

# **REPORT TO THE LEGISLATURE**

## **State Agency Audits, Inspections, and Enforcement Actions Affecting Small Businesses in Washington State**

**HB 1352 (2017 Regular Session)**

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## **I. Executive Summary**

This Report was developed in response to House Bill 1352 adopted by the Washington State Legislature in 2017. That legislation requested information regarding: the authorities and responsibilities of six state agencies; the rights and protections provided to small businesses subject to inspection, audit or enforcement action by those agencies; the way in which agencies communicate information about those rights or protections to business owners prior to or at the time of agency action; and recommended steps to improve those rights or protections and/or access to timely information about them. The six agencies covered by House Bill 1352 are the Department of Agriculture, Department of Ecology, Employment Security Department, Department of Labor and Industries, Department of Revenue, and the State Fire Marshal.

As set forth in HB 1352, the Attorney General's Office has reviewed and summarized the existing legal rights and protections afforded to small business owners selected for inspection, audit, or enforcement action by the six named state agencies. There are well-defined constitutional and statutory provisions limiting state action and protecting the rights of regulated entities to challenge unlawful or unauthorized state action. General protections in this area are often supplemented by more specific governing law and process under which state agencies implement their individual authorities and programs.

The roles and authorities of the six agencies named in HB 1352 are varied and widespread. For example, the Department of Revenue oversees approximately 60 different taxes and collects more than 90 percent of the state General Fund tax revenues. The Department of Agriculture implements approximately 78 different programs ranging from pesticide application to livestock transportation, and from protections in egg handling to safeguards for facilities slaughtering meat. The process and procedures for regulating the wide variety of activities covered by the six agencies included in HB 1352 are as varied as the programs implemented. Nonetheless, each of the agencies and their actions are governed by the robust, well-defined legal rights and protections afforded small businesses and other regulated entities under the existing constitutions, laws and other guiding authorities. There are existing legal tools and processes available to small businesses and other entities to challenge agency action when necessary.

The Legislature and the executive branch have taken many steps to streamline the regulatory environment and improve the overall business climate in Washington State. At the same time, policymakers have worked to ensure that procedural and substantive rights and protections are afforded and communicated to parties selected for agency audit, inspection or enforcement action. Much of this effort has been directed at assisting small businesses. Infrastructure such as the Office of Regulatory Innovation and Assistance, the Small Business Liaison Team, and the Washington Business Hub, has been created to centralize and coordinate the efforts of regulatory agencies, and provide a portal for businesses looking for help or information.

Individually, state agencies have simplified thousands of state regulations and improved their practices and policies. Agencies have created websites and produced outreach materials to better communicate their requirements and regulatory expectations to small businesses and other regulated entities. Agencies have taken a deliberate approach to helping businesses understand

their rights in the face of agency action. Nevertheless, there is room for improvement. Consistent with the conclusions of regulatory reform performance reviews conducted by the State Auditor's Office, the Attorney General's Office has developed recommendations for steps to improve the communication of rights and protections provided to small business owners subject to agency audit, inspection, or enforcement action. Specifically, we recommend that steps be taken to further

1. Improve efforts to provide transparent, accessible information and assistance to operating businesses early in the process.
2. Improve efforts to share effective practices among agencies.
3. Expand the role of business associations and other groups in coordinating the sharing of information between small business owners and agencies.
4. Be deliberate about how "small business" is defined.
5. Consider targeted expansion of the use of special advocates or ombuds to help disseminate information and resolve noncompliance issues or disputes.

To achieve the highest potential for Washington's economy, regulated entities must have a clear understanding of their rights and their responsibilities. Washington's legislative and executive branches have undertaken significant efforts to reach this goal, but more can be done. Improvement will require cooperation and partnership between agencies and the business community, as well as continued support from policymakers.

## **II. Introduction**

As expressed in House Bill 1352,<sup>1</sup> the Washington State Legislature has determined that “the licensing and regulation of businesses and professions requires periodic inspections, audits, interviews, site visits, or other oversight measures to verify that licensing, permit, and other regulatory requirements are met.” The Legislature further found that “unnecessary costs and delays may occur when small business owners must seek outside counsel or other professional assistance to prepare for and participate in review and enforcement actions such as audits and inspections of their records, facilities, or job sites.” The Legislature reaffirmed prior findings that “small businesses are likely to bear a disproportionate share of regulatory costs and burdens, and that greater coordination on regulatory matters among agencies is a way to promote economic vitality and increase state program efficiency.”

Following from these findings, HB 1352 seeks to identify:

1. The rights or protections small business owners have when selected for audit, inspection, or other enforcement action by one of six designated state agencies (the Departments of Agriculture, Ecology, Employment Security, Labor & Industries, and Revenue, and the State Fire Marshal);
2. How the agencies communicate those rights or protections to business owners prior to or at the time of an agency action; and
3. Recommendations from the Attorney General’s Office for
  - a. Statutory, rule, policy, or other changes to identify, clarify, and harmonize, where practical, those rights or protections across agency programs; and
  - b. Methods to improve the notice of rights provided to small business owners selected for agency audit, inspection, or enforcement action.

### **A. What this Report Includes**

HB 1352 directs the Attorney General’s Office (AGO) to review the Administrative Procedure Act<sup>2</sup> and related administrative rules, case law, and similar statutes, to identify the existing rights or protections afforded to small business owners subject to agency inspection, audit, or enforcement action. That review is set out in the section below titled “Summary of Legal Rights and Protections Afforded to Small Business Owners Subject to Audit, Inspection or Enforcement Action by State Agencies.”

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<sup>1</sup> Laws of 2017, 65th Leg., Reg. Sess., ch. 243.

<sup>2</sup> [RCW 34.05](#).

HB 1352 also directs the six named agencies to each:

1. Provide information to the AGO identifying any provisions in their governing statutes, administrative rules, policy statements, guidance, or directives that list rights or protections afforded parties selected for inspection, audit, or other enforcement actions by that agency along with a copy or hyperlinks to the source material; and
2. Include a copy of or link to any statement of rights or similar materials the agency provides to small business owners in advance or at the time of audit, inspection, enforcement action, and appeal process.

Those submittals are included in the Appendix to this Report available at the following link: <http://www.atg.wa.gov/policy/HB1352>. The detailed information contained in the submittals is summarized in the section below titled “Overview of Governing Laws and Policy for Agency Audits, Inspections, or Enforcement Actions and Identification of Materials Provided by Agencies to Businesses.”

Finally, HB 1352 directs that as part of this Report, the AGO make recommendations for statutory, rule, policy, or other changes to identify, clarify, and harmonize where practical, the rights or protections afforded to parties subject to agency enforcement actions. Also requested were recommendations on methods to improve the notice of rights provided to small business owners subject to agency audit, inspection, or other enforcement actions. The methods identified are included in the “Recommendations” section below. As set forth in HB 1352, the participating agencies were given the opportunity to review and comment on the draft Recommendations. The consolidated agency response, transmitted from the Governor’s Office, is attached to this final Report, and was taken into account in finalizing this document.

## **B. What this Report Does Not Include**

HB 1352 and this Report focus on the authorities and activities of six state regulatory agencies. In 2011, at the start of what became a major, multi-year regulatory reform review and recommendation project, the Washington State Auditor’s Office (SAO) published an inventory identifying over 1100 business permits, licenses, and inspections administered by 26 Washington state regulatory agencies.<sup>3</sup> The authorities and activities of the agencies identified by the SAO but not named in HB 1352 were not explicitly taken into account in this Report.

HB 1352 directly excludes consideration of criminal investigations and prosecutions, and implicitly excludes actions by local government or those of the federal government. Although not covered here, businesses may be subject to inspection, audit, or enforcement action in all of those contexts, in which case they may have comparable or sometimes very different rights, protections, and responsibilities. Importantly, while the Report does not include federal action, the requirements of federally delegated or authorized programs, or federal law in general, quite

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<sup>3</sup> <http://www.sao.wa.gov/state/Documents/InventoryTable.pdf#search=regulatory%20reform>.

frequently affect state agencies' investigative and enforcement authorities and actions, including those of the six agencies named in HB 1352.

Finally, this Report does not have at its foundation the rigor, standards and practices underlying the performance reviews and audits conducted by the SAO. The work of the SAO has the underpinnings of statistical and empirical methods to gather evidence including surveys, focus groups, independent review of agency records and authorities, and information from their auditor counterparts around the country. These methods help ensure a solid basis for the analysis, findings and conclusions of the work of the SAO. Even with more time to devote to the task, the Attorney General's Office does not have the expertise to conduct a review or produce a report to the same level of depth and precision as the State Auditor's Office.

The information relied on for this Report was submitted to the AGO by the six named agencies, supplemented by a non-statistical, non-scientific review of public information available in this state and others. The content of the Report and its conclusions were developed from review of those sources and consultation with – and contribution from - Assistant Attorneys General who represent those agencies. The Recommendations are based on our understanding of applicable practices, authorities, legal constraints, and common sense.

### **III. Background**

Since the early 1980s, Washington legislators have passed dozens of bills and succeeding Governors have issued a series of Executive Orders, all with the intent of streamlining the regulatory environment and improving the overall business climate in our state.<sup>4</sup> In response, state agencies have simplified thousands of state regulations, altered their practices and policies, and built websites and outreach materials to better communicate their requirements and regulatory expectations.<sup>5</sup>

#### **A. Office for Regulatory Innovation and Assistance**

The [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#), initially called the Office of Permit Assistance, was created in 2002 by the Legislature.<sup>6</sup> In 2003, the name was changed to the Office of Regulatory Assistance, and the duties were expanded to include small business assistance and a full range of regulatory support, including a focus on improving agency processes and systems.<sup>7</sup> In 2009, the Legislature changed the role of the office still further, to promote accountability, timeliness, and predictability for citizens, businesses, and state, federal,

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<sup>4</sup> A comprehensive summary of the relevant state and federal laws and executive orders issued between 1980 and 2011 and designed to promote regulatory reform is listed in Appendix E of SAO [Audit No. 1](#), pp. 61-67. Other efforts have been put forward since 2011, some of which are described in this Report.

