

## Small Business Economic Impact Statements – Frequently Asked Questions:

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*\*Please note that the following information is intended only as suggested guidance to assist agencies in complying with the Small Business Economic Impact Statement (SBEIS) requirements of the Regulatory Fairness Act (Chapter 19.85 RCW). Accordingly, this document does not replace or impose any legal requirements itself, nor does it endeavor to provide an exhaustive account of all possible rulemaking potentialities. Further, because each agency operates under its own unique set of state and federal legal requirements, and each rulemaking effort is also unique, it is highly recommended that agency staff consult with their assigned Assistant Attorney General and internal regulatory experts throughout the rulemaking process to ensure compliance with the Regulatory Fairness Act and other applicable legal requirements.*

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## **What is a Small Business Economic Impact Statement (SBEIS)?**

An SBEIS is a public document that details how an agency has:

- Examined the costs imposed by a proposed rule on businesses in an industry;
- Determined whether the costs disproportionately impact small businesses; and
- Considered methods for reducing costs imposed on small businesses.

## **When is an agency required to prepare an SBEIS?**

The Regulatory Fairness Act, RCW 19.85, requires state agencies to prepare an SBEIS in most cases when adopting rules. Specifically, an SBEIS is required when a proposed rule is determined to impose more than minor costs, as defined in [RCW 19.85.020\(2\)](#), on businesses in an industry. In addition, an SBEIS must be completed if requested by the Joint Administrative Rules Review Committee (JARRC).

Agencies should assume that an SBEIS is required unless it is clear that the rule has very limited economic impact or RCW 19.85 specifically exempts the rule from the SBEIS requirement.

## **What is a small business?**

[RCW 19.85.020\(3\)](#) defines a small business as any independent business entity that has 50 or fewer employees. Small businesses include both proprietorships and businesses organized as another type of entity such as a partnership or corporation.

## **Is an SBEIS required for all rules?**

An agency is not required to prepare an SBEIS for the following rules:

- Expedited repeal of rules (unless the agency receives a written objection). [RCW 19.85.025\(1\)](#), [RCW 34.05.353](#).
- Pilot rule making. [RCW 19.85.030\(1\)](#), [RCW 34.05.310\(2\)](#),
- Negotiated rule making if using the expedited rulemaking process. [RCW 19.85.025\(2\)](#), [RCW 34.05.353\(1\)\(e\)](#).
- Along with pilot and negotiated rulemaking, an SBEIS is not required for rules subject to “some other process that involved substantial participation by interested parties before the development of the proposed rule.” An agency should seek legal advice if it

is considering adopting rules without an SBEIS based on the exemption for substantial participation by interested parties. [RCW 19.85.025\(2\)](#), [RCW 34.05.353\(1\)\(e\)](#).

- Rules solely adopted to conform or comply with federal law. [RCW 19.85.061](#). A statement must be filed describing the federal law and the consequences of failure to adopt the proposed rules.
- Rules with no effect on small businesses. [RCW 19.85.025\(4\)](#). The agency must be able to demonstrate this and should include the documentation in the rulemaking file.
- Agencies that complete a qualifying analysis and cost reduction under the significant legislative rule making process do not have to prepare an SBEIS. [RCW 19.85.025\(5\)](#), [RCW 34.05.328](#).
- Expedited rules (unless the agency receives a written objection) and the types of rules listed in [RCW 34.05.310\(4\)](#), [RCW 19.85.025\(2\)](#) and (3). Note that the categories of expedited rules largely overlap with the list in [RCW 34.05.310\(4\)](#) but the lists aren't exactly identical.
  - Emergency rules adopted under [RCW 34.05.350](#);
  - Rules relating only to internal governmental operations that are not subject to violation by a non-government party;
  - Rules adopting by reference federal or state statutes or regulations, or national consensus codes that generally establish industry standards;
  - Rules that correct typographical errors, make address or name changes, or clarify language of a rule without changing its effect;
  - Rules the content of which is dictated by statute;
  - Rules that set or adjust business licensing fees under [RCW 19.02.075](#) or that set or adjust fees pursuant to legislative standards including those under [RCW 19.80.045](#); or
  - Rules that adopt, amend, or repeal agency hearing procedure or the process for license or permit application.

