U.S. ABILITYONE COMMISSION

Policy 51.541
Effective Date: 07/24/2014

TITLE: REQUIREMENT TO PURCHASE PRODUCTS ON THE PROCUREMENT LIST INSTEAD OF "ESSENTIALLY THE SAME (ETS)" ITEMS -- INTERIM POLICY

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1. PURPOSE.

This document prescribes the U.S. AbilityOne Commission (Commission) policy and procedures pertaining to the requirement that Federal agencies purchase Procurement List (PL) products from sources designated by the Commission in lieu of non-AbilityOne items that are essentially the same (ETS).

2. APPLICABILITY.

This policy is applicable to the Commission, its Central Nonprofit Agencies (CNAs), AbilityOne participating nonprofit agencies (NPA), Federal contracting activities and AbilityOne Authorized Distributors (defined below.) Further, this policy is applicable when the products in question are commodities; it is not applicable to "critical or weapons system" related items as defined by the Department of Defense.

3. AUTHORITY.

(a) 41 U.S.C. §§ 8501 - 8506, Javits-Wagner-O'Day (JWOD) Act

(b) 41 CFR Chapter 51, Committee for Purchase From People Who Are Blind or Severely Disabled

(c) Federal Acquisition Regulation (FAR) Subpart 8.7, Acquisition From Nonprofit Agencies Employing People Who Are Blind or Severely Disabled

4. DEFINITIONS AND ACRONYMS.

Definitions, abbreviations, and acronyms frequently used throughout this policy system are provided in 51.102, Definitions. Terms unique to this subject matter are defined below.

Term	Definition
AbilityOne Authorized Distributors	Private sector companies (also called dealers) that have been authorized by the U.S. AbilityOne Commission to buy and resell AbilityOne products.
Commercial Item	As defined in FAR 2.101, "commercial item" means— (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and— (i) Has been sold, leased, or licensed to the general public; or (ii) Has been offered for sale, lease, or license to the general public; …

Term	Definition
Essentially the Same (ETS)	A descriptive term for commodities (not applicable to critical or weapon system related items) that are comparable in all the prominent physical, functional, or performance characteristics to items on the PL. This includes but is not limited to form, fit, and function sufficient to enable interchangeability. Form includes similarity in appearance, shape, size, dimension, design, color, texture, environmental characteristics, quality, and/or other features (when these characteristics make a difference in customers' use of a product per paragraph 8(a)i. of this policy). Fit pertains to the ability to physically interface, connect or integrate with other parts. Function entails the intended use of the product. A Commission determination on Essentially the Same (ETS) does not mean and will not be interpreted to mean the product/item is "exactly" the same.

5. RESPONSIBILITIES.

(a) The Commission determines which commodities (and services) procured by the Federal Government are suitable to be furnished by qualified nonprofit agencies employing persons who are blind or significantly disabled, and adds those items to the Procurement List (PL) of mandatory source items (41 CFR 51-2.2(b)).

(b) The Commission informs Federal agencies about the AbilityOne Program and the statutory mandate that items on the Procurement List be purchased from qualified nonprofit agencies (41 CFR 51-2.2(e)).

(c) The Commission monitors Federal agencies' compliance with statutory requirements to purchase items on the PL when such items meet Federal agencies' needs (41 CFR 51-2.2(e)).

(d) In administering the PL and monitoring compliance, the Commission implements policy and procedural guidance to include interpreting the scope of the mandatory source requirement. The mandatory source requirement covers, for products, the National Stock Number or item designation listed and commodities that are "essentially the same" as the listed item (41 CFR 51-5.3(a)).

i. The Commission defines herein the term essentially the same (ETS) as used in its regulation, and informs Federal agencies as well as AbilityOne Authorized Distributors about compliance with the PL and the exclusivity of PL items.

ii. The Commission communicates to Federal agencies that when PL products can meet the Government's requirement, Federal agencies are required to purchase those products and should refrain from purchasing non-AbilityOne ETS items identified by the Commission.

iii. The Commission may monitor and consult with Federal contracting activities to ensure compliance with the JWOD Act and its implementing policies regarding ETS.

a. For products that are commercial and used for general purposes, the Commission will make the determination of ETS.

b. For materials that are identified by the Department of Defense as being "critical or weapons system" materials, this policy is not applicable. The

Commission will refer any such determination related to critical or weapons system materials to the appropriate Military Engineering Support Activity (ESA) for approval, normally through DLA.

