

# PERFORMANCE AUDIT



Office of the  
Washington  
State Auditor  
Pat McCarthy

## Reassessing Implementation of the Regulatory Fairness Act

November 10, 2020

Report Number: 1027267

# Table of Contents

Executive Summary	3
Background	6
Audit Results	11
Agencies have significantly improved their execution of Regulatory Fairness Act requirements since our last audit. They attributed progress in large part to help provided by the Office of Regulatory Innovation and Assistance.	11
Agency staff report that ORIA's tools and support have greatly helped them comply with the Act	16
While overall compliance with the Act has improved, some agencies struggled to correctly apply allowable exemptions	18
State Auditor's Conclusions	20
Recommendations	21
Agency Response	22
Appendix A: Initiative 900 and Auditing Standards	26
Appendix B: Scope, Objectives and Methodology	28
Appendix C: Exemptions Allowed by Statute	32
Appendix D: Required Content for a Small Business Economic Impact Statement	35
Appendix E: Data and Information Requirements for Statutory Compliance	37

## State Auditor's Office contacts

### State Auditor Pat McCarthy

564-999-0801, [Pat.McCarthy@sao.wa.gov](mailto:Pat.McCarthy@sao.wa.gov)

### Scott Frank – Director of Performance and IT Audit

564-999-0809, [Scott.Frank@sao.wa.gov](mailto:Scott.Frank@sao.wa.gov)

### Christopher Cortines, CPA – Assistant Director for Performance Audit

206-355-1546, [Christopher.Cortines@sao.wa.gov](mailto:Christopher.Cortines@sao.wa.gov)

### Shauna Good – Principal Performance Auditor

564-999-0825, [Shauna.Good@sao.wa.gov](mailto:Shauna.Good@sao.wa.gov)

### Deborah Stephens – Senior Performance Auditor

564-999-0074, [Deborah.Stephens@sao.wa.gov](mailto:Deborah.Stephens@sao.wa.gov)

### Corey Crowley-Hall – Performance Auditor

564-999-0846, [Corey.Crowley-Hall@sao.wa.gov](mailto:Corey.Crowley-Hall@sao.wa.gov)

### Kathleen Cooper – Director of Communications

564-999-0800, [Kathleen.Cooper@sao.wa.gov](mailto:Kathleen.Cooper@sao.wa.gov)

## To request public records

### Public Records Officer

564-999-0918, [PublicRecords@sao.wa.gov](mailto:PublicRecords@sao.wa.gov)

## Americans with Disabilities

In accordance with the Americans with Disabilities Act, this document will be made available in alternative formats. Please email [Webmaster@sao.wa.gov](mailto:Webmaster@sao.wa.gov) for more information.

# Executive Summary

## Background (page 6)

Washington's small businesses are an essential part of the state's overall economy, creating jobs and sparking innovation. Both federal and state lawmakers recognize that the disproportionate impacts of regulatory costs on small businesses can reduce competition, innovation, and new employment opportunities, and can potentially threaten the survival of the businesses themselves. The state's Regulatory Fairness Act (RCW 19.85) requires agencies to take the financial effects of proposed regulations into account, calculate the costs to businesses, and mitigate costs that are disproportionate for small businesses, where feasible.

This audit follows up on the State Auditor's 2016 report "Assessing Implementation of the Regulatory Fairness Act." It assesses agency compliance with the Act since the previous audit to understand whether compliance has improved following legislation requiring the Governor's Office of Regulatory Innovation and Assistance (ORIA) to provide tools and assistance to regulatory agencies.

**Agencies have significantly improved their execution of Regulatory Fairness Act requirements since the previous audit. They attributed progress in large part to help provided by the Office of Regulatory Innovation and Assistance.** (page 11)

**Agencies claimed 47 percent of rules in our sample were exempt from the Act. For the other 53 percent, agencies provided sound support for their cost-related claims most of the time.** (page 12)

Nearly 90 percent of the less-than-minor cost claims were fully supported – a significant improvement from the last audit, when only half were fully supported. Compliance with the Small Business Economic Impact Statement (SBEIS) greatly improved since the last audit: nearly 75 percent in our sample were substantively complete. One key area where agencies continue to struggle is accessing reliable, consistent data about the businesses they regulate.

## **Agency staff report that the Governor’s Office of Regulatory Innovation and Assistance’s (ORIA) tools and support have greatly helped them comply with the Act** (page 16)

ORIA has provided extensive support to agencies in navigating requirements of the Act. Agencies in our audit were aware of ORIA’s resources, and most use them regularly. Agencies praised ORIA’s efforts and are asking for expanded help. Some agencies suggested it could be helpful to have additional improvements in the standardized forms used to propose new or revised rules.

## **While overall compliance with the Act has improved, some agencies struggled to correctly apply allowable exemptions** (page 18)

All the exemptions claimed in our sample were actual legal exemptions, which is far better than in the previous audit. While all the exemptions claimed were allowed by law, agencies were entitled to claim only about two-thirds of them. Agencies would benefit from additional training on the application of exemptions.

## **State Auditor’s Conclusions** (page 20)

Small businesses play an important role in Washington’s economy, but they often face proportionally higher costs compared to big companies when complying with some state regulations. The state’s Regulatory Fairness Act set up a framework to address this disparity. It requires state agencies to assess their rules’ effects, and develop strategies to mitigate the disproportionate impact of some regulations.

Our 2016 performance audit examining agencies’ compliance with the Act found most agencies struggled to follow the law. Agencies frequently could not support their conclusions that the costs of new regulations were minimal, and often claimed exemptions from the Act that did not exist. Furthermore, we found they rarely prepared complete Small Business Economic Impact Statements (SBEIS), one of the Act’s main requirements. One of the audit’s key recommendations was for the Legislature to designate a central authority to help agencies meet the requirements of the law. In 2017, the Legislature assigned that responsibility to the Governor’s Office of Regulatory Innovation and Assistance (ORIA).

The results of the current audit are far better than the 2016 audit. Agencies were more consistent in completing the SBEIS when required, and did a much better job of documenting the circumstances when one was not needed. In addition, the agencies were overwhelmingly positive about the level of support and guidance in navigating the requirements of the Act they got from ORIA.

Maintaining an equitable regulatory environment for small businesses is always important, but given the difficult times we are experiencing now, it is even more so. ORIA and the state agencies deserve to be commended for the tremendous improvement they have made in administering the Regulatory Fairness Act since our last review.

## Recommendations (page 21)

We made recommendations to the Office of Regulatory Innovation and Assistance (ORIA) to expand its assistance to agencies in three areas where they still have challenges in their efforts to comply with the Regulatory Fairness Act. We recommended ORIA help facilitate the sharing of summary data among agencies, serving as a repository of information relevant to the specific sectors of small businesses in Washington's economy. We also recommended ORIA expand its assistance in helping agencies apply exemptions to their proposed rules.

In addition, we made a recommendation to ORIA to work with agencies and the Code Reviser to explore opportunities to improve the standardized form used for proposed new or revised rules.

## Next steps

Our performance audits of state programs and services are reviewed by the Joint Legislative Audit and Review Committee (JLARC) and/or by other legislative committees whose members wish to consider findings and recommendations on specific topics. Representatives of the Office of the State Auditor will review this audit with JLARC's Initiative 900 Subcommittee in Olympia. The public will have the opportunity to comment at this hearing. Please check the JLARC website for the exact date, time and location ([www.leg.wa.gov/JLARC](http://www.leg.wa.gov/JLARC)). The Office conducts periodic follow-up evaluations to assess the status of recommendations and may conduct follow-up audits at its discretion. See **Appendix A**, which addresses the I-900 areas covered in the audit. **Appendix B** contains information about our methodology.