### **Are rules that set fees exempt from the requirement to prepare an SBEIS?**

[RCW 19.85.025\(3\)](#) states that the SBEIS requirement does not apply to the types of rules described in [RCW 34.05.310\(4\)](#) including rules “that set or adjust fees or rates pursuant to legislative standards.” There isn't a definition of “legislative standards” in [RCW 19.85](#). If the statute which authorizes the agency to set fees includes a specific amount for

the fee, a range for the fee, or a method for setting or calculating the fee, then an SBEIS is likely not required. Where the authorizing statute gives no limits or guidance on setting the fee amount, adopting rules without preparing an SBEIS presents risk to the agency. Agencies are advised to seek legal advice in that situation.

### **What is the relationship between an SBEIS and Significant Legislative Rules?**

Agencies that are subject to the requirements for significant legislative rules under the Administrative Procedures Act, [RCW 34.05.328](#), do not have to prepare an SBEIS if the analysis done for the significant legislative rule meets the requirements for an SBEIS and the agency reduced costs to the same extent required by RCW 19.85. The portion of the significant legislative rule analysis that meets the requirements of RCW 19.85 is then filed with the code reviser in lieu of filing the SBEIS. [RCW 19.85.025\(5\)](#).

If the agency's rules do not fall under the significant legislative rules process, the agency will have to prepare an SBEIS unless another exemption applies. The question of whether the significant legislative rule making process applies should not be confused with the question of whether there is an exemption from the SBEIS process. Instead, from the two laws read together provide that an agency does not need to conduct two separate analyses if the agency's significant legislative rules process meets the requirements of [RCW 19.85.025\(5\)](#).

### **At what point in the rule making process must the SBEIS be completed?**

The SBEIS must be prepared and filed with the Code Reviser along with the Notice of Proposed Rule Making (CR-102). [RCW 19.85.030\(1\)](#), [RCW 34.05.320\(1\)\(j\)](#). If the SBEIS was prepared at the request of the Joint Administrative Rules Review Committee (JARRC), the SBEIS must be filed with the code reviser prior to adoption of the rule.

### **What notice must be given to small businesses about proposed rules requiring an SBEIS?**

When an agency is proposing a rule that requires an SBEIS, the agency must provide notice to small businesses by using at least the three methods listed in [RCW 19.85.070](#):

- Direct notice to interested small businesses or trade organizations;

- Notice and information to publications likely to be obtained by small businesses affected by the proposed rule; and
- Posting on the agency website.

In addition, the agency has to provide a copy of the completed SBEIS to anyone who requests a copy. [RCW 19.85.030\(1\)\(b\)](#).

### **What steps are required in preparing an SBEIS?**

- The initial step for agencies is to determine whether the proposed rule will impose more than minor costs on businesses in an industry. The agency's determination and its justification should be documented in its rule making file.
- If the answer is yes, then an SBEIS must be prepared.
- The required content of the SBEIS is described in [RCW 19.85.040](#).
- The agency may conduct surveys and gather input from businesses, trade associations, and other representative parties to compile this information.
- Based on the information gathered, the agency must determine whether the proposed rule will disproportionately impact small businesses. That determination and the methodology used should appear in the SBEIS.
- If the agency finds that the rule has disproportionate impacts on small businesses, then the agency must reduce or mitigate the costs imposed by the rule or explain why it is not legal or feasible for the agency to do so. [RCW 19.85.030\(2\)](#). If the agency determines it cannot reduce or mitigate the rule's cost impacts, the agency should document how that was determined and include its justification in the SBEIS. [RCW 19.85.030\(5\)](#).

