

# How to Determine If A Small Business Economic Impact Statement Is Required

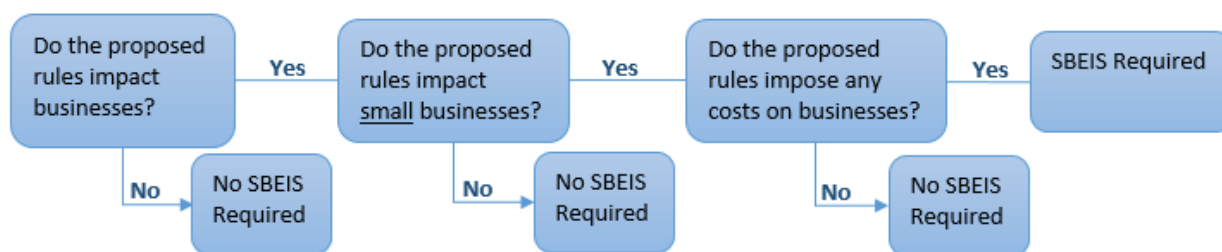
In adoption of a rule under the Administrative Procedure Act, chapter [34.05 RCW](#), the Department of Health, including its health profession boards and commissions, or the State Board of Health may be required to prepare a significant legislative rule analysis (SA) and/or a small business economic impact statement (SBEIS).

It is important to note that not all proposed rules require a SBEIS. Certain exemptions may apply and eliminate the need for a SBEIS. Typically a SBEIS will not be required unless an SA is also required. The SA should be drafted first; the results can then be used to determine if a SBEIS is required. The department has templates for both the SA ([SA Template](#)) and SBEIS ([SBEIS Template](#)) which need to be used when completing the analyses.

## Once the SA is drafted the first and most important question is “Do we need to have a SBEIS for the rule package?”

The legislature finds that administrative rules adopted by state agencies can have a disproportionate impact on the state's small businesses because of the size of those businesses. This disproportionate impact reduces competition, innovation, employment, and new employment opportunities, and threatens the very existence of some small businesses. The legislature therefore enacted the Regulatory Fairness Act, chapter [19.85 RCW](#), with the intent of reducing the disproportionate impact of state administrative rules on small business. The Regulatory Fairness Act requires agencies that adopted rules under chapter 34.05 RCW to prepare a SBEIS if the proposed rule will impose more than minor costs on businesses in an industry, or if requested to do so by the joint administrative rules review committee.

## What to ask when determining if a SBEIS is required.



## **When determining if a SBEIS is required the first question to ask is, “Do the proposed rules impact businesses?”**

It is important to note that the definition of business can play an important role in deciding to prepare the SBEIS.

Some proposed rules apply to individuals and not businesses. An individual’s license is not considered a business, and therefore no SBEIS is required. If the answer is “no” the proposed rule doesn’t impact businesses, then a SBEIS is not required. The “no” box on the CR102 form under the section titled **“COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES”** is checked and an explanation is provided. ([Example, WSR 18-20-122](#)) If the answer is yes, further analysis is needed to determine whether a SBEIS is required.

## **The second question to ask when determining if a SBEIS is required is “Does the proposed rule impact small businesses?”**

“Small business” is defined as any business entity, including a sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees. If the answer is “no” the proposed rules do not impact small businesses, then under RCW 19.85.025(4) a SBEIS is not required. The “no” box on the CR102 form under the section titled **“COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES”** is checked and an explanation is provided. The explanation for this exemption could be *“The proposed rules do not impact small businesses. The proposed rules only impact businesses with more than 50 employees.”*

## **If the proposed rule impacts small businesses then the third question to ask when determining if a SBEIS is required is “Does the proposed rule impose any costs on businesses?”**

If the answer is “the proposed rule does not impose any costs on businesses” or if there may be a cost savings then the “no” box on the CR102 form under the section titled **“COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES”** is checked and an explanation is provided. ([Example, WSR 19-14-102](#))

*If you are unable to answer “no” to any of the previous three questions and the proposed rule impacts small businesses, then we must determine how the proposed rule impacts those businesses.*

***Does the proposed rule impact businesses, either small or a combination of large and small businesses?*** If the proposed rules impact businesses, either small or a combination of large and small, then compliance costs of the rule is an important factor in determining the need for a SBEIS. We can estimate the compliance costs of the rule in the process of preparing the SA for the proposed rule.

A SA is a cost-benefit analysis comparing the costs and benefits of the proposed rule. The proposed rule is supposed to change an existing rule or current situation. The change may impose costs to businesses since it may require new tools, equipment, education or training. The proposed rule aims to improve existing health or safety conditions for the people of Washington State. The cost analysis done for the SA should be used in the SBEIS.