# Background

## The cost of complying with regulations can be disproportionately high for small businesses

Washington's small businesses are an essential part of the state's overall economy, creating jobs and sparking innovation. They provide goods and services that may not be available through larger companies and corporations. However, unlike large businesses, small business owners cannot easily spread the cost of complying with state laws across their business operations. Nor do they typically possess the resources to employ experts to help them navigate the complex regulatory landscape. Many costs of regulation, for example, are fixed costs, such as occupational safety and health requirements, which do not vary with the amount of the company's output. That means that a small firm with fewer than 50 employees incurs roughly the same expense as a firm with 500 employees. While the fixed costs of compliance can be spread over higher revenue, greater output and broader employee base in the large firm, these costs disproportionately affect the small firm with less revenue and output and fewer employees.

Both federal and state lawmakers recognize that the disproportionate effect of regulatory costs on small businesses can reduce competition, innovation and new employment opportunities. The financial burden can even jeopardize the survival of the business.

## The state's Regulatory Fairness Act was designed to mitigate the disproportionate effect state rules can have on small businesses

### Washington's law is derived from similar federal laws

Forty years ago, federal lawmakers recognized the problems small businesses face in complying with regulatory requirements. In 1980, Congress took steps designed to help mitigate those challenges, and President Carter signed into law the Regulatory Flexibility Act. It requires agencies to conduct an economic analysis of the impact of any proposed rule and consider the costs that the rule will impose upon small organizations, including businesses, governments and nonprofits.

In 1996, President Clinton signed into law the Small Business Regulatory Enforcement Fairness Act, which added "teeth" to the Regulatory Flexibility Act.

In addition to allowing for judicial review of rules, it allows businesses to challenge an agency's compliance with the Regulatory Fairness Act – forcing the agency to confirm or defend its cost assertions. Furthermore, it requires agencies developing new regulations to ask for input from the small businesses the regulation will affect.

Executive Order 13272 (signed by President Bush in 2002) directed the Small Business Administration's Office of Advocacy to provide federal agencies with training and information on how to comply with the Regulatory Flexibility Act. Executive Order 13563, Improving Regulation and Regulatory Review (signed by President Obama in 2011), required agencies to work together to simplify overlapping or redundant regulations, and to provide cost-benefit analyses on proposed rules. It also underscored the importance of engaging with small businesses early in the regulatory process.

Washington's state Legislature addressed regulatory flexibility in the Regulatory Fairness Act (signed into law as RCW 19.85 in 1982). Following the 1980 federal law, this state law requires agencies to take the financial effects of proposed rules into account: they must calculate a rule's cost to the businesses it applies to. The state law has been revised several times since its establishment, but the changes were technical in nature and did not reflect subsequent changes in the federal law.

## **The state's Regulatory Fairness Act requires agencies to make a series of calculations to determine whether to mitigate costs for small businesses**

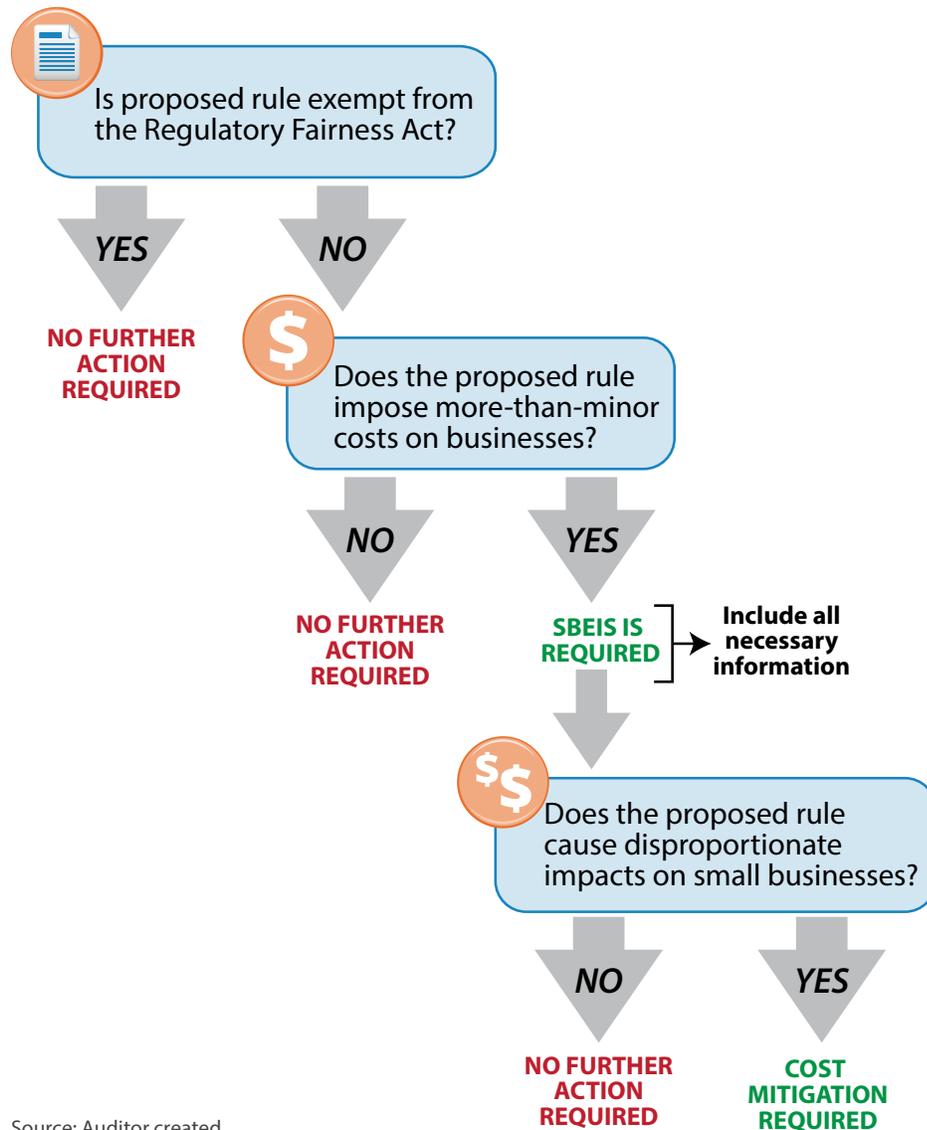
As an agency prepares to file a new or amended rule with the state's Office of the Code Reviser, which it submits on a standardized form, it must follow several steps to be in compliance with the Regulatory Fairness Act.

First, the agency must determine whether a proposed rule is exempt from the requirements of the Act. Allowable exemptions are numerous, and can be complex. They are scattered across several different statutes, listed in **Appendix C**.

Once an agency determines that a proposed rule or parts of that rule are not exempt, it must next determine whether the rule will impose costs on businesses that exceed minor costs. The Regulatory Fairness Act defines *more-than-minor costs* to businesses as costs of a proposed rule that exceed thresholds based on annual revenue or payroll. In the case of rules proposed by the Department of Social and Health Services, the threshold is \$50 per client served by the business affected by the rule.

When an agency determines that costs of complying with the regulation exceed that minor-cost threshold, it must prepare a Small Business Economic Impact Statement (SBEIS) in addition to the standardized form it submits to the Office of the Code Reviser. **Exhibit 1** (on the following page) summarizes the sequence of decisions required by the law to determine whether an SBEIS is required.

**Exhibit 1** – Once an agency determines its proposed rule imposes more-than-minor cost on businesses, an SBEIS is required



Source: Auditor created.

***SBEIS must contain many complex elements***

The law states that an SBEIS must describe all compliance costs and must consider, based on input received from affected businesses, whether those costs will cause them to lose sales or revenue. The SBEIS must also include the estimated number of jobs created or lost due to the impact of the rule. (See Appendix D for a full list of required content.)

The SBEIS must demonstrate whether compliance with the proposed rule will cost small businesses disproportionately more by comparing the cost of compliance for small businesses with the cost of compliance for the largest 10 percent of businesses required to comply.

Based upon the extent of disproportionate impact on small business, agencies must consider, without limitation, a number of methods for reducing the effect, where legal and feasible. Methods to be considered include: reducing or eliminating substantive regulatory requirements, reducing the frequency of inspections, and delaying compliance.

