



Office of Inspector General

PHONE: 703-603-2124

2331 Mill Road, Suite 505
Alexandria, Virginia 22314-4608

November 15, 2018

MEMORANDUM

FOR: Thomas D. Robinson
Chairperson
U.S. AbilityOne Commission

Tina Ballard
Executive Director

FROM: Thomas K. Lehrich
Inspector General

SUBJECT: U.S. AbilityOne Commission
Top Management and Performance Challenges Report

In accordance with the Reports Consolidation Act of 2000, the Office of Inspector General (OIG) reports on the most significant management and performance challenges facing the U.S. AbilityOne Commission (Commission), for inclusion in the Commission's Performance and Accountability Report (PAR) for fiscal year 2018.

The Commission designates CNAs to facilitate the employment of people who are blind or have significant disabilities and the dynamics of the CNAs in the program is changing and growing. Our reporting reflects on, and seeks to assist in, this challenging environment. We met with the Commission leadership to gain their perspective on the challenge areas and received feedback from managers and the Agency's business units. In this year's Top Management and Performance Challenges Report, we introduce two new challenges. They are related to transparency and implementation of the cooperative agreements, given CNA growth. We also discuss progress on the four challenges reported last year and the continued efforts by the Agency leadership.

Thank you for your strong support of our work, and we look forward to working with the Commission and AbilityOne stakeholders as the OIG continues its oversight mission.

Enclosure: Top Management and Performance Challenges Report

cc: Kimberly M. Zeich
Deputy Executive Director

Kelvin Wood
Chief of Staff

Top Management and Performance Challenges Report

Introduction

In accordance with the Reports Consolidation Act of 2000 (P.L. 106-531), the Office of Inspector General (OIG) reports on the most significant management and performance challenges facing the U.S. AbilityOne Commission (Commission), for inclusion in the Commission's Performance and Accountability Report (PAR) for fiscal year 2018.

The identified challenge areas reflect continuing emerging issues facing the AbilityOne Program. Each challenge area is connected to the Commission's mission to provide employment opportunities in the manufacture and delivery of products and services to the Federal Government of the United States for people who are blind or have significant disabilities.

The OIG identified the top management and performance challenges (TMPC) for fiscal year (FY) 2018 as:

- Erosion of Statutory Program Authority
- Higher Level of Transparency Needed to Enhance Program Confidence
- Implementation of Cooperative Agreements given Central Nonprofit Agencies (CNA) Growth
- Lack of Adequate Resources Impacts Program Effectiveness
- Establishing an Enterprise-wide Risk Management Framework
- Enhancement of Program Compliance

The topics discussed in the report encompass multiple challenge areas and attest to the complex nature of the AbilityOne Program. In this report, we include transparency (needed to enhance program confidence) and the implementation of cooperative agreements as new challenges for the AbilityOne Program.

This report is based on OIG and U.S. Government Accountability Office (GAO) reviews and other reports, as well as our knowledge of the AbilityOne programs and operations. The OIG met with the Commission leadership to learn their perspective on the challenge areas. The OIG analysis considers the accomplishments the Commission reported as of September 30, 2018. We also received input on the challenges to the program from the CNAs and Congress.

In addition, the Council of Inspectors General on Integrity and Efficiency (CIGIE) reported on consolidated challenges found by federal IGs in 2017 across government, and the Commission was referenced among the 61 OIG reports that CIGIE considered. The CIGIE report referenced the Commission's challenges in terms of funding and staffing as a Human Capital Management challenge, and training under the Procurement Management challenge. The CIGIE report afforded the Commission broader exposure and visibility on its resource challenges for the administration of the complex AbilityOne Program.

Background

Enacted in 1938, the Wagner-O'Day Act established the Committee on Purchases of Blind-Made Products to provide employment opportunities for the blind. Legislation sponsored by Senator Jacob K. Javits was signed in 1971, amending and expanding the Wagner-O'Day Act to include persons with other severe disabilities. The Act, as amended, became known as the Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. §§8501-8506) and the program's name became the JWOD Program. The 1971 amendments also established the federal agency as the Committee for Purchase from People Who Are Blind or Severely Disabled (CPPBSD) to reflect the expanded capabilities of the JWOD Program. In 2006, CPPBSD changed the program's name from the JWOD Program to the AbilityOne Program. Additionally, the CPPBSD is now known as the U.S. AbilityOne Commission (Commission).

By statute, the Commission is composed of fifteen Presidential appointees: eleven representing federal agencies and four serving as private citizens coming from the blind and disabled community, bringing their knowledge about employment of people who are blind or have significant disabilities. Currently, in the composition of the Commission's fifteen Presidential appointees there are nine vacancies: seven federal agencies and two private citizens. The Commission has 27 full-time employees for the administration of the AbilityOne Program. The Program is a source of employment for approximately 46,000 people who are blind or have significant disabilities through contracts with more than 550 nonprofit agencies (NPAs) across all fifty states and U.S. territories. The Commission administers contracts for more than \$3.3 billion in products and services to the federal government annually through the AbilityOne Program.

The Commission designates CNAs to facilitate the employment of people who are blind or have significant disabilities. The dynamics of the CNAs in the program are changing and growing. The Commission administers the AbilityOne Program with the assistance of two CNAs,¹ the National Industries for the Blind (NIB), established in 1928, and SourceAmerica, established in 1974. On July 26, 2018, the Commission designated the American Foundation for the Blind (AFB) as a third CNA. Figure 1 below shows the AbilityOne structure.

