

**SIMILARITIES AND DIFFERENCES BETWEEN THE 898 PANEL RECOMMENDATIONS
AND THE SOCIAL ENTERPRISE SET ASIDE CONCEPT**

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EXECUTIVE SUMMARY

There are numerous issues with the Javits, Wagner, O'Day (JWOD) Act and its current state. JWOD was passed in 1938 and updated in 1971 to address employment for people with disabilities. Since that time, expectations and disability rights have shifted considerably, but JWOD has remained the same.

There have been multiple attempts to reform JWOD, but those attempts have failed over the last 13 years. Still, the major change is the passage of the Workforce Innovations and Opportunities Act (WIOA) in 2014 and its implementing regulations in 2016. For the first time, JWOD is considered, officially, not "Competitive and Integrated Employment (CIE)." As a result, many of the referrals of personnel the program relies on have been reduced and therefore, the program is in need of some major changes.

Against the backdrop of the challenges to the program, Congress convened the Section 898 Panel by the FY 2017 NDAA (PL 114-328) to bring recommendations to refresh the program through specific metrics to reduce fraud, waste and abuse, and the first recommendations were submitted to Congress in July 2018. This document will review many of those recommendations and examine their efficacy. It is our contention that the recommended solutions perpetuate more of the same as opposed to offering true reform. We contrast the solutions with those we proposed in the creation of a Social Enterprise Set Aside, which accomplishes many of the objectives the 898 Panel set forth to meet, to bring accountability, transparency, and oversight that has been lacking thus far.

We see the differences as more a matter of form than substance. The Social Enterprise Set Aside was proposed in August of 2017 and incorporates many of the suggested changes the 898 Panel offers in July of 2018, but with a clearer path to getting there- namely removing discretion that has been vested in the AbilityOne Commission- discretion that has been the root cause of many of the structural issues of the program heretofore.

There are solutions for the program, and the instant document shows that those solutions can be advocated through the 898 Panel and the authorities vested in it by Congress. It is a matter of impressing on the stakeholders that a path exists and to choose to take that path to meet the various macro-level considerations (WIOA, JWOD, and other historical difficulties) that have limited the program and present existential limitations to AbilityOne going forward. Easy answers are not the solution (such as lowering ratio for instance). The past should be respected with regards to the program's historical position in employment with people with disabilities, but there are a lot of examples as well demonstrating difficulty in meeting Congressional intent that should not be ignored either. Our proposal seeks to find a third way- a synthesis- to bring the necessary challenges in line and focus on the clear goal of Competitive and Integrated Employment and to do so without fraud, waste, and abuse.

1.0 INTRODUCTION

In July 2018, the Section 898 Panel (898 Panel) convened by the FY 2017 National Defense Authorization Act (NDAA) (PL 114-328), recommended various preliminary suggestions about how to address changes in the AbilityOne program authorized under the Javits, Wagner, O'Day Act (JWOD) (see:

https://www.acq.osd.mil/dpap/cpic/cp/docs/First_Annual_RTC_on_the_Panel_on_DoD_and_AbilityOne_Signed_18_July_18.pdf). The 898 panel recommendations address many ongoing and systemic challenges related to the program. While many of these recommendations are nuanced and address the ongoing operation of AbilityOne, they nonetheless highlight significant changes necessary for rectifying programmatic vulnerabilities.

The history of JWOD Act reform is tortuous and riddled with multiple examples of well intentioned attempts but ultimate failure to affect change. The most ambitious was the Senate Health, Education, Labor and Pensions (HELP) Committee in 2005 with its very detailed hearings on the program and its flaws. Recommendations were publicly released, and at one point, the AbilityOne Commission was going to go so far as to use rulemaking to address the most glaring issue at the time, executive compensation (see Fed Reg Vol 69, No. 218, November 12, 2004).

Reading the response to the HELP hearings in 2005 is like seeing history repeat itself. In particular, Jim Gibbons, then the CEO of the National Industries for the Blind, submitted comments which are very illuminating. At the time, AbilityOne represented \$2 billion in revenue (today it is \$3.3 billion). The Committee notes that the number of jobs in 2004 was 45,000, the same number it is today (but with a 33% increase in revenue). The job growth predicted by Mr. Gibbons (doubling to 10,000 in the blind program by 2010), has not materialized. In fact, it has stagnated.

In 2013, the GAO issued its report <https://www.gao.gov/assets/660/654946.pdf> addressing many of the flaws highlighted by the HELP Committee and other scandals such as an expose, by the Oregonian, on the program and its internal flaws in terms of regulatory oversight (a theme that seems to be ongoing (http://blog.oregonlive.com/oregonianspecial/2007/08/jobs_program_investigation_1.html)). The issues continued, even after the GAO's report, as demonstrated in the CNN expose in 2015 where SourceAmerica was exposed for widespread fraud in its various programs similar to those exposed in 2007 (<https://www.cnn.com/2015/07/27/us/disabled-work-program-investigation/index.html>). Frighteningly, there have been DOD IG investigations, a convening of a panel by Congress (Section 898 of PL 114-328, or the 898 Panel), and yet, still little to nothing to show for the needed changes.

Additionally, Congress has tried, twice, to introduce legislation to address the shortcomings of the JWOD program in the last 10 years, first by Senator Enzi in 2008 (<https://www.congress.gov/bill/110th-congress/senate-bill/3112>), and Congressman Townes in 2010 (<https://www.congress.gov/bill/111th-congress/house-bill/5983>). Neither bill made significant movement,

which leaves us today with a JWOD program that is flawed by multiple long standing issues and without reform in sight.¹

It is in this environment that the Workforce Innovation and Opportunities Act (WIOA) was passed in 2014 and its accompanying rules in 2016 which changed the playing field for the first time. WIOA designated JWOD as not Competitive and Integrated Employment (CIE). The use of a direct labor requirement puts the program into direct contradiction with WIOA from an employment perspective. The statutes can be read to exist in harmony, but only in a limited circumstance (which is not necessarily palatable to the program). WIOA and JWOD can coexist if JWOD is a training program (as some contend it was originally created to be). However, JWOD and its power, growth and future is in employment, so the paradox is very real.

Seizing on this dichotomy, our organization proposed to the Section 809 Panel (among others, including various Congressional Committees) the notion of simply solving the JWOD problem through the creation of a set aside program under the Small Business Act (Social Enterprise Set Aside (SESA), see Enclosure 1).

In July 2018, the Section 898 Panel's recommendations attempt to try to address the transom between WIOA and JWOD by lowering direct labor ratio (or eliminating it altogether) as we will discuss below. While differences exist between our proposals, many of the 898 Panel's recommendations can effectively be solved by the Set Aside and in a manner that already exists within the government (see Enclosure 2 for a chart demonstrating the recommendations from the 898 Panel and then our recommendations).² What the 898 Panel did not do is build in the accountability or stakeholder alignment necessary to bring the proposed changes, contrary to its mission and instructions from Congress in the FY 2019 NDAA which stated the following:

LEGISLATIVE PROVISIONS NOT ADOPTED

*“Contract goal for the AbilityOne program The House bill contained a provision (sec. 821) that would amend section 2323a of title 10, United States Code, to create a contract goal for the AbilityOne program of 1.5 percent. This section would also require the Secretary of Defense to submit an annual report to the U.S. AbilityOne Commission on progress made toward achieving said contract goal. The Senate amendment contained no similar provision. The House recesses. **The conferees note that the AbilityOne program must have policies and procedures in place to ensure that funding is used in a way that maximizes the benefits to the people it is intended to serve and that taxpayer funds are not wasted.** Recognizing this, in 2015 the Congress directed the establishment of an AbilityOne Inspector General,*

¹ It helps to read Senator Enzi's floor speech to understand the difficulty he went under to draft his legislation which would have significantly addressed many of the oversight issues in the program:

https://www.help.senate.gov/imo/media/doc/2008_06_11.pdf. It is in this speech you can see the frustration felt by legislators to try and address the problems in JWOD and yet, the recognition of the problems was evident even then, foretelling many of the challenges being faced today.

² What is interesting is that many of the matters we brought up to address oversight and transparency were not addressed by the 898 Panel and many of their recommendations are accomplished through our solution.

and in 2016 Congress directed the establishment of a Panel on Department of Defense, and AbilityOne Contracting, Oversight, Accountability, and Integrity. The conferees note that both the Inspector General and the Panel are generating findings and recommendations for needed reforms and expect the AbilityOne Commission to take appropriate steps in the future to increase transparency and effectiveness of the program.” Emphasis added.

This document is designed to look at the issues raised by the 898 Panel. Moreover, this document will discuss the history of the Commission in its attempts to regulate the program (or lack thereof), and why a change in the employment of people with disabilities is necessary since the existing structure of JWOD, its rules/regulations, and most important the inability of the AbilityOne Commission to properly oversee the program has led to growth beyond Congress’s original intent, left many scorned in the process, and has not been reformed in any meaningful way (purposefully) since its creation in 1938 except to grow in revenue, while opportunities for those with disabilities continues to decreased in an exponential manner.

We feel the proper implementation of the 898 Panel recommendations and building in actual oversight, accountability and management will meet the future objectives of the program. The 898 Panel has the authority to make recommendation broadly and fully, including the SESA which we feel addresses many if not all the challenges for the program and sets it on a future course. Our hope is that this document will assist policy makers in understanding that the opportunity to bring about the reform requested multiple times and over many years is being wasted on more of the same instead of responding to Congressional intent.

2.0 QUESTION AND ANSWER

Question: What is the key take away from the 898 Panel's Recommendations from your perspective?

Our feeling is the 898 Panel did an adequate (though not thorough) job of examining the AbilityOne program. We feel that they illuminate how the program can be affected, but we feel that they did not go far enough to address the key points of **accountability, transparency, and oversight**, key factors in the implementing language for the 898 Panel itself (to eliminate fraud, waste and abuse endemic in the program). Furthermore, the focus on "internally friendly" contributors instead of reaching out to those who might have differing opinions to sculpt a more well rounded response definitely colors the recommendations.

Question: What makes this time different than before with regards to JWOD reform? Reform of JWOD seems to be a political quagmire.

The reason why today is different is that WIOA now colors the conversation. Before today, JWOD could and did spurn Congress and others because of its position as a mandatory source while continuing to receive referrals from State Vocational Programs. That conversation is different today with WIOA. Since referrals are slowing significantly, it affects many of the AbilityOne nonprofits **meaning AbilityOne needs Congress to act on the issue for the first time**. While there are some organizations not affected by WIOA per se, the overall conversation is now colored by WIOA as it clearly points out that AbilityOne agencies are indeed and are promoting a segregated work environment with their mandated 75% direct labor ratio. Moreover, the argument of being the "virtuous" provider of employment for people with disabilities via JWOD has shifted as light has been shown on the segregating aspects of the program and the complete disregard for WIOA, which is the law of the land.

Question: We see many "green" lines but there are differences in Enclosure 2. It seems like the 898 Panel is looking to reinvent the wheel. Is this true?