<sup>5</sup> SAO Audit No.1, p. 8.

<sup>6</sup> See [Laws of 2002, ch. 153](#).

<sup>7</sup> See [Laws of 2003, ch. 71](#).

and local permitting agencies, and to provide information and assistance on the regulatory process.<sup>8</sup>

In 2013, the Office for Regulatory Innovation and Assistance name was adopted, with an added focus on collaboration and innovation. Organizationally ORIA is located in the Governor's Office of Financial Management.

ORIA's [Information Center](#) provides help to citizens and businesses seeking to understand and navigate Washington's regulatory processes. Employees at the Information Center answer questions about local, state, and federal permits and regulatory requirements and research project-specific questions. The Information Center also connects customers to experts at regulatory agencies.<sup>9</sup> The most frequent customer inquiries in recent years have been questions from Washingtonians starting a new business or needing information about business regulations and environmental permits.<sup>10</sup>

[Executive Order 12-01](#), issued by Governor Gregoire on January 5, 2012, formalized and expanded the [Small Business Liaison Team](#) (SBLT) under ORIA. The SBLT is comprised of representatives from 27 state and federal agencies tasked with collaborating to make it easier to do business in the state. Subject matter experts from the SBLT member agencies work with ORIA to review and update the [Small Business Guide](#) on a quarterly basis. The Small Business Guide was viewed online over 36,000 times each month in Fiscal Year 2017, and is available in six languages: English, Spanish, Russian, Korean, Vietnamese, and Chinese.<sup>11</sup>

The [Regulatory Fairness Act](#) (RFA),<sup>12</sup> was originally adopted in 1994 with the intent of reducing the disproportionate impact of state administrative rules on small business. This law was recently amended to be more explicit about the agencies' role when a proposed rule impacts small businesses.<sup>13</sup> The amendment requires ORIA to collaborate with and provide support to state agencies in meeting these requirements.<sup>14</sup> ORIA has confirmed that the office will "work jointly across state agencies and business associations to convene a workgroup that shares best practices, identifies standards, and develops online resources to support this bill."<sup>15</sup>

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<sup>8</sup> See [Laws of 2009, ch. 97](#); see also [Laws of 2007, ch. 94](#), [Laws of 2010, ch. 162](#), [Laws of 2011, ch. 149](#), [Laws of 2012, ch. 196](#), [Laws of 2017, ch. 53](#).

<sup>9</sup> ORIA, [Performance Report 2016-2017](#), p. 3.

<sup>10</sup> ORIA, [Performance Report 2016-2017](#), p. 3.

<sup>11</sup> ORIA, [Performance Report 2016-2017](#), p. 3.

<sup>12</sup> RCW 19.85.011.

<sup>13</sup> See [Laws of 2017, ch. 53](#).

<sup>14</sup> See [Laws of 2017, ch. 53](#), § 3.

<sup>15</sup> ORIA, [Performance Report 2016-2017](#), p. 16.

## **B. Washington Business Hub**

The [Washington Business Hub](#) is an online “portal” that provides local entrepreneurs with resources related to planning, creating, and maintaining a small business in Washington State. The genesis of the Washington Business Hub dates back to [Executive Order 06-02](#) issued by Governor Gregoire in February 2006, directing state agencies to begin development of a “One-Stop Business Portal” to make it easier for businesses to comply with state regulations. Citing a lack of progress, on July 3, 2013, the Legislature adopted and Governor Inslee signed [Substitute Senate Bill 5718](#) directing the Office of the Chief Information Office to present a plan for the development of the portal. In 2014, the Legislature funded the plan, granting \$737,114 in the 2014 supplemental budget to continue work on the development of the portal. Version 1 of the Washington Business Hub portal launched in mid-2015.

## **C. Regulatory Reform Performance Audits**

Between 2011 and 2016, the State Auditor’s Office completed four performance audits as part of a Regulatory Reform series<sup>16</sup> designed to identify opportunities for the state to improve its interactions with businesses. These regulatory reform audits focus on the activities of 26 state regulatory agencies that administer more than 1,100 business licenses, permits and inspections.

In addition to the collaborative work of ORIA described above, the 2017 amendment to the Regulatory Fairness Act requires that the SAO conduct a performance review of agency compliance with the rulemaking requirements of the Act. The performance review must be completed no later than June 30, 2020.<sup>17</sup>

## **IV. Summary of Legal Rights and Protections Afforded to Small Business Owners Subject to Audit, Inspection or Enforcement Action by State Agencies**

This section describes the constitutional provisions, statutes and case law setting out the existing rights and protections afforded to small business owners subject to state agency inspections, audits, and enforcement actions.

### **A. Constitutional Rights and Protections**

Both the state and federal constitutions guarantee certain procedural due process protections before government can deprive a person of life, liberty, or property.<sup>18</sup> The amount and type of process due generally corresponds to the “nature of the interest and the severity of the deprivation.”<sup>19</sup>

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<sup>16</sup> See <http://www.sao.wa.gov/state/Pages/RegReform.aspx>.

<sup>17</sup> See [Laws of 2017, ch. 53](#), § 4.

<sup>18</sup> U.S. Const. amend. XIV; Wash. Const. art. I, § 3. See also *In re Pers. Restraint Petition of Bush*, 164 Wn.2d 697, 701, 704, 193 P.3d 103 (2008).

<sup>19</sup> *Tellevik v. Real Property Known as 31641 W. Rutherford St.*, 125 Wn.2d 364, 371, 884 P.2d 1319 (1994).

In Washington State, a constitutionally protected interest may arise from contract, common law, statute, or regulation.<sup>20</sup> Due process protections require “notice and an opportunity to be heard.”<sup>21</sup> The opportunity to be heard “requires a neutral and detached judge”<sup>22</sup> and “review must be conducted by someone who did not participate in making the determination being reviewed.”<sup>23</sup>

Due process protects state-issued licenses, permits, certifications, and similar forms of authorization required by law. It also protects the revocation, suspension, or modification of those authorizations.<sup>24</sup> Clear and convincing proof, for example, is required to suspend or revoke a professional license.<sup>25</sup>

Once a right is conferred, it may not be deprived by the government without appropriate procedural safeguards.<sup>26</sup> Beyond the general constitutional requirement, procedures to ensure a fair and timely process are typically established by statute or by the administrative rules adopted by the enforcing agency.

When it comes to inspections or audits, among other things, the state and federal constitutions also provide Washingtonians with certain privacy rights. Article I, section 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” The Washington Supreme Court has characterized the privacy protections in article I, section 7 as “qualitatively different from, and in some cases broader than, those provided by the Fourth Amendment [of the U.S. Constitution].”<sup>27</sup> Absent voluntary consent from the business owner for an inspection, audit or review, courts look to see whether the state action constitutes a disturbance of one’s private affairs, and if so, whether authority of law justifies the intrusion. The “authority of law” can be satisfied by a valid warrant.<sup>28</sup> A warrantless search is unreasonable and constitutionally barred, unless it falls within a recognized exception to the warrant requirement.

Article I, section 7 of the Washington Constitution prohibits state courts from issuing administrative warrants except when statute or court rule expressly grants jurisdiction to the

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<sup>20</sup> *Durland v. San Juan County*, 182 Wn.2d 55, 70, 340 P.3d 191 (2014).

<sup>21</sup> *In re Bush*, 164 Wn.2d 697, 704, 193 P.3d 103 (2008).

<sup>22</sup> *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993) (internal quotation marks omitted).

<sup>23</sup> *Crescent Convalescent Ctr. v. Dep’t of Soc. & Health Servs.*, 87 Wn. App. 353, 360, 942 P.2d 981 (1997).

<sup>24</sup> RCW 34.05.010(9), .422.

<sup>25</sup> *Nguyen v. Dep’t of Health Med. Quality Assur. Comm’n*, 144 Wn.2d 516, 529, 29 P.3d 689 (2001).

<sup>26</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

<sup>27</sup> *City of Seattle v. McCready*, 123 Wn.2d 260, 267, 868 P.2d 134 (1994) (*McCready I*).

<sup>28</sup> *York v. Wahkiakum Sch. Dist. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008).

court to issue the warrant.<sup>29</sup> The statute or court rule must do more than authorize the agency recourse to unspecified remedies should access be denied by the business owner. The statute or court rule must explicitly authorize a court to issue an administrative warrant for the purpose requested in the application for a warrant.<sup>30</sup>

The administrative warrant process offers rights and protections to small businesses. When a small business owner denies entry, an agency with statutory warrant authority may ask a court for an administrative search warrant. Certain programs within the Department of Agriculture,<sup>31</sup> Department of Labor & Industries<sup>32</sup> and Department of Ecology<sup>33</sup> have such an administrative warrant authority granted by the State Legislature. Typically, agencies are granted warrant authority for regulations involving the police powers of the state, and often based on strong public interests in health and safety. The principle of ‘probable cause’ to issue a warrant to inspect has been the subject of much case law and applies if there is (1) specific evidence of an existing violation, or (2) a general inspection program based on reasonable legislative or administrative standards derived from neutral sources.<sup>34</sup> Where probable cause is based on a general inspection program, the warrant application (or attached declarations or affidavits) “must describe the program in sufficient detail” to enable the “neutral and detached magistrate” to determine that the “desired inspection fits within that program.”<sup>35</sup>

If there is no codified ability to obtain a warrant from a court, an agency can instead seek an injunction to stop a business from operating until certain actions are authorized by the business, such as inspection or audit. Given this alternative, the authority to obtain an administrative warrant can be seen as enhancing safeguards for small businesses, ensuring searches are reasonable, without unduly disrupting individual privacy. Warrants also serve to: limit the discretion of the inspector to decide when, where, and whom to search by committing this decision to a neutral judicial officer; give notice to the individual subject to inspection regarding the legality and scope of the inspection; reduce the inspection’s subjective intrusiveness; and provide the same protection already given to those suspected of crime.