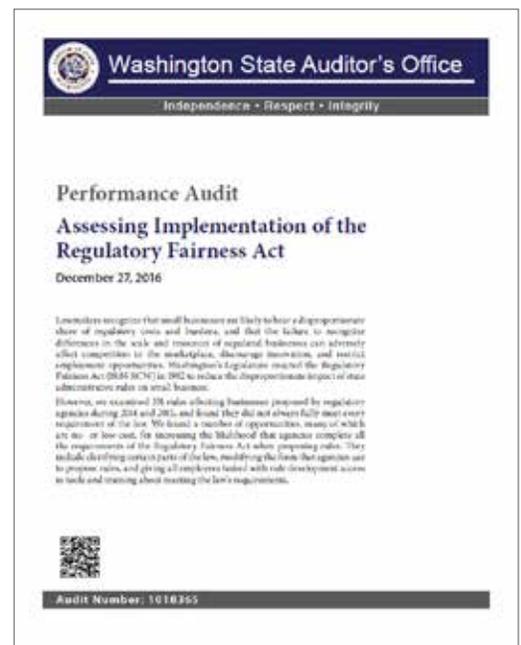
The SBEIS must describe how the agency has involved small business in the development of the rule, and include a list of industries affected. The law states that an agency may survey a representative sample of affected businesses to collect information for the SBEIS. Further, it should, whenever possible, appoint a committee to help accurately assess the costs of the proposed rule and the means to reduce the costs imposed on small businesses.

## The Office for Regulatory Innovation and Assistance is required to give agencies tools and support to help them comply with the Act

The Office of the Washington State Auditor completed a performance audit in 2016 to assess how well state agencies complied with the Act. That audit, titled “Assessing Implementation of the Regulatory Fairness Act” (see the sidebar for a link to read it on our website), made recommendations for templates, guidance and legal clarifications.

Subsequently, in 2017, the Legislature approved 2SHB 1120, which engaged the Governor’s Office of Regulatory Innovation and Assistance (ORIA) in efforts to help agencies comply with the Act. ORIA was originally created in 2002 by the Washington State Legislature to help improve the regulatory system and assist citizens and businesses. The 2017 legislation required ORIA to: “collaborate with and provide support to state agencies in meeting the requirements of the [Act].” Required support includes:

- Providing online guidance and tools, such as templates, which were required to be made available by December 31, 2017
- Offering access to available data for agencies to complete required cost calculations
- Facilitating information sharing among agencies and between agencies and business associations



Read the 2016 performance audit *Assessing Implementation of the Regulatory Fairness Act* on our website at: <https://bit.ly/34j8hpZ>

## This audit examined the extent to which agencies are in compliance with the Regulatory Fairness Act since ORIA's involvement

The legislation that resulted from our 2016 audit also required the State Auditor to “conduct a performance review of agency compliance with the regulatory fairness act...[to] be completed no earlier than June 30, 2020 [and presented to the Legislature by June 30, 2021], and...periodically thereafter.” (RCW 43.09.188)

The current audit looked at 136 rules affecting businesses, proposed by 16 agencies in 2018 and 2019, to understand whether agencies have improved their compliance following ORIA's efforts to provide tools and assistance. The audit also assessed agencies' perceptions of the usefulness of those tools. In addition, this audit looked more closely at one area of the Act — instances where agencies claimed they were exempt from compliance. We not only evaluated rules agencies claimed were exempt from the Act to determine whether the exemptions were actually permitted by statute, as was done in the first audit, but also evaluated the exemptions to discover whether agencies were entitled to take them.

This audit answered the following questions:

1. To what extent has compliance with the Regulatory Fairness Act improved following the previous audit?
2. Are agencies correctly applying exemptions to the requirements of the Regulatory Fairness Act?
3. Did ORIA provide tools and assistance to help agencies comply with the Regulatory Fairness Act as required by law?

# Audit Results

**Agencies have significantly improved their execution of Regulatory Fairness Act requirements since our last audit. They attributed progress in large part to help provided by the Office of Regulatory Innovation and Assistance.**

## Summary of results

Agencies claimed 47 percent of rules in our sample were exempt from the Act. For the other 53 percent, agencies provided sound support for their cost-related claims most of the time. Nearly 90 percent of the less-than-minor cost claims were fully supported – a significant improvement from the last audit, when only half were fully supported. Compliance with the requirements of the Small Business Economic Impact Statement (SBEIS) greatly improved since the last audit: nearly 75 percent in our sample were substantively complete. One key area where agencies continue to struggle is accessing reliable, consistent data about the businesses they regulate.

Agency staff reported that the Governor’s Office of Regulatory Innovation and Assistance’s (ORIA) tools and support have greatly helped them comply with the Act. ORIA has provided extensive support to agencies in navigating requirements of the Act. Agencies in our audit were aware of ORIA’s resources, and most use them regularly. Agencies praised ORIA’s efforts and are asking for expanded help. Some agencies suggested it could be helpful to have additional improvements in the standardized forms used to propose new or revised rules.

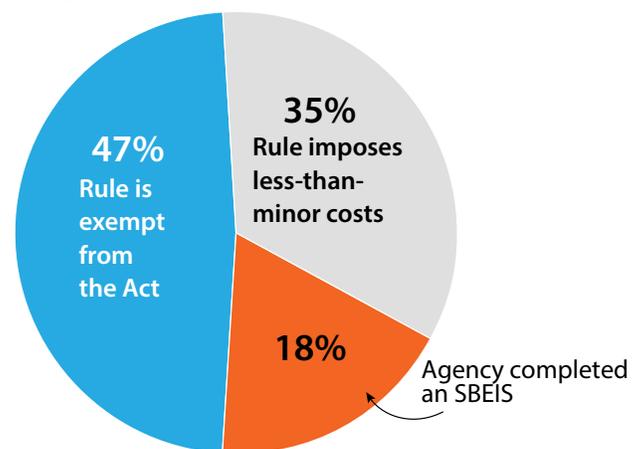
While overall compliance with the Act has improved, some agencies struggled to correctly apply allowable exemptions. All the exemptions claimed in our sample were actual legal exemptions, which is far better than in the previous audit. While all the exemptions claimed were allowed by law, agencies were entitled to claim only about two-thirds of them. Agencies would benefit from additional training on the application of exemptions.

**Agencies claimed 47 percent of rules in our sample were exempt from the Act. For the other 53 percent, agencies provided sound support for their cost-related claims most of the time.**

This audit examined a sample of 136 rules affecting businesses, submitted to the Code Reviser by 16 regulatory agencies in 2018 and 2019. The selection for analysis included all business rules proposed in 2019 in which agencies claimed an exemption to the Act or claimed that the rule would not impose more-than-minor costs on businesses. The sample for our evaluation of Small Business Economic Impact Statements (SBEIS) was drawn from both 2018 and 2019, because agencies complete SBEIS far less often.

In our sample of proposed rules, agencies claimed their rules were not exempt from the Regulatory Fairness Act for 53 percent of rules in our sample (see Exhibit 2). Agencies claimed the remaining 47 percent of rules in our sample were exempt from the Act. This audit reviewed those rules in greater detail than in our 2016 audit; we discuss the results in the section beginning on page 18.

**Exhibit 2 – Agencies claimed 53% of the rules in our sample were not exempt from the Act**  
*For rules submitted in 2018 and SBEIS submitted in 2018 and 2019*



Source: Auditor analysis.

**Nearly 90 percent of the less-than-minor cost claims were fully supported – a significant improvement from the last audit, when only half were fully supported**

For proposed rules that are not considered exempt from the requirements of the Act, an agency must first determine whether the rule will impose more-than-minor costs for businesses. To do that, it calculates the costs of compliance for all businesses, then compares that cost to one of the three minor-cost thresholds identified by the law, shown in Exhibit 3 (on the following page).