### **What information should be included in the SBEIS?**

The detailed requirements for the content of the SBEIS are contained in [RCW 19.85.040](#). The agency should document in the SBEIS that the required process was followed, the information considered and the analysis performed. Agencies must include the following information in the SBEIS:

- A brief description of the reporting, recordkeeping, and other compliance requirements of the proposed rule and professional services small businesses need to comply with the requirements;
- Analysis of the cost of compliance for businesses, including costs of equipment, supplies, labor, professional services and increased administrative costs;

- Consideration of whether compliance with the rule will cause businesses to lose sales or revenue;
- Comparison of the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed rules using costs per employee, per hour of labor, or per \$100 of sales as a basis for comparing costs;
- Description of how the agency will involve small business in the development of the rule;
- List of industries required to comply with the proposed rule;
- Estimate of the number of jobs that will be created or lost as the result of compliance with the rule; and
- Description of the steps taken to reduce or mitigate costs for small businesses or an explanation why the agency can't reduce costs.

### **How are Minor Costs Calculated?**

Agencies are required to prepare an SBEIS when the proposed rule will impose more than minor costs on businesses in an industry. [RCW 19.85.030\(1\)](#). “Industry” is defined by United States Department of Commerce industry classification codes. [RCW 19.85.020\(1\)](#). “Minor cost” is defined in [RCW 19.85.020\(2\)](#) as a cost per business that is less than one percent of annual payroll or the greater of either 0.3 percent of annual revenue or \$100. A minimum of \$100 of costs will usually trigger the SBEIS requirement, though in unique situations, a lower number may possibly trigger the requirement. For DSHS, minor costs are defined as less than \$50 of annual costs per client or other appropriate unit of service.

Note that the calculation of whether minor costs are imposed is in relation to all businesses in an industry, not just small businesses. Determination of whether minor costs will be imposed may require some data gathering and analysis as the agency may need to know the annual payroll, income or revenue of the affected businesses.

An SBEIS is not required for rules that do not impose requirements on businesses (as they do not impose more than minor costs on small businesses). For example, a rule that imposes requirements on or only applies to private individuals would likely not trigger the requirement for an SBEIS. It will not always be immediately obvious if a rule imposes requirements on businesses. For example, a rule directed at persons holding a

professional license may impact the licensee's business activities and could trigger the SBEIS requirement. Agencies should carefully analyze the scope of the proposed rule.

### **What costs does the agency have to consider in calculating costs to businesses?**

Under [RCW 19.85.040](#), agencies should consider the following costs when determining whether the rule will impose more than minor costs on businesses.

- Description of reporting, recordkeeping, or other compliance requirements of the proposed rule;
- Description of the types of professional services that a small business will need for compliance with the rule;
- Analysis of the costs of equipment, supplies, labor, professional services, and administrative costs needed for compliance;
- Whether compliance with the rule will cause losses to sales or revenue, and
- Estimates of the number of jobs created or lost as a result of compliance with the rule.

Agencies are required to consider costs imposed on businesses and costs associated with compliance with the proposed rules. [RCW 19.85.030\(1\)\(a\)](#). Agencies are not required under RCW 19.85 to consider indirect costs not associated with compliance. For example, if the proposed rule requires that businesses install a new safety feature, the agency does not have to consider the increase in sales for manufacturers of the new safety feature or decreases in sales of the old safety feature. The agency also need only consider costs incurred by businesses for compliance with the rule. [RCW 19.85.040\(1\)](#). Fines, penalties, or defense costs associated with enforcement actions for failure to comply with the proposed rules are similarly not costs that need to be considered in the SBEIS.

### **How does the agency determine whether costs of compliance with the rule are disproportionate?**

The SBEIS must determine whether the proposed rule will have a disproportionate cost impact on small businesses. To do that, [RCW 19.85.040\(1\)](#), requires that the agency compare the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest required to comply with the proposed rules. The agency may use one or more of the criteria for comparison listed in the rule, including:

- Cost per employee;
- Cost per hour of labor, or

- Cost per one hundred dollars of sales.