Another protection against unlawful search comes from federal civil rights laws. It is incumbent on a state actor executing a search warrant to ensure the search is lawfully authorized and lawfully conducted.<sup>36</sup> If the search warrant - and therefore the ensuing search - is not lawful,

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<sup>29</sup> *McCready I*, 123 Wn.2d at 274; *City of Seattle v. McCready*, 124 Wn.2d 300, 309, 877 P.2d 686 (1994) (*McCready II*); *Bosteder v. City of Renton*, 155 Wn.2d 18, 23-24, 117 P.3d 316 (2005).

<sup>30</sup> *McCready I*, 123 Wn.2d at 278-79 (citing examples of statutes that provide sufficient authority).

<sup>31</sup> RCW 16.57.180 (livestock identification laws).

<sup>32</sup> RCW 49.17.075 (industrial safety).

<sup>33</sup> RCW 76.09.150 (forest practices).

<sup>34</sup> *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320-21, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).

<sup>35</sup> *City of Seattle v. Leach*, 29 Wn. App. 81, 84-85, 627 P.2d 159 (1981) (citing *In re Northwest Airlines, Inc.*, 587 F.2d 12, 14-15 (7th Cir. 1978)).

<sup>36</sup> See *Groh v. Ramirez*, 540 U.S. 551, 563, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004); see also *United States v. Pruitt*, 458 F.3d 477, 488 (6th Cir. 2006), *cert. denied*, 549 U.S. 1283 (2007).

there is potential for a claim for damages under federal civil rights law at 42 U.S.C. § 1983, or for criminal trespass under state law.<sup>37</sup>

## **B. APA Rights and Protections**

Minimum requirements for due process are codified in the Washington Administrative Procedures Act (APA). Among the six agencies named in HB 1352, the requirements of the APA generally apply when a small business owner or other entity contents an agency auditing, licensing, permitting, inspection and enforcement.

When appeal is taken, there are strong protections in place to ensure the impartiality of the judge or presiding officer. In addition to rules promulgated by the Washington Commission on Judicial Conduct,<sup>38</sup> a judge cannot preside in a case if the judge is prejudiced against any party, attorney or their interests.<sup>39</sup> Any party may petition for the disqualification of an individual promptly after receipt of notice or promptly upon discovering facts establishing grounds for disqualification.<sup>40</sup> The Model Rules of Procedure for the Office of Administrative Hearing provide for additional protections, such as providing an interpreter if needed by a party or witness.<sup>41</sup>

The APA directs the presiding officer to exclude witnesses and evidence in adjudicative hearings on constitutional grounds,<sup>42</sup> or if their admission would violate a state statute or would be inadmissible under existing laws of evidentiary privilege.<sup>43</sup> Thus, privileges such as the attorney/client and doctor/patient privileges are recognized in administrative adjudications. The APA also requires a separation of agency functions in proceedings; a person who serves at any point in an proceeding may not go on to serve as a presiding officer in the same proceeding.<sup>44</sup>

Ex parte communications from and to the presiding officer are tightly prescribed. Contact between the officer and any employee of an agency regarding a hearing issue without notice is prohibited.<sup>45</sup> A former agency employee who participated in a case is prohibited from appearing as an expert witness for any other party in the hearing.<sup>46</sup> Similarly, without notice, ex parte communications are prohibited with any outside person who has a direct or indirect interest in

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<sup>37</sup> RCW 9A.52.070 (first degree criminal trespass); RCW 9A.52.080 (second degree criminal trespass).

<sup>38</sup> <https://www.cjc.state.wa.us/>.

<sup>39</sup> RCW 34.05.422(1)(a)-(c), .010(1), (9)(a).

<sup>40</sup> RCW 34.05.425(4).

<sup>41</sup> WAC 10-08-040(2).

<sup>42</sup> RCW 34.05.452(1).

<sup>43</sup> RCW 34.05.452.

<sup>44</sup> RCW 34.05.458(1).

<sup>45</sup> RCW 34.05.455(1), (3).

<sup>46</sup> WAC 10-08-140(4); *see also* RCW 42.52.080(5).

the proceeding.<sup>47</sup> The agency is required to report any violations to the “appropriate authorities” for sanctions.<sup>48</sup>

The APA also includes several sections dedicated to the process for civil enforcement of agency orders and rules.<sup>49</sup> These protections provide a means for small businesses and others to further elevate challenges to agency actions claimed to be arbitrary and capricious or contrary to law.<sup>50</sup>

The APA grants authority to agency presiding officers and attorneys for the parties to issue subpoenas in an adjudicative proceeding.<sup>51</sup> However, the APA does not grant administrative agencies the power to investigate, nor to issue investigative subpoenas.<sup>52</sup> Actions brought to enforce a subpoena<sup>53</sup> do not constitute “judicial review” of agency action.<sup>54</sup> Subpoena enforcement cases are equitable in nature.<sup>55</sup> Article I, section 7 of the Washington Constitution has been found to provide greater protection than Fourth Amendment defenses to agency subpoenas under the U.S. Constitution.<sup>56</sup> Fifth Amendment protection from self-incrimination may apply to agency subpoenas.<sup>57</sup> Consideration is sometimes given to First Amendment rights such as freedom of speech, association, and religion.<sup>58</sup>

### **C. APA Amendments, the Regulatory Fairness Act and Small Businesses**

In 2009, the Washington State Legislature amended the APA to place limits on the issuance of civil penalties to small businesses by state agencies.<sup>59</sup> Under this law, agencies must waive fines, civil penalties, or administrative sanctions for first time paperwork violations by a small business.<sup>60</sup> A “paperwork violation” is defined as a failure to comply with any statute or

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<sup>47</sup> RCW 34.05.455(2).

<sup>48</sup> RCW 34.05.455(7).

<sup>49</sup> RCW 34.05.578(1).

<sup>50</sup> RCW 34.05.570(2), (3) (grounds for challenging rules and orders).

<sup>51</sup> RCW 34.05.446(1).

<sup>52</sup> RCW 18.130.050(4); RCW 43.09.165(1); RCW 43.20A.605(1); RCW 82.32.110.

<sup>53</sup> They are special actions, originally filed in superior court under RCW 34.05.588. RCW 49.60.160.

<sup>54</sup> RCW 34.05.510-.574.

<sup>55</sup> *United States v. Friedman* 532 F.2d 928, 937-38 (3d Cir. 1976).

<sup>56</sup> *State v. Farmer*, 80 Wn. App. 795, 800, 911 P.2d 1030 (1996).

<sup>57</sup> The Fifth Amendment to the United States Constitution right against self-incrimination is applied to the states through the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

<sup>58</sup> *NAACP v. Alabama*, 357 U.S. 449, 463, 78 S. Ct. 1163, 2 L. Ed 2d 1488 (1958); *Buckley v. Valeo*, 424 U.S. 1, 64-66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984); *Pratt v. Kirkpatrick*, 718 P.2d 962, 969 (Alaska 1986).

<sup>59</sup> *See [Laws of 2009, ch. 358](#)*, codified at RCW 34.05.110.

<sup>60</sup> RCW 34.05.110(2).

regulation requiring a business to collect, post, or retain information.<sup>61</sup> For the purpose of this requirement, the APA defines “small” business as one with 250 or fewer employees or gross annual revenue of less than \$7 million.<sup>62</sup> If the business violates the law a second time or fails to correct the first violation, the agency may reinstate the previously waived penalty and impose any penalty stemming from the second violation.<sup>63</sup>

In 2011, the Legislature again amended the APA to require agencies provide a small business “a copy of the state law or agency rule that a small business is violating and a period of at least seven calendar days to correct the violation before the agency may impose any fines, civil penalties, or administrative sanctions for a violation of a state law or agency rule by a small business.”<sup>64</sup> Exceptions to this provision and the paperwork violation waiver described above exist if:

- The agency head determines that the effect of the violation or waiver presents a direct danger to public health, results in a loss of income or benefits to an employee, poses a potentially significant threat to human health or the environment, or causes serious harm to the public interest;
- The violation is knowing or willful;
- The violation is of a requirement concerning the assessment, collection, or administration of any tax, tax program, debt, revenue, receipt, a regulated entity’s financial filings, or insurance rate or form filing;
- There is a conflict with federal law or program requirements, federal requirements that are a prescribed condition to the allocation of federal funds to the state, or the requirements for eligibility of employers in this state for federal unemployment tax credits, as determined by the agency head;
- The small business committing the violation previously violated a substantially similar requirement; or
- The owner or operator of the small business committing the violation owns or operates, or owned or operated, a different small business which previously violated a substantially similar requirement.<sup>65</sup>

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<sup>61</sup> RCW 34.05.110(9)(b).

<sup>62</sup> RCW 34.05.110(9)(a).

<sup>63</sup> Laws of 2009, ch. 97; RCW 34.05.110(5)(b).

<sup>64</sup> See Laws of 2011, ch. 18 (RCW 34.05.110(1)). This provision is not limited to “paperwork” violations.

<sup>65</sup> [RCW 34.05.110\(4\)](#).

