



STATE OF WASHINGTON
OFFICE OF FINANCIAL MANAGEMENT

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December 21, 2016

The Honorable Troy Kelley
Washington State Auditor
P.O. Box 40021
Olympia, WA 98504-0021

Dear Auditor Kelley:

On behalf of the audited agencies, thank you for the opportunity to review and respond to the State Auditor's Office (SAO) performance audit report, "Assessing Implementation of the Regulatory Fairness Act." The Office of Financial Management worked with the Gambling Commission, Liquor and Cannabis Board, Washington State Patrol, Washington Utilities and Transportation Commission, and the departments of Agriculture, Early Learning, Ecology, Fish and Wildlife, Health, Labor and Industries, Licensing, Revenue, Social and Health Services and Transportation to provide this consolidated response.

We appreciate the SAO's efforts to determine whether agencies are fulfilling Regulatory Fairness Act (RFA) requirements when proposing rules and whether there are opportunities for the state to improve. We are committed to the RFA's intent of reducing the disproportionate cost to small businesses to comply with state administrative rules. We believe the concepts and tools in the SAO's recommendations to the Legislature could strengthen processes that would benefit small businesses and agencies. We support and would like to be part of the effort to refine and develop tools that could be used successfully by all agencies.

Nevertheless, we are concerned that your recommendation to revise the law is premature. Before the Legislature considers specific changes to the RFA or the Office of the Code Reviser modifies rulemaking forms such as the CR-102, we urge the Legislature to gather additional information about how any proposed changes to the RFA, or alternative statutes, would impact small businesses and the agencies that serve them. What may seem like simple changes to the law may have unintended consequences. For example, the suggested minor cost estimation methodology could result in reducing the number of analyses completed under the RFA. In addition, a one-size-fits-all solution may be problematic given the differences between agencies and small businesses affected by individual agency rulemaking.

We also note the limited scope of the audit. Some of the SAO's findings were based on its own legal review and advice. The audit did not consider the legal advice agencies received from their assigned assistant attorneys general or how that advice affects agency analysis of obligations and the corresponding impacts on small businesses. Obtaining a single legal interpretation from the



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Attorney General's Office would better inform the Legislature and state agencies of the current meaning of the RFA and the need for any clarifications or revisions.

Another limitation of the SAO report is that it focuses almost entirely on the small business economic impact statement (SBEIS) procedures at the end of the rulemaking process. The report does not describe the due process components of rulemaking required by the Administrative Procedures Act (APA). The APA has requirements for public notice, participation and input. These actions mitigate impact to businesses because input is sought and considered while rules are being developed and finalized. Agencies spend considerable time and effort working with stakeholders early in the rule drafting process to address and mitigate impacts prior to developing the SBEIS required by the RFA. Much of that effort occurs prior to filing the rules and is documented in the rulemaking file, which this audit did not take into account.

Resources and assistance toward rulemaking vary across agencies. We appreciate the SAO's recognition of several agencies using leading practices that could benefit other agencies. Those examples will be a good starting point to further refine and develop some standard tools and trainings that all agencies could use.

As a next step, the Governor's Office plans to invite rulemaking agencies, small business customers, stakeholders and representatives from the Office of the Attorney General and Office of the Code Reviser to better understand how any proposed changes to the act, or alternative statutes, would impact small businesses and agencies. Convening a robust workgroup such as this could also help increase consistency in how agencies follow the RFA and allow them to participate in efforts to refine and develop standardized implementation tools.

Currently, the RFA guides agencies in performing rulemaking analyses suited to each agency's unique customers and situations. This allows agencies to incorporate concerns from stakeholders related to particular situations while maintaining statutory goals of protecting health, safety and the environment. Despite best efforts, there are times when agencies cannot and should not mitigate the impact of rules on small business if that impact is necessary for the agency to comply with statutory requirements or goals. The RFA allows that flexibility so long as the agency provides a clear and reasonable explanation.

As you know, agencies must strike a balance between maintaining the intent of the regulations mandated by law and limiting the costs to businesses. We look forward to working with small business stakeholders to improve the state's rulemaking activities.

Sincerely,



David Schumacher
Director

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