

# Guidelines for Agency Regulatory Statements Required under the Regulatory Flexibility Act

## Regulatory Flexibility Analysis and Impact Statement Guidelines for State Agencies, Boards, and Commissions

For Regulations Affecting Small Businesses or Individuals per the Regulatory Transparency and Accountability Acts of 2015

### Introduction

Beginning January 1, 2016, agencies submitting proposed new or amended regulations that affect small businesses or individuals are required, under the new Regulatory Transparency and Accountability Acts of 2015 (see 80 *Del. Laws*, c. 112 and 113), to submit a Regulatory Flexibility Analysis (RFA) and a Regulatory Impact Statement (RIS) with the proposed regulation to the Registrar of Regulations (see 29 **Del.C.** Ch. 104). For agencies proposing amendments to existing regulations, the promulgating agency shall only be required to complete the RFA and RIS for the proposed amended portion of the existing regulation, and not for the entire existing regulation.

The Acts require the Office of Management and Budget (OMB) to adopt and publish guidelines to assist state agencies in preparing the statements required by the Acts. These guidelines have been prepared by OMB, the Department of State, and the Registrar of Regulations in consultation with the Department of Justice and a variety of regulatory agencies that issue state regulations.

The guidelines are intended to clarify the requirements contained in the Acts as well as provide state agencies with a specific form and general format for preparing and publishing the RFA and RIS. The form is also intended to benefit the small businesses and individuals impacted by proposed regulations by ensuring a reasonable level of consistency in the formatting of RFAs and RISs across different agencies and regulations. State agencies are encouraged to widely disseminate proposed regulations and any accompanying RFAs and RISs in an effort to reach impacted citizens and interest groups. Citizens and interest groups are encouraged to subscribe to receive proposed regulations from agencies by selecting “Subscription Services” on the Delaware Register of Regulations website and to visit the online Delaware Public Meeting calendar for notices of agency meetings and regulatory hearings. Proposed regulations are held open for public comment for a minimum of 30 days after a proposal is published in the Register of Regulations.

### Definitions

“Small business” means any not-for-profit enterprise, sheltered workshop, or business enterprise which is engaged in any phase of manufacturing, agricultural production or personal service, regardless of the form of its organization, when such enterprise or workshop employs fewer than 50 persons, has gross receipts of less than \$10,000,000 and is not owned, operated or controlled by another business enterprise.

To meet the definition of “small business” there are three components:

1. A not for profit enterprise, sheltered workshop, or business enterprise engaged in manufacturing, agricultural production, or personal service regardless of form of organization; and
2. Employs fewer than 50 persons AND has gross receipts of less than \$10M; and
3. Is not owned, operated, or controlled by another business enterprise (note: the owner controller entity is not limited by size or receipts)

A “personal service” is generally construed to mean the rendering of a service to the public, whether by an individual or a legal entity, that requires a license or other legal authorization.

“Individual” means any natural person, including any sole proprietorship. The term “individual” does not include any natural person affected by a regulation in his/her capacity as an officer, director, or employee of an organization that is not a “small business”; e.g. the CEO of a large business.

*Agencies, Boards, and Commissions: please fill out this form when proposing new or amended regulations for the purpose of informing the public and business community. All proposed regulations, even if an exemption applies, must have this form attached when submitting to the Registrar of Regulations.*

Date \_\_\_\_\_ Agency \_\_\_\_\_ Division/Office \_\_\_\_\_

Contact Name \_\_\_\_\_

Contact Email (or mailing address for comments) \_\_\_\_\_

Regulation # \_\_\_\_\_ Title \_\_\_\_\_

## Exemptions

All proposed regulations, whether new or amended, must have an accompanying RFA and RIS to be published by the Registrar of Regulations as part of the notice of proposal, unless exempted. The General Assembly has provided exemptions from the requirement to prepare an RFA and RIS for certain types of regulations. If the agency, board, or commission is claiming an exemption, please still include the RFA and RIS form with the proposed regulation. To claim an exemption, complete the beginning contact information, and then check the appropriate reason why the exemption applies. If the agency, board, or commission is claiming an exemption, the remainder of the RFA and RIS form is not required to be completed.

Under the statute, there are two categories of exemptions:

- Exemption A: “This proposed regulation is not subject to Chapter 104, Title 29 of the Delaware Code, because it will not apply to small businesses or individuals at all.”
- Exemption B: “The agency, board, or commission is exempt from completing the RFA and Impact Statement due to the nature of the proposed regulation.”

If the agency, board, or commission is claiming an exemption, then choose either Exemption A or Exemption B.

Exemption A does not require further clarification.

Exemption B requires further clarification.

It is possible for a proposed regulation to meet the conditions of both Exemption A and Exemption B. However, agencies are encouraged to check only A or B, not both.