In addition, the Regulatory Reform Act of 1995<sup>66</sup> requires most regulatory agencies to provide technical assistance visits to the regulated community.<sup>67</sup> The purpose is to encourage voluntary compliance by emphasizing agency assistance before the imposition of penalties or other enforcement consequences.

In conclusion, there are many legal rights and protections in place for small business owners that help level the playing field. Those rights and protections are in effect -- and remain in place -- before, during, and after an audit, inspection or enforcement action involving potential non-compliance with the law or a condition of a permit or license. In addition to creating legal rights for business owners, these protections serve as constraints on agency staff and agency actions.

## **V. Overview of Governing Laws and Policy for Agency Audits, Inspections or Enforcement Actions and Identification of Materials Provided by Agencies to Businesses**

HB 1352 directs the six named agencies to each make a submittal to the Attorney General's Office identifying any provisions in their governing statutes, administrative rules, policy statements, guidance, or directives that list rights or protections afforded to parties selected for inspection, audit, or other enforcement actions by that agency along with a copy or hyperlinks to the source material. The bill also directs the agencies to include a copy of or link to any statement of rights or similar materials provided to small business owners in advance or at the time of audit, inspection, enforcement action, or during the appeal process. The submittals received by the AGO from the agencies are included in an Appendix to this Report, available at the following link: <http://www.atg.wa.gov/policy/HB1352>. The content of those submittals is summarized here.

### **A. Department of Agriculture**

The Washington State Department of Agriculture's (WSDA) governing statutes and rules, alongside WSDA's Administrative Regulations Program, provide oversight and training to all regulatory enforcement programs and personnel within the agency.<sup>68</sup> These ensure compliance with the Administrative Procedure Act<sup>69</sup> and other chapters in Washington code.<sup>70</sup> Policies and procedures are maintained by each regulatory program specific to that program's statutory authority.

The information provided by WSDA for purposes of HB 1352 covers 78 programs with permits, licenses, inspections, registration, or certification requirements that may affect small

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<sup>66</sup> Laws of 1995, ch. 403, §§ 601-39 (Part VI).

<sup>67</sup> RCW 43.05.030(1), (2), RCW 49.17.250.

<sup>68</sup> RCW Titles 15 and 16, and RCW 17.21, RCW 17.24, RCW 19.94, RCW 19.112, RCW 20.01, RCW 69.04, RCW 69.07, RCW 69.10, RCW 69.22, RCW 69.25, RCW 90.64 and WAC Title 16.

<sup>69</sup> RCW 34.05.

<sup>70</sup> For example, RCW 43.05.100.110 (which requires notice of correction before imposing penalties).

businesses.<sup>71</sup> Many permitting activities arise from federal requirements. WSDA's main website provides a tab to a list of Licenses, Permits. This page identifies, in alphabetical order, the primary certifications, licenses, permits, and registrations issued by WSDA, each for distinct activities such as pesticide application, food processing, or livestock transportation. The website replicates some line items in different places. For example, the list has both "Agent's License under Commission Merchant Act" and "Commission Merchant Act, Agent's License under," with WSDA's main website providing a separate tab to Inspections.

Many of the listed inspections exist pursuant to licensing programs listed on the Licenses, Permits page. List items are linked to the actual application for the license or permit, or to comprehensive information about the particular license, depending on the complexity of the regulatory scheme. For example, clicking on the list item Custom Slaughter/Meat License takes the reader to the application form while clicking on Commercial Operator License takes the reader to the pesticide license site providing information on how to prepare for and take exams. Additionally, a summary is provided for each program. For example, Egg Handler/Dealer License Summary takes the reader to a webpage identifying the purpose of the license, who is required to be licensed, how to apply, cost, requirements, legal authority, and appeal rights.

All WSDA permitting programs offer on-site technical assistance visits to regulated businesses. Farmers and food businesses receive assistance to navigate the regulatory environment through education, on-site workshops, and publications including handbooks and educational videos. For example, WSDA maintains a Handbook for Small Farm and Direct Marketing Farms online and in hardcopy, providing an overview of regulatory requirements. The applications for certain licenses likely to affect small businesses also include handbooks specific to the license.<sup>72</sup> Before there is a need for an enforcement action, WSDA provides notice of rights and protections through technical assistance outreach.

Generally, WSDA identifies an entity for investigation or enforcement in response to a complaint (for example, a property owner suspects they have been sickened by pesticides overspray) or upon discovery of a failure to comply with applicable regulations at the time of a routine inspection of a licensee (for example, a food processor is found to have rats or unclean equipment at the time of inspection). At each stage of an enforcement action, WSDA issues a written document setting forth the appropriate appeals process. Upon discovery of a violation and depending on the risk to public health, WSDA first provides a notice of correction.<sup>73</sup> This affords the violator an opportunity to correct before WSDA undertakes formal enforcement action. In some cases, WSDA may issue a "stop sales" order, which prevents the distribution of

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<sup>71</sup>Animal Services: about 15 permits, licenses, inspections, registrations, or certifications. Commodity Inspection/Market Development: about 10 permits, licenses, inspections, registrations, or certifications. Food Safety & Consumer Services: about 17 permits, licenses, inspections, registrations, or certifications: Pesticide Management: about 26 permits, licenses, inspections, registrations, or certifications: Plant Protection: about 10 permits, licenses, inspections, registrations, or certifications.

<sup>72</sup> For example, WSDA's Food Processing Plant License application attaches a "Food Processing Handbook." It provides a general overview of operating a business in Washington as well as detail about the regulatory requirements applicable to food processing.

<sup>73</sup> The notice is in compliance with RCW 43.05.100 and .110.

adulterated or noncompliant products. Upon the commencement of a formal enforcement action, WSDA issues a notice of intent to impose a penalty (NOI) such as civil monetary penalties or license suspension. NOIs uniformly provide a written “Notice of Rights and Opportunity for Hearing.”

The detailed submittal made by the Department of Agriculture under HB 1352, including documents used by the agency to communicate rights or protections to business owners prior to or at the time of an agency action is available in the Appendix to this Report at the following link: <http://www.atg.wa.gov/policy/HB1352>.

## **B. Department of Ecology**

The Department of Ecology (Ecology) was created to manage and develop Washington’s air and water resources in an orderly, efficient, and effective manner, and to carry out a coordinated program of pollution control involving these and related land resources.<sup>74</sup> Ecology’s website lists the agency’s rules and statutory authorities.<sup>75</sup> Ecology is authorized by the Legislature to implement ten programs,<sup>76</sup> including water quality regulation, water resource allocation, air quality protection, spill response, managing solid and hazardous wastes, cleanup of contaminated sites, reducing toxics, floodplain management, and managing shorelines and work in or near water.

In addition to the legislation creating the agency, there are numerous state and federal laws, rules, and guidance that further define the role and responsibilities of Ecology, and the rights, protections and responsibilities of those regulated by the agency – including small businesses. Ecology adopts rules<sup>77</sup> to implement federal and state requirements. In some cases, the agency also provides policy statements, guidance, and other tools to help businesses comply and to explain their rights and responsibilities. This information, including informal fact sheets and FAQs, is available through Ecology’s [website](#) and is provided to businesses as part of an inspection or audit, or as part of a permitting, certification, or enforcement action. Given the volume of these educational materials, all were not included in Ecology’s submittal for this Report, but all can be found on the agency’s website.

Ecology issues permits and certifications and conducts inspections to ensure small businesses meet environmental standards. In some cases, Ecology has discretion and flexibility in how it works with small businesses to ensure applicable regulatory and enforcement requirements are met. In other cases, the agency does not have discretion. These differences in flexibility result from federal requirements (especially in delegated or authorized programs) and from state requirements. The degree of flexibility exercised is also calibrated to the degree of risk to public health or safety from any given potential violation.

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<sup>74</sup> RCW 43.21A.020.

<sup>75</sup> See <http://www.ecy.wa.gov/laws-rules/ecyrcw.html>.

<sup>76</sup> See <http://www.ecy.wa.gov/programs.html>. The programs are primarily codified in RCW Titles 15, 18, 43, 36, 70, 79, 79A, 80, 88, and 90.

<sup>77</sup> Ecology rules can be found in Titles 173, 197, 371, 372 and 508 of the Washington Administrative Code (WAC).

As a starting point to assist small businesses, Ecology provides information on its website and points to the [Regulatory Handbook](#) managed by ORIA. The Regulatory Handbook provides an overview of each permit and certification issued by Ecology, describing the purpose of the permit, how to apply, how long the permit is valid, and resources for further assistance. In compliance with RCW 43.05, Ecology also provides technical assistance information on its website and through one-on-one conversations with small businesses.

Ecology staff strives to first provide education, inspections, and technical assistance to attempt to gain voluntary correction and to help the business understand the requirements and their responsibilities. If enforcement action becomes necessary, the information provided by Ecology to a business varies depending on the stage of the enforcement process, the type of action, and the applicable regulatory requirements. The agency deploys a range of increasingly strict enforcement tools. Through these tools, and depending on the facts and law at issue, Ecology may use a warning letter or letter of correction, for example, to notify an entity of non-compliance and explain the steps that must be taken to return to compliance. Communications detail the rights of the business at any given point in the process.

If problems persist, Ecology may then issue an enforcement order and/or penalty. Due to the prior engagement with the business, it is unlikely that the formal enforcement will be a surprise. In situations where there is an immediate or emergency threat to human health or the environment, Ecology has authority to go directly to a formal enforcement order or penalty.

Throughout the regulatory process, Ecology provides guidance, technical assistance, documentation, letters, and formal communication describing the non-compliance issue, how the issue can be corrected, and what rights the business has at that point in the process, such as asking for a meeting or filing an appeal.