Yes. Our impression is that many of the goals can be accomplished by simply adopting the Social Enterprise Set Aside (SESA) from an accountability and clarifying perspective.

The definition of disabled, for instance, does not need to be recreated. There are plenty of sources for that definition and since the definition is dynamic, why propose a static solution?

Essentially, the SESA accomplishes what the 898 recommendations set forth, in substance, but with more transparency than what is being proposed by the Commission (Enclosure 3 is a copy of the Commission's initial rules that are being floated around). As we see it, there is not enough clarity and too much discretion in the Panel's recommendations and the Commission's proposed regulations to enforce any real accountability, thus obviating the purpose of the recommendations in the first place.

Question: What do you mean by discretion?

For instance, the whole notion of the Commission taking a contract if performance is lacking leaves a tremendous amount of leeway for the Commission in the 898 Panel recommendations. What are the circumstances? Will it be like dropping below ratio and having multiple chances to correct the deficiency? Who makes the determination? Is it the Commission or the customer? How does one enforce favoritism between some nonprofits and others? **In contrast**, competition every 5 years will be the clarifying method to ensure performance as we propose. There is no need for discretion in that circumstance. The concept is one of many. Enclosure 2 sets out where the nonspecific is not necessary. The fact is, the program can migrate to a small business set aside with little effect.

Question: What is the big issue that you have with the 898 Panel recommendations?

The major area of disagreement is the lowering of direct labor ratios, which is also a very sore spot for most all of the NPAs. We see this option of lowering ratio as the wrong move. We see that there are NPAs that can function in that environment and leaving the ratio is more beneficial for the training programs. Furthermore, the logistics of changing JWOD in statue is very difficult. Instead, we see the parallel path of opening the new set aside as an easier path to a more desirable outcome, and one that coincides, not conflicts, with the blended goal of incorporating indirect labor.

Question: Does the 898 Panel have the authority to override JWOD and AbilityOne to allow for a Set Aside to be developed?

Yes. The authority in PL 114-328, Section 898 c (4) (see <https://www.congress.gov/bill/114th-congress/senate-bill/2943/text>) to recommend changes to statute to address the issues are a clear authority under which the SESA can be implemented to address the issues of JWOD, WIOA and fraud, waste and abuse. Again, making the recommendations for a parallel path via the Small Business Act to address the issues of WIOA would not preclude regulatory changes under AbilityOne to bring the two within synthesis. In fact, the two can be read to work together to achieve the goals of the 898 Panel to bring greater oversight, transparency, and accountability.

We also think that PL 114-328, Section 898 c (6) also offers an opportunity to increase competition. While the current definition of participants are qualified nonprofits, if the program shifts to allow for a new category or transfers to the new SESA, then those would also be included in the competitive landscape. This competition allows for more opportunities for the already trained workforce for those with disabilities, which drives better wages, individuals afforded the opportunity to truly get off social security disability insurance, and more employment opportunities for additional individuals with disabilities to come into the workforce.

We believe there is enough flexibility available to allow for the 898 Panel to address the Set Aside as we propose it, as long as the focus is on the substance as opposed to the form.

Question: What about stakeholders. Which path is simpler?

The idea of lowering ratio to make suitability for adding new contracts easier is a non-starter, particularly with the small business groups and even with the programs NPAs. Furthermore, it does not necessarily address WIOA issues, and where it does, it will have to drop ratio to a point that can affect nonprofit status.

We see the blended concept of ratio (indirect and direct labor) as the solution. We model our solution on the HUBZone Small Business concept where the goal is to increase employment in economically underdeveloped communities (instead of underemployed due to disability). It is WIOA compliant and works to meet programmatic objectives. Moreover, the incentive is upward mobility, an area seriously lacking in the AbilityOne program currently (and historically), because moving anyone from direct labor to indirect labor lowers the mandated ratio.

The key is to align stakeholders. We see them as the following:

Stakeholder	Objective
Individuals with disabilities	Competitive and Integrated Employment Upward Mobility Wider opportunities for employment than AbilityOne NPAs Ownership potential
AbilityOne Contractors	Continue to have profit from business lines for mission Continue to provide employment for people with disabilities Leverage existing business lines, plant, people, and equipment Highest priority in contracting in small business set aside
Veterans	Competitive and Integrated Employment Set aside with incentives to employ veterans with disabilities Ownership and employment incentives under the Set Aside
Small Business	Open new opportunities in the SESA Built in competitive protection for small business Trade off to put JWOD into small business category that SESA takes priority.

The bottom line is in the areas where the 898 Panel does not line up these stakeholders, or meet these objectives in substance (and if it does, only partially), the SESA meets them entirely.

Question: What about the Commission's proposed Regulatory Changes?

There is an early version of the Commission's regulatory changes that are being proposed based on the 898 Panel Recommendations. These changes go to the heart of being discretionary and not addressing the accountability necessary to enforce the changes. They attempt to split the baby instead of coming down on the side of accountability or on the side of continued status quo (meaning no one will be happy). As we see it, the problem is that the Commission's response is business as usual. They have not been able to effectively regulate the program, instead conceding to the whims of the CNA's and NPA's throughout (see Enclosure 4 for a discussion on the legal predicaments the Commission has been in and how low it abrogated its regulatory oversight function). **There needs to be a clear method to regulate the program and ensure accountability, removing the arbitrary nature of regulation implementation that has defined and shaped JWOD since its creation. The Commission has not demonstrated a history of honest and fair dealing nor competence when it comes to regulatory promulgation and execution (if anything it has been the opposite). We feel the Set Aside meets that objective, removing most of the discretion, certainly in contrast to what the Commission is proposing.**

Question: What can Congress do to facilitate the next stages of this conversation?

Congress can firmly state that there is no desire to open JWOD or WIOA, which has been articulated by many Congressional offices. The Commission, 898 Panel and other stakeholders, furthermore, should take a more proactive approach to adopting a set aside within or in conjunction with the AbilityOne program to open up competition. Just as the Commission purportedly did with allowing the American Foundation for the Blind (AFB) to compete with NIB as a CNA, the goals of the program should be to allow for more open competition among the program participants, and not limit participation to exclusively nonprofits. Nonprofits have not proven adept at growing employment, adapting to the marketplace, and changing heretofore, and as a result, it is time to expand the base and let small business for profit entities to come in under a protected set aside, which as stated above protects the contracts and more importantly the individuals with disabilities working the contracts. The 898 Panel has the authority to recommend changes to statute to address the matter (see Section 898 of PL 114-328 Section c (4)). Doing so through the aforementioned set aside program makes the most sense.

The perfect example of how this can work is the approach that VA has taken with the Veterans Benefit Act (VBA). In that case, VA has a specific set of circumstances to create a set aside (much as if a set aside were to be created within JWOD). The rules governing VA's Service Disabled Veteran Owned Small Businesses (SDVOSBs) and Veteran Owned Small Businesses (VOSBs) were recently harmonized within the Small Business Administration, with the SBA providing support to VA for the management of its program. Perhaps a similar model can be created for JWOD, where competition is expanded or the Commission staff is contracted through a Memorandum of Understanding (MOU) with SBA to administer the program for them (so as to not open JWOD itself). The program can be administered like the SBA 8(a) program. Again, the recommendation can be made from the 898 Panel for just such a solution.

The other factor to consider is that JWOD does not need to go away. In fact, as a training program (as WIOA allows), employment for training purposes can be a desired outcome, especially with a set aside program to handle the placements at the conclusion of the training. **The symbiotic relationship can be an ideal synthesis between JWOD and WIOA. Training and then employment in a broader workforce should be the desired outcome.**

Question: So you see a movement away from the concentration among nonprofits to a broader base as the future for employment for people with disabilities?

Yes. Current nonprofits are employers of sorts, but they are not a broad enough cross section to allow for employees to maximize opportunities. In many respects, the nonprofits are trainers or supporters of people with disabilities, which is fair. However, due to the size and complexity of many of the larger nonprofits (and the fact their most profitable and modern employment is below ratio), the adaptation to a for profit model should not be that difficult. Furthermore, **since employment in the AbilityOne program has not increased in the last 13 years (though revenue has increased by 33%), there needs to be a change and perhaps it is time to let more than nonprofits be the incentivized group to employ people with disabilities.**

Question: Are we really that far apart between the Set Aside and the 898 Panel?

No, in actuality we are very close. The substance is there, it is just a question of form. From the Commission's perspective, they are concerned with maintaining their own way. Our perspective is there is no reason to reinvent the wheel. If you look at Enclosure 2, it is clear that many, if not all, the objectives are satisfied through the Set Aside. Furthermore, it is a cleaner model, one that is already tried and true from an accountability standpoint, not one that relies on the ability of the Commission to actually promulgate and then regulate. **It is time that discretion is removed as the Commission has demonstrated historically an inability to properly exercise its discretion predicating multiple efforts from Congress to reform the program, also prompting multiple rebukes from Congress as well.**

Question: What are the next steps?

Based on the above, it is imperative that Congress starts to signal its direction to the different groups. If the 898 Panel is going to lead the changes, then it is up to Congress to signal that there are certain factors it desires to be addressed by the Panel (as was done in the FY 2019 NDAA language quoted at the outset). It is clear that Congress is not satisfied with the lack of oversight and accountability, and the recommendations offered this far, do not go far enough to establish that oversight and accountability (particularly the accountability since many of the regulations will be unenforceable and subject to interpretation from the Commission).

Bringing the different parties together in a forum to address specific questions would also be helpful with specific parameters laid out. As we have indicated throughout, there are many misconceptions about the program, the purported effects of the changes, and more than anything, a willingness to make changes.

We see the conflict as one of choices. The program (from the top on down) can make the changes necessary. They can minimize the effects on the people they serve. They can adapt and grow, in fact achieving many of their objectives. It is a question of needing the proper venue and guidance. The Commission has shown its intent through its part on the 898 Panel as well as its proposed regulations and it is more of the same. History is clear on this point as well. The Commission has not been a partner of Congress, a fair and reasonable arbiter of the program, and has left much to be desired on that front. It is time that Congress sets forth the firm expectation that the Commission be that arbiter and support the mission it is designed to do- employment of people with disabilities.