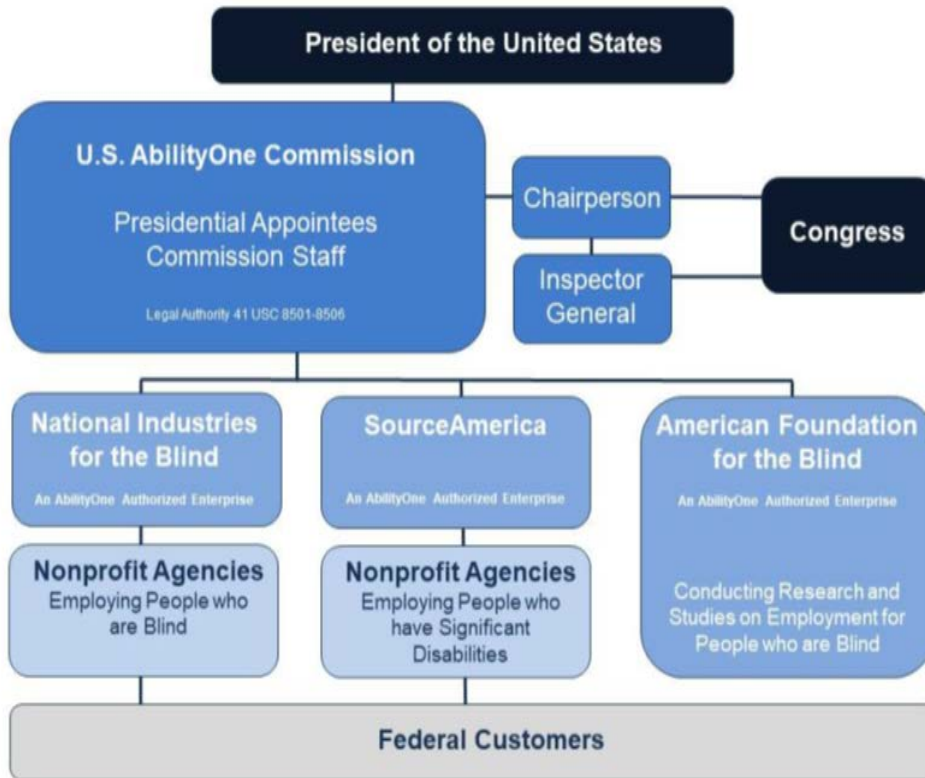
AFB has not yet begun fully operating as a CNA and has not been authorized by the Commission to charge or collect fees from NPAs. AFB does join NIB and SourceAmerica as a Commission-designated CNA, but will begin with an initial 18 month period of research and studies, per the Cooperative Agreement between the Commission and AFB. Each CNA has its own Cooperative Agreement with the Commission and that Agreement helps govern the relationship and performance of each CNA.

The Commission is ultimately responsible for the administration of the \$3.3 billion worth of contracts between the NPAs and the federal government. Stakeholders expect greater program integrity, efficiency, accountability, and transparency of government operations. The OIG will continue to report on management progress and to promote the benefits of an open and transparent culture, ultimately leading to a more resilient AbilityOne Program.

¹ 41 CFR Chapter 51-3.

Figure 1:

AbilityOne Program Organization



Management Challenge 1: Erosion of Statutory Program Authority

Why This Is a Challenge

The challenge of program erosion is at a pivotal stage. Last year we first presented the concept of erosion of statutory program authority as a challenge after observing that the Agency is confronted with encroachment in the program. The legal framework for the AbilityOne Program was created in 1938 and amended in 1971. Since that time, Congress has enacted, and agencies have implemented, multiple acquisition reform laws designed to modernize the way that government agencies buy goods and services. Specifically, several new laws passed ensure our Nation's disabled veterans have expanded opportunities in federal government acquisitions. However, these laws are in conflict with the statutory authority of the AbilityOne Program.

Congress passed the Veterans Entrepreneurship and Small Business Development Act in 1999, the Veterans Benefits Act (VBA) in 2003, and in 2006 it approved the Veterans Benefits, Health

Care, and Information Technology Act which removed important language from the VBA of 2003. Each of these laws established procedures related to service-disabled veteran business procurement goals and requirements, but the VBA of 2006 created problems with JWOD supremacy. While the removal of such language doesn't by itself nullify the JWOD supremacy, it challenges the Program by antagonizing what Congress contemplated for JWOD Act jurisdiction as applied to the Department of Veterans Affairs (VA). Executive Order 13360 increased federal contracting and subcontracting opportunities for service-disabled veteran businesses to the detriment of AbilityOne Program participants. The creation of multiple initiatives that are in competition with each other makes it difficult for contracting officers to navigate compliance, due to conflicting regulations. Recent court challenges further demonstrate the confusion as to how AbilityOne Program rules should be interpreted and implemented.

1. PDS Consultants – the “Rule of Two” analysis

In *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969 (2016), the Supreme Court held that VA contracting officers are required to give veteran-owned small businesses (VOSBs) procurement priority when there is a “reasonable expectation” that two or more VOSBs will bid on the contract “at a fair and reasonable price that offers best value to the United States” (Veterans Benefits Act of 2006) (38 U.S.C. § 8127(d)). This is known as the “Rule of Two” analysis. The Court also held that this analysis was required regardless of whether the VA had already met its annual minimum VOSB contracting goals.²

PDS Consultants, Inc. alleged in the Court of Federal Claims that the VA improperly implemented the Veterans Benefits, Health Care, and Information Technology Act of 2006 (VBA of 2006)³ mandate when it revised its contracting rules in an attempt to comply with the Supreme Court ruling in *Kingdomware* while remaining compliant with the JWOD Act.⁴

In *PDS*, the VA awarded a contract to a qualified NPA provider on the AbilityOne Procurement List without first employing the VBA's “Rule of Two” analysis. The VA did so because it believed that *Kingdomware* could be distinguished as applying only to competitive contracts and that JWOD procurements were non-competitive. The VA further believed that the mandatory nature of the VBA's “Rule of Two” applied only to new contracts and that here it was merely renewing a contract that existed prior to the VA's 2010 implementation of the VBA of 2006. The Court of Federal Claims disagreed with the VA, holding that the VA must conduct a “Rule of Two” analysis for all new procurement contracts before treating the AbilityOne Procurement List as a mandatory source pursuant to the JWOD Act. The Court of Federal Claims also held that because the VBA of 2006 applied only to the VA's procurements, the VBA was a more specific statute than the JWOD Act's broad application government-wide, and thus the VBA would take precedence, regardless of the existence of a prior contract with a Procurement List contractor.

On September 1, 2017, the Court of Federal Claims stayed its decision in *PDS* pending appeal to the United States Court of Appeals for the Federal Circuit in order to resolve the issue of whether

² *Kingdomware Technologies, Inc. v. United States*, 136 S.Ct. 1969 (2016).

³ 38 U.S.C. §§ 8127, 8128.

⁴ *PDS Consultants, Inc. v. United States*, Case No. 16-1603C, (Fed. Cl. 2017).

the court properly interpreted the interplay between the VBA and JWOD Act. Oral arguments took place on September 4, 2018 and a final order was issued on October 17, 2018.