The detailed submittal made by the Department of Ecology under HB 1352, including documents used by the agency to communicate rights or protections to business owners prior to or at the time of an agency action is available in the Appendix to this Report at the following link: <http://www.atg.wa.gov/policy/HB1352>.

### **C. Employment Security Department**

The Employment Security Department (ESD) regulates businesses for unemployment insurance tax compliance.<sup>78</sup> ESD's authorities, and the requirements for employers, are set forth in statute and rules.<sup>79</sup> Those authorities also set forth the rights and protections afforded to employers subject to audit to determine their compliance with unemployment insurance tax requirements.

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<sup>78</sup> Copies of the laws and regulations governing unemployment insurance (several chapters in RCW Title 50 and WAC Title 192) and governing administrative procedures (RCW 34.05 and WAC 10-08).

<sup>79</sup> RCW Title 50 and WAC Title 192.

Those provisions, in turn, reference and incorporate many provisions of the Administrative Procedure Act<sup>80</sup> and the Model Rules of Procedure for the Office of Administrative Hearings.<sup>81</sup>

Employers are selected for audit at random, as a result of a referral for investigation, or based on suspicion that the employer has not reported all wages or paid all taxes due. Thousands of employers are audited by ESD each year for compliance with unemployment insurance tax requirements. The communications by auditors to employers, and employers' rights and responsibilities under the employment security laws and rules, do not differ whether the businesses are large or small.

Employers subject to audit receive a written letter from the auditor,<sup>82</sup> informing them of the initiation of the audit and the records required to be produced. In general, the letters reference provisions of applicable law<sup>83</sup> and list [online resources](#) for accessing relevant information. ESD has various template letters sent to employers selected for audit and other letters sent during the course of and upon completion of an audit. These materials include templates for auditors' subpoenas requiring production of records, templates for auditors' reports upon completion of an investigation, and sample language for various determinations auditors may reach, and forms employers are required to complete concerning worker wages and unemployment insurance taxes. These records often direct employers to contact the auditor or ESD if they have questions or need additional information. Depending on whether and when the employer responds, the auditor may send follow-up written communications, and/or a subpoena requiring that records be made available for inspection or produced by certain deadlines.

If an ESD audit results in a determination that taxes or penalties are due, the employer may request a hearing before the Office of Administrative Hearings, an independent state agency. ESD's determinations describe the process and timelines for the business to contest an action. Orders of the administrative law judge at the Office of Administrative Hearings may be appealed to ESD's Commissioner, and the Commissioner's final decision may be appealed to the courts. Each order describes the party's appeal rights. The laws pertaining to appeals are found in RCW Title 50, WAC Title 192, WAC 10-08, and RCW 34.05.

The detailed submittal made by the Department of Employment Security under HB 1352, including documents used by the agency to communicate rights or protections to business owners prior to or at the time of an agency audit or action is available in the Appendix to this Report at the following link: <http://www.atg.wa.gov/policy/HB1352>.

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<sup>80</sup> RCW 34.05.

<sup>81</sup> WAC 10-08.

<sup>82</sup> Generic samples of which were included in the Department's materials provided.

<sup>83</sup> RCW Title 50 and WAC Title 192.

## **D. Department of Labor & Industries**

The Department of Labor and Industries (L&I) administers programs addressing workplace safety and health, wage and hour requirements, audits, trade licensing and inspection, and workers' compensation. L&I interacts with businesses in many ways. The work of the agency is governed by several chapters in Washington statutes and rules.<sup>84</sup> Each regulatory program maintains policies and procedures specific to its responsibilities and authority.

For purposes of HB 1352, L&I provided copies of laws, regulations, policies and educational materials for a broad range of possible audits, inspections and enforcement actions. The process varies depending on the relevant statute or program. However, the agency strives to provide clear information about rights and responsibilities at the earliest possible stage. A number of the major L&I programs have adopted a common escalation strategy providing businesses with instructions on how to comply with requirements and affording businesses the opportunity to voluntarily comply before an issue is elevated to formal enforcement.

L&I provides information and educational opportunities to small businesses through a variety of methods. To meet the needs of the public – including small businesses – the agency continually updates the content of the information provided and the way in which it is provided. The agency maintains a strong [online](#) presence to provide easy access to information for businesses. Educational opportunities are emphasized throughout the inspection and enforcement processes as well as through classes, trainings and online materials. For safety and health matters, employers are encouraged to request individualized consultation services to help them understand and meet their responsibilities.

The detailed submittal made by the Department of Labor & Industries under HB 1352, including documents used by the agency to communicate rights or protections to business owners prior to or at the time of an agency action is available in the Appendix to this Report at the following link: <http://www.atg.wa.gov/policy/HB1352>.

## **E. Department of Revenue**

The Department of Revenue (DOR) is the state's principal tax collection agency. DOR administers most of the state's excise tax laws, manages the state's unclaimed property program, and supervises the state's property tax programs.<sup>85</sup> The agency oversees about 60 different taxes and collects more than 90 percent of the state General Fund tax revenues.<sup>86</sup> The Department also provides taxpayer assistance, information, education, and audits tax businesses and other persons subject to the state's tax laws.

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<sup>84</sup> RCW Titles 18, 19, 39, 43, 49, 51, and 70, and WAC Title 296, among others.

<sup>85</sup> Chapters 63, 82, 83, and 84 and agency rules in WAC Title 483.

<sup>86</sup> See <https://dor.wa.gov/about-us/what-we-do>.

DOR works with small business owners in a wide variety of contexts. Generally speaking, much of the information the agency provided in response to HB 1352 is available to the general public from DOR's [webpage](#) and can be accessed at any time by a small business owner subject to audit or an enforcement action. The agency also provides information and materials directly to impacted small business owners, typically through letters, notices, and similar correspondence sent as part of an enforcement action. The most common types of actions in which relevant information and materials are directly provided to small business owners are excise tax audits and the collection of past-due taxes. DOR does not divide these actions into stages, so it is not possible to identify the stage of the process at which the information is provided to the owner.

There are many rights and protections outlined in DOR's key governing statutes and administrative rules.<sup>87</sup> Materials are also available on DOR's website.<sup>88</sup> Online guidance is offered to individual industries, such as, construction contractors, mortgage brokers, and restaurant owners.<sup>89</sup> Small business owners can sign up for the Department's [Listserv](#) to receive updates and other tax information.<sup>90</sup> Although materials are available to small businesses and other taxpayers at any time, information pertaining to appeal rights is typically provided to those taxpayers involved in compliance audits and in administrative appeals.

The detailed submittal made by the Department of Revenue under HB 1352, including documents used by the agency to communicate rights or protections to business owners prior to or at the time of an agency action is available in the Appendix to this Report at the following link: <http://www.atg.wa.gov/policy/HB1352>.

## **F. State Fire Marshal**

The State Fire Marshal's Office (SFMO) regulates fire sprinklers, fireworks, and fire safe cigarettes. SFMO also has authority to regulate the small businesses that offer to contract for the design, installation, testing, or maintenance of fire sprinkler systems.<sup>91</sup> The relevant statutes and rules authorize SFMO to deny fire sprinkler licenses, take administrative action against licensees, and impose civil penalties.

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<sup>87</sup> RCW 82.32.160 – correction of tax assessment; RCW 82.32.170 – reduction of tax after payment; RCW 82.32.180 – procedures for initiating court action for refund of taxes; RCW 82.32.200 – stay of collection; RCW 82.32.350 – settlement and closing agreements authorized; RCW 82.32A.020 – taxpayer rights, including the right to rely on specific, official written advice and tax reporting instructions from the Department to that taxpayer; RCW 82.32A.050 – taxpayer services program; WAC 458-20-100 – informal administrative review of actions of the Department in the assessment of excise taxes or denial of an excise tax refund claim; WAC 458-20-10002 – formal adjudicative proceedings; WAC 458-14-056 – property tax appeals procedures; The Audit Process (brochure); How to File an Excise Tax Appeal (brochure).

<sup>88</sup> <https://dor.wa.gov/>.

<sup>89</sup> See generally <https://dor.wa.gov/get-form-or-publication/publications-name>.

<sup>90</sup> See <https://fortress.wa.gov/dor/efile/secureforms/Content/Listserv/Listserv.aspx>.

<sup>91</sup> RCW 18.160 and WAC 212-80.

The SFMO initiates action with a fire sprinkler licensee when there has been a complaint from the public or an “Authority Having Jurisdiction”, or when the SFMO has concerns about a licensee. Depending on the facts, the SFMO sends a letter advising the small business about the investigation. Once an inspection occurs, a letter is provided in follow up. If an inspection results in citations for noncompliance, then another inspection will occur. If a violation involves unlicensed conduct by a business, the SFMO will also send a Cease and Desist Order. Once the investigation is complete, the SFMO sends an Administrative Violation Notice letter with a civil penalty notice. The letter explains the findings and charges in detail. Once the business receives the letter and penalty notice, the business must either pay the fine or appeal the action. Businesses may appeal through a three-step administrative appeal process.<sup>92</sup>

The SFMO also implements a Fire and Life Safety inspection program to protect vulnerable populations against fire and fire hazards in state licensed health care, residential care, and child care facilities, and to determine compliance with fire safety standards.<sup>93</sup> Facilities are inspected upon initial licensing and 12 to 36 months thereafter for license renewal. The applicable facilities are: Assisted Living Facilities (RCW 18.20.125), Crisis Residential Care/Emergency Respite Care and Group Care (RCW 74.15.050), Enhanced Services Facilities (RCW 70.97.210), and Residential Treatment Facilities (RCW 71.12.485). Childcare Facilities (RCW 43.215.210) are also inspected upon initial licensing and for fire and life safety concerns on an ongoing basis. After one of these inspections, the SFMO provides a letter to the facility identifying any citations for violations of the Fire Code, in which case a follow-up inspection will occur. Facilities may appeal the citations.<sup>94</sup>

The SFMO also conducts Fire and Life Safety Inspections for facilities that require federal certification as a part of the approval process under Title 18 Medicare and Title 19 Medicaid. Applicable facilities are inspected only upon notification by the state licensing agency. Inspections are completed for initial licensing and approximately 12 to 18 month thereafter upon license renewal and only upon notification. The applicable facilities are: Nursing Homes (RCW 18.51.140), Ambulatory Surgical Facilities (RCW 70.230.100), Hospitals (RCW 70.41.080 and 70.41.120), Birthing Centers (RCW 18.46.110), and Hospice Care Centers (RCW 70.127.280). Under this program, the SFMO provides a report of deficiencies verbally to the facility during an exit interview and also gives the facility a written Statement of Deficiencies summarizing the findings. Based upon the Statement of Deficiencies, the facility will have an opportunity to prepare and implement a Plan of Corrections and a follow-up inspection will occur. There is a separate, federal review process for small businesses to challenge inspection findings.