ENCLOSURE 1

**PROPOSED SOLUTION TO ADDRESS CONFLICTS BETWEEN THE WORKFORCE
INNOVATION AND OPPORTUNITIES ACT (WIOA) AND THE JAVITS, WAGNER, O'DAY
ACT (JWOD).**

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1.0 Summary

The Javits Wagner O'Day Act (JWOD) and the Workforce Innovation and Opportunities Act (WIOA) are currently in conflict with one another. JWOD mandates that qualified nonprofits must maintain a 75% direct labor requirement for performance of contracts with people with disabilities. WIOA, in contrast, states that such a requirement is not in compliance with its intent for Competitive and Integrated Employment (CIE). This paper provides a solution creating a Set Aside program under the Small Business Act that bridges the WIOA/JWOD without creating a need to reopen either act. Further, this paper focuses on the ultimate goal of providing employment for people with disabilities in Competitive and Integrated environments with the government as a key catalyst to ensure these objectives are carried out.³ We envision that the option herein will also provide upward mobility to people with disabilities to carry out management and ownership of organizations (not available today), affecting groups such as people who are blind and service disabled veterans.⁴

2.0 The Problem

WIOA and JWOD are in direct conflict in providing employment and training for people with disabilities. JWOD was created in 1938, an era when people with disabilities were segregated out of the mainstream community. WIOA, with final rules implemented in 2016, focuses on how people with disabilities should be integrated in the broader workforce, and the necessity to ensure the growth of both competitive and integrated opportunities in the broader community. The objectives of JWOD and WIOA are similar with regard to providing training and employment to people with disabilities. However, the two acts conflict on how to achieve these goals. JWOD mandates a direct labor requirement and focuses on segregated work environments in order for participating organizations to maintain their preference in government contracting. WIOA intends to see employment move away from segregated workshops to CIE. The question is how to bring the two into concert with one another.⁵

³ Our hope is that the program synthesis created herein will also provide an example to be used in those states with large State Use programs for people with disabilities modelled on JWOD originally.

⁴ For instance, the instant option incorporates preferences currently found in Randolph Sheppard for companies owned by people who are blind and expands opportunities to those same merchants that can meet the employment requirements, as well as Service Disabled Veteran Owned Small Businesses that also employ a percentage of their workforce with Service Disabled Veterans across government agencies and without regard for JWOD (the Veterans Benefit Act (VBA) would still control at VA).

⁵ We leave for the topic of another discussion the programmatic issues around AbilityOne, the program used to implement JWOD. The General Accountability Office has addressed these questions with its study in May 2013, (see: <https://www.gao.gov/assets/660/654946.pdf>). Some of our recommendations incorporate the discussions GAO highlighted as well as others. Nonetheless, we acknowledge attempts by other Representatives and Senators to try and reopen JWOD and see the difficulties in such an approach.

3.0 The Program⁶

AbilityOne, JWOD's brand name, is one of the largest employers of people with disabilities in the nation, with a figure of approximately 45,000 people with disabilities employed in FY 2015 (the most recent year where information is available). The figure is roughly divided at 5,000 people who are blind and 40,000 people who are disabled.⁷ Moreover, AbilityOne represents approximately \$3 billion in government spending annually (for FY 2015), or approximately 0.5% of the total government spend (out of \$600 billion).⁸ AbilityOne, under JWOD, has the highest priority in government contracting.⁹ Considering these factors, the solutions offered here intend to maintain the essential portions of the program while providing a broader base of opportunities to people with disabilities through government contracting. As noted above, a key point to bear in mind is the fact JWOD currently consolidates training and employment which is separated out under WIOA.

4.0 Implementation

It is essential that in solving the WIOA/JWOD conflict, policy makers focus on the bifurcation of the training and employment components of the AbilityOne program. We suggest that JWOD be maintained for training functions associated with employment with people with disabilities. With regard to employment, we feel the creation of a set aside under the Small Business Act (Social Enterprise Set Aside), at the same level of preference as AbilityOne today, will achieve the twin objectives of maintaining the current preferences for people with disabilities (certified by VA or Social Security) while bringing the program into compliance with WIOA, thus limiting if not negating any employment reductions.¹⁰

Attachment 1 outlines the key components of the program. We feel the objective is to provide CIE opportunities modelled on the Historically Underdeveloped Business (HUB)Zone program at SBA (mandate of a specific overall workforce ratio as opposed to direct labor) with the features of the SBA 8(a) program with a focus on a protected environment to ensure organizations employing people with disabilities have the necessary ability to maintain stable employment where it is reasonable. The proposed model would provide an adequate basis on which WIOA's objectives for employment for people with disabilities can be achieved. Further,

⁶ Statistics provided herein are drawn from publicly available data sources.

⁷ We note that the definition of disabled is not tied to any specific government certification (such as Social Security Administration or VA), and therefore the fidelity of the 40,000 people with disabilities should be taken with skepticism.

⁸ A rough breakdown for the five largest customers from the FY 2015 figures is \$1.8 billion for DOD, \$202 million for GSA, \$85 million for DOJ, \$72 million for VA and \$72 million for DHS.

⁹ See Federal Acquisition Regulation (FAR) Part 8.6 and 8.7 generally.

¹⁰ Since it is impossible to know the number of jobs that will transition in this scenario, the long "runway" on implementation is designed to allow for transition opportunities into new fields, a business cycle shift for old opportunities, and workforce attrition to occur. Again, the overall effects on certified disabled persons is impossible to determine since there is no publicly available information on how many SourceAmerica affiliates have certified disabilities.

we are advocating for a specific goal to be put on Social Enterprise Set Asides (which does not exist for AbilityOne currently) of 1.5% above the current 23% broader based small business set aside goals (bringing the government to 24.5% total).¹¹

For current AbilityOne nonprofits opting to remain in the AbilityOne program, we see that JWOD can be used to maintain a preference (grandfathered in) for those opportunities which can provide only a training opportunity for people with disabilities.¹² Upon the conclusion of a work-training program, those individuals must be referred to the CIE opportunities in the broader community, including the Social Enterprise category. Again, the question of scale is essential to ensuring a broad base of opportunities for people with disabilities, and that is where the Social Enterprise Set Aside plays a key role (and the federal government), in that the size of the government can be used to ensure a large enough program can be developed for employment of people with disabilities on scale.

Our intention is to therefore have JWOD adjust to the current marketplace and WIOA Act through direct involvement with training to grow the broader employment base via a Social Enterprise Set Aside or the broader community.

5.0 Transition

The key to success of the solution provided is to create an adequate transition from the current AbilityOne program for those opting into the Set Aside to the new WIOA-compliant set aside. We envision a twenty-four month implementation process (allowing organizations in the AbilityOne program to assess their mission, bifurcate their business lines, and opt into the new set aside or maintain their presence in AbilityOne). At the end of that twenty-four month period, we envision that those organizations receive five year contracts with the government to maintain their business before the marketplace is allowed to compete for the contracts.¹³ Therefore, the employment-based organizations continue in their business lines for a minimum of another seven years after the enactment of the new set aside (with the implementation of rules another potential two years before being fully enacted). Therefore, the final implementation could be almost ten years unless Congress decided to accelerate the process. Thus, there is adequate time to adjust the workforce, allow attrition to occur, and focus organizations on meeting the new requirements of a competitive contracting environment.

¹¹ The intent is to increase the actual amount of opportunities to small business in general without diluting the current pool of small business set asides.

¹² Regulations for these nonprofits will focus around training and reducing the “cycle of training” which can become endemic. WIOA calls for less than 12 months in a position as part of a training program and our intention is to see that objective broadly implemented and stringently enforced.

¹³ To the extent it is a competitive marketplace. The reality is that similarly situated organizations will be bidding on opportunities in the set aside, so the competition would be limited to those organizations which comply with the set aside certification requirements, including employment of people with disabilities.

6.0 Next Steps

The framework above addresses the various stakeholders, and offers an opportunity for rulemaking regardless of the implementation of a set aside solution (see Attachment 2). The intent is to leave WIOA and JWOD intact with minimal (if any) statutory changes. We know that various stakeholders can affect specific reform to JWOD or WIOA and both serve purposes which should remain. We feel what WIOA brought about was a need for a third category, which can be implemented through the use of a new Small Business Set Aside. Since small business will be a constituency in the instant matter, we felt it best to go through their program and bring the expertise, proven track records and the established transparency of the Small Business Act and Small Business Administration to solve the employment question posed by WIOA and JWOD.

Overall, the objective is to shift employment of people with disabilities to a broader base, lean on existing resources in the government contracting programs which have been successful and transparent, and afford people with disabilities the skills necessary to maintain CIE in the modern economy.

ATTACHMENT 1

OUTLINE OF SOCIAL ENTERPRISE SET ASIDE

The implementation of the proposed Social Enterprise Set Aside will require an amendment to the Small Business Act found in 15 USC but modeled on the features of the HUBZone program (employment percentages, limitations on subcontracting and other contracting preferences with respect to other than small businesses) and operated like the SBA 8(a) set aside program (subcontracted by SBA to the entity, sole source authorities, competitive requirements, adverse impact determinations, as well as oversight and management). We envision the creation of a new set aside category, which will ensure a specific goal is implemented for federal contracting dollars spent and apply to all subcontracting goals as well.

1. Rule of Two

Amendment of 15 USC 644(j) to allow for the mandatory Rule of Two through statute for all contracts solicited by the United States Government as opposed to only those up to the Simplified Acquisition Threshold (SAT).

2. Definition of Social Enterprises

Define Social Enterprises under the new designation as businesses which are organized for profit under the Small Business Act, and provide a specific social goal of employing people with disabilities. Disabilities are defined as a certification from a government entity, including Social Security Administration (SSA), Department of Veterans Affairs (VA) or any other government entity charged with determining disabilities. Social Enterprises will be required to maintain a workforce of at least 35% of the total workforce with people disabled as defined above. Social Enterprises shall be certified by the Small Business Administration as meeting the workforce requirement every three years and hold such certifications to be eligible to compete for contracts under the category.

3. Set Aside Method

The Federal Government shall set aside contracts for those entities which were previously found to participate in the AbilityOne program and opt into the new Social Enterprise Set Aside category and associated opportunities. If an entity intends to “vacate” an assignment previously held under the AbilityOne program to enter into the Social Enterprise Set Aside, that assignment shall be referred back to the Central Nonprofit Agency (CNA) to reallocate among those nonprofits remaining in the AbilityOne program.

4. Current AbilityOne Opportunities “Grandfathered” and Exceptions to the Statutory Rule of Two

All AbilityOne requirements not transferred to the Social Enterprise Set Aside shall remain “grandfathered” with the priority to provide such requirements through authorities found in FAR Part 8. All new and transferred opportunities shall have priority as found in 15 USC 644(j)’s revision. The only exceptions to 15 USC 644(j) shall be government inventories and sources, Federal Prison Industries (with their current exceptions), and contracts solicited under the Randolph Sheppard Act.

5. Transition to the Set Aside Program and Competitive Marketplace

Upon the conclusion of formal rulemaking for the creation of the Social Enterprise Set Aside, AbilityOne nonprofits have twenty four months to opt into the new Social Enterprise Set Aside. They shall designate the requirements for which contracts exist and enter into sole source contracts with a base year and four one year options during the transition. After the conclusion of the initial sole source contract, the instant requirement shall be solicited among those entities in the Social Enterprise Set Aside program. If there are not two Social Enterprises that can satisfy the Rule of Two, then the government shall enter into a sole source contract with the incumbent Social Enterprise for a period of one year and two one year options. Social Enterprise Set Asides cannot be removed from the program unless there is a reason (such as price quality and delivery issues),

6. Contract Administration Requirements

All Social Enterprise Set Asides will require compliance with Contract Administration requirements, including Buy American Act (FAR Part 25.1), Limitations on Subcontracting (FAR Part 52.219-14), and affiliation requirements found in the Small Business Act.¹⁴ Social Enterprises shall be entitled to a 10% price adjustment (same as HUBZone) when competing on contracts that have “other than small businesses.”