### Exhibit 3 – Assessing the cost of compliance compared to the more-than-minor cost thresholds defined in statute

#### Costs of compliance include

- Equipment
- Supplies
- Labor
- Professional services
- Increased administrative costs
- Lost sales or revenue

← compared to →

#### Legal thresholds

Agencies must use either:

- Whichever is the greater: \$100 or 0.3 percent of annual revenue or income

**OR**

- One percent of annual payroll

*DSHS only = \$50/client*

The agency does not have to submit documentation supporting these calculations with its proposed rule filing, and few of the filings we reviewed included any supporting documents. For our evaluations of filings that claimed a result of less-than-minor costs for businesses, we asked agencies for documentation of their calculations. While we did not test the accuracy of the specific calculations, we considered an agency to have fully supported its claim if the documentation included all of the following:

- Costs to businesses compared to one of the legal thresholds
- A clear conclusion
- A credible methodology or source of data

If the agency provided a qualitative analysis, we considered that analysis sufficient if it contained a clear explanation of how the agency reached its conclusions.

Of the 136 proposed rules we examined, agencies claimed the cost impact would be less-than-minor in 47 rules (35 percent), as shown in Exhibit 2. The quality and substance of documentation had improved significantly from filings we reviewed in our previous audit. Of the 47 rules, agencies gave us sufficient and credible cost support for 89 percent of filings, compared to 51 percent in the previous audit.

In the rule filings we did not consider fully supported, agencies said they sometimes struggled to obtain sufficient data, and in other cases, to fully explain their analyses. Such issues were also evident in the previous audit but to a much greater extent.

## **SBEIS compliance greatly improved since the last audit: nearly 75 percent in our sample were substantively complete**

Once an agency determines that a proposed rule will cause more-than-minor costs to businesses, it must complete an SBEIS. The requirements for an SBEIS are numerous and complex. The document must contain all these elements:

- A description of all compliance and other costs
- A determination about whether compliance costs will cause lost sales or revenue
- An estimation of the number of jobs created or lost due to the impact of the rule
- A description of how the agency will involve small business in the development of the rule
- A list of industries affected by the proposed rule
- A determination of whether the proposed rule will disproportionately affect small businesses by comparing the cost of compliance for small businesses with the cost of compliance for the largest 10 percent of businesses required to comply

Based upon the extent of a rule's disproportionate effect on small businesses, the agency must reduce the costs the rule imposes on them, where legal and feasible. The law requires agencies to consider a number of cost mitigation strategies, including:

- Reducing, modifying or eliminating substantive regulatory requirements
- Reducing reporting requirements
- Modifying fine schedules

The Act requires the agency to list every strategy in the SBEIS, and indicate that it has been considered even if dismissed as not feasible. The complete list must be included even if a certain remedy is irrelevant to the proposed rule. In this audit, 18 percent of the rules in our sample included SBEIS (shown in Exhibit 2).

Agencies were much more successful in completing SBEIS documents in this audit compared to the 2016 audit, when complete documentation was rare. We evaluated the same number of SBEIS in both audits, 25 in each. The number of fully complete SBEIS doubled in this audit, from seven to 14. In addition to the 14 we considered fully complete, four more were substantively complete; the element most commonly missing was the consideration of every cost mitigation method. In total, 18 – or nearly three-quarters – of the SBEIS we reviewed were fully or substantively complete.

In the previous audit, nearly half the 25 SBEIS we reviewed were missing a discussion of potential lost sales or revenue. In the current audit, only three of the 25 lacked that information. The most frequently omitted component in this audit was an estimate of the number of jobs created or lost as a result of implementation of the proposed rule.

## **One key area where agencies continue to struggle is accessing reliable, consistent data about the businesses they regulate**

The Regulatory Fairness Act requires agencies to conduct a number of complex cost calculations based on industry-specific information and to estimate changes in such things as employment and revenue for affected businesses. To do this accurately, they need access to relevant, reliable and consistent data about these businesses. Without a way to access the available raw data about individual firms, agencies are limited in their ability to conduct the analyses needed to answer key SBEIS questions that require information about, for example, firm size, annual revenue, sales or employment.

Finding current, relevant data and information can be challenging. The Bureau of Labor Statistics (BLS) publishes economic data that agencies can access through the Employment Security Department's website. However, not all data needs can be met by the data provided there, and the quality of data is not necessarily useful in all sector analyses. For example, data about a fairly new industry such as cannabis, which is heavily regulated and provides nearly a billion dollars of sales tax revenue to Washington's economy each biennium, is not available through BLS. In fact, newer industries can be fully operational long before any type of data is readily available.

A complete list of data and information agencies must locate and use as they complete steps to comply with the Act can be found in Appendix E.

We sent a survey asking staff at audited agencies about the additional help or resources they thought they needed to more effectively complete their calculations and analyses. Several suggested the Office of Regulatory Innovation and Assistance (ORIA) should explore opportunities for agencies to share summary data with each other about businesses affected by their proposed rules.

Several state agencies collect and steward data that can, if aggregated and scrubbed for personally identifiable information, help agencies analyze their regulatory proposals in a Washington state-specific context. Each agency may have different mandates and policies around data sharing and privacy. In some cases, the Legislature may need to adjust or clarify agency data privacy provisions, as well as specify an expectation that providing data is not only authorized, but encouraged.

ORIA can help facilitate data-sharing agreements, and serve as a repository for sharable data and information relevant to the specific sectors of small businesses in Washington's economy.

## Agency staff report that ORIA's tools and support have greatly helped them comply with the Act

### ORIA has provided extensive support to agencies to help them navigate requirements of the Act

Following our 2016 performance audit, ORIA began adding basic resources to its website to meet its new statutory requirements. In 2017, Governor Inslee named a new director to head ORIA, and under new leadership, it has been regularly reviewing and updating its resources and tools. In 2019, having completed an internal restructure, ORIA significantly increased its efforts to help agencies comply with the Act. ORIA now has a dedicated employee who works directly with agency staff to:

- Identify the help they need
- Focus ORIA's efforts where they offer greatest benefit
- Engage in cross-agency collaboration and information sharing
- Provide training
- Improve and update online tools
- Make available economic consultants to help with calculations

### Agencies in our audit were aware of ORIA's resources, and most use them regularly

According to ORIA, many of the agency staff who prepare rules are new and often lack institutional knowledge. ORIA's assistance, training and tools can be critical to helping them meet the requirements of the Act.

We surveyed the 16 agencies whose rules were evaluated in this audit to understand the extent to which staff found ORIA's tools and assistance helpful, and where ORIA could best focus its efforts to help agency staff in the future. Most (75 percent) said they regularly use ORIA's online tools, and reported finding them helpful. The online tools most frequently used by agency staff were the cost calculators and templates. In addition to using the resources available online, around half of the agencies said they had reached out to ORIA for direct assistance.

## Agencies praised ORIA's efforts and would like expanded help

In survey responses, agency staff overwhelmingly expressed appreciation for the tools and assistance ORIA has provided. Respondents singled out as particularly valuable in-person meetings and conferences where agency staff can exchange information with each other. Many expressed interest in additional such meetings. Overall, agencies want ORIA to continue to expand its efforts. However, because ORIA was appropriated only half of one full-time equivalent staff person to implement the requirements of the 2017 legislation, it will likely need additional resources to do so.

Agency staff identified specific problem areas they would like ORIA to focus on in the future. Several survey respondents said they struggle to understand which exemptions to the Act apply in which circumstances. Many highlighted the problem of gaining access to reliable cost and other information about the businesses they regulate. Finally, several respondents said they did not always know how to fulfill the law's requirements in unique situations, such as when businesses sell products in Washington but are located elsewhere.

## Some agencies suggested it could be helpful to have additional improvements in the standardized forms used to propose new or revised rules

In addition to comments about ORIA, some respondents addressed matters related to the Office of the Code Reviser. Some agency staff said they believe the Code Reviser's forms they must use to file proposed rules and address the requirements of the Act could be further improved. These forms record agency regulatory activities, and businesses or members of the public might review them to learn about the rules an agency is proposing. For that reason, the content of those forms must be clear and understandable.