The United States Court of Appeals for the Federal Circuit (CAFC) affirmed the lower court's decision in favor of PDS.⁵ The CAFC held that *Kingdomware* "requires the [VA] to apply the Rule of Two to all contracting determinations."⁶ To hold this way essentially requires that the VA compete all contracts where "the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States" before a mandatory source determination is made (by checking whether an item is on the AbilityOne Procurement List).⁷

To reconcile the competing provisions, the court relied on the "basic tenant of statutory construction . . . that a specific statute takes precedence over a more general one" and "when two statutes conflict, the later-enacted statute controls."⁸ The court held that "while the JWOD applies to all agencies of the federal government, the VBA applies only to VA procurements and only when the Rule of Two is satisfied."⁹ Additionally, the court explained that "we assume that Congress was aware that it wrote an exception into the agency-wide Veterans Benefits Act in 2003 [expressly retaining JWOD's primacy over the VBA] when it left that very same exception out of the VBA only three years later."¹⁰

This decision in favor of PDS Consultants, Inc. will have a negative impact on the AbilityOne Program and Federal Acquisition Regulation Part 8 Mandatory procurement sources as applied to the VA.

2. Randolph-Sheppard Act

The Randolph-Sheppard Act (RSA) was passed in 1936 and amended in 1954 and 1974.¹¹ Its implementation has been in conflict with the JWOD Act since the latter's inception in 1938. "The RSA was enacted to provide blind persons with remunerative employment, enlarge their economic opportunities, and encourage their self-support through the operation of vending facilities in federal buildings. The U.S. Department of Education prescribes regulations, as set forth in 34 CFR, Part 395, implementing the *Act* as amended (See 41 CFR 101-20.2)."¹²

Under the Randolph Sheppard Vending Facility Program, "state licensing agencies recruit, train, license, and place individuals who are blind as operators of vending facilities located on federal and other properties. The act authorizes a blind individual licensed by the state licensing agency to conduct specified activities in vending facilities through permits or contracts."¹³ However,

⁵ *PDS Consultants, Inc. v. United States*, Court of Appeals for the Federal Circuit (decided Oct. 18, 2018).

⁶ *Id.* (citing *Kingdomware*, 136 S. Ct. at 1976).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 20 U.S.C. § 107 et. seq.

¹² [Randolph Sheppard Vending Facility Program](#).

¹³ *Id.*

recent progress has been made by RSA participants and supporters to implement the respective mandates as Congress intended.

In 2006, Congress sought to dispel the confusion and conflict between the JWOD and RSA Acts via the 2006 National Defense Authorization Act (NDAA). Therein, Congress required the agencies administering both the JWOD Act and the RSA, (the Commission and the Department of Education, respectively), as well as the Department of Defense (DoD) to issue a joint statement clarifying "the application of those Acts to both operation and management of all or any part of a military mess hall, military troop dining facility, or any similar dining facility."¹⁴

The Commission, the Department of Education, and the DoD complied with this Congressional directive. The three agencies developed a task force comprised of representatives from each agency that "met weekly and engaged in almost daily discussions by electronic mail and telephone to develop a joint statement of policy pursuant to Section 848 [of the 2006 NDAA]."¹⁵ The three agencies also "solicited public comments through a notice in the Federal Register, and approximately 240 comments were received."¹⁶

The three agencies memorialized their agreement as to the policy that should govern application of the JWOD Act and RSA to military dining facilities in a joint report to Congress dated August 29, 2006 (the "Joint Policy Statement"). According to the Joint Policy Statement, "contracts will be competed under the RSA when the [Department of Defense] solicits a contractor to exercise management responsibility and day-to-day decision-making for the overall functioning of a military dining facility," i.e., operation of the military dining facility.¹⁷ However, "In all other cases, the contracts will be set aside for JWOD performance . . . Dining Facility Attendant Services (DFA) . . . when the [Department of Defense] needs dining support services (e.g., food preparation services, food serving, ordering and inventory of food, meal planning, cashiers, mess attendant, or other services that support operation of a dining facility) . . ."¹⁸ Relevantly, mess attendant services are also known as dining facility attendant services.¹⁹

After more than two years²⁰ of lost AbilityOne Program jobs, the Unified Agenda²¹ published on June 11, 2018, includes an entry by DoD regarding this proposed rule. The relevant DoD entry states that the "DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) . . . to implement the Joint Report and Policy Statement (Joint Policy Statement) issued by DoD, the Department of Education, and the CFP pursuant to section 848 of the NDAA for FY 2006. Pursuant to the Joint Policy Statement, the RSA applies to contracts for

¹⁴ NDAA of 2006, Pub. L. No. 109-163, § 848(b), 119 Stat. 3136, 3395 (2006).

¹⁵ Joint Report to Congress, Section 848 of the National Defense Authorization Act for Fiscal Year 2006: Application of the Javits-Wagner-O'Day Act and the Randolph-Sheppard Act to the Operation and Management of Military Dining Facilities (Aug. 29, 2006) ("Joint Policy Statement") at 3.

¹⁶ *Id.*; see also [Statement of Policy and Report Relating to Contracting with Employers of Persons with Disabilities, 71 Fed. Reg. 5819 \(Feb. 3, 2006\) \(requesting public comments\).](#)

¹⁷ Joint Policy Statement at 4, Full Food Services (FFS).

¹⁸ *Id.* (emphasis added).

¹⁹ See Food Services for Dining Facilities on Military Installations, 81 Fed. Reg. 36,506, 36,508 (June 7, 2016) ("Mess attendant services' (also known as 'dining facility attendant services') are a subset of 'dining support services.'").

²⁰ See FY 2015 NDAA Joint Explanatory Statement (prompting the DFARS rule). P.L. 113-291 (December 2014).

²¹ The Unified Agenda is a semi-annual report on the actions that agencies plan to issue in the near and long term.

the operation of a military dining facility, also known as full food services, while the CPPBSD statute applies to contracts and subcontracts for dining support services (including mess attendant services).” As of October 15, 2018, no final rule has been issued.

3. E-Commerce

Government-wide use of procurement through commercial E-Commerce portals is both an opportunity and a challenge to the AbilityOne Program. The FY 2018 NDAA was signed by the President on December 12, 2017, and included Section 846, “Procurement Through Commercial E-Commerce Portals.”²² Section 846 directed the General Services Administration (GSA), in partnership with the Office of Management and Budget (OMB), to “...establish a program to procure commercial products through commercial E-Commerce portals for the purposes of enhancing competition, expediting procurements, enabling market research, and ensuring reasonable pricing of commercial products.”

The OIG views the innovations of E-Commerce as the future of an evolving marketplace, just as in the past, the early “workshops” provided new employment opportunities for the blind. There is, however, risk for significant program erosion despite shared success of the E-Commerce platform. It is paramount that the buyers of products and services, i.e. the government agencies and their purchase officers, understand that the customer the E-Commerce platform seeks to serve is the AbilityOne Program itself. This is accomplished when the E-Commerce purchases comply with the JWOD Act, requiring that government agencies continue to buy from the AbilityOne Program.