7. WIOA Compliance

All entities in the Social Enterprise Set Aside category shall comply with the requirements of WIOA as defined by Competitive and Integrated Employment.

8. Increase of Small Business Goals for Federal Contracting

¹⁴ We have purposefully left off the HUBZone Limitations on Subcontracting and the use of the nonmanufacturer rule to be settled by Congress and/or the SBA during formal rulemaking. HUBZone’s limitations on subcontracting are more restrictive than other entities due to its priority in government contracting and the use of a 10% price adjustment for “unrestricted” solicitations.

Small business goals for federal government contracting shall be amended to increase the share of small businesses to 24.5% of the total government spend, up from the current 23%. The increase shall apply to Social Enterprises (1.5%).

9. Encroachment

No small business contracts under any other set aside program can be allocated to the Social Enterprise Set Aside like is found in the SBA 8(a) program.

10. Competition Requirements

Requirements being added to the SESA will be governed by competition among similarly situated entities, with the same requirements as found in the SBA 8(a) program, with sole source justifications and competition requirements as defined by the 8(a) program.

ATTACHMENT 2

REGULATORY CHANGES TO JWOD

To implement many of the changes suggested by GAO in its 2013 study, and to address controls necessary to comply with WIOA, the following regulatory changes must occur JWOD/AbilityOne. Whether the Social Enterprise Set Aside is approved, these regulatory changes should be considered and implemented.

1. Training versus Employment

JWOD opportunities must comply with the training requirements of the WIOA rules issued on August 19, 2016. Employees performing JWOD contracts shall only be able to work on a contract under JWOD for a period of no more than twelve months and in conjunction with an approved training program by the State in which the program is being performed. Following the conclusion of the approved training program, the individual with disabilities shall be placed in Competitive and Integrated Employment (CIE). Current employees are “grandfathered” in to perform their current tasks as an individual choice and in conjunction with a State approved program. No new employees can be placed in non-WIOA compliant referrals.

2. Executive Salaries

Executive compensation (salary plus bonus) shall be capped at Level V of the SES Rate published by the Office of Personnel Management (OPM) for those nonprofits participating in the AbilityOne program.¹⁵

3. Restriction on Lobbying

Central Nonprofit Agencies (CNA) administering the program on behalf of the AbilityOne Commission shall be restricted in the use of fees paid from AbilityOne participants to lobby Congress in the same manner appropriated funds from other government agencies are prohibited for such use.¹⁶

4. Country of Origin Requirements

Sale of items to government end users shall be in accordance with the Trade Agreements Act (FAR Part 25.4) requirements. End items shall be manufactured in those countries or in the United States as appropriately required for government contracts. Items covered by the Berry Amendment for the Department of Defense shall continue to comply with the requirements of that Act as well.

¹⁵ For FY 2017, that figure was \$151,700 per annum.

¹⁶ The reason for this prohibition is that the JWOD statute requires payment of a fee from the participant to the CNA, and therefore it functions as an indirect appropriation.

5. Value Add Requirement

AbilityOne nonprofits shall create a “value add” in the production process for the supply of items or services provided to ensure people with disabilities are trained and employed (to the extent they remain employed through the grandfather policy and no new legislation is written to address employment in accordance with CIE) in a proper work environment in accordance with the Commission’s long-standing policy. The Commission shall approve all “distribution” requirements and require the CNA to demonstrate why a value add cannot be applied in the manufacturing of an item, and is not suitable for the individual requirement. The said approval shall be for all requirements found in AbilityOne and require a value-add component be created where one does not exist.

6. Restrictions on Additional Requirements

Any item or requirement added to the AbilityOne program currently commercially supplied by a small business shall not be added to the Procurement List. The restriction applies to requirements that are also “essentially the same” or “bundled” where small business is performing a portion of the current requirement, as those performed currently commercially.¹⁷ There will no longer be an adverse impact determination to assess the impact on existing small business contractors.

7. Announcement of Procurement List Additions

Any item or requirement to be added to the Procurement List shall be publicly announced in the Federal Register *and* on FedBizOpps (www.fbo.gov), the government’s listing of procurement actions.

8. Protest of Suitability Determinations

Small businesses can opt to protest suitability determinations made by the AbilityOne Commission to the General Accountability Office (GAO). Costs shall be awarded if the protest is successful to the protester.

¹⁷ A major complaint is that AbilityOne will change a requirement through minor revisions, and the end item or service is essentially the same as those previously supplied by small businesses. The standard for essentially the same determinations should be those used by the Commission to determine when items are being examined to determine whether they are essentially the same as those offered under the program to enforce the requirements of JWOD.

ATTACHMENT 3

FREQUENTLY ASKED QUESTIONS

1. Will the new program take away existing AbilityOne jobs?

The intent is to shift AbilityOne jobs to a WIOA compliant set aside category or maintain the opportunities in a training mechanism in accordance with WIOA. WIOA requires the maintenance of CIE environments for referrals and for employment of people with disabilities. We see AbilityOne bifurcating with a majority of the employment shifting to the new set aside and becoming WIOA compliant.

Our intention is to have AbilityOne agencies focus on either training or employment and address the best method to meet the mission of their own organization in the existing regulatory framework. Jobs may change and become CIE, but the design is to ensure that they do not go away. Additionally, it should be noted that we are advocating for a goal to increase business by 300% over the current total AbilityOne business, so if anything we see that there will be more opportunities, not less, if properly administered and goals are met.

2. What do you mean by “choice?”

The intent is to offer a choice to AbilityOne nonprofits to continue to bifurcate along the lines of whether they are focusing on training or employment. The JWOD program is already divided on a spectrum between these two objectives currently. However, there are some training oriented agencies which use AbilityOne as a training ground to provide on the job training for people with disabilities to acclimate to the work environment. AbilityOne can be a very intricate part of a training program and we envision that the program can function to meet those objectives. However, with regards to employment, WIOA addresses this matter. We are offering an alternative approach for jobs, which allows nonprofits to adjust to meet WIOA as well as maintain their existing business lines, priority in government contracts, opportunities and employment objectives.

3. Why does WIOA affect AbilityOne and JWOD.

It is important to understand that AbilityOne, long term, will be severely affected by WIOA. The referrals of labor from State disability programs will continue to be limited once WIOA is fully implemented since JWOD is not CIE. The cycle begins to then limit the opportunities that can be provided by AbilityOne as workforces change over. Thus, less referrals, means less opportunities, means less ratio, means less opportunity and so forth. Therefore, before the situation becomes critical, we are proposing a solution to move JWOD and AbilityOne into a CIE environment and allow for the referrals to continue as the program shifts to the new Social Enterprise Set Aside where necessary and training where necessary. The referral changes may

take a couple years to show up, but the program herein is designed to pick up the labor requirements when the referrals are stopped, ensuring people with disabilities continue to have WIOA compliant employment opportunities and training. It also must be kept in mind that JWOD is the “scale” necessary to ensure people with disabilities are able to find employment. Therefore, the Social Enterprise Set Aside will replace AbilityOne as that “scale.”

4. What about Subminimum Wage?

For employment under the Social Enterprise Set Aside, subminimum wage cannot be used as it is not compliant with WIOA.

5. Will the proposed Social Enterprise Set Aside negatively affect small businesses?

No. Small businesses will not be negatively affected by the Social Enterprise Set Aside from the perspective of dilution of current opportunities. As stated above, no small business set aside can be transferred to the Social Enterprise Set Aside. In fact, the opposite is true. Those small businesses which comply with the Social Enterprise definition can now participate in opportunities previously restricted to JWOD compliant nonprofits. Moreover, small business is further protected by the fact the Small Business Act will be amended to increase the scope of the Rule of Two to statute and over all procurements, not just those under the SAT. Lastly, the fact small business is elevated over AbilityOne for ongoing opportunities, means that small business will have priority over JWOD for programs such as VA’s Veterans First contracting program. Items or requirements grandfathered will still be a priority for AbilityOne where the requirement stays in the program, but subject to the regulatory restrictions found above, particularly with regards to employee restrictions under WIOA. Therefore, small business will be offered an opportunity to compete to expand its business with the government and offer employment to people with disabilities across a broader spectrum and receive advantages for doing so, if they opt to enter into the program.

6. Why will the Social Enterprise be treated with a grandfathered method and protected as a small business category.

It is imperative that the transfer from AbilityOne to a new category remain with the priority necessary to maintain employment for people with disabilities but in a competitive and integrated environment since JWOD is not WIOA compliant. Since new opportunities will open up to small business, opportunities currently off-limits today, there must be a *quid pro quo*. That *quid pro quo* is to maintain those opportunities in the set aside category to meet the objective of continuing to employ people with disabilities while affording a greater breadth of organizations which can meet that objective.

7. What about Veterans? Do they qualify as disabled under the Social Enterprise Set Aside? Can they own a Social Enterprise?

We envision that the Social Enterprise Set Aside can be used to employ veterans disabled while serving in the military (much as AbilityOne employs veterans today) as well as offer ownership opportunities as well- a double advantage for veterans. We feel that the set aside allows for CIE of people with disabilities and veterans with disabilities. We also see an opportunity to grow the Social Enterprise Set Aside in that Service Disabled Veterans (SDVs) can be the owner of Social Enterprises and participate in VA's Set Asides (Veterans First) as well as the Social Enterprise program.

6. Why use the Small Business Act to create the set aside?

We see multiple reasons why the Small Business Act is the best course of action to meet the goal of CIE for people with disabilities. The first reason is the Small Business Administration has broad experience in managing, adjudicating and overseeing programs associated with socio-economic needs and we envision the program to model itself on the HUBZone and 8(a) programs which are already in existence.

Second, we feel that the small business requirements will bring much needed "divestiture" of business lines which are currently conglomerated under nonprofits. Third, we see that for profit entities are more in line with WIOA, especially when the requirements to offer CIE are factored in (more like a commercial business and less like a charity). Fourth, it is important that small businesses bring more competition to the market and allow nonprofits to continue to operate as such provides an unfair advantage from a tax standpoint. Finally, we see the inevitability of Unrelated Business Tax Income (UBTI) exceeding other revenue in the organization, thus predicating many larger entities to lose their nonprofit status. For all these reasons, we feel the use of the Small Business Act and its set aside mechanisms as the best course forward.

7. Why will JWOD become "second" in the priorities for government contracts?

First, JWOD (for existing requirements) shall remain the priority, as long as the nonprofits do not opt to go into the set aside category and opt to follow the regulations stated above. For the Social Enterprise Set Aside to work, it is imperative that small business have a priority over JWOD to meet the needs of government contracts (provided the Rule of Two is met). Moreover, once an item is on the Procurement List, it shall be there for good, provided it passes the necessary framework to meet suitability. Finally, JWOD, in respecting those requirements that are small business and not adding them as suitable, will not conflict with small business going forward. Therefore, since those changes will not create an adverse situation to JWOD, it is perfectly logical that JWOD can be secondary to small business for government procurement priorities.