For example, one agency found it did not have sufficient space to list by name all the numerous industries affected by the proposed rule. Rather than exceed the limited space – which adds additional processing time to the filing – staff used the North American Industry Classification System numeric codes to identify those businesses. These codes are used to classify businesses for the purpose of reporting statistical data related to the U.S. economy. To identify the industries listed, a reader would have to decode the list, and may not know where to readily find that information. Other suggested areas for improvement included clearer instructions about the filing requirements of an SBEIS and clarification of allowable exemptions.

In our previous audit, we recommended the Code Reviser modify its proposed rule form (CR-102) to include several components we believed would help agencies comply with the Act. The Code Reviser made our suggested revisions immediately, even before the 2017 legislative session began. Based on the Code Reviser's willingness to make needed revisions previously, we believe it would be willing to explore additional improvements. ORIA is well positioned to facilitate a discussion of additional improvements to the forms.

## While overall compliance with the Act has improved, some agencies struggled to correctly apply allowable exemptions

### All the exemptions claimed in our sample were actual legal exemptions, which is far better than in the previous audit

Proposed rules are exempt from the requirements of the Act under certain conditions. Exceptions include those that are emergency rules, have already gone through a pilot rule process, or do not affect any small businesses. A complete list of exemptions allowed by statute is provided in Appendix C.

In the 2016 performance audit, we found that only about half of the exemptions agencies claimed were actually authorized by statute. In this audit, however, all the exemptions claimed by the agencies were authorized.

### While all the exemptions claimed were allowed by law, agencies were *entitled* to claim only about two-thirds of them

In the 2016 audit, we confined our examination of exemptions to determining whether the exemptions agencies claimed were allowed by the law, because such a high percentage of those claimed did not comply with the Act. In this audit, because all claimed exemptions were legally allowed, we took the examination of exemptions a step further, and assessed whether agencies were entitled to take the exemptions they claimed.

For example, the law allows an agency to forego an SBEIS if the language in a new proposed rule is "...explicitly and specifically dictated by statute." In this audit, when an agency claimed that exemption, we assessed whether the proposed rule did, in fact, warrant the exemption because the language was dictated by a statute.

The examination of exemptions proved to be very complex. While some rule filings are exempt from the Act based on only one exemption, others are exempt based on multiple exemptions. In the latter case, different exemptions are applied to different parts of the proposed rule. We found that only 63 percent of the rules agencies claimed were exempt, were in fact exempt from the Act for the reasons agencies claimed. In some instances of a claim for only one exemption, we found a portion of the rule did not fall under the claimed exemption but was exempt for another reason. We considered those rules to be exempt from the Act.

## Agencies would benefit from additional training on the application of exemptions

Agency staff recognize that understanding how and when to apply which exemptions is a complex task in itself, given the complicated nature of regulations. An agency's Assistant Attorney General is the best resource for answers to legal questions about applying specific exemptions to a proposed rule; however, ORIA currently provides a comprehensive list of exemptions among its many online tools. Survey results suggested that agency staff rarely used the list, and some agency staff asked for additional training or guidance to help them better understand and apply the various exemptions. ORIA may be able to provide more help in the form of general guidance or by facilitating cross-agency discussions, but it will likely need additional resources to do so.

# State Auditor's Conclusions

Small businesses play an important role in Washington's economy, but they often face proportionally higher costs compared to big companies when complying with some state regulations. The state's Regulatory Fairness Act set up a framework to address this disparity. It requires state agencies to assess their rules' effects, and develop strategies to mitigate the disproportionate impact of some regulations.

Our 2016 performance audit examining agencies' compliance with the Act found most agencies struggled to follow the law. Agencies frequently could not support their conclusions that the costs of new regulations were minimal, and often claimed exemptions from the Act that did not exist. Furthermore, we found they rarely prepared complete Small Business Economic Impact Statements (SBEIS), one of the Act's main requirements. One of the audit's key recommendations was for the Legislature to designate a central authority to help agencies meet the requirements of the law. In 2017, the Legislature assigned that responsibility to the Governor's Office of Regulatory Innovation and Assistance (ORIA).

The results of the current audit are far better than the 2016 audit. Agencies were more consistent in completing the SBEIS when required, and did a much better job of documenting the circumstances when one was not needed. In addition, the agencies were overwhelmingly positive about the level of support and guidance in navigating the requirements of the Act they got from ORIA.

Maintaining an equitable regulatory environment for small businesses is always important, but given the difficult times we are experiencing now, it is even more so. ORIA and the state agencies deserve to be commended for the tremendous improvement they have made in administering the Regulatory Fairness Act since our last review.

# Recommendations

## For the Governor's Office of Regulatory Innovation and Assistance

To address the challenges agencies have in obtaining relevant, current and reliable data about the businesses they regulate, as described on page 15, we recommend it:

1. Help facilitate the sharing of summary data among agencies, such as through data sharing agreements, where feasible.
2. Serve as a repository for and make available sharable data and information relevant to the specific sectors of small businesses in Washington's economy to help agencies more easily conduct the numerous calculations required in the Act.

To address the challenges agencies identified with completing the requirements of the Regulatory Fairness Act on the Code Reviser's rule filing form (CR-102), as described on page 17, we recommend it:

3. Work with agencies and the Code Reviser to explore opportunities for improving the form's instructions and clarity. Examples include: improving instructions about submitting an SBEIS, and clarifying allowable exemptions.

To address the challenges agencies have in correctly applying exemptions to the Regulatory Fairness Act on proposed rules, as described on pages 18-19, we recommend it:

4. Expand assistance focused specifically on helping agencies apply exemptions to their proposed rules.

# Agency Response



## STATE OF WASHINGTON

November 4, 2020

Honorable Pat McCarthy  
Washington State Auditor  
P.O. Box 40021  
Olympia, WA 98504-0021

Dear Auditor McCarthy:

On behalf of the audited agencies, thank you for the opportunity to review and respond to the State Auditor's Office performance audit report, "Reassessing Implementation of the Regulatory Fairness Act." The Office of Financial Management and the Governor's Office for Regulatory Innovation and Assistance worked with the audited agencies to provide this response.

We appreciate the information provided in the performance audit report and the recommendations for ORIA to help agencies improve the effects of rule making on small businesses. We also appreciate that the report acknowledges the progress agencies have made since introducing assistance from ORIA.

ORIA plans to implement SAO's recommendations wherever practicable. Although we face many challenges, including privacy issues and the economic impacts of the global pandemic, we are optimistic that ORIA can make significant progress on the recommendations.

Please extend our thanks to your team for their collaborative work on this performance audit report.

Sincerely,

David Schumacher  
Director  
Office of Financial Management

Aaron Everett  
Director  
Office for Regulatory Innovation and Assistance

cc: David Postman, Chief of Staff, Office of the Governor  
Kelly Wicker, Deputy Chief of Staff, Office of the Governor  
Keith Phillips, Director of Policy, Office of the Governor  
Patricia Lashway, Deputy Director, Office of Financial Management  
Christine Bezanson, Director, Results Washington, Office of the Governor  
Tammy Firkins, Performance Audit Liaison, Results Washington, Office of the Governor  
Scott Frank, Director of Performance Audit, Office of the Washington State Auditor

## OFFICIAL STATE CABINET AGENCY RESPONSE TO THE PERFORMANCE AUDIT ON REASSESSING IMPLEMENTATION OF THE REGULATORY FAIRNESS ACT – NOVEMBER 4, 2020

---

The Office of Financial Management and the Governor’s Office for Regulatory Innovation and Assistance provide this management response to the State Auditor’s Office performance audit report received on October 14, 2020.

---

### **SAO PERFORMANCE AUDIT OBJECTIVES:**

The SAO sought to understand whether compliance has improved following legislation requiring the Governor’s Office of Regulatory Innovation and Assistance to provide tools and assistance to regulatory agencies.