(e) The Commission may provide written delegation of authority to the CNA(s) to assist it in implementing ETS policy and procedures in accordance with 41 CFR 51-3.2(n). Delegated authority may be provided by the Deputy Executive Director for up to two years.

(f) The CNAs, in their designated roles and responsibilities, may obtain input from participating NPAs regarding the products those NPAs furnish under the AbilityOne Program.

(g) NPAs may provide input to their CNAs regarding which non-AbilityOne (commercial) items they consider to be ETS items.

(h) Federal contracting activities, typically the General Services Administration (GSA), the Defense Logistics Agency (DLA) and the Department of Veterans Affairs (VA) have responsibility for item management of the products in the Federal Supply Classes assigned to them. They may provide technical expertise regarding the attributes of non-AbilityOne (commercial) items that may be ETS as AbilityOne products on the PL for those items they manage.

(i) Federal contracting activities, typically GSA, DLA and VA, administer their procurement and distribution systems or vehicles (e.g., depots, Federal supply schedules, prime vendor contracts, electronic commerce sites, etc.) in a manner that conforms with applicable laws and regulations, to include supporting compliance efforts regarding the purchase of AbilityOne products on the PL.

(j) Prior to making a purchase, all Federal agencies are responsible for consulting the PL and ensuring their purchase complies with the mandatory source requirement in FAR 8.7.

   i. If their requirement can be fulfilled by a product on the PL, they will purchase it from the source designated by the Commission and not purchase a commercial (non-AbilityOne) item that is ETS as the PL item.

   ii. If the PL item is not available or insufficient to meet their needs, Federal agencies can seek a purchase exception from the Commission to purchase an equivalent or similar non-AbilityOne item.

6. POLICY.

(a) The Javits-Wagner-O'Day (JWOD) Act was enacted by Congress to create employment opportunities for people who are blind or have significant disabilities. Congress established the Commission to implement the Act and determine which products and services furnished by qualified nonprofit agencies are suitable for procurement by the Government.

(b) Federal agencies must comply with the Act and purchase those products (and services) on the PL from the source designated by the Commission.

(c) If a Federal agency, their authorized contracting activity, purchase card or other designated purchasing personnel do not purchase in compliance with the Commission's Procurement List, their action is a failure to comply with 41 U.S.C. §8504, Procurement requirements for the Federal Government .

(d) When a commodity is included on the Procurement List, the mandatory source requirement covers the National Stock Number or item designation listed and commodities that are essentially the same (ETS) as the listed item (41 CFR 51-5.3(a)).

(e) NPAs designated to provide PL products have the demonstrated capability to supply products comparable to items sold in the competitive marketplace, with similar delivery terms. Accordingly, Federal agencies requiring products on the PL must purchase them exclusively from the source(s) designated by the Commission, and shall refrain from purchasing non-AbilityOne (commercial) items that are ETS items or are otherwise generic alternatives.

i. Commercial items are considered essentially the same (ETS) by the Commission, as reflected in the definition of ETS.

ii. The acceptable variance in product characteristics and package quantity between a PL item and a non-AbilityOne (commercial) equivalent item will vary by product type and the user's requirement (See Section 8, Procedures, of this policy regarding comparison of items.).

iii. Variances and ETS determinations related to commodity-type items will be resolved by the Commission with input from GSA or DLA, as needed.

(f) A difference in price between the PL item and the comparable commercial item does not disqualify the commercial item from being ETS. Challenges to the fair market price are considered by the Commission in accordance with 41 CFR 51-2.7, Fair market price, and the Commission's pricing policies.

(g) The CNAs shall assist the Commission in identifying and supporting ETS determinations, when specified in their delegated authority.