8. Can you guarantee that opportunities will stay in the program?

Once a requirement is accepted to the Social Enterprise Set Aside program, it will remain in that program and not be removed unless no Social Enterprise can provide the requirement any longer or the end user is unable to obtain the item at a competitive rate or meet the quality/delivery requirements necessary for government customers.

9. How will new opportunities be added?

New opportunities can be added to the program the same as with other small business set asides. We intend to allow SBA rulemaking to determine how opportunities can be transferred in and what standards are used. However, we see the SBA 8(a) contracting program as a guide.

ENCLOSURE 2

***GREEN= AGREE IN PRINCIPLE (RECOMMENDATION IS SATISFIED UNDER OUR SCENARIO).**

***YELLOW= NOT CONSIDERED BUT NO CONFLICT WITH OUR CONCEPT.**

***RED= NOT ABLE TO RECONCILE WITH OUR CONCEPT.**

RECOMMENDATIONS	RECOMMENDATIONS FROM 898 PANEL (JULY 2018)	SOCIAL ENTERPRISE SET ASIDE (CREATED AUGUST 2017)	COMMENTS
1	IMPLEMENT EXISTING POLICY BY DOD REQUIRING CONTRACTING OFFICERS TO CHECK PL AND TRAINING ON ABI PROGRAM	CONTRACTING OFFICERS ARE ALREADY TRAINED UNDER FAR PART 19	
2	ABI TRAINING MUST BE UPDATED CONTINUALLY AT DAU	SMALL BUSINESS TRAINING IS UPDATED IN A GROUP CONSISTENTLY	
3	INCREASE OVERSIGHT AND STRENGTHEN AUDIT COVERAGE	CERTIFICATION EVERY 3 YEARS TO VERIFY STATUS AND CONTINUED STATUS REQUIREMENTS THROUGH APPEALS AND SBA PROCEDURES	
4	IMPOSE STRICTER REQUIREMENTS ON NPAS FOR DOCUMENTATION AND DISABILITY DETERMINATIONS	USE A STANDARD BASED ON GOVERNMENT DETERMINATION FOR DISABILITY DETERMINATIONS (VA OR SOCIAL SECURITY). NO NEED TO DOCUMENT ANYTHING MORE THAN THAT AND SUBMIT TO CERTIFICATION EVERY 3 YEARS.	STILL NO CLEAR DEFINITION OF DISABLED FROM 898 RECOMMENDATIONS. LEAVE IT TO THE ENTITIES WITH THE NECESSARY EXPERTISE TO DO THE CERTIFICATION
5	BUILD A CENTRALIZED DATABASE ON PRICING AND REQUIRE FAIR MARKET PRICING DOCUMENTATION TO NEGOTIATE WITH NPAS AND CNAS	MARKET BASED DETERMINATIONS AND USE FAR DETERMINATIONS AS OTHER CONTRACTORS SINCE CONTRACTING USES SUCH METHODS TO AWARD CONTRACTS ELSEWHERE UNDER SMALL BUSINESS ACT	NO NEED FOR A NEW SYSTEM TO DETERMINE FAIR MARKET PRICES IN A SEPARATE SYSTEM WITHOUT COMPETITION.

6	PROHIBIT USE OF PROGRAM FEE FOR LOBBYING EXPENSES	SAME PROHIBITION EXISTS FOR GOVERNMENT CONTRACTORS	
7	INCREASE TRANSPARENCY IN CNA RECOMMENDATION PROCESS WITH MANDATORY CRITERIA AND CERTIFICATIONS	USE OF FAR AND ITS PROCEDURES TO AWARD CONTRACTS WHICH IS SUBJECT TO TREMENDOUS TRANSPARENCY	
8	DEVELOP TRAINING, CERTIFICATION/VALIDATION PROGRAMS FOR ABI INDIVIDUAL ELIGIBILITY EVALUATION	USE A STANDARD BASED ON GOVERNMENT DETERMINATION FOR DISABILITY DETERMINATIONS (VA OR SOCIAL SECURITY). NO NEED TO DOCUMENT ANYTHING MORE THAN THAT AND SUBMIT TO CERTIFICATION EVERY 3 YEARS.	
9	OUTSIDE IEE SUBMISSIONS SHOULD BE ACCEPTED/ENCOURAGED	USE A STANDARD BASED ON GOVERNMENT DETERMINATION FOR DISABILITY DETERMINATIONS (VA OR SOCIAL SECURITY). NO NEED TO DOCUMENT ANYTHING MORE THAN THAT AND SUBMIT TO CERTIFICATION EVERY 3 YEARS.	
10	FURTHER STUDY THE NEED FOR BENEFITS OF PROGRAM WIDE IMPLEMENTATION OF CASE MANAGEMENT RECORDS AND PROTOCOLS WITH DEFINED VOCATIONAL GOALS/ASSESSMENTS FOR ALL ABI QUALIFIED NONPROFIT AGENCIES	COMPETITIVE AND INTEGRATED EMPLOYMENT IS FOUND IN THE SET ASIDE THUS SATISFYING THE GOALS	GOALS CAN BE SATISFIED IN THE TRAINING MODULE REMAINING UNDER JWOD
11	BETTER DEFINE ABI PROGRAM PARTICIPANT CAREER GOALS LEADING TO A CAREER PATH	COMPETITIVE AND INTEGRATED EMPLOYMENT IS FOUND IN THE SET ASIDE THUS SATISFYING THE GOALS	GOALS CAN BE SATISFIED IN THE TRAINING MODULE REMAINING UNDER JWOD
12	ESTABLISH AN ABI COMMISSION ELIGIBILITY	AGREED	GOALS CAN BE SATISFIED IN THE TRAINING MODULE REMAINING UNDER JWOD

	AND EMPLOYMENT CELL OF QUALIFIED PERSONNEL		
13	USE ABI PARTICIPANT MAPPING AGAINST ESTABLISHED DISABILITY EMPLOYMENT PROGRAMS	COMPETITIVE AND INTEGRATED EMPLOYMENT IS FOUND IN THE SET ASIDE THUS SATISFYING THE GOALS	GOALS CAN BE SATISFIED IN THE TRAINING MODULE REMAINING UNDER JWOD
14	FURTHER DEFINE, MEASURE AND TRACK ABI EMPLOYMENT OUTCOMES	COMPETITIVE AND INTEGRATED EMPLOYMENT IS FOUND IN THE SET ASIDE THUS SATISFYING THE GOALS	GOALS CAN BE SATISFIED IN THE TRAINING MODULE REMAINING UNDER JWOD
15	AMEND JWOD TO LOWER RATIO FROM 75% DIRECT LABOR TO ANOTHER RATIO TO BE DETERMINED	RATIO IS STILL A VIOLATION OF WIOA. SET ASIDE ADDRESSES WIOA COMPLIANT GOAL OF EMPLOYMENT OF PEOPLE WITH DISABILITIES WHILE ADDRESSING THE ASPIRATIONAL GOAL OF ENSURING PEOPLE ARE PROVIDED EMPLOYMENT	MOST PROJECTS THAT PROVIDE GROWTH FOR THE PROGRAM ARE BELOW RATIO ANYHOW SO WHY LOWER IT AND UPSET OTHERS INVOLVED SUCH AS SMALL BUSINESS.
16	AMEND JWOD TO INCLUDE INDIRECT LABOR INTO THE CALCULATION OF RATIO.	SET ASIDE USES 35% ACROSS THE ORGANIZATION TO DETERMINE ELIGIBILITY LIKE HUBZONE AND MEETS REQUIREMENTS OF WIOA.	
17	AMEND JWOD TO ADD IN DISABILITY CATEGORIES	USE A STANDARD BASED ON GOVERNMENT DETERMINATION FOR DISABILITY DETERMINATIONS (VA OR SOCIAL SECURITY). NO NEED TO DOCUMENT ANYTHING MORE THAN THAT AND SUBMIT TO CERTIFICATION EVERY 3 YEARS.	NO NEED TO OPEN JWOD IN A STATIC ENVIRONMENT. LET THE DEFINITION BE DYNAMIC AS IT COULD CHANGE.
18	COLLABORATE AND EXPOUND DEFINITION OF SIGNIFICANT DISABLED INDIVIDUAL AND NORMAL COMPETITIVE EMPLOYMENT THAT ALLOWS ELIGIBLE VETERAN TO PARTICIPATE IN VA'S	USE A STANDARD BASED ON GOVERNMENT DETERMINATION FOR DISABILITY DETERMINATIONS (VA OR SOCIAL SECURITY). NO NEED TO DOCUMENT ANYTHING MORE THAN	REFERRALS FROM VA CAN OCCUR ONCE DISABILITY DETERMINATION IS CREATED.

	VOCATIONAL REHAB, COMPENSATED WORK THERAPY, TO PARTICIPATE IN ABILITYONE DIRECT LABOR RATIO	THAT AND SUBMIT TO CERTIFICATION EVERY 3 YEARS.	
19	WORK WITH VA AND DEPARTMENT OF EDUCATION FOR ONE YEAR ON FEASIBILITY, IMPACT AND IMPLEMENTATION OF RECOMMENDATIONS THAT RELY ON THEIR DETERMINATION OF VETERAN AND NON-VETERAN ELIGIBILITY FOR AB1 PROGRAM AND INCLUDE RESULTS IN 2019 REPORT TO CONGRESS WITH UPDATES	AGREED. AGAIN, USE OF VETERAN EMPLOYMENT AS DEFINED BY VA AND SET ASIDE RULEMAKING WILL ACCOMPLISH SAME GOAL.	
20	DEVELOP CERTIFICATION /VALIDATION PROGRAM FOR INDIVIDUALS CERTIFYING IEE FORM AND RECOMMEND THAT AB1 CONTRACT FOR ELIGIBILITY ASSESSMENTS	USE A STANDARD BASED ON GOVERNMENT DETERMINATION FOR DISABILITY DETERMINATIONS (VA OR SOCIAL SECURITY). NO NEED TO DOCUMENT ANYTHING MORE THAN THAT AND SUBMIT TO CERTIFICATION EVERY 3 YEARS.	VA DISABILITY WILL QUALIFY FOR SET ASIDE DEFINITION OF DISABLED.
21	REVISE DEFINITION OF SEVERELY DISABLED INDIVIDUAL SO IT DOES NOT STATE THAT PARTICIPANTS ARE UNABLE TO ENGAGE IN COMPETITIVE AND INTEGRATED EMPLOYMENT WHICH WILL ALLOW VA TO REFER VETERANS TO PARTICIPATING NAPS AND AB1	SET ASIDE IS COMPETITIVE AND INTEGRATED. NO NEED TO AMEND ANY DEFINITIONS	IS NOT THE PURPOSE OF AB1 HAVING A PRIORITY TO ENSURE THAT PEOPLE BEING EMPLOYED ARE UNABLE TO BE EMPLOYED IN CIE ELSEWHERE? DOES THIS RECOMMENDATION NOT GO TO THE HEART OF THE WIOA ARGUMENT?

