

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.*
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