*Exemption A:* This proposed regulation is **not subject to Chapter 104, Title 29 of the Delaware Code**, because it will not apply to small businesses or individuals at all.

**Discussion:** If Exemption A is checked, then the agency is asserting that the proposed regulation does not apply to any persons that meet the definition of “small business” or “individuals”. For example, a proposed regulation that applies to governmental entities only, and does not impact any small businesses or individuals would not be subject to the RFA or RIS section of the Delaware Code.

- Exemption B*: The agency, board, or commission is exempt from completing the RFA and Impact Statement due to the nature of the proposed regulation.

**Discussion: If Exemption B is checked, the agency must also further clarify the nature of the proposed regulation by choosing one exemption that best fits from the list of subgroup options that follows (B1, B2, B3, B4, or B5):**

Choose the reason for exemption:

- B1*. This proposed regulation is not substantially likely to impose additional costs or burdens upon individuals and/or small businesses. Explain this conclusion:

**Discussion: If the B1 exemption is selected, the agency must explain how it arrived at the conclusion that the regulation is not likely to impose additional costs or burdens upon small businesses or individuals.**

- B2*. This is an emergency regulation pursuant to **29 Del.C. §10119**.

**Discussion: Emergency regulations are exempt, even if they affect small business-es or individuals. Such regulations must qualify as emergency regulations under the Administrative Procedures Act.**

- B3*. This proposed regulation is exempt from the procedural requirements of the Administrative Procedures Act, **29 Del.C. §10113(b)**. Choose which reason:

- B3a*. Descriptions of agency organization, operations and procedures for obtaining information
- B3b*. Rules of practice and procedure used by the agency
- B3c*. Delegations of authority to subordinates
- B3d*. Nonsubstantive changes in existing regulations to alter style or form or to correct technical errors
- B3e*. Amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations
- B3f*. Codifications of existing agency or judicial principles of decision derived from previous decisions and rulings

**Discussion: Certain regulations are exempt from the procedural requirements of the Administrative Procedures Act pursuant to 29 Del.C. §10113(b). An agency, board, or commission may determine that one or more of the exemptions set forth above apply. If the B3 exemption is chosen, the agency, board, or commission must select the statutory reason (B3a, B3b, B3c. etc.).**

- B4. This proposed regulation defines standard of conduct or qualifications of individuals applying for licensure or as licensed professionals. Identify which professional license or professional qualification this would apply to:

**Discussion: Regulations dealing solely with standards for the licensing of professionals are exempt. Standards and procedures for licensing and qualifications for various professions and occupations are found throughout the Delaware Code, and many are found in Title 24. It is important to note, that the B4 exemption may not be claimed if a proposed regulation would affect a business in ways other than standards for professional licensing qualification or certification. In such case, the agency, board, or commission would be required to prepare an RFA and RIS specific to how the aspects of the regulation unrelated to standards of conduct and qualifications of individuals impacts such small businesses.**

- B5. Regulations that are required by federal law and/or have already complied with the federal Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. *(If this is checked, the agency, board, or commission shall cite the federal law, regulation, directive, or guidance strictly mandating such state regulation and shall attach any applicable Federal RFA related to the regulation, if available. Attach the Federal RFA statement to this form, or provide the URL):*

**Discussion: Where a Federal RFA has been published related to a state regulation required by federal law, the agency, board, or commission may select this exemption, and no state RFA or RIS is required. Include the copy of the Federal RFA or provide a URL, for the purpose of informing the public and businesses as to where to find more information.**

Where no Federal RFA has been published related to a regulation required by Federal law, and where considering whether the B5 exemption may be used, it is important to distinguish between federally required specific regulation(s) or, a federal directive, that may be eligible for this exemption, versus general regulatory authority which may not be eligible for this exemption.

In the case of federally required specific regulations, agencies may receive guidance from their federal counterparts that a specific regulation or amendment to an existing regulation is required to be promulgated by the state agency, board, or commission to remain in compliance with the requirements of the federal program. The agency, board, or commission may be given flexibility to alter the substance of the proposed regulation. These regulations or amendments are exempt from the requirements of the RFA and RIS. If claiming this exemption, an agency, board, or commission should discuss and cite (if applicable) the specific federal requirement prompting the promulgation of the state regulation or amendment, and why this exemption should apply.

Other regulations may be promulgated pursuant to general regulatory authority authorized by the federal government, and promulgation of regulation by the state agency, board or commission is not mandatory. State agencies, boards, and commissions are given substantial flexibility to compose and promulgate these regulations. These regulations and any subsequent amendments are subject to the requirements of the RIS and RFA.