The SFMO also regulates fireworks.<sup>95</sup> Under its authorities, the SFMO may impose civil penalties<sup>96</sup> for violations and take administrative action against fireworks licenses. The relevant

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<sup>92</sup> WAC 212-12-030.

<sup>93</sup> RCW 43.44.010.

<sup>94</sup> WAC 212-12-030.

<sup>95</sup> RCW 70.77; WAC 212-17.

<sup>96</sup> RCW 19.305.

statutes and regulations provide due process protections to small businesses in the form of notice, informal resolution, and a formal hearing. SFMO will provide a notice of a hearing if an applicant's license is denied, when fireworks are seized, and when civil penalties are imposed. Additionally, SFMO provides a notice of violations and civil penalties for noncompliance with Washington's fire safe cigarette regulations. The notice is provided when civil penalties are imposed.

The detailed submittal made by the State Fire Marshal under HB 1352, including documents used by the agency to communicate rights or protections to business owners prior to or at the time of an agency action is available in the Appendix to this Report at the following link: <http://www.atg.wa.gov/policy/HB1352>.

## **VI. Recommendations**

HB 1352 directs that as part of this Report, the Attorney General's Office includes recommendations "for statutory, rule, policy, or other changes to identify, clarify, and harmonize, where practical, the rights and protections afforded to small business owners selected for agency enforcement actions, as well as methods to improve the notice of rights provided to small business owners selected for agency audits, inspections, and other enforcement actions."

As of 2015, businesses with fewer than 50 employees accounted for 96 percent of Washington's businesses, employing nearly half of the state's private sector workers.<sup>97</sup> To operate in our state, businesses are required to comply with applicable regulations. They are often required to obtain certain regulatory approvals in the form of a certificate, license or permit.

Regulations that affect any given business may be designed to help protect the environment, guarantee a safe workplace, or ensure that comparable taxpayers share a comparable tax burden. Regulation of businesses helps ensure the health and safety of Washingtonians, including the state's workers, communities, and consumers.

Once a business is approved to operate, often the business owner must continue to comply with regulatory requirements, including the terms and conditions of any permit or licenses under which they operate. The regulatory agency must be able to verify compliance – often through an audit or site inspection, or both. When an existing business is found to be out of compliance with applicable requirements, sanctions can incur. Equal application of regulatory requirements and sanctions to similarly-situated businesses is required as a matter of equal protection and fairness under the law. Equal treatment is also important to ensure a level playing field in the marketplace. Non-complying businesses should not be able to gain an economic advantage by avoiding compliance costs paid out by their law-abiding competitors.

Among the six agencies named in HB 1352, the auditing, licensing, permitting, and inspection authorities and functions have a wide variety of purposes and effects. Some inspections and

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<sup>97</sup> SAO [Audit No. 4](#), *Performance Audit: Assessing Implementation of the Regulatory Fairness Act 6* (Dec. 27, 2016).

certificates, such as grain inspection or sanitary certificates for export of foods, are transactional rather than regulatory, providing a service to Washington businesses as part of compliance with established market, federal or international criteria. The regulatory programs often concern particular business activities or processes, and may operate under very different regulatory schemes from agency to agency and program to program. Among other things, these differing approaches may result from differences in impacts associated with noncompliance. The immediate public health and safety threat can be much higher for noncompliance with food safety rules or fire sprinkler regulations, for example, than they may be with other regulatory requirements. Variations can also reflect the nature of the activity regulated, or federal requirements that are a pre-condition of program delegation or authorization or a condition for federal funds. These differences and variables make compliance more complicated for businesses. At the same time, it presents challenges for consistency across programs and agencies.

Washington policymakers have focused much attention on streamlining and coordinating agency processes as a means to assist business owners with gaining approval to commence operations, particularly the owners of small businesses. Similarly, policymakers have focused the work of the State Auditor's Office on the effectiveness of regulatory reforms at the front end of the compliance process when approvals are obtained, and licenses and permits are issued.<sup>98</sup> As a result, the [Governor's Office for Regulatory Innovation and Assistance \(ORIA\)](#), including the [Small Business Guide](#), and the [Small Business Liaison Team](#), have generally been directed at the front end of starting a business. This is also true for the [Washington Business Hub](#) operated by the Office of the Chief Information Officer. Less centralized focus and attention has been brought to bear on the processes, rights and protections when regulatory agencies take steps, such as audits, inspections or enforcement actions, to verify and ensure that operating business owners are complying with regulatory requirements.

The following Recommendations were developed as a result of the reflections of the Attorney General's Office on: the information submitted by the six agencies; our knowledge of the legal rights and protections generally afforded to regulated entities; a non-statistical, non-scientific review of public information available in this state and others; consultation with the series of Regulatory Reform Performance Audits<sup>99</sup> produced over the last five years by the State Auditor's Office; and consultation with Assistant Attorneys Generals who represent the six agencies listed in HB 1352. The Recommendations are based on our understanding of applicable practices, authorities, legal constraints, and common sense.

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<sup>98</sup> In fact, even in the most recent session of the Legislature, the State Auditor's Office was tasked with conducting a performance audit of agency compliance with the Regulatory Fairness Act's requirement for agency preparation of a small business economic impact statement before new rules are proposed. See [Laws of 2017, ch. 23](#).

<sup>99</sup> See <http://www.sao.wa.gov/state/Pages/RegReform.aspx>.

## A. Improve Efforts to Provide Transparent, Accessible Information and Assistance to Operating Businesses Early In the Process

Businesses want prompt, predictable, and transparent regulatory processes.<sup>100</sup> State agency websites are a simple, low-cost opportunity for regulatory agencies to communicate information. “[B]usinesses expect that state government will make complete, accurate, and understandable regulatory information available through its public websites. It is not enough to put ‘some’ or ‘most’ information online. When businesses face penalties if they do not comply with all the regulations, it is only fair that they be able to find out about 100 percent of those regulations online.”<sup>101</sup>

One recommendation for improving communication with affected businesses is to make sure that agency websites contain user-friendly, complete and accurate information about regulatory compliance and the consequences of non-compliance. As online content is posted, it is important that the agencies communicate its availability to businesses. This could include pointing out that fact in application forms, permits and licenses, audit and inspection materials shared at the time of an audit or inspection, and with communications at the time an enforcement action is commenced.

While agencies need to have protocols and resources in place to ensure usable and up-to-date web content, they need to be equally as mindful that they communicate the fact that the content exists. For example, the [Employment Security Department’s webpage](#) is quite helpful. The templates for communications to employers audited could better highlight what information and resources are available online, and strongly encourage employers to visit the website.

[The Employment Security Department’s website](#) has tabs on the home page for “Employer Taxes” and “Employer Resources” and quick links to common pages. Several places link to other agencies’ websites, including the [Washington Business Hub](#) (*Your one stop resource for starting and operating a business in Washington State*), [Restaurant Success](#) (*Your guide to opening a Seattle restaurant*), the Governor’s Office for Regulatory Innovation and Assistance’s [Small Business Guide](#), and resources within the Department of Revenue’s website. There is also a [handbook](#) available on the Employment Security Department’s website, titled Unemployment Insurance Tax Information, which has much guidance about unemployment insurance tax issues. Additionally, and pertinent to HB1352, there are [sections](#) of the website that describe procedures for administrative appeals, linking to the website for the [Office of Administrative Hearings](#) and the resources and information posted there. The Employment Security Department’s website also has [general information](#) about audits and a document titled [After the audit](#) linked on the Employer Taxes webpage with tips for businesses, including [Working with us during an audit](#), and [Common audit findings](#). The website isn’t perfect, as some of the links, particularly to pages on other agencies’ websites, are broken. But the Employment Security Department’s letter

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<sup>100</sup> SAO [Audit No. 2](#), *Regulatory Reform: Improving Permit Timeliness* 6 (Dec. 30, 2013).

<sup>101</sup> SAO [Audit No. 1](#), *Regulatory Reform: Communicating Regulatory Information and Streamlining Business Rules* 13 (Sept. 6, 2012).

communications with businesses could clarify that the website is a resource to learn more about their rights and responsibilities.<sup>102</sup>

Similarly, the [Small Business web page](#) of the Department of Labor & Industries provides a central resource for learning about the requirements and rights that small businesses have with regard to that agency's work. There are opportunities to sign up for mailing lists and to request forms, and individual businesses can request trainings on any number of topics or ask for customized classes. The Department of Labor & Industries employs two Small Business Liaisons who may be reached by phone at 1-800-987-0145 or by email at [SmallBusiness@Lni.wa.gov](mailto:SmallBusiness@Lni.wa.gov). It is critically important that the agency communicates the fact that this information is available to businesses who may not know to look for it until it is too late.