---

**SAO Recommendations to ORIA:** To address the challenges agencies have in obtaining relevant, current and reliable data about the businesses they regulate, we recommend it:

1. Help facilitate the sharing of summary data among agencies, such as through data sharing agreements, where feasible.
2. Serve as a repository for and make available sharable data and information relevant to the specific sectors of small businesses in Washington’s economy to help agencies more easily conduct the numerous calculations required in the Act.

To address the challenges agencies identified with completing the requirements of the Regulatory Fairness Act on the Code Reviser’s rule filing form (CR-102), we recommend it:

3. Work with agencies and the Code Reviser to explore opportunities for improving the form’s instructions and clarity. Examples include: improving instructions about submitting an SBEIS, and clarifying allowable exemptions.

To address the challenges agencies have in correctly applying exemptions to the Regulatory Fairness Act on proposed rules, we recommend it:

4. Expand assistance focused specifically on helping agencies apply exemptions to their proposed rules.

### **STATE RESPONSE:**

State regulating agencies’ improvement in Regulatory Fairness Act (RFA) performance reflects their commitment to protecting the viability of small business while maintaining high standards for safeguarding all Washingtonians. The demonstrated performance improvements would not have been possible without the technical implementation assistance that accompanied the Legislature’s policy direction in ESSHB 1120.

The Governor’s Office for Regulatory Innovation and Assistance is grateful for the partnership of state agencies in helping resolve RFA implementation challenges. Continuing improvement and innovation in government service is a central priority of Governor Inslee’s administration. The state appreciates and fully concurs in SAO’s findings and recommendations for areas of additional improvement.

As the performance audit mentioned, ORIA was initially appropriated 0.5 FTE staff to accomplish the requirements of ESSHB 1120. Achieving the SAO recommendations for additional levels of assistance will require additional fiscal and staff resources. There are many options for how the recommended service levels could be provided. ORIA has already begun to develop some options.

The state concurs in the audit's conclusion that agencies struggle most with a lack of available data for well-informed RFA calculations and analyses. SAO's recommendation to expand the use of state agency-held data would certainly result in the greatest increment of performance improvements, but this would also be the most complex to implement for three primary reasons.

First, agencies possessing such data have individual duties as prescribed by their respective authorizing statutes, but they do not have the authorization or resources to furnish these data for RFA purposes. Some, such as the Department of Revenue or Employment Security Department, maintain records that often contain proprietary information about business operations, and are appropriately sensitive about releasing it for purposes that have not been explicitly authorized by law or where the law precludes release for any purpose other than for the purpose it was collected. Additionally, the agencies make data publicly available when it serves their respective duties and programs, using the funding appropriated for that purpose. Absent authorization to do so, expending resources to support statewide RFA implementation is in many cases inconsistent with existing resource allocations. These considerations are not within ORIA's control and will require partnership among the agencies and the Legislature to accomplish.

Second, assembling agency sources of raw data will also require a small but carefully considered administrative infrastructure to address privacy, security and accessibility issues. The data that would help agencies improve their RFA compliance inherently contain proprietary, personally identifiable, and other sensitive categories of information. These data require special privacy and security measures such as clear privacy sideboards, data access controls, and secure data storage. ORIA has already undertaken a fairly extensive amount of feasibility work on this recommendation and believes these concerns can be resolved. However, they will, once again, require agency and legislative partnership for success.

Third, making these data and analytical products available to agencies will also likely generate significant public demand for the same information. This is a good thing in ORIA's opinion. Washington would benefit greatly from a publicly held, privacy-protected, and highly detailed set of real-time economic data. Beyond improved RFA implementation, there are much broader public policy and economic development benefits from having access to this type of information. But the demand for data and analysis product information requests will require additional staff resources.

The state also concurs with the audit's conclusion that making changes to the standard rulemaking procedural forms and instructions administered by the Office of the Code Reviser could benefit agencies' RFA performance. Since the Code Reviser ultimately decides the content of its forms and instructions, the state recommends that the Legislature consider whether direction to the office would help prioritize work on this objective. While valuable, ORIA believes this recommendation would not have as much impact as the SAO's data and RFA exemptions recommendations, and thus, should be considered a lower priority.

Finally, the state concurs with the finding that proper application of exemptions to the RFA continues to hinder successful implementation of the law. ORIA strongly believes assistant

attorneys general are agencies' best and most appropriate source of assistance on RFA exemptions. ORIA sees significant benefits in providing agencies with overview-level training and resources on exemptions. Additionally, ORIA is committed to working with the Attorney General's Office to explore options for working in partnership on compliance improvements. However, ORIA cannot speak for the AGO's resource availability or interest in participating in such an effort. Ultimately, exemptions are applied as a legal question within the context of each rulemaking's scope and each agency's and program's legal underpinnings. Agency counsel are responsible to resolve these questions.

### **ORIA Action Steps and Time Frame**

*While ORIA will lead these actions, successful progress will be dependent on the participation of the agencies identified.*

- Work with regulatory agencies to produce an inventory of the scope of data each agency retains regarding the businesses they regulate, and their current regulatory framework for data sharing. *By March 15, 2021.*
  - Work with the Office of the Chief Information Officer to develop options to create an administrative infrastructure for economic data that addresses privacy, security and accessibility issues. *By March 15, 2021.*
  - Gather input from regulatory agencies on CR-102 form challenges. *By May 1, 2021.*
  - Meet with the Office of the Code Reviser to discuss the SAO audit recommendation, relay agency feedback and determine the Code Reviser's interest in making changes. *By June 1, 2021.*
  - Meet with the Attorney General's Office to explore options for working in partnership on compliance improvement solutions. *By January 15, 2021.*
  - Develop an overview-level training for agencies on RFA exemptions. *By July 1, 2021.*
  - Develop a funding decision package for resources needed to implement audit recommendations and submit to the governor for consideration. *By September 15, 2021.*
-

# Appendix A: Initiative 900 and Auditing Standards

## Initiative 900 requirements

Initiative 900, approved by Washington voters in 2005 and enacted into state law in 2006, authorized the State Auditor’s Office to conduct independent, comprehensive performance audits of state and local governments.

Specifically, the law directs the Auditor’s Office to “review and analyze the economy, efficiency, and effectiveness of the policies, management, fiscal affairs, and operations of state and local governments, agencies, programs, and accounts.” Performance audits are to be conducted according to U.S. Government Accountability Office government auditing standards.

In addition, the law identifies nine elements that are to be considered within the scope of each performance audit. The State Auditor’s Office evaluates the relevance of all nine elements to each audit. The table below indicates which elements are addressed in the audit. Specific issues are discussed in the Results and Recommendations sections of this report.

I-900 element	Addressed in the audit
1. Identify cost savings	<b>No.</b> The audit did not identify cost savings.
2. Identify services that can be reduced or eliminated	<b>No.</b> The audit did not identify services that can be reduced or eliminated.
3. Identify programs or services that can be transferred to the private sector	<b>No.</b> Agency rulemaking cannot be transferred to the private sector.
4. Analyze gaps or overlaps in programs or services and provide recommendations to correct them	<b>Yes.</b> The audit sought to identify whether there were gaps in the guidance the Office of Regulatory Innovation and Assistance (ORIA) provides to agencies. It determined that agencies still need assistance in understanding exemptions and acquiring data.
5. Assess feasibility of pooling information technology systems within the department	<b>No.</b> The audit did not assess the feasibility of pooling information technology systems, but did discuss agencies’ need to share information across agencies.
6. Analyze departmental roles and functions, and provide recommendations to change or eliminate them	<b>Yes.</b> The audit looked at the role ORIA serves as a source of statewide guidance for agencies, and determined it is fulfilling its responsibilities well and that agency performance is improving.