22	<p>COMMISSION DEVELOP A GOAL FOR VETERANS TO BE INTEGRATED INTO THE WORKSHOP UNDER INTERNSHIPS, PART-TIME OR FULL-TIME EMPLOYMENT OPPORTUNITIES. SPECIAL CONSIDERATION SHOULD BE GIVEN TO VETERANS LIVING WITH MENTAL ILLNESS OR PHYSICAL DISABILITIES TO HELP THEM SECURE AND MAINTAINING COMMUNITY BASED COMPETITIVE EMPLOYMENT</p>	<p>SET ASIDE IS COMPETITIVE AND INTEGRATED AND THEREFORE CAN BE A SOURCE OF EMPLOYMENT AS STATED.</p>	
23	<p>COMMISSION WRITES POLICY AND IMPLEMENTS BUSINESS PRACTICES THAT PROVIDE SUFFICIENT OVERSIGHT AND TRANSPARENCY. CREATES INCENTIVES FOR INCLUSION AND MENTORING OF SMALLER NONPROFITS AND VETERAN EMPLOYMENT OPPORTUNITIES ON DOD CONTRACTS</p>	<p>SET ASIDE HAS NECESSARY TRANSPARENCY AND OVERSIGHT BUILT INTO THE SMALL BUSINESS ACT. MENTOR PROTÉGÉ IS A PROGRAM WITHIN THE SBA PROGRAM AND JOINT VENTURES CAN BE OFFERED AS A FEATURE OF A NEW SET ASIDE</p>	
24	<p>ALLOCATION OF WORK RECOMMENDATIONS TO INCLUDE BEST VALUE TRADE OFF, PUBLIC ANNOUNCEMENT OF OPPORTUNITIES, J & A'S IF ONLY ONE NPA CAN SUPPORT, SOURCE SELECTION DECISION DOCUMENTS, THRESHOLDS FOR CERTIFICATIONS AND REPRESENTATIONS</p>	<p>ALL FEATURES OF THE SMALL BUSINESS ACT.</p>	
25	<p>COMMISSION ESTABLISHES POLICY AND BUSINESS RULES THAT INCLUDE COMPETITION AND RE-COMPETITION WITHIN THE AB1 PROGRAM</p>	<p>ALL FEATURES OF THE SMALL BUSINESS ACT, THOUGH COMPETITION IS MORE TRANSPARENT IN THE SMALL BUSINESS SET ASIDE PROPOSED.</p>	<p>THE LACK OF MANDATORY RE-COMPETITIONS IS A FEATURE WE THINK CREATES THE OSSIFICATION THAT EXISTS TODAY.</p>

26	IMPLEMENT MANDATORY SOURCE SELECTION PROCEDURES THAT CNAS WILL FOLLOW THAT REQUIRES A BEST VALUE TRADE OFF SIMILAR TO OTHER FEDERAL SOURCE SELECTION PROCEDURES.	USE THE FAR WHICH INCORPORATES THE NECESSARY SOURCE SELECTION PROCEDURES BY THE FAR.	AGAIN, A SECONDARY SYSTEM IMPOSED ON A THIRD PARTY TO DO A CRITICAL SOURCE SELECTION REQUIREMENT LEAVES A LOT TO BE DESIRED. THE SMALL BUSINESS ACT ALREADY HAS THESE FEATURES BUILT IN.
27	ESTABLISH PENALTIES IF A CENTRAL NONPROFIT OR NPA DOES NOT FOLLOW PROCEDURES	SMALL BUSINESS ACT AND FALSE CLAIMS ACT HAVE NECESSARY PENALTIES AND WAYS TO DETERMINE WHETHER REGULATIONS AND/OR STATUTES ARE VIOLATED	
28	REDUCE EXISTING GAPS AND DEFICIENCIES IN CENTRAL NONPROFIT PROCESSES	USE THE FAR WHICH INCORPORATES THE NECESSARY SOURCE SELECTION PROCEDURES BY THE FAR.	DELEGATION TO CENTRAL NONPROFITS HAS CREATED A MULTITUDE OF PROBLEMS AND RECOMMENDATIONS ARE ONLY LAYERING ON MORE INCONSISTENCY.
29	AUTHORIZE AND DEAUTHORIZE CENTRAL NONPROFITS AND NONPROFITS TO ACCEPT CONTRACTS FROM CONTRACTING ACTIVITIES FOR FURNISHING OF SPECIFIC PRODUCTS AND SERVICES ON THE PROCUREMENT LIST	THIS FEATURE CAN BE BUILT IN (REMOVING THE CENTRAL NONPROFITS) UNDER OUR 8(A) RECOMMENDATION	
30	IN MATTERS OF RESOLUTION REGARDING CONTRACTING DISPUTES, THE CONTRACTING ACTIVITY OR THE NONPROFIT AGENCIES CAN REQUEST ASSISTANCE FROM EITHER THE CENTRAL NONPROFIT OR THE COMMISSION	AN OMBUDSMAN WOULD ACCOMPLISH THIS FUNCTION IN THE SET ASIDE.	

31	<p>IN THE EVENT THE COMMISSION REMOVES THE DESIGNATION OF AN NPA AS AUTHORIZED SOURCE OF SUPPLY, THE NPA SHALL ALLOW AS MANY PERSONNEL AS PRACTICABLE TO REMAIN ON THE JOB TO HELP SUCCESSORS MAINTAIN CONTINUITY AND CONSISTENCY</p>	<p>FAR 22.12 ADDRESSES THIS ISSUE FROM A SERVICES PERSPECTIVE. IT COULD BE A CLAUSE BUILT INTO THE NEW SET ASIDE</p>	<p>INTERESTING THAT THE CHANGE OF A DESIGNATED CONTRACT, PARTICULARLY WHERE PERFORMANCE IS THE PREDICATING CHANGE, WOULD REQUIRE THAT STAFF THAT CAUSED THE PERFORMANCE QUESTIONS TO BE RETAINED.</p>
32	<p>SUCCESSOR NPAS IS REQUIRED TO OFFER EMPLOYEES UNDER PREDECESSOR CONTRACT, TERMINATED DUE TO A NEW CONTRACTOR, TO BE OFFERED RIGHT FOR FIRST REFUSAL TO BE OFFERED POSITIONS FOR WHICH THEY ARE QUALIFIED.</p>	<p>FAR 22.12 ADDRESSES THIS ISSUE FROM A SERVICES PERSPECTIVE. IT COULD BE A CLAUSE BUILT INTO THE NEW SET ASIDE</p>	<p>HOW LONG DOES THE COMMISSION INTEND FOR THAT LIABILITY TO BE INCURRED?</p>
33	<p>PREVIOUSLY DESIGNATED NPA SHALL DISCLOSE NECESSARY PERSONNEL RECORDS AND ALLOW SUCCESSOR NPA TO CONDUCT ON-SITE INTERVIEWS WITH THOSE IDENTIFIED EMPLOYEES WHO COULD BE EMPLOYED UNDER A SUCCESSOR CONTRACT</p>	<p>CONTINUITY OF SERVICE REQUIREMENTS IN THE FAR ALLOW FOR THE SAME GOALS.</p>	
34	<p>IF SELECTED EMPLOYEES ARE AGREEABLE TO THE CHANGE, THE PREVIOUSLY DESIGNATED NPA SHALL RELEASE THEM AT A MUTUALLY AGREEABLE DATE AND NEGOTIATE TRANSFER OF EARNED FRINGE BENEFITS, ETC.</p>	<p>COULD BE A RULE UNDER THE NEW SET ASIDE.</p>	
35	<p>UPDATE PROCUREMENT LIST TO MAKE IT MORE USER FRIENDLY</p>	<p>NO NEED IF UNDER THE SET ASIDE.</p>	<p>REMAINING JWOD WOULD MAKE SENSE</p>

36	DEPLOY IT SOLUTION WHERE THE PL CAN BE LINKED TO EXISTING CONTRACTING VEHICLES TO ROUTE PURCHASES THROUGH THE PL PRIOR TO OTHER AVENUES	NO NEED IF UNDER THE SET ASIDE.	REMAINING JWOD WOULD MAKE SENSE
37	RECOMMEND CONTRACTING SYSTEMS ACROSS DOD BE MODIFIED TO ADD FLAGGED CHECKPOINTS REQUIRING THE CONTRACTING OFFICERS TO USE MANDATORY SOURCES	NO NEED IF UNDER THE SET ASIDE.	REMAINING JWOD WOULD MAKE SENSE
38	UPDATING THE PROGRAMS TO SEND UP FLAGS WITHOUT EASY BYPASS TO INCREASE USE OF THE PL	NO NEED IF UNDER THE SET ASIDE.	REMAINING JWOD WOULD MAKE SENSE
39	MAKE THE PL INFORMATION AVAILABLE TO DOD CONTRACTING PERSONNEL TO CHECK STATUS OF CONTRACTS, ETC.	NO NEED IF UNDER THE SET ASIDE.	REMAINING JWOD WOULD MAKE SENSE
40	RECOMMEND CHANGES AND ADDITIONS TO LOCAL REGULATIONS TO ENHANCE ABILITY OF DOD CONTRACTING PERSONNEL TO CHECK PL BEFORE MAKING PURCHASES	NO NEED IF UNDER THE SET ASIDE.	REMAINING JWOD WOULD MAKE SENSE
41	GOAL FOR GROWTH IN AB1 PARTICIPATING	SET ASIDE WILL SET A GOAL 1.5% OF DOD SPEND	REMAINING JWOD WOULD MAKE SENSE
42	DOD COMPONENTS CAN CONSIDER USING AIR FORCE MODEL AS A STARTING POINT	N/A	REMAINING JWOD WOULD MAKE SENSE
43	RECOMMEND INTERIM DFARS REVISION UNTIL FAR CAN BE MODIFIED TO INCORPORATE A CHANGE DETAILING THE CHANGE TO BUSINESS PRACTICES, INFORMATION SYSTEMS AND TRAINING FOR PROPER USE OF THE PL	NO NEED IF UNDER THE SET ASIDE.	REMAINING JWOD WOULD MAKE SENSE