4. Additional Examples of Erosion of Statutory Program Authority

The following illustrates additional examples of potential AbilityOne Program erosion:

- a. Recommendations for changes to the AbilityOne Program and the definition of “competitive integrated employment” resulting from the report of the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities established under Section 609 of the Rehabilitation Act of 1973, as amended by Section 461 of the Workforce Innovation and Opportunity Act. The 898 Panel report identified definitions that should be amended to bring JWOD into compliance with the Workforce Innovation and Opportunity Act;²³
- b. Efforts by the Small Business Administration to assert its preference programs over the mandated priority of the JWOD Act;
- c. Lack of enforcement capabilities for the AbilityOne Program to assert its mandated source-priority when federal agencies fail to purchase AbilityOne products and services;
- d. Increased legal challenges from qualified NPAs questioning the agency’s ability to administer the AbilityOne Program;
- e. As discussed in more detail later in the transparency challenge, despite being included in

²² Pub. L. 115-91.

²³ [“Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity” 2018 First Annual Report to Congress \(898 Panel Report \(2018\)\) at 19.](#)

the Chairman's Mark,²⁴ a provision increasing contracting goals, and thus AbilityOne Program size, was abandoned at the NDAA Conference. The reason discussed by lawmakers was: "...both the [AbilityOne] Inspector General and the [DoD] 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."²⁵

Progress In Addressing The Challenge

As mandated by Congress, the Commission is a member of the "Panel on Department of Defense and AbilityOne Contracting, Oversight, Accountability, and Integrity" or Section 898 Panel²⁶ (hereinafter, the "898 Panel"). The mandate of the 898 Panel includes making recommendations to Congress regarding the JWOD Act and improving the AbilityOne Program.

The 898 Panel released its first annual report to Congress on July 18, 2018.²⁷ Issuing its 41 recommendations, the 898 Panel concluded that the overall lack of funding committed to the Commission was the AbilityOne Program's biggest challenge.²⁸ The 41 recommendations were grouped into six focus areas, and the 898 Panel reports that it intends to refine the specific recommendations by priority level and to implement them accordingly.

The recommendations identified in DoDIG-2016-097, and tracked by the 898 Panel, are on the path for successful implementation.²⁹ The Commission will continue to work with Congress to update legislation improving the AbilityOne Program's statutory authority per the 898 Panel's recommendations. The Commission continues to seek increased cooperation from AbilityOne Program participants to improve processes and controls, and to recognize the market evolution where NPAs increasingly contribute their own ideas for inclusion to the Procurement List.

What Needs To Be Done

While the Commission continues its work with the 898 Panel (which has a three-year mandate ending in 2020) and agency partners, it is vital to ensure that contracting officials have a thorough understanding of the Program to ensure growth and implementation.

In an effort to improve awareness about the AbilityOne Program, the Commission's initiative of issuing educational materials and providing presentations to agencies, so government entities understand how the AbilityOne Program works, helps meet critical agency needs and should continue.

The lack of Commissioners currently appointed, and corresponding vacancies especially from federal government agencies,³⁰ deprives these agencies of a senior government official with the

²⁴ [FY 2019 NDAA Chairman's Mark](#).

²⁵ [FY 2019 NDAA House Conference Report 115-874 at 920](#).

²⁶ Pub. L. 114-328, FY 2017 National Defense Authorization Act.

²⁷ [898 Panel 2018 Annual Report to Congress](#).

²⁸ *Id.* at 2.

²⁹ See [Contracting with the AbilityOne Program](#); see also [Required AbilityOne Program Training](#).

³⁰ [41 U.S.C. §8502\(b\)\(1\)\(A\)-\(K\) \(listing the 11 Agencies that AbilityOne Commissioners must come from as the Department of Agriculture, Department of Defense, Department of the Army, Department of the Navy, Department](#)

expertise within their home agency, as was envisioned by Congress, and deprives them of a representative voice. As a result, these unrepresented departments or agencies³¹ may be disadvantaged, and so is the Commission.

Key Resources

1. 41 U.S.C. §8501 – 8506.
2. 41 CFR Chapter 51, Committee for Purchase From People Who Are Blind or Severely Disabled.
3. Veterans Benefit Act, 38 U.S.C. 8127(a), (d), (i).
4. “Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity” 2018 First Annual Report to Congress.

Management Challenge 2: Higher Level of Transparency Needed to Enhance Program Confidence

Why This Is a Challenge

The stakeholders and affected parties from the disabled community are extremely interested in Commission activities including what is under consideration, and when Commission decisions are available. The Commission designates CNAs to facilitate the employment of people who are blind or have significant disabilities and the dynamics of the program are changing and growing.

The AbilityOne Program is challenged with improving transparency.³² Congress has repeated observations regarding challenges in transparency. We believe greater transparency would enhance operations in administering the program and result in increased program confidence. Several factors point to the benefits from improved transparency to the program.

Starting with a GAO report published in May 2013, the need to enhance program oversight and transparency has been identified as a challenge.³³ Progress was made in establishing written agreements between the Commission and each CNA, specifying key expectations.³⁴ The Cooperative Agreements, as required by the Consolidated Appropriations Act of 2016, measure CNA operations.³⁵

[of the Air Force, Department of Education, Department of Commerce, Department of Veterans Affairs, Department of Justice, Department of Labor, and General Services Administration\).](#)

³¹ *Id.* at (b)(1) (stating that Commissioners are Presidential Appointees that must be nominated by the head of the department or agency). There are no confirmed Commissioners from the Departments of Agriculture, Defense, Army, Navy, Education, Veterans Affairs, Justice.

³² [GAO-13-457, “Employing People with Blindness or Severe Disabilities: Enhanced Oversight of the AbilityOne Program Needed,” \(May 2013\).](#) See also “Panel on Department of Defense and AbilityOne Contracting Oversight, Accountability, and Integrity” 2018 First Annual Report to Congress (898 Panel Report (2018)).

³³ [GAO-13-457, “Employing People with Blindness or Severe Disabilities: Enhanced Oversight of the AbilityOne Program Needed,” \(May 2013\).](#)

³⁴ See [NIB Cooperative Agreement](#); See also [SourceAmerica Cooperative Agreement](#).

³⁵ [Public Law 114-113](#).