## I-900 element

## Addressed in the audit

7. Provide recommendations for statutory or regulatory changes that may be necessary for the department to properly carry out its functions	<b>Yes.</b> The audit made recommendations to ORIA that would further improve agency performance.
8. Analyze departmental performance data, performance measures and self-assessment systems	<b>No.</b> The audit did not examine agencies' performance measures or self-assessment systems.
9. Identify relevant best practices	<b>Yes.</b> The audit identified the tools agencies use from ORIA and the additional support that they need.

## Compliance with generally accepted government auditing standards

We conducted this performance audit under the authority of state law (RCW 43.09.470), approved as Initiative 900 by Washington voters in 2005, and in accordance with generally accepted government auditing standards as published in *Government Auditing Standards* (July 2018 revision) issued by the U.S. Government Accountability Office. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

## The mission of the Office of the Washington State Auditor

To provide citizens with independent and transparent examinations of how state and local governments use public funds, and develop strategies that make government more efficient and effective. The results of our work are widely distributed through a variety of reports, which are available on our website and through our free, electronic [subscription service](#). We take our role as partners in accountability seriously. We provide training and technical assistance to governments and have an extensive quality assurance program. For more information about the State Auditor's Office, visit [www.sao.wa.gov](http://www.sao.wa.gov).

In accordance with the Americans with Disabilities Act, this document will be made available in alternative formats. Please email [Webmaster@sao.wa.gov](mailto:Webmaster@sao.wa.gov) for more information.

# Appendix B: Scope, Objectives and Methodology

## Scope

Of the nearly 30 regulatory agencies in Washington, we identified 16 that had proposed two or more rules affecting businesses in the 2019 Washington State Register. We included in our selection only proposed rules which were rulemakings that occurred before the adoption of permanent rules and were subject to the requirements of the Regulatory Fairness Act (RCW 19.85). We excluded expedited and emergency rules because they are universally exempt from the requirement to complete a Small Business Economic Impact Statement (SBEIS). We also excluded rules that did not affect businesses and those that were subject to ongoing litigation at the time of the audit. Because SBEIS are relatively rare, we added those that were filed in the 2018 Washington State Register to increase the size of our sample. In total, we reviewed 136 rules proposed by 16 state agencies that affect businesses.

### The 16 agencies in this audit

*The Departments of:* Agriculture, Children, Youth and Families, Financial Institutions, Ecology, Fish and Wildlife, Health, Labor and Industries, Licensing, Revenue, Social and Health Services, and Transportation, and the Employment Security Department, the Liquor and Cannabis Board, the Office of the Insurance Commissioner, the Utilities and Transportation Commission, and the Washington State Gambling Commission.

## Objectives

The purpose of this performance audit is to evaluate whether agencies improved compliance with the Regulatory Fairness Act following efforts by the Governor's Office of Regulation, Innovation and Assistance (ORIA) to provide tools and support. The audit also assesses agencies' perceptions of those tools' usefulness. The audit addresses the following objectives:

1. To what extent has compliance with the Regulatory Fairness Act improved following the previous audit?
2. Are agencies correctly applying exemptions to the requirements of the Regulatory Fairness Act?
3. Did ORIA provide tools and assistance to help agencies comply with the Regulatory Fairness Act as required by law?

## Methodology

We obtained the evidence used to support the findings, conclusions and recommendations in this audit report during our fieldwork period from February through August 2020. We summarize the work we performed to address each of the audit objectives in the following sections.

### **Objective 1: To what extent has compliance with the Regulatory Fairness Act improved following the previous audit?**

To address this objective, we evaluated each rule filing to determine if the agency had filed an SBEIS, and, if it had not, the reason the agency gave for not completing one. To complete this evaluation, we performed the following tasks.

- We examined those rule filings that claimed an exemption to determine whether the exemption claimed was clearly identified and allowable by law.
- To evaluate those proposed rules claiming impacts to businesses that were of less-than-minor costs, we asked agencies for their supporting documentation. We considered the claim fully supported if it included costs to businesses compared to one of the legal thresholds, provided a clear conclusion, and described a credible source of data. If the agency provided a qualitative analysis, we considered that analysis to be sufficient if it cited a credible source for the information and contained a clear explanation of how the agency reached its conclusions. We did not evaluate the accuracy of the calculations themselves.
- For those rule filings claiming more-than-minor cost impacts to businesses, which require the completion of an SBEIS, we reviewed the document to ensure it contained all information required by the Act. We did not evaluate the quality or accuracy of the contents of the SBEIS.

We then compared those results to the results of the previous audit in which we used the same process.

### **Objective 2: Are agencies correctly applying exemptions to the requirements of the Regulatory Fairness Act?**

When agencies claimed exemptions to the Act, we evaluated whether those exemptions were appropriate for the context of the rule. We performed the following tasks to address the different types of exemptions.

- When agencies stated that no small businesses would be affected by the rule (RCW 19.85.025(4)), we asked for their supporting documentation. We evaluated that supporting documentation by looking at whether it included all four required points:
  - It identified all businesses that would be expected to comply
  - It identified the number of employees in those businesses
  - There was a plausible source for the information
  - The agency correctly applied the definition of a small business (less than 50 employees)

If the rule was written in such a way as to not apply to small businesses by default, we also accepted that explanation.

- When agencies stated that the rule was adopted solely for conformity or compliance with federal statutes or regulations (RCW 19.85.061), we looked at the underlying federal law or rule to determine whether the rule conformed to the underlying federal requirements.
- When agencies stated that the rule related only to internal governmental operations (RCW 34.05.310(4)(b)) and was not subject to violation by a non-government party, we read the rule and determined whether a non-government actor could face a consequence for not following the rule and if the rule only laid out internal agency processes.
- When agencies stated that the rule adopted other legal or industry practice standards by reference without material change (RCW 34.05.310(4)(c)), we found the source of the standards that the rule was adopting and checked that the rule language approximately matched the language in the source.
- When agencies stated the rule only clarified the language of the rule without changing its effect (RCW 34.05.310(4)(d)), we read the rule and the prior language to determine if the new language changed the requirements of the rule.
- When agencies stated that the content of the rule was explicitly and specifically dictated by statute (RCW 34.05.310(4)(e)), we read the statutes being implemented to determine if the referenced statute required the specific content changed in the agency's rules. If the statute only authorized or required the agency to make a rule, but did not specify the content of that rule, then we determined this was not an appropriate use of the exemption.
- When agencies stated that the rule set or adjusted fees or rates pursuant to legislative standards (RCW 34.05.310(4)(f)), we read the rule to determine whether it set a fee or a rate, and then read the authorizing statute to determine if there was a legislative standard (such as "to cover costs of the program") that would tell the agency how to set those fees or rates.
- When agencies stated that the rule adopted procedures related to agency hearings or a filing process requirement for applying to the agency for a license or permit (RCW 34.05.310(4)(g)), we read the rule to determine whether it related to agency hearings, or if it was a filing process requirement. If it was a filing process requirement, we read the rule to determine whether it was related to applications for agency licenses or permits.

### **Objective 3: Did ORIA provide tools and assistance to help agencies comply with the Regulatory Fairness Act as required by law?**

To address this objective, we sought to understand what ORIA has done to help agencies meet the requirements of the Act, whether agencies think that assistance has been helpful, and what more ORIA could do to help agency staff. To do this, we examined the materials available on the ORIA website, interviewed ORIA staff, and surveyed staff at the 16 audited agencies. The survey asked questions related to how often staff use ORIA, what materials they used, what they found helpful, and what ORIA could do that would help them more.

## Work on Internal Controls

In the 2016 audit, we observed that a key missing control was consistent guidance on how agencies should meet the requirements of the Act, and recommended that agencies have access to a centralized, outside source of guidance. Since then, the Legislature directed ORIA to provide support to state agencies to help them meet the requirements of the Act. Therefore, we considered the support ORIA gives to agencies the key control in this audit. As such, we assessed agencies' perceptions of that support, and how often agencies used that guidance.