*End of Exemption Section*

## Regulatory Flexibility Analysis

State agencies, boards, and commissions proposing to adopt or amend a regulation that is substantially likely to impose additional costs or burdens upon individuals and/or small businesses shall consider, where **applicable, lawful, feasible and desirable**, the following methods of reducing the additional costs and burdens of proposed regulations **on individuals and small businesses**:

1. The establishment of less stringent compliance or reporting requirements;
2. The establishment of less stringent schedules or deadlines for compliance or reporting requirements;
3. The consolidation or simplification of compliance or reporting requirements;
4. The establishment of performance standards to replace design or operational standards required in the proposed regulation;
5. The exemption of certain individuals or small businesses from all or part of the requirements contained in the proposed regulation; and
6. Such other alternative regulatory methods that will accomplish the objectives of the proposed regulation while minimizing the adverse impact upon individuals and small businesses.

Explain whether each of the above methods would be applicable, lawful, feasible, and desirable to reduce the costs or burdens of the proposed regulation:

1. \_\_\_\_\_  
\_\_\_\_\_
2. \_\_\_\_\_  
\_\_\_\_\_
3. \_\_\_\_\_  
\_\_\_\_\_
4. \_\_\_\_\_  
\_\_\_\_\_
5. \_\_\_\_\_  
\_\_\_\_\_
6. \_\_\_\_\_  
\_\_\_\_\_

If the above RFA section does not address each of the six methods and there is not an exemption that applies, explain why the agency, board, or commission decided it was not applicable, lawful, feasible, and desirable to complete the RFA section above:

**The RFA is intended to show the public how the state agency, board, or commission made its determination that a regulation might impact small businesses or individuals. The RFA is required when the promulgating agency has determined that a proposed regulation is substantially likely to impose additional costs or burdens on small businesses and individual regulated parties. A best practice for agencies, boards, and commissions in determining whether a proposed regulation would impact small businesses or individuals, is to work with agency executive leadership and to consult with legal counsel when necessary.**

**Where such costs or burdens are anticipated, other alternatives should be considered, in terms of whether they are lawful, applicable, feasible, and desirable. The methods to consider are set forth below. In the response, explain the rationale and conclusions after the agency, board, or commission has considered each of these methods. In addition, address each method individually. It is important to consider methods that will accomplish the objectives of the proposed regulation while minimizing the adverse impact upon individuals and small businesses.**

*End of Regulatory Flexibility Analysis Section*

## Regulatory Impact Statement

Any agency, board, or commission that proposes to adopt or amend a regulation that is substantially likely to impose additional costs or burdens upon individuals and/or small businesses must submit the below Regulatory Impact Statement (RIS).

- Reference the statutory provision that allows for the adoption or amendment of the regulation and the statutory provisions that address the subject matter of the regulation. In addition, provide the URL to the specific section of the Delaware Code to allow the public easy access to view the provision.
  - Statutory Citation: \_\_\_\_\_
  - URL: \_\_\_\_\_
  - Subject Matter Statutory Citation: \_\_\_\_\_
  - URL: \_\_\_\_\_

**Discussion: If referencing specific citations in Delaware Code, include the citation and provide a URL to the relevant section or chapter of the Code.**

- Describe the purpose of the proposed regulation (what is the need for the proposed regulation?):

**Discussion: Include rationale for the need and purpose for the regulation. The response can include text from the preamble of the proposed regulation.**

- What are the anticipated benefits of the proposed regulation? (Describe the benefits that are expected to accrue as a result of the implemented regulation). Please quantify such benefits, as feasible:

**Discussion: Explain any anticipated benefits, even if they are qualitative rather than quantitative (public health, public safety, security, etc.).**

- Identify the types of individuals and/or small businesses that would be subject to compliance under the regulation:

**Discussion: “Types of individuals and or small businesses” means explaining which types of businesses (e.g. dry cleaners, salons, construction companies, etc.) or individuals. Estimate the number of businesses or individuals if this is available (e.g., there are over 3500 licensed food establishments operating in the State of Delaware, therefore if a regulation that affects all food establishments is proposed, you can estimate that 3500 businesses are affected by such a change).**



- Provide a **good-faith estimate** of the potential cost of compliance for individuals and/or small businesses, which at minimum shall include the projected reporting, recordkeeping, and other administrative costs required to comply with the proposed regulation. Use the below space for a free-text response (*Cost Estimate Option 1*) or, use the questionnaire below to guide the response (*Cost Estimate Option 2*):

**Discussion:** When estimating the cost of compliance for individuals and/or small businesses, absolute costs are not required; a general estimate or a range of costs will suffice. The intent of this question is not to define every possible cost, but rather to generally assess the types of costs, time, and materials that might be imposed on small businesses or individuals as a result of the implementation of the regulation. Questions the agency, board, or commission should ask when estimating the cost of compliance include:

- Does the regulation require capital costs (building costs, material costs, upgrades to property or structures, retrofitting of systems, etc.)?
- Does the regulation require additional recurring costs?
- Does the regulation require paperwork of any kind for the small business or individual? If so, is it ongoing reporting or one time? How long will the paperwork take (a general range of time)?
- Does the regulation require new or changed record keeping that will create new processes or change processes already in place for small businesses or individuals?
- Will the class of small businesses or individuals need to hire an outside professional to comply with the proposed regulation (such as an attorney, accountant, tax advisor, environmental consultant, engineering firm, etc.)? If an outside professional is needed, how many hours will they be needed to assist? Will retaining or hiring the outside professional be on an ongoing basis?
- Does the regulation require small businesses to purchase goods or services that are unusual or not commercially reasonable?
- Does the regulation require that small businesses exceed commercially reasonable data storage and transmission standards?

There are two options for completing the cost estimate section of the RIS:

- **Cost Estimate Option 1:** free-text response. The agency, board, or commission may choose to address this question via a free-text response. At a minimum, this response shall address the projected reporting, recordkeeping, and other administrative costs required to comply with the proposed regulation.
- **Cost Estimate Option 2:** series of questions to guide the response along with a free-text response. Use the following questions to guide the response. The free-text section is also required when electing this option (see #17 in the chart below).

*Cost Estimate Option 1: (Free text)*

	<b>Cost Estimate Option 2</b>	<b>Yes</b>	<b>No</b>	<b>Unknown</b>
1	Is this regulation being proposed to implement a state or federal program that provides funds to Delaware?			
2	If this regulation is not implemented, will individuals, businesses, or programs lose federal funding?			
3	Does this regulation implement a plan that has already been approved by the federal government, after an opportunity for public comment?			
4	Does this regulation follow industry standards and best practices?			
5	Are there potential costs in not establishing these standards?			
6	Does the regulation require capital costs (building costs, material costs, upgrades to property or structures, retrofitting of systems, <i>etc.</i> )?			
7	Does the regulation require additional recurring costs on small businesses or individuals?			
8	Does the regulation impose additional administrative burden for a small business or individual?			
8a	If answering yes to #8, is it ongoing reporting or one time? (Choose answer) <div style="display: flex; justify-content: space-around; width: 100%;"> <span>Ongoing</span> <span>One Time</span> <span>Unknown</span> </div>			
8b	If answering yes to #8, generally, how much administrative effort will be required to comply with the regulation? <div style="display: flex; justify-content: space-around; width: 100%;"> <span>Large Amount</span> <span>Small Amount</span> <span>Unknown</span> </div>			
9	Does the regulation require new or changed record keeping that will create new processes or change processes already in place for small businesses or individuals?			

	<b><i>Cost Estimate Option 2 (continued)</i></b>	<b>Yes</b>	<b>No</b>	<b>Unknown</b>
10	Would a small businesses or individual be required to hire an outside professional to comply with the proposed regulation (such as an attorney, accountant, tax advisor, environmental consultant, engineering firm, etc.)?			
10a	If answering yes to #10, estimate how many hours an outside professional may be needed to assist			
10b	If answering yes to #10, will a small business or individual be required to retain the services of the outside professional on an ongoing basis?			
11	Does the regulation require small businesses to purchase goods or services that are unusual or not commercially reasonable?			
12	Does the regulation require that small businesses exceed commercially reasonable data storage and transmission standards?			
13	Will small businesses have to hire additional employees in order to comply with the proposed regulation?			
14	Does the regulation require small businesses to cooperate with audits, inspections, or other regulatory enforcement activities?			
15	Does the regulation have the effect of creating additional licenses, taxes and/or fees for small businesses?			
16	Does the regulation require small businesses to obtain additional education to keep up to date with regulatory requirements?			
17	Please further explain any additional costs or burdens, which at a minimum shall include the projected reporting, recordkeeping, and other administrative costs required to comply with the proposed regulation.			

- Provide a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation, and why these methods were not preferred to a regulation:

**Discussion: This question is similar to the Regulatory Flexibility Analysis, where the agency, board, or commission explained each alternative method and what the conclusions were after considering each method.**

- *(Optional)* Estimate the amount of agency, board, or commission staff hours it took to prepare this RFA and RIS statement:

**Discussion: This question is optional. If the agency, board, or commission chooses to estimate the amount of time it spent on preparing this statement, please include that information here.**

- *(Optional)* Agencies are encouraged to list trade or industry groups, small businesses, or other stakeholders such as currently regulated parties that were consulted by the agency, board, or commission in preparing this RFA and RIS. The agency, board, or commission is further encouraged to send them a copy of the RFA and RIS upon completion:

**Discussion: This question is optional. The agency, board, or commission is encouraged to list stakeholders who were consulted in preparing this statement here.**

*End of Regulatory Impact Statement Section*