(h) AbilityOne Authorized Distributors shall provide PL items to Federal customers as a condition of their authorization from the Commission. Normally, this is accomplished via their electronic ordering system's ability to reject or "block" orders of ETS items and to offer or substitute the appropriate AbilityOne product.

(i) In walk-in retail sales environments Authorized AbilityOne Distributors, whether private sector, nonprofit or government, are to maximize AbilityOne sales to include reconfiguration of larger selling units to individual selling units in the store.

(j) The Commission shall identify and administer a procedure to address and resolve ETS disputes (See Section 8, Procedures.).

7. EXCEPTION TO POLICY.

(a) The "essentially the same" (ETS) provisions of this policy do not apply to critical or weapons system related items as defined by the Department of Defense, or to any personal safety, health or medical-related products. However, when Federal agencies' requirements are exact matches to products on the PL in these categories, the PL product must be purchased.

(b) Exceptions to the ETS policy may be considered by the Commission on a case-by-case basis, when requested by a Contracting Activity or by an Authorized AbilityOne Distributor on behalf of a Federal Customer.

i. Requests are submitted to the Commission's Distribution Program Coordinator in writing, via email or facsimile, and provide the information needed by the Commission in accordance with Appendices B and C (Federal Customer "Essentially The Same (ETS" Waiver Request and "Essentially The Same" (ETS) Distributor Challenge Form respectively) to consider the exception.

ii. An adequate business reason for use of the non-AbilityOne (commercial) item, or demonstration that the PL item is not available in the timeframe needed must be provided to the Commission when a request for exception is made. For example, documentation showing that a technical or agency-unique requirement cannot be met by the PL product will be considered an adequate business reason.

iii. If the business reason presented is found adequate by the Commission, the staff will confirm that it is not mandatory to purchase the PL item, and will provide a written confirmation , normally within two (2) week of receiving a request.

iv. When reviewing a request for exception, the Commission will determine whether a one-time exception should be granted, or whether the ETS determination for that commercial product must be revisited for all Federal customers.

v. The Commission may pursue technical, industry and/or independent expert consultation to determine whether an item(s) is/are ETS.

8. PROCEDURES.

(a) In determining ETS products, a comparison of the non-AbilityOne (commercial) product to the PL product shall be completed from the perspective of prominent characteristics under the broad categories of form, fit, and function. The following criteria will be used to compare the products:

i. The appearance, shape, design, color, texture, environmental characteristics, quality, and other features of the product shall be considered to determine whether the two products are ETS. The Commission will consider whether these characteristics affect the effective use of the product, or make the products significantly different from one another.

ii. In terms of environmental (recycled and/or bio-based) content, when an AbilityOne product meets or exceeds the criteria of government or third party multi-attribute standards (e.g., FAR Subpart 23.4, Environmental Protection Agency's Design for the Environment, Executive Orders 13423/13514, etc.), products with the same form, fit, and function will be considered ETS to that product within a reasonable range.

a. In general, the Commission will recognize well-established industry recycled content levels, e.g., 30%, 50%, 100% for paper products, as legitimate considerations when analyzing commercial SKUs to be ETS to AbilityOne products.

b. If the commercial items do not meet the environmental standards (i.e., virgin content), they may be claimed as ETS to the AbilityOne product that meets the standards.

iii. The size and dimensional characteristics and unit of issue (a.k.a. unit of measure) shall be considered, to include the compatibility with a companion product, where applicable. The Commission will consider (but is not limited to) the following characteristic elements.

a. The specific size of the product.

i. This may include how the specific size affects the use, performance, storage, life-cycle, or price of the product (e.g. quantity order buys).

b. The unit of issue of a commercial product.

i. Items will be considered Essentially the Same (ETS) when there are slight differences in retail packaging units.

ii. Slight differences are determined by the Commission, and they may include, but are not limited to:

1. Cosmetic in nature.
2. Different inner-packs for the same total unit of issue
3. See Section 7 of this policy for Exceptions.