44	DEVELOP SEPARATE PART OF THE FAR (8.7) TO DETAIL HOW TO DO BUSINESS WITH ABILITYONE	NO NEED IF UNDER THE SET ASIDE.	PROBABLY NOT NECESSARY SINCE PROGRAM WILL SHRINK CONSIDERABLY IF SET ASIDE IS ADOPTED FOR THOSE REMAINING JWOD BUSINESS OPPORTUNITIES.
45	RECOMMEND CHANGE TO ALLOTTED TIME FRAME CURRENTLY REQUIRED BY APA WHEN ADDING PRODUCTS	NO NEED IF UNDER THE SET ASIDE.	PROBABLY NOT NECESSARY SINCE PROGRAM WILL SHRINK CONSIDERABLY IF SET ASIDE IS ADOPTED FOR THOSE REMAINING JWOD BUSINESS OPPORTUNITIES.
46	INCORPORATE SECTION 508 TRAINING FOR CONTRACTING PERSONNEL	NO NEED IF UNDER THE SET ASIDE.	REMAINING JWOD WOULD MAKE SENSE
47	USE DAU ONLINE AND CLASSROOM TRAINING TO TEACH ABI INFORMATION	NO NEED IF UNDER THE SET ASIDE.	PROBABLY NOT NECESSARY SINCE PROGRAM WILL SHRINK CONSIDERABLY IF SET ASIDE IS ADOPTED FOR THOSE REMAINING JWOD BUSINESS OPPORTUNITIES.
	898 PANEL RESPONSES	SOCIAL ENTERPRISE SET ASIDE RECOMMENDATIONS	
48	DOES NOT ADDRESS	CHANGE OF STATUTORY RULE OF TWO TO INCREASE THE SCOPE OF IT OVER JWOD	CHANGES THE SMALL BUSINESS ACT TO BE HIGHER PRIORITY THAN JWOD.
49	DOES NOT ADDRESS	DEFINITION OF SOCIAL ENTERPRISE TO REQUIRE NPAS TO BECOME SMALL BUSINESSES AND ORGANIZED FOR PROFIT	
50	SEE RECOMMENDATIONS THROUGHOUT	DEFINITION OF SOCIAL ENTERPRISE TO INCLUDE DEFINITION OF DISABLED AS CERTIFIED BY VA/SOCIAL SECURITY	WE SIMPLIFY THE DEFINITION AND MAKE IT MORE DYNAMIC TO BE CHANGING WITH REGULATORY/STATUTORY ADJUSTMENTS AS THEY OCCUR.
51	RECOMMEND LIMITED COMPETITION	SET ASIDE METHOD	

52	NO CHANGES TO JWOD TO INCLUDE SUCH CHANGES TO ENSURE GREATER PERFORMANCE BY NPAS	CONTRACT ADMINISTRATION REQUIREMENTS TO INCLUDE LIMITATIONS ON SUBCONTRACTING, BUY AMERICA ACT, AND OTHER ELEMENTS	
53	TRIES TO ADDRESS THROUGH RATIO	WIOA COMPLIANCE	
54	2018 NDAA AND RECOMMENDATION 41	SET ASIDE GOALS	
55	DOES NOT ADDRESS	ENCROACHMENT ON SMALL BUSINESS	LOWERING RATIO AND INCREASING SUITABILITY WILL LEAD TO ENCROACHMENT.
56	LIMITED COMPETITION.	COMPETITION REQUIREMENTS	SET ASIDE HAS CLEAR PROCEDURES AND 898 HAS NOT CREATED CLEAR PROCEDURES AND INTERIM RULES ARE VERY DISCRETIONARY.
57	DOES NOT ADDRESS	EXECUTIVE SALARIES	REGULATORY CHANGES GOING BACK TO 2005 TO ADDRESS THIS ISSUE HAVE NOT BEEN IMPLEMENTED.
58	YES	RESTRICTION ON LOBBYING	
59	DOES NOT ADDRESS	COUNTRY OF ORIGIN REQUIREMENTS	
60	DOES NOT ADDRESS	VALUE ADD REQUIREMENTS	
61	DOES NOT ADDRESS	RESTRICTION ON ADDITIONAL REQUIREMENTS	LIMIT AND DEFINE MORE CLEARLY THE USE OF THE SUITABILITY DETERMINATIONS TO LIMIT EFFECTS ON SMALL BUSINESSES.
62	DOES NOT ADDRESS	ANNOUNCEMENT OF PROCUREMENT LIST ADDITIONS	FOCUSES ON ANNOUNCEMENTS OF PROCUREMENT OPPORTUNITIES
63	DOES NOT ADDRESS	PROTEST OF SUITABILITY DETERMINATIONS	

ENCLOSURE 3

*****SEE ATTACHMENT TO EMAIL*****

ENCLOSURE 4

***AKIMA AND PDS: THE TWO MOST IMPORTANT DECISIONS IN RECENT YEARS FOR
THE ABILITYONE PROGRAM***

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If asked what the two most important legal decisions related the AbilityOne program in the last 10 years are, we would say *Akima Intra Data v. United States* is the first. We think the second is *PDS Consultants v. United States*. The reason these decisions are so critical to the program is the response from the Commission to the decisions, and the legacy of each, not the decisions themselves *per se*. To understand why these decisions are so important, it is critical to understand a bit about what their context means today. More important, the response by the regulators related to these legal challenges were focused more on program expansion than on the effects of the challenges and safeguarding the program as regulators should, abrogating their essential role in the JWOD regulatory scheme. Ultimately, the actions by the Commission in *Akima* and *PDS* have had and will continue to have profound effects on the program in terms of its decline and accelerating the decline if nothing changes.

Historical Context

It is important to understand the context of the legal actions and what the Commission was doing during those periods. In 2014, when *Akima* came about, the Commission and the program were riding high, seemingly invulnerable to any challenge. Previously at GAO, issues around the Veterans Benefit Act (VBA) and JWOD were disposed of quite handily. Moreover, the effects of *SA-Tech* and the Yakima firing range really had minimal effects on the program though the Court's opinion exposed the essential flaws of how the Procurement List process worked and should have been a complete embarrassment to the program. Further, SourceAmerica's troubles were not yet exposed publicly, an event that shone an additional light on how the program was about growth versus the fidelity of its mission. Finally, *Bona Fide Conglomerate* was making noise but it was being adequately addressed internally. Neglected were the emerging cracks the hubris was bringing, and the Commission, right along with its CNAs, chose to look the other way.

Never litigated was the optical industry and IFB's dispute related to the addition of the entire Eastern United States and their eyeglasses to the Procurement List (SAO East), the progenitor of the *PDS* lawsuit. The matter was attributed to NIB's failure to address suitability properly (the Commission totally absolved itself of responsibility in that matter though they were heavily involved), coming on the heels of the *SA-Tech* debacle. While the bullet was dodged related to an actual Court based VBA/JWOD challenge (as opposed to a GAO challenge), the matter was not actually put to rest (*Kingdomware* was still at the lower courts, WIOA was not yet passed, and the SourceAmerica scandals exposed by CNN et al had not been brought to the surface yet).

Against this backdrop, *Akima* was seen as a great win in the context of its time and place. The case was, in fact, the basis on which the Commission evaluated its candidates to the new General Counsel. It was the defeat of a very real challenge- whether AbilityOne was legally able to "scale" through the use of organization-wide ratio instead of on a project by project basis. More important, the Commission's regulatory authority was upheld notwithstanding a very inconsistent approach to the matter. Like so many times before, the Commission got its way, leading to false confidence. For example, throughout the case, one can read the contradictory regulatory position of the Commission on the issue, yet the inconsistency was upheld with a deference to Agency rule interpretation. It was a "soft" regulation, and fortunately for the program, JWOD affords a tremendous amount of discretion in the Commission in its rule making.

Scaling as determined by the *Akima* situation ensures there are projects that will be below ratio to allow for growth financially for many NPAs as newer, more profitable opportunities were not ratio-heavy in many circumstances. Over time, the solution to achieving scale was to view ratio as organization-wide

as opposed to individual projects (and this point does not include the fact NPAs will break off sections and subcontract portions to increase ratio and “game the system”). The concept gained traction and was imbedded in the system by the time of the *Akima* challenge. AbilityOne NPAs wanted growth to continue unimpeded and the challenge to ratio was the last great battlefield (in a long line of successes, including the Randolph Sheppard Act battles of the late 1990s and early 2000s). It is here the Commission’s commitment to the growth of the program sacrificed its long-term health because the blending of the projects creates a potential daisy chain when the situation reversed. However, at the time, hubris would not illuminate the reason why the Commission should be more concerned with managing and regulating the program than growing it. WIOA was just passed and no regulations were evident. Moreover, the widespread use of the organizational ratio standard meant unwinding the situation would be very unpleasant.

After *Akima*, growth continued unfettered. Through 2015 and 2016, the program was essentially invulnerable. For example, the Commission and IFB used the “unilateral add authority” without abandon as it related to the addition of eyeglasses to the Procurement List in response to the VBA and the VA’s Information Letter (IL), a roadblock put up by VA to ensure a synthesis between the VBA and JWOD. The method almost created a second lawsuit in 2015, but it was averted through negotiations. *Kingdomware* had been unsuccessful at the lower court, lost on appeal, and it seemed VA would get its “discretion” to implement the VBA how it saw fit (even to a certain extent *Angelica Textile*, while a set back for the program, enshrined the concept of discretion to allow the VBA and JWOD to coexist if the IL is followed). In that context, the conflict between the VBA and JWOD sat simmering, waiting for the next shoe to drop. Moreover, WIOA’s definitions of Competitive and Integrated Employment (CIE) were still being hashed out. Final rules were not to come out until September of 2016, after the *PDS* lawsuit would be filed. Furthermore, the Federal Strategic Sourcing Initiative (FSSI) had not fully been

developed, and it seemed Essentially the Same (ETS) would remain a priority of the government (the prelude to the Amazon Amendment in 2018). These macro-level storm clouds sat out there, waiting for conditions to come together, but they were manageable. The Commission and its CNA's continued to grow their program at will. Scale was unimpeded. Challenges to the program were beat back. Even the changes from the GAO's study and recommendations were met with minimal effect. Congress implemented the Office of the Inspector General (OIG) and convened the 898 Panel, but the 898 Panel was far more friendly than what Senator McCain originally proposed in the wake of the SourceAmerica fiasco (the 898 Panel is actually a mere extension of the program than a panel examining true reform as its most recent recommendations and attempts to affect the NDAA demonstrate).

The macro-level conditions continued to move against the program however, and the seeds laid in the legal challenges and ultimately in *Akima* would bear their fruit in ways unintended. In 2016 after the Supreme Court's decision in *Kingdomware*, the Commission did not seek to address the conflict between the VBA and AbilityOne through a compromise or find a solution to satisfy both parties, rather, confident in their position with the VA, the Commission went ahead and ignored the pleas from PDS to find a solution and continued with the unilateral addition of VISN 6, which forced the current legal action. Furthermore, WIOA's final rules were implemented and AbilityOne became seen as not CIE, thus the effects would be that referrals would dry up by 2020 (still 3 years away). A greater problem of whether JWOD and WIOA can exist in concert with one another manifested, and thus cast a pall now over the program. No more was the employment under JWOD virtuous, rather, it was contrary to the intent of Congress for CIE. Lurking in the weeds was the *Akima* decision, becoming more dangerous every day as these events continued to push the program in directions never anticipated by regulators and leadership. However, that danger was not yet fully evident because there was time to figure out solutions which were offered in 2017/2018 to little avail.

2017 yielded the loss of the program in *PDS*, again as we have argued, facially a big deal, but in actuality, its effects will be minimal on the overall program. It was the first direct challenge to JWOD in the post-WIOA world. *PDS*, as we have said is the “crack in the dam,” but it is WIOA which will break the dam. The program would now be viewed as anti-WIOA and employment of people with disabilities in JWOD is now seen as contrary to what WIOA desires. The effects of the *PDS* decision allowed negotiations with the program in that light. JWOD is now anti-disability, not the SDVOSB community which is being attacked in *PDS*.