Additionally, despite being included in the Chairman's Mark,³⁶ a provision increasing contracting goals and setting the stage for expanded Program growth was abandoned at the NDAA Conference. The reason discussed by lawmakers was: "...both the [AbilityOne] Inspector General and the [DoD] 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."³⁷

Commission Membership

The Commission's broad membership provides a benefit for participating Agencies and the Commission operations by maximizing representation across the federal government. Four specific Members come from the blind and disabled community, as private citizens.³⁸ The varying expertise and backgrounds of the talented Members is key to the success of the AbilityOne Program. Currently, the Commission has an untenably low six Commission Members, which is less than half of the full fifteen set by law. Maintaining full membership has been difficult for reasons not known to the OIG. The current membership level means lower representation by government agencies and it decreases program outreach, communication, and opportunities for greater transparency across the enterprise.

Commission Meetings

More frequent Commission meetings through subcommittee work with larger and more robust agendas that have open discussions would better inform stakeholders. The Commission's public meetings are regularly held, well-attended, and comprise excellent content.

Revitalizing the Commission-held subcommittee system would increase open member dialogue and solutions. Subcommittees could meet more often and establish or encourage "liaisons" from each of the CNAs to provide field-level input. Additionally, the subcommittees should have a role in completing body initiatives.

Also, the Commission aggravates the perception of opacity with two practices: the frequent use of executive sessions (non-public sessions) and the execution of nondisclosure agreements (NDAs) with Commission members and third-parties. Both practices are permissible and needed in many instances. However, they also encourage participants and other stakeholders to infer that the Commission actions are not meant to be well understood, and they limit transparency.

Progress In Addressing The Challenge

The Commission continues to advance program goals in response to GAO recommendations and Congressional mandates. Establishing the Cooperative Agreements with NIB and SourceAmerica in 2016 was a critical step taken by the Commission to strengthen oversight and evaluate performance. The Cooperative Agreement between the Commission and AFB, signed in July 2018, provides a framework for a new CNA model focusing on increasing job placement and career-advancement opportunities in knowledge-based positions.

³⁶ [FY 2019 NDAA Chairman's Mark.](#)

³⁷ [FY 2019 NDAA House Conference Report 115-874 at 920.](#)

³⁸ [41 U.S.C. §8502\(b\)\(2\)-\(5\).](#)

Congress supported the Commission's request for the 898 Panel in the 2017 NDAA. The 898 Panel is responsible for recommendations in seven critical areas of Congressional interest. The Panel's first report to Congress was issued in July 2018 and identified 41 recommendations in six focus areas: resources, program oversight, contract goal, definitions, training, and technology. The Commission leadership has been successful with outreach through the program visits, meeting with DoD customers, and designing a communication initiative for the 898 Panel recommendations for the CNAs and the NPAs. This includes townhalls and webcasts hosted or sponsored by the Commission.

What Needs To Be Done

The Commission is facing challenges with improving the transparency in the administration of the AbilityOne Program. Commissions and Boards typically benefit from publishing regulatory plans that are tailored to the business of the Agency. Increased use of a docketing system and social media outreach could mitigate some of these transparency concerns. The regulations of the Commission do not have a public plan for revisions of business administration and operations. Agencies are increasingly using electronic filing and document dissemination systems to manage deadlines and actions. The Commission has two excellent dedicated communications staff. However, these staff are burdened with the delivery of information for an enormous program with limited resources.

Furthermore, use of a notice of proposed rulemaking could increase transparency by informing interested parties of impending action and by soliciting public and open dialogue. The Commission successfully used this method when designating SourceAmerica and NIB as CNAs.

In 1973, the Commission issued regulations, after notice and comment, designating NIB as the CNA to represent contractors employing the blind, and designating six organizations (Goodwill Industries of America, International Association of Rehabilitation Facilities, Jewish Occupational Council, National Association for Retarded Children, National Easter Seal Society for Crippled Children and Adults, and United Cerebral Palsy Association) as the CNAs to represent the contractors employing people with severe disabilities.³⁹ In 1976, the Commission replaced those six CNAs with SourceAmerica (formerly NISH) by issuing regulations, again after notice and comment, designating SourceAmerica the sole CNA to represent contractors employing people with other severe disabilities.⁴⁰

Key Resources

1. GAO-13-457, "Employing People with Blindness or Severe Disabilities: Enhanced Oversight of the AbilityOne Program Needed," (May 2013).
2. Public Law 114-113, Consolidated Appropriations Act, 2016.
3. FY 2019 NDAA House Conference Report 115-874.
4. Javits-Wagner-O'Day (JWOD) Act (41 U.S.C. §§ 8501-8506).

³⁹ 41 C.F.R. § 51-3.1 (1974); 38 Fed. Reg. 16318 (June 21, 1973); *see also* Notice of Proposed Rulemaking, 38 Fed. Reg. 6076, 6078 (March 6, 1973).

⁴⁰ 41 C.F.R. § 51-3.1 (1977); 41 Fed. Reg. 26905-6 (June 30, 1976); *see also* 41 Fed. Reg. 21359-60 (May 25, 1976) (providing notice of and soliciting written comment 9 Case 1:18-cv-02965-GJH Document 2 Filed 09/26/18 Page 10 of 23 on the proposed regulation).

Management Challenge 3: Implementation of Cooperative Agreements with CNAs

Why This Is a Challenge

The Commission designates CNAs to facilitate the employment of people who are blind or have significant disabilities. The dynamics of the CNAs in the program are changing and growing. The Commission administers the AbilityOne Program with the assistance of two CNAs, National Industries for the Blind (NIB) and SourceAmerica (41 CFR Chapter 51-3). The Commission designated American Foundation for the Blind (AFB) as a third CNA on July 26, 2018. This third CNA has not yet begun fully operating and has not been authorized by the Commission to charge or collect fees from any NPAs.

The Commission is responsible for overseeing the implementation of the Cooperative Agreements with the CNAs to ensure performance.⁴¹ The Commission established a Program Management Office (PMO) with two professional staff to administer and implement the Cooperative Agreements. The new Director of the PMO, recently joining the Commission staff from the DoD OIG, brings significant experience and expertise to the Commission. The progress with the PMO office is impressive.

A recurring threat to the effectiveness of the AbilityOne Program is the narrow capacity resulting from challenges in funding. When ensuring quality performance for their respective Cooperative Agreements, the Commission's PMO size stands in stark contrast to the size of the CNAs' offices.