# Appendix C: Exemptions Allowed by Statute

A dozen laws or subsections address exemptions from the Regulatory Fairness Act

Rules are exempt if they:	RCW	Text of the RCW
Are expedited rules	19.85.025	(1) Unless an agency receives a written objection to the expedited repeal of a rule, this chapter does not apply to a rule proposed for expedited repeal pursuant to [RCW 34.05.353]. If an agency receives a written objection to expedited repeal of the rule, this chapter applies to the rule-making proceeding. (2) This chapter does not apply to a rule proposed for expedited adoption under [RCW 34.05.353], unless a written objection is timely filed with the agency and the objection is not withdrawn.
	34.05.353	(3) The expedited rule-making process must follow the requirements for rule making set forth in RCW 34.05.320, except that the agency is not required to prepare a small business economic impact statement under RCW 19.85.025.
Are emergency rules	19.85.025	(3) This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).
	34.05.310	(4)(a) Emergency rules adopted under RCW 34.05.350.
Relate only to internal governmental operations	19.85.025	(3) This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).
	34.05.310	(4)(b) Rules relating only to internal governmental operations that are not subject to violation by a nongovernment party.
Adopt federal or state laws or regulations by reference without material change	19.85.025	(3) This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).
	34.05.310	(4)(c) Rules adopting or incorporating by reference without material change federal statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule.
Make typographical or clarifying changes without changing the effect	19.85.025	(3) This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).
	34.05.310	(4)(d) Rules that only correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect.

Rules are exempt if they:	RCW	Text of the RCW
Have content explicitly dictated by statute	19.85.025	(3) This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).
	34.05.310	(4)(e) Rules the content of which is explicitly and specifically dictated by statute.
Set or adjust fees or rates according to legislative standards	19.85.025	(3) This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).
	34.05.310	(4)(f) Rules that set or adjust fees under the authority of RCW 19.02.075 or that set or adjust fees or rates pursuant to legislative standards, including fees set or adjusted under the authority of RCW 19.80.045.
Relate to the process of agency hearings or applying for a license or permit	19.85.025	(3) This chapter does not apply to the adoption of a rule described in RCW 34.05.310(4).
	34.05.310	(4)(g) Rules that adopt, amend, or repeal: <ul style="list-style-type: none"> <li>(i) A procedure, practice, or requirement relating to agency hearings; or</li> <li>(ii) A filing or related process requirement for applying to an agency for a license or permit.</li> </ul>
Do not affect small businesses	19.85.025	(4) This chapter does not apply to the adoption of a rule if an agency is able to demonstrate that the proposed rule does not affect small businesses.
Include a cost-benefit analysis with all requirements of an SBEIS	19.85.025	(5) An agency is not required to prepare a separate small business economic impact statement under RCW 19.85.040 if it prepared an analysis under RCW 34.05.328 that meets the requirements of a small business economic impact statement, and if the agency reduced the costs imposed by the rule on small business to the extent required by RCW 19.85.030(3). The portion of the analysis that meets the requirements of RCW 19.85.040 shall be filed with the code reviser and provided to any person requesting it in lieu of a separate small business economic impact statement.
Complete the pilot rule process	19.85.030	(1)(a)(ii) ... However, if the agency has completed the pilot rule process as defined by RCW 34.05.313 before filing the notice of a proposed rule, the agency is not required to prepare a small business economic impact statement.
Are necessary for conformity or compliance with federal statutes or regulations	19.85.061	Unless so requested by a majority vote of the joint administrative rules review committee under RCW 19.85.030, an agency is not required to comply with this chapter when adopting any rule solely for the purpose of conformity or compliance, or both, with federal statute or regulations. In lieu of the statement required under RCW 19.85.030, the agency shall file a statement citing, with specificity, the federal statute or regulation with which the rule is being adopted to conform or comply, and describing the consequences to the state if the rule is not adopted.

Rules are exempt if they:	RCW	Text of the RCW
Are adopted by a referendum under the Agricultural Enabling Act	15.65.570	(2) Rule-making proceedings conducted under this chapter are exempt from compliance with RCW 34.05.310, chapter 19.85 RCW, the regulatory fairness act, and RCW 43.135.055 when the adoption of the rules is determined by a referendum vote of the affected parties.

Source: Revised Code of Washington, [www.leg.wa.gov](http://www.leg.wa.gov).

# Appendix D: Required Content for a Small Business Economic Impact Statement

## Determine compliance costs

*Briefly describe:*

- Reporting, recordkeeping, and other compliance requirements of the proposed rule
- Kinds of professional services that a small business is likely to need to comply
- Costs of compliance for businesses required to comply, including costs of:
  - equipment
  - supplies
  - labor
  - professional services
  - increased administrative costs
- Whether compliance with the rule will cause businesses to lose sales or revenue

## Provide other business information

*Describe:*

- How the agency will involve small businesses in the development of the rule
- Industries that will be required to comply with the rule
- An estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule

## Determine disproportionate costs

*Compare:*

- Cost of compliance for small business
- Cost of compliance for the 10 percent of largest businesses required to comply

## Basis of comparison, using one or more:

- Cost per employee
- Cost per hour of labor
- Cost per one hundred dollars of sales

## Mitigate disproportionate costs, if necessary

*Describe steps taken to reduce costs for small business if disproportionate impacts exist or if otherwise required to do so by:*

- Reducing, modifying or eliminating substantive regulatory requirements
- Simplifying, reducing or eliminating recordkeeping and reporting requirements
- Reducing the frequency of inspections
- Delaying compliance timetables
- Reducing or modifying fine schedules for noncompliance
- Any other mitigation techniques suggested by small businesses or their representatives

**OR**

*Provide a clear explanation of why agency did not reduce costs if it determined it cannot do so.*

# Appendix E: Data and Information Requirements for Statutory Compliance

Type of claim made for the proposed rule	Calculation required	Information needed	Data needed
<b>Exemption</b>	Demonstrate that no small businesses are affected by the rule		Workforce size of businesses that would be affected by the rule, unless the rule explicitly exempts businesses with 50+ employees
<b>Less-than-minor cost to businesses – Step 1</b>	Compliance cost of the proposed rule	Identify all costs of compliance, such as reporting, recordkeeping, and professional services.	Estimated costs of each compliance requirement
<b>Less-than-minor cost to businesses – Step 2</b>	Minor-cost threshold option 1: Whichever is greater – \$100 or 0.3% of annual revenue or income		Annual revenue or income of businesses in the industries affected by the proposed rule
	Minor-cost threshold option 2: 1.0% of annual payroll \$50 per client (DSHS only)		Annual payroll of businesses in the regulated industry  Number of DSHS clients for regulated businesses affected by the proposed rule
<b>Small Business Economic Impact Statement (SBEIS)</b>	Cost of complying with the rule	Identify all costs of compliance, such as reporting, recordkeeping, and professional services	Estimated costs of each compliance requirement
	Lost sales or revenue resulting from the proposed rule		Sales and revenue estimates of the industry affected by the proposed rule
	Jobs created or lost resulting from the proposed rule		Employment estimates of the industry affected by the proposed rule
	Disproportionate cost estimates	Cost of compliance for small businesses affected by rule  <i>AND</i> Cost of compliance for the largest 10% of businesses affected, based on one of the these: <ul style="list-style-type: none"> <li>• Cost per employee</li> <li>• Cost per hour of labor</li> <li>• \$100 of sales</li> </ul>	For small and large businesses used in this calculation: <ul style="list-style-type: none"> <li>• Firm size</li> <li>• Employment</li> <li>• Hours worked</li> <li>• Sales</li> </ul>

Source: Auditor analysis of state law.



“Our vision is to increase **trust** in government. We are the public’s window into how tax money is spent.”

– Pat McCarthy, State Auditor

Washington State Auditor’s Office  
P.O. Box 40031 Olympia WA 98504

[www.sao.wa.gov](http://www.sao.wa.gov)

**1-564-999-0950**



Office of the Washington State Auditor