters.

Slide #7 says, “A1 currently lacks a strong external monitoring process. For example, A1 is not currently monitored by any Office of the Inspector General.” It would be more accurate to state, “AbilityOne [or the Commission] does not have its own Office of Inspector General, though it supports the recommendation to establish one.”

Rationale: Aside from an Office of Inspector General (OIG), the Commission is subject to external oversight similar to other Federal agencies in terms of reporting to its Presidential appointees, reporting to the Office of Management and Budget, reporting to its authorizing Committees in the House and Senate, being subject to review by the Government Accountability Office (GAO) and publishing its proposed regulations or Procurement List decisions in the Federal Register for transparency. The Commission is on record in its response to GAO Report 13-457 that it supports their recommendation (to Congress) to establish an OIG for the Agency.

Slide #7 says, “The JWOD Act is outdated because it is not in compliance with current Federal disability policies or civil rights laws.” It would be more accurate to frame this conclusion as, “The JWOD Act has not been substantially updated since the 1970s, and more recent Federal disability policies or civil rights laws emphasize different employment models.”

Rationale: The JWOD Act was enacted long before the Americans with Disabilities Act of 1990, as amended. The ADA does not address, supersede or revoke the JWOD Act; rather, the statutes coexist legally. We do not believe the JWOD Act, which is narrowly focused on employment through the Federal procurement system, violates any other laws. With respect to the Supreme Court’s decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), the court was asked to interpret the ADA, not the JWOD Act. One way in which current laws and regulations are implemented is through the Federal contracts awarded under the authority of the JWOD Act; these include Federal Acquisition Regulation (FAR) clauses that implement civil rights laws and regulations such as adherence to the requirements of DOL’s Office of Federal Contracts Compliance Programs (OFCCP).

Slide #7 also says the “JWOD Act requires segregation of employees who are blind or have significant disabilities at their worksites and is not in compliance with the 1999 Supreme Court decision *Olmstead v. L.C.*” This is not correct. It would be accurate to frame the conclusion as “The JWOD Act requires a ratio of direct labor hours performed by individuals who are blind or who have significant disabilities that results in a higher proportion of those individuals working together



on AbilityOne contracts than is found in the general population.” It would be balanced to include a statement of context that in the performance of AbilityOne services, employees who are blind or have significant disabilities often work side by side with, or interact regularly with, individuals who do not have disabilities.

Rationale: The statement “not in compliance” implies a violation of law, which is not the case, though we are aware that some express the opinion that facility-based or community-based employment such as we offer through the AbilityOne Program is incongruent with contemporary disability policy. The JWOD Act makes no reference to segregation, and the intent (mission) is to provide employment to a targeted population in the manufacture and delivery of products and services to the Government, not to segregate those individuals. While one may conclude that the JWOD direct labor hour ratio requirements result in a less integrated work environment, it is not accurate to say the Act requires segregation. The Federal procurement system provides preference to businesses owned by veterans, by women, by people who are economically disadvantaged, or to organizations that create employment for people who are blind/significantly disabled. These preferential programs are intended to offer opportunities to groups that have historically been underutilized or underrepresented in Federal procurement or in the national laborforce.

Slide #8 states that “Congress should consider amending the JWOD Act so that the A1 program ensures that the only priority for Federal procurement opportunities for nonprofit organizations under A1 is that they provide competitive, integrated employment opportunities for PWD.” As worded, this recommendation would eliminate the basis for the AbilityOne Program and thus eliminate the employment opportunities it provides to people with significant disabilities who face the most barriers to obtaining and maintaining integrated competitive employment.

Rationale: The community rehabilitation programs (nonprofit agencies) participating in the AbilityOne Program refer or place individuals into integrated competitive employment outside of their organizations. They are affirmative employers of other individuals whose functional limitations, due to the nature of their significant disabilities, have prevented competitive employment from occurring and require supports and services beyond reasonable accommodations which are now required under the ADA. If nonprofit agencies were to only receive a priority for AbilityOne contracts when they are providing integrated competitive employment, they would have to employ fewer people with significant disabilities to get that priority, which would be contrary to the AbilityOne mission and the nonprofit agencies’ purpose.

Slide #8 also states, “The JWOD law should be updated to require all nonprofit organizations that provide goods and services to the Federal government through the A1 program to have human resource staff to assist in the placement of employees into competitive, integrated employment settings in their communities...” It would be relevant context to include some newly analyzed data that shows over the past five-year period, AbilityOne nonprofit agencies have placed nearly 118,000 people who are blind or have significant disabilities into competitive or supported employment,



Ms. Jennifer C. Sheehy, DFO
May 11, 2015
Page 4

either directly or after those individuals worked on AbilityOne contracts (Source: Commission staff analysis of Annual Certification data from nonprofit agencies – Forms 403/404, May 1, 2015).

Slide #8 says, “No employee who is blind or has other significant disabilities working for a nonprofit under the A1 program should receive a subminimum wage under the FLSA Sec. 14(c).” Notwithstanding the slide’s title, we suggest preceding this statement with verbiage making it clear that this is a recommendation of the subcommittee, not a legal assessment. It would be more balanced to include a statement of context that not all AbilityOne participating nonprofit agencies that have a 14(c) certificate pay wages under the certificate. Some nonprofit agencies only hold a certificate in order to meet certain requirements of their state or other funding sources. It is also factual to note that the Department of Labor administers the Fair Labor Standards Act, including Section 14(c).

Rationale: The sentence currently reads as though it could be a statement of fact, implying that it’s not legal to pay a subminimum wage under the AbilityOne Program, or some readers may infer that the AbilityOne Program uses 14(c) exclusively.

In closing, we appreciate the task of the Advisory Committee and its subcommittees, and find it aligned with the Commission’s vision that all people who are blind or who have significant disabilities are able to achieve their maximum employment potential. We appreciate the opportunity to contribute to this dialogue, and as the AbilityOne Program is fairly complex, we look forward to providing subject matter expertise when requested.

Sincerely,



Kimberly M. Zeich
Deputy Executive Director

