

Regulatory Flexibility Analysis and Impact Statement Form

For Proposed New and Amended Regulations Affecting Small Businesses or Individuals

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**).

This RFA and RIS form is 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 proposing new or amended regulations that are substantially likely to impose additional costs or burdens on small businesses¹ or individuals² must submit a Regulatory Flexibility Analysis (RFA) **and** a Regulatory Impact Statement (RIS) to the Registrar of Regulations, with the proposed regulation. 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.

What is a Regulatory Flexibility Analysis (RFA)?

In each RFA, an agency must consider, where applicable, lawful, feasible and desirable, specific methods of reducing the burdens of the regulation on individuals and/or small businesses, including: (1) establishing less stringent requirements and deadlines; (2) establishing performance standards to replace design standards; (3) exempting individuals and small businesses from all or part of the regulation; and (4) examining other ways to accomplish the regulation's purpose, while minimizing the impact upon individuals and/or small businesses.

What is a Regulatory Impact Statement (RIS)?

Among other things, each RIS must (1) describe the purpose of the regulation; (2) identify the individuals and/or small businesses subject to it; (3) provide an estimate of the potential costs of compliance; and (4) describe any less intrusive or less costly alternative methods of achieving the purpose of the regulation. In addition, the Act further enhances transparency by requiring the Registrar of Regulations to transmit regulatory impact statements to the appropriate standing committee of the General Assembly.

¹"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.

²"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

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.

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:

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

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

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:

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):

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:

End of Regulatory Flexibility Analysis Section

- 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*):

Cost Estimate Option 1:

| | Cost Estimate Option 2 | Yes | No | Unknown |
|----|--|------------|-----------|----------------|
| 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, etc.)? | | | |
| 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) Ongoing One Time Unknown | | | |
| 8b | If answering yes to #8, generally, how much administrative effort will be required to comply with the regulation? Large Amount Small Amount Unknown | | | |
| 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? | | | |

| | <i>Cost Estimate Option 2 (continued)</i> | Yes | No | Unknown |
|-----|---|------------|-----------|----------------|
| 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:

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

- *(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:

End of Regulatory Impact Statement Section

requirements in a permit via permit reopening. *See, e.g.*, 40 CFR 70.7(f)(1)(i). As explained in the 2016 proposal, the EPA expects that any necessary permit changes should occur in the ordinary course of business. For example, these revisions could be made when a state processes periodic permit renewals or other permit revisions. Additionally, states may utilize other existing mechanisms to effectuate these permit changes, consistent with each state's approved part 70 program regulations. For example, the EPA does not believe that a permit revision to simply remove a discretionary affirmative defense provision would require significant modification procedures, and permitting authorities may be able to process these changes as minor modifications. Also, in certain circumstances, it may be possible for some permit changes to be made using administrative permit amendment procedures, provided that the removal of the title V emergency provisions would satisfy one of the specific circumstances contemplated within each state's approved part 70 program regulations governing administrative amendments.⁶⁴ States may also be able to utilize other streamlined mechanisms for processing multiple permit revisions at once.

Regarding the timing of such permit changes, for state or tribal permitting agencies implementing the federal title V program or part 70 programs that directly rely on 40 CFR 70.6(g), any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should occur promptly after the effective date of this final rule. For states implementing part 70 programs that contain state affirmative defense provisions, any permit revisions necessary to remove impermissible affirmative defense provisions from individual permits should similarly occur promptly after the EPA's approval of the necessary part 70 program revisions.⁶⁵ Generally, states would be expected to remove title V affirmative defense provisions from permits (or clearly label remaining provisions as state-only) at the earliest possible occasion when each permit is next

reviewed by the permitting authority, such as the next permit renewal or unrelated permit revision. Thus, at the latest, states would be expected to remove affirmative defense provisions from individual permits by the next periodic permit renewal that occurs following either (1) the effective date of this rule (for permit terms based on 40 CFR 70.6(g) or 71.6(g)) or (2) the EPA's approval of state program revisions (for permit terms based on a state affirmative defense provision).

It is important to note that while the EPA is not currently establishing any independent timeline for states to remove these provisions from individual permits, the EPA encourages states to begin removing these provisions from permits prior to the completion of any necessary part 70 program revisions. States may also find it convenient to remove these provisions in the course of completing revisions to permits related to the implementation of the 2015 SSM SIP Action.

3. EPA Objections to Permits

Comment: Some commenters urged the EPA to make clear that the agency will object to title V permits issued after the effective date of the final rule that incorporate or refer to title V affirmative defense provisions.

Response: As previously noted, the EPA expects that any necessary permit revisions will generally occur following program revisions to remove the underlying affirmative defense provisions from each permitting authority's part 70 program regulations. Therefore, although the EPA encourages states to remove title V emergency affirmative defense provisions from operating permits at the earliest possible opportunity (including during permit renewals that occur before program revisions take place), the EPA generally does not anticipate objecting to title V permits that contain emergency affirmative defense provisions during the Agency's 45-day review period until after the relevant permitting authority has made necessary corrections to its approved part 70 program. The Administrator will evaluate any petitions to object to proposed title V operating permits on a case-by-case basis. Statements in this document are not intended to prejudice such petition responses.

As noted in section IV.B.2. of this document, in those state or tribal areas that implement the federal title V program (in 40 CFR part 71) or where the operating permit program directly relies on or incorporates by reference 40 CFR 70.6(g), the EPA expects states to begin the process of removing

impermissible affirmative defense provisions from operating permits promptly after the effective date of this final rule, as such permit revisions would not need to await state program revisions.

V. Statutory and Executive Orders Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060–0243 (for part 70 state operating permit programs) and 2060–0336 (for part 71 federal operating permit program). In this action, the EPA is removing certain provisions from the EPA's regulations, which should ultimately result in the removal of similar provisions from state, local, and tribal operating permit programs and individual permits. Consequently, some states will be required to submit program revisions to the EPA in order to remove affirmative defense provisions from their EPA-approved part 70 programs, and will eventually be required to remove provisions from individual permits. However, this action does not involve any requests for information, recordkeeping or reporting requirements, or other requirements that would constitute an information collection under the PRA.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. Entities potentially affected directly by this proposal include state, local, and tribal governments, and none of these governments would qualify as a small entity. Other types of small entities, including stationary sources of air pollution, are not directly subject to the requirements of this action.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or

⁶⁴ In addition to specifying various types of permit changes for which the administrative amendment process would be appropriate, the EPA's regulations in 40 CFR 70.7(d) also provide states with the opportunity to specify additional criteria as part of their part 70 programs, if the EPA Administrator determines that those situations are similar to those specified in 40 CFR 70.7(d).

⁶⁵ 81 FR 38645, 38653, n. 35 (June 14, 2016) (acknowledging limits on state discretion where currently-approved state program regulations require inclusion of emergency affirmative defense provisions in state-issued title V permits).