Progress In Addressing The Challenge

The Cooperative Agreements govern the relationship with, and the performance of, NIB and SourceAmerica. The implementation of the agreements in their first full fiscal year is a major accomplishment by the Commission. The Commission stated that its effective stewardship encompasses fostering, monitoring, and enforcing nonprofit agencies' compliance with the statutory and regulatory requirements to participate in the AbilityOne Program. In order to achieve its goal, the Commission will assess the staffing level and resources necessary for the PMO to be effective as reports, deliverables, and evaluation processes increase. Any proposal for an increase in resources will be justified in future budget requests.⁴²

The Commission continues to pursue budget increases for Agency operations and resources to enable greater program oversight. The increasingly complex responsibilities combined with the need to monitor its Cooperative Agreements, implement the 898 Panel's recommendations, and continue efforts to build the field office to oversee the Western United States are outlined in the Commission's budget justifications to Congress.

The Cooperative Agreements include Commission's requirements for timeliness and accuracy in the CNAs' submissions of requests for Procurement List or pricing transactions. The Cooperative Agreements have Quality Assurance Surveillance Plans that measure the timeliness

⁴¹ [U.S. AbilityOne Commission Fiscal Year 2019 Budget Justification.](#)

⁴² [U.S. AbilityOne Commission Fiscal Year 2019 Budget Justification.](#)

and accuracy in accordance with specified standards. Additionally, the Cooperative Agreements address the AbilityOne Program fee determination and implementation. In accordance with the Consolidated Appropriations Act of 2016, the Cooperative Agreements require program fees to be disclosed to Congress on a quarterly basis.

What Needs To Be Done

The Commission PMO's progress in building the infrastructure needed to strengthen its oversight through Cooperative Agreements with designated CNAs is impressive and encouraging. The Cooperative Agreements emphasize employment growth, program integrity, support for nonprofit agency employers participating in the AbilityOne Program, as well as enhanced training and communications.

The Commission PMO's continuous evaluation and improvement process will ensure greater success, including deeper involvement with the 898 Panel. The 898 Panel's duties will continue through at least FY 2020, and the Commission is required to annually implement the Panel's recommendations in support of the AbilityOne Program.

While emphasizing oversight, the Commission maintains an unwavering focus on its core mission – employment opportunities for people who are blind or have significant disabilities.

Key Resources

1. 41 U.S.C. §8501 – 8506.
2. 41 CFR Chapter 51, Committee for Purchase From People Who Are Blind or Severely Disabled.
3. Cooperative Agreements: [National Industries for the Blind](#), [SourceAmerica](#), and [American Foundation for the Blind](#).

Management Challenge 4: Lack of Adequate Resources Impacts Program Effectiveness

Why This Is a Challenge

The Commission does not have adequate staffing and resources to effectively execute its responsibilities and sustain the mission to provide employment opportunities for people who are blind or have significant disabilities in the manufacture and delivery of products and services to the federal government. As noted in the CIGIE TMPC report, human capital is a significant challenge that impacts the ability of federal agencies to meet their performance goals and to execute their missions efficiently. Consistent with the CIGIE TMPC report's findings, funding and staffing are a challenge for the Commission that negatively impacts the agency's ability to effectively meet its mission.⁴³ If adequate funding is not provided, pressure on the Commission's capacity to ensure program accountability and operational efficiency will hit a critical state.

⁴³ CIGIE, [Top Management and Performance Challenges Facing Multiple Federal Agencies](#), April 2018, pg. 8.

The Commission's FY 2019 budget justification recognized the imbalance between its resources and a historic increase in mission requirements.⁴⁴ Currently, the Commission operates with a staff of 27 people (Figures 2 and 3) responsible for establishing the rules, regulations, and policy to ensure effective implementation of the JWOD Act and for the administration of the AbilityOne Program which recently exceeded \$3.3 billion in sales to U.S. government agencies worldwide. AbilityOne contractors providing goods and services are located in all 50 states as well as Puerto Rico and Guam and employ approximately 46,000 people who are blind or have significant disabilities.

Another strain on resources results from supporting the 898 Panel. The 898 Panel is required to report to Congress annually on its activities, findings and recommendations. The Commission has the added responsibility of implementing certain Panel recommendations addressing diverse issues ranging from waste, fraud, and abuse to business practices and veteran's employment.⁴⁵

The resource levels of the Commission are not adequate for the geographical size and complexity of the program it oversees. The Commission is seeking remedies to these problems by working with OMB and Congress.

The Commission needs adequate resources to meet mission-critical requirements, and to maintain and accelerate the momentum toward strengthening oversight of the AbilityOne Program. Increased resources are essential for the Commission to successfully respond to the rapidly growing demands resulting from Congressional requirements for the Commission to exercise stronger oversight of the AbilityOne Program.

⁴⁴ [U.S. AbilityOne Commission Fiscal Year 2019 Budget Justification](#).

⁴⁵ First Panel Annual Report to Congress, *Under Secretary of Defense for Acquisition and Sustainment*, July 18, 2018.

Figure 2:

AbilityOne Program Organization

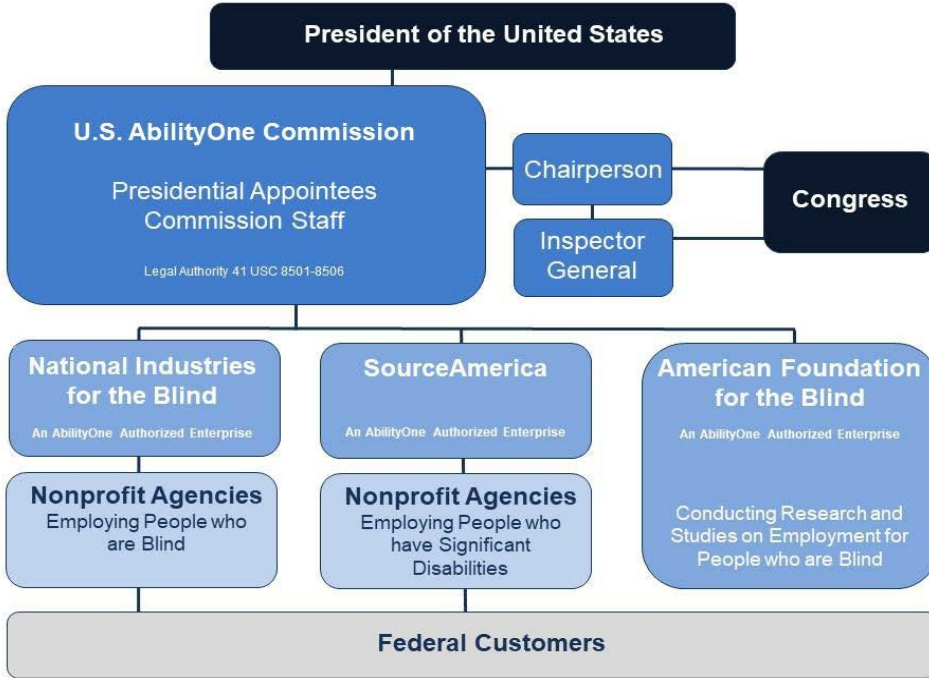
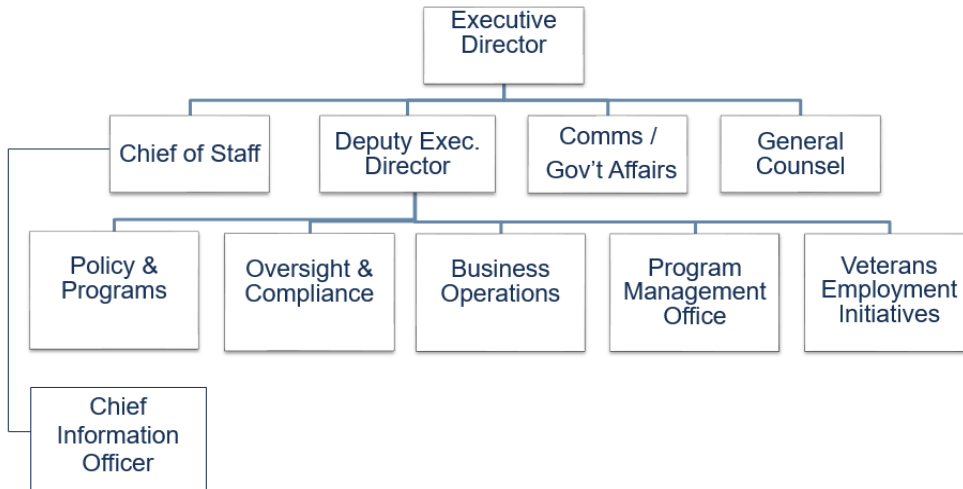


Figure 3:

U.S. AbilityOne Commission Organization



Progress In Addressing The Challenge

The Commission has strengthened its oversight of the Program through changes in response to the Consolidated Appropriations Act 2016. The Cooperative Agreements with NIB and SourceAmerica directly link employment growth and other key performance indicators to the fees collected by the CNAs for their assistance in administering the AbilityOne Program.

The Commission also needs additional resources to advance the progress made this year in the establishment of the field office to oversee the AbilityOne contracts in the Western areas of the United States, and to conduct on-site compliance inspections designed to ensure adherence with statutory, regulatory, and other requirements by NPAs participating in the AbilityOne Program.⁴⁶

What Needs To Be Done

The Commission should continue to assess the level of resources needed to fully achieve and implement its strategic objectives and expand activities and operations.

Key Resources

1. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act of 2019 and Continuing Appropriations Act of 2019.
2. OMB Memorandum M-17-22, *Comprehensive Plan for Reforming the Federal Government and Reducing the Federal Civilian Workforce* (April 12, 2017).

Management Challenge 5: Establishing an Enterprise-wide Risk Management Framework

Why This Is a Challenge

The Commission does not have a formal enterprise-wide framework to identify, analyze, and manage risk. This has limited the Commission's ability to identify and respond to critical issues or integrate risk management into its existing business operations and to respond effectively to changing risks and priorities. In July 2016, OMB issued an update to Circular A-123 requiring federal agencies to implement Enterprise Risk Management (ERM) procedures so executives can ensure the achievement of the agency's strategic objectives (Figure 4). Additionally, Circular A-123 requires a Chief Risk Officer position to be established.

The Commission does not currently have a Chief Risk Officer or a Chief Financial Officer. Like other agencies, the Commission is required to align ERM processes with its goals and objectives, and to report on each of the identified risk areas. The Commission has been open to the need to address this challenge. However, the Commission does not have the staff or resources to accomplish ERM at this time.

⁴⁶ [U.S. AbilityOne Commission FY 2017 Performance and Accountability Report](#)

Figure 4:

OMB Circular A-123 Seven Continuous Risk Identification and Assessment

| | |
|--------------------------------|---|
| Establish the Context | Understanding and articulating the internal and external environments of the organization. |
| Initial Risk Identification | Using a structured and systematic approach to recognizing where the potential for undesired outcomes or opportunities can arise. |
| Analyze and Evaluate Risks | Considering the causes, sources, probability of the risk occurring, the potential positive or negative outcomes, and then prioritizing the results of the analysis. |
| Develop Alternatives | Systematically identifying and assessing a range of risk response options guided by risk appetite. |
| Respond to Risks | Making decisions about the best options(s) among a number of alternatives, and then preparing and executing the selected response strategy. |
| Monitor and Review | Evaluating and monitoring performance to determine whether the implemented risk management options achieved the stated goals and objectives. |
| Continuous Risk Identification | Must be an iterative process, occurring throughout the year to include surveillance of leading indicators of future risk from internal and external environments. |

[Progress In Addressing The Challenge](#)

As outlined in the Standards for Internal Control in Federal Government (Green book) and the Playbook for Implementation of ERM in government, the Commission recognizes that the greatest risk to the integrity and effectiveness of the AbilityOne Program is a lack of capacity resulting from insufficient funding and staffing. The Commission so noted in its Congressional Budget Justification for FY 2019. The Commission will continue to request funding in future budget justification cycles to remedy Challenge No. 4: Lack of Adequate Resources.

Despite this, as stated earlier, the Commission has established Cooperative Agreements with its CNAs, has begun addressing recommendations from the 898 Panel, and has established a Western field office in order to better serve its stakeholders.

Additionally, the Commission’s Oversight and Compliance Office initiated a comprehensive risk-based model for the compliance approach to emphasize transparency of what is considered an at-risk or high-risk NPA. The office utilizes an internal control system using quantifiable

metrics and the automated documentation system, referred to as Procurement List Information Management System (PLIMS). The risk-based model, when fully implemented, will allow managing and deploying resources devoted to program compliance and allow continued improvement to risk mitigation processes in a systematic, structured, and enterprise-wide approach.

What Needs To Be Done

The Commission needs to implement the ERM to effectively respond to both expected and unexpected events. ERM is beneficial because it addresses a fundamental organizational principle: the need for information about major risk to flow both vertically (i.e. up and down) and horizontally (i.e. across business functions). ERM implementation would also improve Challenge No. 2: Higher Level of Transparency Needed to Enhance Program Confidence.