In summary, and echoing the conclusions of the State Auditor's Office, "[e]asy access to complete regulatory information is critical to **minimizing** the time and cost of regulation to businesses, government agencies, and taxpayers, and **maximizing** the likelihood of compliance. Government websites should contain complete regulatory information, and be easy to use."<sup>103</sup> The value is there for owners who are considering starting a business. It is also there for existing businesses with ongoing operations.

## **B. Improve Efforts to Share Effective Practices Among Agencies.**

In Washington, the Legislature and succeeding Governors have long recognized the value of coordination among regulatory agencies, directing them to improve coordination around regulatory approvals often to facilitate the startup of operations for specific types of business projects.<sup>104</sup> The series of Regulatory Reform Performance Audits<sup>105</sup> conducted by the State Auditor's Office since 2011 have consistently concluded that regulatory reform efforts would be more successful in our state with greater communication and coordination among agencies, and with support from a central entity. The third audit in the series, for example, found that:

“[S]everal coordination efforts established by lawmakers for specific industry needs have been successful[.], Washington does not have a lead agency, nor does it have a strategic approach to identify and prioritize new opportunities for multiagency coordination. Much of the existing agency coordination is informal, and is based on existing relationships rather than systematic process. While we do not believe it is appropriate to ask agencies to formalize all coordination practices, a long-term, strategic approach led by a single agency would ensure ongoing coordination among regulatory agencies in priority areas, which could result in significant benefits to businesses and government.”<sup>106</sup>

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<sup>102</sup> The audit letter templates submitted by the Employment Security Department did not direct businesses to view the Department's website. We have reason to believe that this process improvement has already been put in place.

<sup>103</sup> SAO [Audit No. 1](#), at 27.

<sup>104</sup> SAO [Audit No. 3](#), *Regulatory Reform: Enhancing Regulatory Agency Coordination* 6 (July 20, 2015).

<sup>105</sup> See <http://www.sao.wa.gov/state/Pages/RegReform.aspx>.

<sup>106</sup> SAO [Audit No. 3](#), at 21.

“One effective way to streamline regulation is by coordinating the business regulatory activities of the many state and local agencies involved in permitting and licensing.”<sup>107</sup>

The Washington State Governor’s Office for Regulatory Innovation and Assistance (ORIA) has an [Information Center](#), providing support for permitting and tax compliance. The [Small Business Liaison Team](#) (SBLT), created by [Executive Order 12-01](#), consists of representatives from 27 state agencies. The SBLT is responsible for maintaining the [Small Business Guide](#). This guide covers regulatory compliance, license and permit renewals, and state and local business taxes. But these efforts do not generally focus on the processes, rights or protections during or after an inspection or audit, or once a business is subject to an enforcement action. Similarly, the [Washington Business Hub](#), supported by the office of the Chief Information Officer, focuses on starting a business, while the “Regulatory Compliance” tab for “running” businesses, simply offers links to agencies’ websites. An extension of the work of the Governor’s Office in this area seems logical.

When compared with business startup, there have been fewer resources dedicated to encouraging interagency coordination and communication regarding developing informational content to communicate with business owners about the rights and protections available at the time of an agency audit or inspection or in the event of a dispute once an enforcement action is underway. Expanding efforts in this area would be a logical extension of other regulatory reform. This is something that may be able to be done within the existing infrastructure surrounding the Small Business Liaison Team, Information Center, and Small Business Guide overseen by ORIA, or the Washington Business Hub. Among other things, we recommend that the Governor’s Office consider compiling and publishing the most effective information and materials created and distributed by Washington’s regulatory agencies as “best practice” templates for all agencies to use. Research and suggestions could also consider and include best practices from other states and agencies around the country.

**C. Expand the Role of Business Associations and Other Groups in Coordinating the Sharing of Information Between Small Business Owners and Agencies**

Industry groups and trade associations can support their members in unique and specialized ways, providing education, counseling, and other services apart from or in cooperation with government agencies. The benefits will vary depending upon the specific industry with which the organization is associated, but these groups could prioritize their goals to help educate small business owners about their rights, protections and responsibilities when selected for agency audit, inspection, or enforcement action.

While the motivation for joining a trade association may vary according to the needs of a particular business, some of the benefits that trade groups could provide to members include:

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<sup>107</sup> SAO [Audit No. 3](#), at 6.

- **Training and Education.** Professional associations could hold events such as seminars, workshops, and classes to help members learn about their rights, protections and responsibilities and to provide opportunities for peer-to-peer learning and mentorship. Sponsoring events that include representatives of the regulatory agencies is a great way to encourage understanding early in the process and to facilitate better communication.
- **Information Sharing.** Using web content and newsletters, trade associations can help agencies provide business owners with immediate access to relevant regulatory information and developments.
- **Best Practices.** Trade associations can help agencies identify and spread the word about practices that can help businesses meet regulatory standards and understand their rights.

Similar to trade or industry groups, small businesses can be assisted by volunteer or not-for-profit groups in various ways. While often helpful at the time of business startup, these groups could also assist small business owners about their rights and responsibilities when selected for agency audit, inspection, or enforcement action. These organizations can collaborate with the trade groups to provide a full range of services to a small business to help ensure that a small business is prepared to operate successfully. Some examples of such groups:

- [Washington SCORE](#)

SCORE’s volunteer business professionals and expert “mentors” give counsel and guidance to entrepreneurs looking to start or expand their businesses. The services are entirely free and volunteer-driven.

- [Washington Small Business Development Centers](#)

Washington hosts SBA-affiliated development centers for small business. Each is dedicated to supporting the development and retention of small business.

- [Startup Washington](#)

Startup Washington is a program run by the state Department of Commerce that helps connect entrepreneurs to useful resources, data, funding sources, accelerators, workspaces and more.

Together, these groups could take an enhanced role in helping small business owners better understand their responsibilities, rights and protections when those businesses are selected for inspection or audit, or subject to an enforcement action for noncompliance. As background for a recent Performance Audit,<sup>108</sup> various industry groups told SAO auditors that small business owners typically look to associations to represent their interests, but noted that agencies rarely asked the associations for advice or information. Consistent with the findings of that audit,

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<sup>108</sup> SAO [Audit No. 4](#), at 23.

agencies and those industry groups could work more closely to share good management practices among businesses and to facilitate the communication of information to and from business owners.<sup>109</sup>

Similarly, small business associations and industry groups could take a more proactive approach in gathering and distributing information that would be helpful to their membership – ideally before a business owner is facing an audit, inspection, or enforcement action. Those same groups can help to facilitate the sharing of good management practices. They could also help businesses access information available on agencies’ websites and elsewhere.

#### **D. Be Deliberate About How “Small Business” is Defined**

Many of the regulatory programs implemented by the six agencies named in HB 1352 affect small businesses in the same way as other regulated entities no matter their size. For purposes of HB 1352 “small business” was given the same meaning as set forth in the Administrative Procedures Act: a business with 250 or fewer employees or gross annual revenue of less than \$7 million.<sup>110</sup>

Yet, the definition of “small business” is not a “one-size-fits-all” designation. In Washington, our laws have a variety of definitions for small business, ranging from under 50 employees to under 250 employees.<sup>111</sup> Whether a company qualifies as “small” or is too large can depend on the language and purpose of the law at issue. Further, the law often does not define by what method revenue is calculated or how the number of employees is counted, such as whether two part-time employees count as one full-time employee. For example, Windermere Real Estate had 55 employees and over \$700 million in revenue in 2014.<sup>112</sup> Windermere would qualify as a “small business” under certain Washington laws. Similarly, under some provisions of Washington law, a farm with more than a million dollars in revenue -- the top four percent of revenue of all farms -- could meet the same definition of small business as a part-time farm bringing in less than \$250,000.<sup>113</sup> The *ad hoc*, varied definitions of small business in our state make it hard for government agencies and other business-counseling providers to appropriately target small businesses and tailor services and regulations. Depending on the industry sector, the definition of

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<sup>109</sup> SAO [Audit No. 4](#), at 23.

<sup>110</sup> [RCW 34.05.110\(9\)\(a\)](#).

<sup>111</sup> 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 [RCW 39.26.010\(22\)\(a\)\(i\)](#). Fifty or fewer employees with a gross revenue of less than seven million dollars annually, or certified by the Office of Minority and Women’s Business Enterprises pursuant to [RCW 39.19](#). A business with two hundred fifty or fewer employees or a gross revenue of less than seven million dollars annually as reported on its most recent federal income tax return or its most recent return filed with the department of revenue. [RCW 34.05.110\(9\)\(a\)](#).

<sup>112</sup> <https://www.bizjournals.com/seattle/blog/2015/06/20-largest-private-companies-in-washington-state.html#g/211551/14> (last visited Nov. 15, 2017) (slide number 8).

<sup>113</sup> CAI Community Attributes, *Washington State Agriculture & Food Processing: Economic/Fiscal Impact Study* (Jan. 2015), [http://www.pnwer.org/uploads/2/3/2/9/23295822/cai.wa\\_farm\\_bureau\\_agri\\_culture\\_&\\_food\\_processing\\_economic\\_and\\_fiscal\\_impact\\_study\\_2015\\_0121\\_\(1\).pdf](http://www.pnwer.org/uploads/2/3/2/9/23295822/cai.wa_farm_bureau_agri_culture_&_food_processing_economic_and_fiscal_impact_study_2015_0121_(1).pdf).

“small business” may need to be scaled up or down to ensure that government services and regulations are targeted towards those businesses that are truly “small,” and in need of targeted treatment, when compared to others.