The first step in preparing a SA is to estimate the compliance costs of the proposed rule. Compliance costs are the total annual costs of the proposed rule as applies to businesses in the industry. We need to consider changes that are required by the proposed rule and the minimum costs associated with these changes, including but not limited to a new tool, new equipment, different kinds of education and training, and administrative costs.

Some proposed rules or portions of the proposed rules may or may not bear costs or may be exempt from the SA, cost-benefit analysis. These are considered non-significant. These rule sections should be identified in the SA. These same exemptions may apply to the SBEIS. The table below shows the correlation between the citations:

#### Non-Significant or Exempt Rule Identification

Exemptions for SA	Exemptions for SBEIS
RCW 34.05.328(5)(b)(ii) – Internal government operations.	RCW 34.05.310 (4)(b) – Internal government operations. The proposed rule relates only to internal governmental operations that are not subject to violation by a nongovernment party.
RCW 34.05.328(5)(b)(iii) - Incorporation by reference.	RCW 34.05.310 (4)(c) – Incorporation by reference. The proposed rule adopts or incorporates by reference without material change federal statutes or regulations, the rules of other Washington state agencies, or national consensus codes that generally establish industry standards.
RCW 34.05.328(5)(b)(iv) - Correct or clarify language.	RCW 34.05.310 (4)(d) – Correct or clarify language. The proposed rule only corrects typographical errors, makes address or name changes or clarifies the language of a rule without changing its effect.
RCW 34.05.328(5)(b)(v) - Dictated by statute.	RCW 34.05.310 (4)(e) – Dictated by statute. The content of the proposed rules is explicitly and specifically dictated by statute.
RCW 34.05.328(5)(b)(vi) - Set or adjust fees.	RCW 34.05.310 (4)(f) – Set or adjust fees. The proposed rules set or adjust fees or rates pursuant to legislative standards fees.
RCW 34.05.328(5)(c)(i) A "procedural rule" is a rule that adopts, amends, or repeals (A) any procedure, practice, or requirement relating to any agency hearings; (B) any filing or related process requirement for making application to an agency for a license or permit; or (C) any policy statement pertaining to the consistent internal operations of an agency.	RCW 34.05.310 (4)(g) – Relating to agency hearings; or process requirement for applying to an agency for a license or permit. The proposed rules adopt, amend, or repeal a procedure, practice or requirement relating to agency hearings; or adopt, amend, or repeal a filing or related process requirement for applying to an agency for a license or permit.

The SBEIS section of the CR102 form titled **“Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement”** requires identification of these exempt (non-significant) rules and identification of which exemption is associated with the rule. Below is an example of rule sections and the exemptions that they qualify under:

**Some Examples of Non-Significant or Exempt Rule Identification**

	Rule Section	Section Title	Subject of Rulemaking	Reason
1	WAC 246-290-638 (WSR 19-04-022)	Analytical requirements	Amending the existing rules to adopt EPA-approved methods by reference for turbidimeters instead of listing each EPA-approved turbidimeter in the rule section	Exempt from the SA under RCW 34.05.328(5)(b)(iii) and the SBEIS under RCW 19.85.061 because this rule making is being adopted solely to conform and/or comply with federal statute or regulations.
2	WAC 246-851-505 (WSR 18-03-153)	Temporary practice permit for military spouse eligibility and issuance	Adopting the process established in WAC 246-12-051. Allows a military spouse or state-registered domestic partner to work in the full scope of their profession under the temporary permit while completing any specific additional requirements in WA not related to a profession’s training or practice standards.	Exempt from the SA under RCW 34.05.328(5)(b)(iii) and from the SBEIS under RCW 34.05.310(4)(c) because the rule incorporates by reference another state rule that has already been analyzed under previous rulemaking.
3	WAC 246-841-535 (WSR 15-09-087)	Definitions	Clarifies the meaning of common terms used throughout the rules.	Exempt from the SA under RCW 34.05.328(5)(b)(iv) and from the SBEIS under RCW 34.05.310 (4)(d) because the proposed rule language clarifies terms used throughout the rule language without changing its effect of the rule.

	Rule Section	Section Title	Subject of Rulemaking	Reason
4	WAC 246-71-010, WAC 246-71-020, WAC 246-71-030, and WAC 246-71-040 (WSR 19-16-148)	Definitions, adding qualifying patients and designated providers to the database, renewing qualifying patients and designated providers in the database, and requirements for recognition cards.	The proposed rule amendments align existing rules with the law as established by ESHB 1094 (chapter 203, Laws of 2019)	Exempt from the SA under RCW 34.05.328(5)(b)(v) and from the SBEIS under RCW 34.05.310(4)(e) because proposed changes are dictated by statute without option.
5	Chapter 246-10 WAC (WSR 18-06-049)	Administrative Procedure's Adjudicative Proceedings	By definition the proposed rules are considered "procedural rules" and provide a process and procedure relating to agency hearings.	Exempt from the SA under RCW 34.05.328(5)(c)(i) and from the SBEIS under RCW 34.05.310(4)(g) because the proposed rules establish process requirements for applying to an agency for a license or permit.