Beyond the optics however, the *PDS* decision was the first real set back for the program in years. Because the *PDS* decision came on the heels of WIOA becoming more widespread, followed by the onset of the 2018 NDAA which included the “Amazon Amendment,” the combined effects will be a major challenge to NIB’s economic model as it exists today. Amazon in particular, goes further than the FSSI initiatives and pushes the government to use a web portal to purchase items under \$250,000 (essentially competing with the online business from Base Supply Centers or BSCs). Furthermore, as WIOA became more of an issue, attempts to minimize its effects have led to actions such as legislative solutions to the *PDS* decision (failed), the Kristie Noem Letter in the fall of 2017 to change the regulations related to CIE and JWOD (still not acted on), HR 5658 which has very little traction, the recent push on the NDAA which led an absolute rebuke from the Senate, as well as the latest 898 Panel recommendations (which were focused on preserving and expanding the status quo versus making true change).

Seeing the difficulties in finding solutions by the actions of the program thus far, we created an alternate proposal circulated around Congress about how to address the long-term effects of the program, which include the creation of a set aside to address the CIE questions and “grandfather” those

opportunities to a new set aside to achieve the objectives of what the recent NDAA calls for. As 2018 comes to a close, the program is faced with major challenges and 15 months to execute a cogent strategy before 2020 and WIOA and the Amazon Amendment is implemented.

It is against these challenges that the legacy of *Akima* and *PDS* have been felt and will continue to be felt. The Commission's "head down" approach on these cases created tunnel vision, missing the bigger challenges on the horizon, compounding the program's structural deficiencies, and the program is now living with these consequences.

***Akima* and the Double Bottom Line**

Akima represents the unfettered growth and scale of the program at the expense of a true firewall to ensure program longevity and prevention of a daisy chain down turn if the situation turned against the program (the Commission could have addressed the matter when *Akima* was originally litigated). What *Akima* wrought was scale to allow NPAs to grow without concern of each project meeting ratio (the practice was being done before *Akima*, but it was not clearly supported in regulation). As long as one project was 60% (though the program allows projects to go forward below 60%), and another was 90% and the blend met 75%, then there was no problem under *Akima* and the Commission's regulatory interpretation. The problem is that in the case of the 90% project being unprofitable and the 60% one being profitable, the two become intertwined inextricably.

In the case of an NIB program, where a BSC is 60%, but is enabled by the 90% project, what happens when BSCs are overridden by the Amazon Amendment? Sure, the physical location will remain, but the money and profit is in the e-commerce suite. Those solutions are the heart of the Amazon

Amendment and technically not protected by JWOD (only the option to operate the BSC is JWOD protected). When the e-commerce and commercial GSA business is gone, then the 90% project goes away too for the NIB agency. There are no economics to allow for the 90% project to remain and lose money, and the program goes bankrupt in terms of the double bottom line necessary to remain in JWOD. Compound this phenomenon across the largest NPAs in the NIB universe and you can see why the situation is pretty dire. This ratio problem is complicated where projects apply across other agencies and are not as clean as two distinct ones. For instance, what if you have VA project dependent on your DOD BSC business, and also your GSA project is also dependent on that BSC business? Then both VA and GSA are affected by the Amazon BSC project. The situation is a daisy chain. Where in *Akima* the opportunity to firewall the “reverse flywheel” existed, the Commission abdicated its role as a regulator to being a cheerleader to devastating effects.

Akima also affects the WIOA discussion in the same way. The opposite of NIB with its BSCs, you have the alternate situation in SourceAmerica. Where projects dependent on WIOA support and compliance with CIE definitions bringing ratio, the fact remains, many high ratio projects are subsidizing lower ratio, complex projects, such as the one in *SA-Tech* at Yakima. As those high ratio, high employee projects are lost, ratio becomes an issue, and the downward spiral exists there too. While not as acute as at NIB in terms of timeliness, it is obvious the same phenomenon is evident at the SourceAmerica program as well. *Akima* is a gift that keeps on giving, first for the program in scale, and now to unscale the program quickly and efficiently. If the Commission acted as a regulator, they would have seen that the interconnectedness of the projects would present a real risk for the program if something changed and unwound the scaling mechanism (what goes up must come down).

PDS

PDS offers a similar phenomenon. The Commission's response to *PDS* has been to appeal the decision, and the outcome of that appeal will be seen later when a final decision is issued. However, the response to *PDS* is another myopic one, made without the foresight of the regulatory lens the Commission should be seeing the program through (no pun intended). *PDS* is a minor injury inflicted on the program and its effects are very limited in a direct way if not for the Commission and their ability to expand the issues beyond their isolated circumstances.

Most of the projects in AbilityOne should not run afoul of the small business requirement in the VBA because adverse impact determinations should have already identified those projects which would be affected by the VBA. Understanding small business set asides is critical to understanding *PDS*. It is not an outright assault on the program, rather, it is a limited circumstance where small businesses will override the program for a single Agency and on a limited basis. To get a set aside, there must be two distinct small business suppliers of a product in the US to meet the needs of the requirement. Since many of the projects (15% of NIB versus 5% of SourceAmerica for sales to VA) are product based, those products should remain safe (unless they are eyeglasses where they were added in the continued face of small business opposition).

During the *PDS* litigation, the WIOA/JWOD dynamic has become more acute, with the 2020 implementation of Amazon and WIOA facing the program. It seemed obvious that VA represented an opportunity to under *PDS* allow affected NPAs to convert to CIE and become small businesses if the VA's rule of two could be met (in fact Alphapointe, at risk of losing pill bottles recently won a contract with ExpressScripts commercially, so it would have been a perfect candidate for the concept). Broadening

the idea, as we examined the legal and political situation, the only expeditious way to bring modernization to the program broadly and quickly was to apply the VBA concept government-wide and through a set aside under the Small Business Act (to make it expeditious, leave as much of the program as possible in place for those that want to use JWOD as a training program, and ensure stakeholders do not line up against the solution).

It is our feeling that other methods, such as opening up JWOD itself, attacking the VBA, et cetera, will not accomplish the goals in the timeframe necessary and engender more opposition than solutions. We have examined the past attempts to do so (following the JWOD/Randolph Sheppard Act challenges) and see that the proposed method will navigate around the issues of those fights. The Commission was made aware of the need to leave the Small Business Act option open, but the need to prosecute the limited VBA matter was more important than firewalling the wide-ranging WIOA effects on the entire program and thus, they pushed ahead with the VBA appeal. Like *Akima*, the Commission's myopia has limited the long-term regulatory support necessary to ensure the program achieves its goal of providing employment to people who are blind and disabled and removes options absolutely essential at the current time.

PDS as a Solution

And now the *PDS* decision becomes more important as it is a crucial component to the solution to WIOA. *PDS* is a lose/lose for the Commission while also offering NPAs a solution to solve their overall problems. *PDS* is predicated on the language in the VBA about *shall* setting aside contracts. The same language exists in the Small Business Act in 15 USC 644(j) for limited contracts (above the micro-purchase threshold and below the simplified acquisition threshold). While the matter has not been

litigated yet, the same situation exists, which could present a solution for the program (expanding the exception in 644(j) and protecting the new set aside from encroachment). The idea is to give NPAs the option- stay in JWOD (and grandfather their projects) or to go to a new set aside, and bring their projects with them, and comply with WIOA.

Of course, the concept runs counter to the Commission and CNA power structure, precisely because it vests power with the NPAs and allows for them to comply with WIOA and the intent of bringing more transparency, oversight, and effectiveness to the goal of employing people with disabilities. CNA fees are now reduced, but the focus on providing employment for people with disabilities is the primary intent of JWOD in substance as opposed to form. Furthermore, broadening the base from merely nonprofits to all small businesses willing to meet the threshold of employing a certain number of people with disabilities seems much more in line with the intent of WIOA considering the largest way people with disabilities are employed is through the JWOD program (or its successor if the set aside is adopted).

PDS, WIOA and the 898 Panel Recommendations about Ratio

If the Commission wins the appeal, *PDS* will cut off the avenue presented above and leave a stasis between WIOA and JWOD. WIOA will continue to erode the program through the lack of CIE placements. Amazon will take out the major revenue driver of the NIB group (effectively bankrupting the blind agencies) since so much of their revenue is dependent on the BSC program generally. Additionally, there will be no option to use the Small Business route without a significant ask in Congress and considering the timelines involved, not something realistic. The ultimate end, with a win in *PDS*, will be that the program will employ people for 12 months or less in a training function and the remainder of the

program will drop off over time without a scale to employ people in a WIOA compliant manner. The built in scale that exists today will be gone.

Moreover, proposals to bring down ratio will be opposed as ratio *is still ratio* regardless of the percentage involved, and that is in violation of WIOA. WIOA focuses on workgroups not ratio percentages *per se*. Furthermore, dropping ratio (as the 898 Panel is proposing) will in turn jeopardize the nonprofit status of organizations in the program since they are more and more like for profit organizations at that point. Since the likelihood is contract revenue will become UBTI, and the majority of NPA revenue will come from UBTI, the loss of the nonprofit status will be next (and the ability to operate in JWOD). Thus, the concept of a lower ratio will ultimately limit many NPAs focused on large scale employment's ability to participate in JWOD anyhow (so why not just do a set aside). Lastly, the notion of lower ratio to make it easier to comply with WIOA also makes it easier to obtain suitability for projects, at the expense of existing contractors, something to be opposed. The 898 Panel's recommendations in all instances alienates stakeholders instead of bringing them together and working with Congressional intent, making the panel look vapid in its independence and goals to increase oversight, accountability, and transparency (none of those recommendations meet those standards). WIOA envisions a system of training and employment and why the Commission continues to fight that goal is perplexing. Since the only other option available is the SBA route, the Commission should have that option available as opposed to closing itself off and leaving the program entirely exposed as they did with *Akima*.

Conclusion

PDS therefore has become a lose lose. *Akima* is already demonstrating its effects and will do so with NIB agencies in the very near future. The less risky loss is that the VBA overrides the program and they move on. If the Commission wins, the program itself loses, much like *Akima*. The Commission is subverting its regulatory role for that of a proponent of a program, which has inherent flaws. Solutions being proposed are vapid and leave much to be desired. Because they are tone deaf to the goals of Congress, the situation will continue to operate in stasis and removing options will only exacerbate the current structural issues evident. Moreover, instead of cheerleading proposals that resonate with legislators (and meet the intent of the program in substance versus form), JWOD continues to focus on the same tactics and same approaches in a world that has changed significantly. When discussing relevant legal decisions, look at not only the gains, but how these changes will increase the speed at which the program declines. Immediate gratification seemingly continues to adversely affect the long-term health of the program. It is in this context that we suggest *Akima* and *PDS* are viewed. They are not what they seem on the surface and in the case of *PDS*, the program should be rooting for a loss to ensure options are available. Otherwise, we see that *PDS* might be the doom prophesied by those in the program, just not how the prophets originally thought it would come about.