c. AbilityOne retail units for highly consumable products, which are used recurrently and get "used up" or discarded, shall be allowed a greater unit of issue variance from the commercial products to which they are considered ETS. Highly consumable products include, but are not limited to, basic writing instruments, toilet tissue, towels or note pads, and will generally be considered ETS to commercial products by the Commission when:

i. They do not exceed one dozen individual products per unit,

ii. The unit pack in question does not exceed a reasonable dollar threshold determined by the Commission, and/or

iii. Multiple units of the PL item can meet customers' requirements if those requirements are greater in quantity than the AbilityOne retail package (or customers may purchase at a wholesale level.)

d. The Commission will apply similar logic to other consumable, low-cost products sold in retail units that differ from the lowest possible selling unit. A retail unit can generally be defined as a reasonable unit that could be found in a super store retail environment.

iv. The intended function, purpose or use of the products shall be considered by the Commission in determining ETS status.

(b) Once the AbilityOne Program analyzes the two products and makes the comparison, an ETS determination will occur.

i. The requiring organization will be consulted, as appropriate.

ii. If the results of the comparison yields minimal differences, such that the difference does not substantially affect the performance of the product, the commercial product will be designated ETS.

iii. If the commercial product has characteristics that the AbilityOne product lacks, and those characteristics substantially affect the performance of the product, the commercial product will not be designated ETS.

(c) Once a commercial product is designated ETS, the determination is communicated as appropriate, and the product will be entered into a central data depository and issued to all AbilityOne authorized distributors (Government and commercial) and wholesalers, normally on a quarterly basis, by the Commission.

(d) Disputes (not exceptions or waiver requests) of ETS designations may be identified by Federal customers or AbilityOne Authorized Distributors (including Base Supply Center (BSC) operators) and/or the responsible Contracting Activity.

i. Disputes should first be reported to NIB or SourceAmerica (as appropriate) to resolve the difference.

ii. If unable to resolve the difference, the dispute must be submitted to the Commission for resolution.

iii. If the Commission determines that a product is not ETS, the commercial product designation (and part number) will be removed from the ETS list and Federal agencies can buy that commercial product on the effective date of the determination by the Commission.

iv. The Commission will announce the release of the ETS designation for that particular product to all channel partners.

(f)

9. SUPERSESSION.

None.

APPROVED: _____ **Date:** 7/24/14

E. Ballard
Executive Director

Appendix A [Sample Application of the U.S. AbilityOne Commission Policy for "Essentially the Same" (ETS) for Products

The Commission provides the following examples for illustrative purposes to demonstrate the ETS rationale:

1. The AbilityOne Program offers a .05 mm mechanical pencil with a burgundy barrel. A commercial .05 mm mechanical writes the same as the AbilityOne product, but has an orange barrel. This characteristic (barrel color) does not affect use or performance of the product. Thus, the commercial product is considered by the Commission to be ETS.
2. The AbilityOne Program makes plastic, top loading, letter size desk trays; priced under $5 per pair. A commercial manufacturer sells a deluxe high quality plastic desk tray set that is wood grained and accommodates legal size trays sells for $15 (per pair). Clearly the quality and expense of the materials used, as well as the size, make these two products different enough to <u>not</u> be considered ETS.
3. The AbilityOne Program offers correction fluid in one color white. Correction fluid is available commercially in a variety of colors, including for instance, yellow. Yellow correction fluid is used in a manner that the AbilityOne product line cannot accommodate. For instance, yellow correction fluid can be used effectively on yellow paper. Given this distinction, correction fluid in a color other than white is <u>not</u> considered ETS.
4. The AbilityOne Program provides 2-inch wide waterproof packaging tape in a variety of colors. A commercial vendor provides a 2-inch roll of clear waterproof packaging tape. There is an advantage to using clear tape over colored tape when shipping packages, as clear tape will not cover important shipping information written on the package (i.e. the address). Therefore, the commercial product offers additional functionality that the AbilityOne product does not allow, and the commercial item would <u>not</u> be considered ETS.
5. The AbilityOne Program offers a heavy duty all-purpose cleaner/degreaser. A nationally-known commercial brand offers a comparable cleaner/degreaser. A Federal purchaser cannot specify the brand name cleaner/degreaser in order to justify buying around the comparable AbilityOne product. The use of the brand name alone, without any indication of the technical specifications of that product, is not sufficient justification to determine the products are different.
6. The AbilityOne Program provides white legal pads, narrow ruled 100 sheets sold by the dozen which are considered essentially the same to a commercial brand of white legal pads, narrow ruled 100 sheets, sold by the each. Legal pads are highly consumable products found within all office settings, therefore the commercial product is considered by the Commission to be ETS.
7. The AbilityOne Program provides a Pocket Folder, Classification, Letter Size, Dark Blue with a pressboard size of 25 points and expansion of 1". A commercial brand which is dark blue, has a pressboard of 23 points and expansion of 1". This would be considered