Note: the following exemptions typically do not apply to the Department of Health, the health profession boards and commissions, or State Board of Health rules:

- The rule proposal, or portions of the proposal, is exempt because the agency has completed the pilot rule process defined by RCW 34.05.313 before filing the notice of this proposed rule. *(The department does not have an approved process for pilot rulemaking).*
- The rule proposal, or portions of the proposal, is exempt under the provisions of RCW 15.65.570(2) because it was adopted by a referendum.

Because a proposed rule may consist of both significant and exempt rule sections, the next question that should be asked is...

***“Do all of the proposed rules need to be analyzed?” or “Are any of the proposed rules exempt from analysis?”***

The answer to this question should be obtained from the SA.

**What to do if all of the proposed rules are exempt.** If the answer is all of the proposed rules are exempt under any of the qualifying exemptions, then the proposed rules are exempt from the Regulatory Fairness Act, chapter [19.85 RCW](#). On the CR 102 form under **“Regulatory Fairness Act Cost Consideration for Small Business Economic**

**Impact statement.”** Check all of the exemptions that apply and in the Explanation Section list which rule sections that apply to each exemption. ([Example, WSR 18-22-115](#))

**What to do if only some of the proposed rules are exempt.** When some of the proposed rules are exempt under the qualifying exemptions and some of the proposed rules are not, only analyze the portions of the proposed rules that are **not exempt**. Both sections of the form titled **“Regulatory Fairness Act Cost Considerations for a Small Business Economic Impact Statement”** must be completed.

For the proposed rules that are exempt under the qualifying exemptions, on the CR 102 form under **“Regulatory Fairness Act Cost Consideration for Small Business Economic Impact statement”** check all of the exemptions that apply and in the Explanation Section list which rule sections that apply to each exemption.

**Minor Cost Threshold.** The estimated total annual compliance costs of the proposed rules that need to be analyzed, determined when drafting the SA, should be used to determine if we need to complete a SBEIS for the rule package. We need to estimate a quantitative measure of costs when possible. It is worth noting that a number of new requirements may impose minimal costs but adding up these minimal costs at the end may become a non-negligible part of the total costs of the proposed rule. We add up these individual cost components to estimate the total compliance costs of the rule. Note, the estimated benefits that are determined as part of the SA are not a required part of the SBEIS.

Public meetings can be a good source for cost estimation. You can also survey all stake holders/businesses or a fair representative of them. A survey can be an email survey to all, or an email, phone or direct mail survey to representative sample of the industry. You can research websites, or you can contact suppliers of tools or/and equipment, training provider schools or institutions, and others to obtain costs estimates.

The total compliance costs of the rule will need to be compared with the industry minor cost threshold in order to decide if the rule package requires a SBEIS. The general rule is we prepare SBEIS if the annual compliance costs of the proposed rule to impacted businesses is more than minor costs threshold to a representative business in those industries. We use annual sales and/or annual payroll data produced and published by Bureau of Census for [“North America Industry Code System” \(NAICS\)](#) for industries.

Having estimated the total compliance costs of the proposed rule, we compare this total annual compliance costs of the proposed rule with the minor cost threshold.

Industry minor cost threshold can be calculated in two ways. Revenue/sales based threshold is 0.03% of total annual sales and payroll based threshold is 1% of total annual payroll for a representative establishment in an industry. You can determine the NAICS using your clear definition of the impacted industries. The Governor’s Office of Regulatory Innovation and Assistance maintains a searchable database and has a simple [minor-cost threshold calculator](#) that can assist in preparing cost calculations.

As mentioned earlier, the non-significant components of the rule (WACs) that may or may not bear costs are exempt from the analysis. Only the significant components of the rule require an analysis. Depending upon existence and amount of compliance costs the following situations may arise:

Significant components of the rule impose costs and the total annual costs of the rule is less than the minor threshold costs for the industry. If this is the case then we don't need to have a SBEIS for the rule package. The "no" box on the CR102 form under the section titled **"COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES"** is checked and an explanation must be provided. ([Example, WSR 17-18-094](#))

Significant components of the rule impose costs and the total annual costs of the rule is more than the minor threshold costs for the industry. If this is the case then we need to have a SBEIS for the rule package. The "yes" box on the CR102 form under **"COMPLETE THIS SECTION ONLY IF NO EXEMPTION APPLIES"** is checked and the analysis is provide on the form. The [SBEIS template](#) should be used to draft the analysis and later cut and pasted onto the CR102 form. ([Example, WSR 18-21-138](#))

The Governor's Office of Regulatory Innovation and Assistance has developed a [decision tree](#) that can give you a visual of the process.