**What if only small businesses are covered by the agency’s proposed rule?**

If the proposed rule only affects small businesses, agencies must reduce or mitigate costs under [RCW 19.85.030\(2\)](#) or explain why doing so is not legal or feasible. [RCW 19.85.030\(5\)](#).

**What if the agency determines the proposed rule does not disproportionately impact small businesses or cannot determine whether costs are disproportionate?**

If the agency has insufficient data to calculate whether costs will disproportionately affect small businesses, agencies must reduce or mitigate costs under [RCW 19.85.030\(2\)](#) or explain why doing so is not legal or feasible. [RCW 19.85.030\(5\)](#).

On the other hand, a finding of no disproportional impact on small business does not eliminate the requirement to prepare an SBEIS. The agency must still prepare and file the SBEIS with the code reviser but is not required to reduce or mitigate costs under [RCW 19.85.030\(2\)](#). Agencies may wish to consider the options for costs reduction and document this in the SBEIS even in cases where cost reduction is not required.

Note that if the agency is able to demonstrate that the proposed rule does not affect small businesses at all, no SBEIS is required. [RCW 19.85.025\(4\)](#). This is a different situation than when there is no disproportionate impact (where small businesses are affected but not disproportionately to all other businesses).

**How should the agency proceed if the analysis shows disproportional impacts on small businesses?**

If the agency determines that the proposed rule will disproportionately impact small business, the agency must evaluate various ways to reduce or mitigate costs on small



businesses as described in [RCW 19.85.030\(2\)](#). Documentation of this evaluation must be included in the SBEIS. The methods may include:

- 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; and
- Any other mitigation techniques.

Then the agency must either implement cost reduction or mitigation measures, or document why such measures are not legal or feasible in the SBEIS.

### **Is mitigation mandatory and if not, what must the agency do?**

[RCW 19.85.030\(2\)](#) states that agencies shall reduce costs where “legal and feasible in meeting the stated objectives of the statutes upon which the rule is based.” If the agency cannot reduce the costs to small business, it must include a clear explanation of why that is the case in the SBEIS.

### **What should the agency include in its rule making record?**

To minimize risk of a challenge to the adequacy of the SBEIS, the agency’s rule making file should document the basis for the agency’s decisions. For a rule that is exempt from the SBEIS requirement, the agency should document which statutory exemption applies. If the agency is adopting a significant legislative rule and chooses not to prepare an SBEIS, the agency should ensure its record states how the analysis prepared for the rule met the SBEIS requirements. If the agency concludes the rule will not impact small businesses, it should consider documenting the research it conducted and the basis for its conclusion. When the agency prepares an SBEIS, it should document which method it used to provide notice to small businesses under [RCW 19.85.070](#). Agencies which receive comments on a preliminary SBEIS or on the SBEIS may want to consider including a response in its record to demonstrate the agency considered the comments.

### **What challenges can be made to the rule based on the SBEIS?**

To challenge the validity of a rule or the process used to adopt it, a case could be brought in the Thurston County Superior Court under [RCW 34.05.570\(2\)](#). No cases presently

exist where a court has invalidated an agency rule for deficiencies in the SBEIS or for failure to prepare an SBEIS, but the failure to conduct a full and complete analysis leaves the rule open to potential challenge. This is why agency documentation of its compliance with the SBEIS process is so important. It is less clear whether a rule can be challenged if a party disagrees with the outcome of the analysis or disagrees with the measures the agency took to mitigate impacts to small business. In such a circumstance, the challenger would face a very high burden to convince a court to set aside the agency's rule. While the risk of facing a legal challenge to an SBEIS is small, agencies can mitigate that risk by preparing a thoughtful and complete SBEIS and rulemaking file.

In addition, the agency also must prepare an SBEIS if the Joint Administrative Rules Review Committee requests the statement even if the agency determines that it is not required. [RCW 19.85.030\(1\)](#). SBEIS are also subject to selective review by the Joint Administrative Rules Review Committee or any person affected by the rule may petition for review by the Committee. [RCW 19.85.030\(6\)](#).