ETS since the difference in pressboard size (25 vs. 23 points) is within a reasonable tolerance.

8. The AbilityOne Program provides silver Shears, Stainless Steel, Bent Trimmers, 8 1/4" Length that can cut 3-5/8 inches +/-1/4". A commercial brand offers silver sheers, 8 ¼" length that can cut 3-1/8". These items are considered ETS, since the small difference in cutting ability is immaterial; consumers get more functionality with the AbilityOne product and can still cut as little as 3-1/8". However, if the commercial product was titanium, then the items would not be considered ETS as there is a different in the performance of shears made from titanium vs. stainless steel.
9. The AbilityOne Program provides a wide assortment of media storage products (CDs, DVD and thumbdrives). The memory capacity must be sufficient for the intended use to designate the AbilityOne product ETS to the commercial product. The AbilityOne Program provides a 2MB encrypted thumb drive. A commercial brand offers a 4MB encrypted thumb drive. These items are not considered ETS as the commercial product has two times the amount of storage capacity.
10. The AbilityOne Program offers 12 ounce hand soap with a pumping dispenser which come 12 in a box. The commercial brand offers 12 ounce hand soap with a pumping dispenser dispensed at the each. The Commission expect retail store operators to stock the AbilityOne hand soaps in lieu of the commercial brand since their operations enable reconfiguration to meet the customer's needs.

APPENDIX B - "Essentially The Same" (ETS) Waiver Request

Federal Customer
"Essentially The Same" (ETS) Waiver Request

The AbilityOne® Program generates much needed employment and training opportunities for individuals who are blind or have another significant disability and is a mandatory source of supply per FAR 8.7. You can learn more about the AbilityOne Program by visiting www.abilityone.gov.

This form is required to submit a request to purchase a commercial ETS product in lieu of an AbilityOne product. Please fill out all required fields and e-mail the completed form to Mr. Eric Beale at ebeale@abilityone.gov or via facsimile at 703-603-0655. Please include "ETS Waiver Request" in the subject line.

- **Commercial ETS Product Name:** _____
- **Commercial ETS Product Item Number:** _____
- **AbilityOne NSN:** _____

Please provide a detailed explanation of why the AbilityOne product will not meet your need and the commercial ETS product will. ***Price is not an accepted reason for a waiver*:**

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Federal Customer Information:

Name: _____

Agency: _____

Date: _____

Phone: _____

E-Mail: _____

APPENDIX C – Distributor Challenge Form

"Essentially The Same" (ETS)
Distributor Challenge Form

Date:

Distributor Name:

City/State:

This form is required to submit an ETS challenge. Please fill out all required fields and e-mail the completed form to the ETS Coordinator, Ms. Kristina Parker at kparker@nib.org or vial facsimile at 703-310-0521. Please include "ETS Challenge" in the subject line. The average response time is 10 business days and will depend on the amount of research required. A sample of the commercial product will expedite the review process. Samples should be sent to: Ms. Kristina Parker, NIB, 1310 Braddock Road, Alexandria, VA 22314-1691.

- **Commercial Product Name:** _____
- **Commercial Product SKU/Item Number:** _____
- **Name of catalog where the product appears:** _____
- **Catalog Page Number:** _____
- **AbilityOne NSN:** _____

"Essentially The Same" (ETS)
Distributor Challenge Form
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Please provide a detailed description of your challenge (price is not a valid challenge):

Submitted by:

Name: _____

Signature: _____

Title: _____

Date: _____

Phone: _____

E-Mail: _____