A key human resource need is a Chief Financial Officer or equivalent, which the Commission lacks due to inadequate resources. While OMB recognizes that not all components of an ERM process are fully operational in the first years, Agency leadership must set priorities in terms of implementation consistently with OMB-required policy changes. As the Commission continues to explore opportunities to increase resources as addressed in the Agency's Congressional Budget Justification, adding personnel to improve risk planning would provide vantage to better achieving the intended benefits of the program.

Key Resources

1. OMB Memorandum M-16-17 for Circular No. A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control* (July 15, 2016).
2. Standards for Internal Control in the Federal Government (known as the Green Book), (September 2014).
3. Playbook: Enterprise Risk Management for the U.S. Federal Government (July 29, 2016).
4. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019.

Management Challenge 6: Enhancement of Program Compliance

Why This Is a Challenge

The Commission's Oversight and Compliance office does not have sufficient resources to execute its compliance responsibilities. The office's responsibilities include implementation of issued policy guidance, conducting routine inspections, providing comprehensive reviews of annual certifications, and training NPAs participating in the AbilityOne Program. The office operates with three government employees and two contractors. Without additional resources, the office is at risk of failing to meet its compliance goals.

Pursuant to Title 41 CFR 51-4, the Commission's Oversight and Compliance office assesses the 550 AbilityOne NPAs with their 46,000 employees for compliance with program qualification requirements. Inspections involve the review of company health and safety standards, direct

labor hour ratios, and compliance with eligibility requirements (i.e. documentation about the NPA employee's significant disability).

Progress In Addressing The Challenge

In October 2017, the OIG reported on progress being made on this management challenge. At the time, OIG reported notable advancements made by the Commission's Oversight and Compliance office. The hiring of a new deputy director, the implementation of virtual NPA documentation assessments, and streamlining the compliance standardization processes all contributed to the progress.

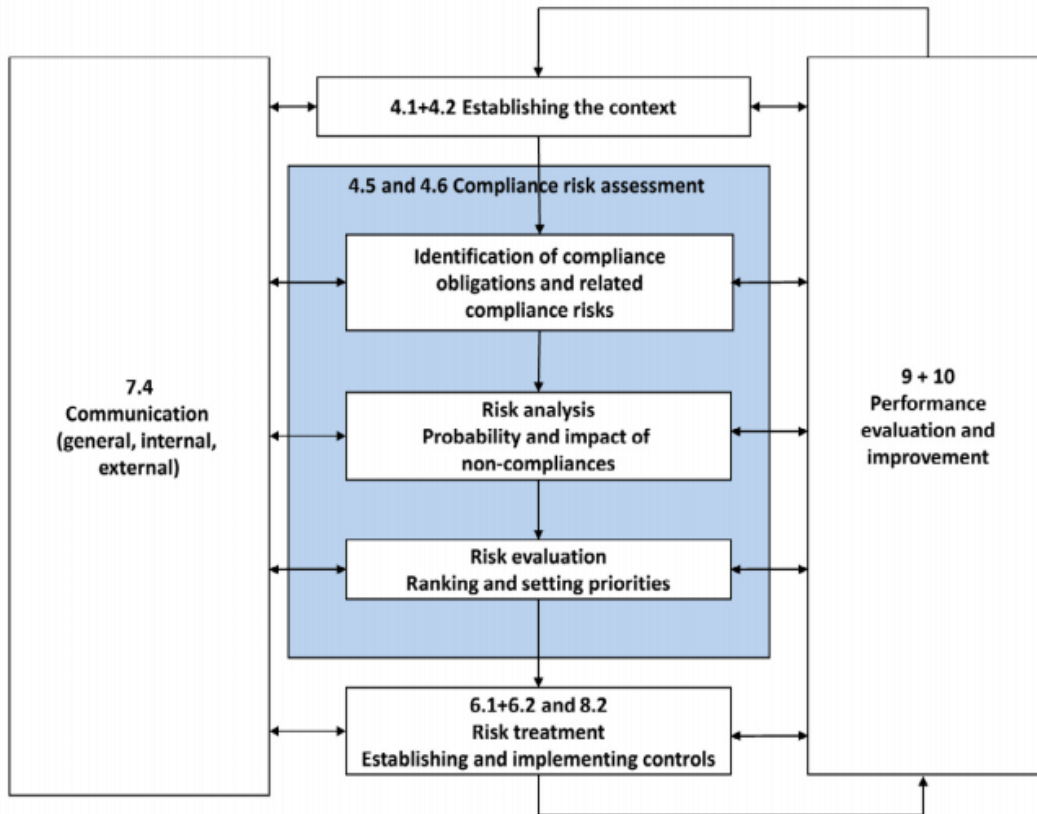
Subsequently, the Commission's Oversight and Compliance office designed a risk-based model. The risk-based model placed emphasis on increasing transparency by NPAs considered either at-risk or at high risk through the automated documentation system – PLIMS – for tracking quantifiable metrics. The risk model was derived from the International Standard for Compliance Management (ISO) 19600: The Development of Global Standard on Compliance Management (Figure 5).

The office developed an FY 2018 NPA 4th Quarter compliance review schedule weighted on a six-criterion model. The model includes factors such as NPAs with complaints not inspected in the last five to ten years by the Commission; NPAs below ratio; higher producing NPAs as determined by sales and direct labor hours; NPAs with a phase-in without progress in the last two years; and a new NPA within the past five years. The office reported improvements to the existing complaint process and the template intake form and analysis form are now used to track complaints from beginning to end.

The Western field office was established this year in Seattle and is located at Joint Base Lewis-McChord, in Washington state. In September 2018, the OIG visited the Western Field office and the Commission staff working there. Overall, the building up of an operational Western field office constitutes progress, as does the four compliance inspections conducted by the compliance office since the hiring of a new deputy director.

Figure 5:

ISO 19600: THE DEVELOPMENT OF A GLOBAL STANDARD ON COMPLIANCE MANAGEMENT



What Needs To Be Done

The Commission's Oversight and Compliance Office should continue to integrate risk management into their existing business operations in accordance with continuous risk identification and assessment. With as many as 550 NPAs in the program, this approach is essential to maximizing compliance coverage.

Key Resources

1. OMB Memorandum M-16-17 for Circular No. A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control* (July 15, 2016).
2. GAO Standards for Internal Control in the Federal Government, (September 2014).
3. International Standard ISO 19600, *Compliance Management System-Guidelines* (December 2014).