The concept of tailoring small business services to industry groups is included in federal law. It is found in Washington law for certain purposes, such as “certification” for public contracting purposes.<sup>114</sup> Since the inception of the U.S. Small Business Administration (SBA), questions have surrounded the appropriate numerical definition of “small” business to establish eligibility for SBA’s programs. The federal [Small Business Act](#) defines a “small business concern” as one that “is independently owned and operated and which is not dominant in its field of operation.”<sup>115</sup> The Small Business Act states that the definition of a “small business” shall vary from industry to industry to the extent necessary to reflect industry differences.<sup>116</sup> This numerical definition is called the “Size Standard” and is usually stated in either number of employees or average annual receipts.

The SBA has established two widely used size standards – 500 employees for most manufacturing and mining industries and \$7.5 million in average annual receipts for many nonmanufacturing industries. However, many exceptions exist. The applicable size standard can be found in the SBA’s [Small Business Size Regulations](#), or the [Table of Small Business Size Standards](#) matched to NAICS (North American Industry Classification System) industries for which SBA has established standards. The size standards for major industries or industry groups within various NAICS industry sectors are summarized on SBA’s website at [Summary of SBA Size Standards by Industry Sector](#).

The NAICS has a wide range of definitions for what constitutes a small business, depending on the industry and the context. Under this system, “small” business can have as many as 1,000 employees, or annual revenues of as much as \$38.5 million. The guidelines account for profit margin, rather than the more arbitrary numbers of gross revenue and employees. Industry-based profit margins are also considered in the SBA designations.

Having a similar, more deliberate focus on various business size standards here in Washington could help state agencies, trade associations, and other small business support providers determine which businesses can and should benefit from targeted assistance and efforts. More care could be taken to make sure that those who need the most help and concessions are receiving them, while making sure that the net is not cast too broadly.

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<sup>114</sup> For “certification” by the Office of Minority and Women’s Business Enterprises, “a business must qualify as a small business concern to be eligible for certification or recertification . . . [including not exceeding] the size limitations as set forth in the current table of North American Industrial Classification System (NAICS) codes and corresponding industry size standards as set forth in [49 C.F.R. Part 26](#) and amendments or inflationary adjustments thereof.” WAC [326-20-092\(1\)\(a\)](#).

<sup>115</sup> [15 U.S.C § 632\(a\)\(1\)](#).

<sup>116</sup> [15 U.S.C § 632\(a\)\(3\)](#).

**E. Consider Targeted Expansion of the Use of Special Advocates or Ombuds to Help Disseminate Information and Resolve Noncompliance Issues or Disputes**

The Department of Revenue's [Taxpayer Rights Advocate](#) was established by the Legislature in 1991 as part of a larger "[taxpayers' bill of rights](#)." The advocate helps taxpayers understand their rights and responsibilities and can serve as a mediator between the taxpayer and the agency in the event of a dispute.

There are other formal, issue-specific advocacy or ombuds roles created in Washington law and policy such as the [family & children](#) ombudsman,<sup>117</sup> the [long-term elderly care](#) ombudsman<sup>118</sup> and the ombuds created for the new paid family and medical leave program.<sup>119</sup> And, there is a [King County Office of the Ombudsman](#) that investigates complaints asserting a County agency or employee is acting in a manner that is unfair, arbitrary, inconsistent, or contrary to law. Each of these roles is configured differently. Much of the work of the positions is focused on providing information and understanding to the public, rather than any formal mediation or advocacy function.

The Legislatures in at least five state legislatures ([Alaska](#), [Arizona](#), [Hawaii](#), [Iowa](#) and [Nebraska](#)) and one territory ([Puerto Rico](#)) have adopted laws creating cross-agency, cross-sector Ombudsmen or Special Advocates with a role in dispute resolution. Beyond the Department of Revenue, the other five agencies listed in [HB 1352](#) (Agriculture, Ecology, Employment Security, Labor and Industries and State Fire Marshal) do not appear to have a formal, statutorily created advocate, ombuds or similar function. Given the scope of this Report and the timeframe in which it was produced the Attorney General's Office did not evaluate either the effectiveness of the programs in other states or the need for them in Washington.

As demonstrated by the Recommendations listed above, however, there are other, more cost-effective means that agencies and other organizations can use to educate and communicate with regulated businesses. Each of the listed state agencies has one or more [Small Business Liaisons](#). With or without legislative authority, state agencies may be able to use their existing infrastructure to effectively take on the informative role that advocates and ombuds employ to educate and train the public, and troubleshoot issues that might arise. In the absence of those measures, after further study Washington policymakers could consider expanding the advocacy or mediator ombuds concept to other particular state agencies and other particular state inspection, audit or enforcement functions or programs beyond the Department of Revenue.

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<sup>117</sup> The Family and Children's Ombuds investigates "upon his or her own initiative or upon receipt of a complaint, an administrative act alleged to be contrary to law, rule, or policy, imposed without an adequate statement of reason, or based on irrelevant, immaterial, or erroneous grounds." [RCW 43.06A.030](#).

<sup>118</sup> Under the federal Older Americans Act, every state is required to have an Office of the Long-Term Care Ombudsman to address complaints and advocate for improvements in the long-term care system. The creation and duties of the Washington State Long-Term Care Ombudsman are contained in Washington state law at [RCW 43.190](#) and implementing regulations at [WAC 365.18.060](#).

<sup>119</sup> [Substitute S.B. 5975, at 61-62, 65th Leg., 3d Sp. Sess. \(Wash. 2017\) \(§ 88\)](#).

# ATTACHMENTS

JAY INSLEE  
Governor



STATE OF WASHINGTON  
OFFICE OF THE GOVERNOR

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November 13, 2017

Kate Kelly, Policy Director  
Office of the Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188

Re: Draft Recommendations – HB 1352

Dear Ms. Kelly:

Pursuant to HB 1352, thank you for the opportunity to review and respond to the draft recommendations which we understand will be finalized and incorporated into a report to the Legislature. The Governor's Policy Office worked with the State Fire Marshal, Office of Regulatory Innovation and Assistance and the departments of Agriculture, Ecology, Employment Security, Labor and Industries, and Revenue to provide the following consolidated response.

**Recommendation 1: Provide transparent, accessible information and assistance to operating businesses early in the process.**

We agree with this the recommendation and appreciate the recognition of agencies' efforts to provide easy access to accurate and timely information. Agencies acknowledge that more improvements can be made to effectively communicate the availability of this information to businesses, and will continue to look for opportunities to do so.

**Recommendation 2: Share effective practices among agencies.**

We agree with this recommendation. The Governor's Office of Regulatory Innovation and Assistance, with support from members of the Small Business Liaison Team, will look for opportunities to compile and share effective information and materials with Washington's regulatory agencies.

Also, we would appreciate clarification in the recommendation's final paragraph where it states, "interagency coordination and communication...at the time of an agency audit or inspection..." We assume this sentence is intended to refer to developing informational content for business owners in a central location, developed in an interagency fashion. As currently drafted, it could be construed as recommending interagency coordination at the time of an agency audit, inspection or dispute. Since agencies rarely take enforcement actions jointly, this interpretation could be problematic.

**Recommendation 3: Business associations and other groups could expand their role in coordinating information between small business owners and agencies.**

We think this recommendation has great potential value and hope that industry groups and trade associations agree. We would welcome the opportunity to increase lines of communication and opportunities for receiving feedback from these groups on behalf of their members. We will encourage agencies to continue to reach out to business associations and other groups and look for additional venues to do so.

**Recommendation 4: Be deliberate about how "small business" is defined.**

As this recommendation aptly points out, how a small business is defined in Washington depends on the purpose of the regulation. We agree that a thoughtful approach to defining "small business" is essential to ensure equitable and fair treatment of this diverse subgroup of businesses. Defining all small businesses the same way may lead to unintended consequences, because what may help one group will not necessarily have the equal impact on another.

Of note, in May of this year, staff from the National Federation of Independent Business posed the following question to several agencies, including Labor & Industries, Department of Revenue and Employment Security: Would a common definition for "small business" in WAC or RCW be useful? Agencies collectively replied that it makes sense to have flexibility in how a small business is defined depending on the particular policy for the reasons noted above. Additionally, as part of a more thoughtful approach, we encourage industry groups and trade associations to engage us in a discussion of which small businesses need more support (and what type of support).

**Recommendation 5: Consider expanding the use of special advocates or ombuds to help resolve noncompliance issues or disputes.**

Rather than establishing a cross-agency special advocate/ombuds or expanding the ombuds concept to other particular state agencies, we concur that it would be a more cost-effective means to use the existing conduit of agency representatives on the Small Business Liaison Team to educate and communicate with small businesses, as well as assist with troubleshooting issues that may arise with their respective agencies.

Again, we greatly appreciate the opportunity to offer feedback on these draft recommendations. If I can clarify our response or answer any questions, please don't hesitate to contact me or Sheri Sawyer, Senior Policy Advisor.

Sincerely,

Keith Phillips  
Policy Director

cc:

Mike Webb, Chief of Staff, Office of the Attorney General  
Shane Esquibel, Chief Deputy Attorney General, Office of the Attorney General  
John Batiste, Chief, Washington State Patrol  
Maia Bellon, Director, Department of Ecology  
Aaron Everett, Director, Office of Regulatory Innovation and Assistance  
Dale Peinecke, Commissioner, Employment Security Department  
Joel Sacks, Director, Department of Labor and Industries  
Derek Sandison, Director, Department of Agriculture  
Vikki Smith, Director, Department of Revenue  
Kathryn Leathers, General Counsel, Office of the Governor  
David Schumacher, Director, Office of Financial Management  
Drew Shirk, Legislative Director, Office of the Governor  
Sheri Sawyer, Senior Policy Advisor, Governor's Policy Office

## APPENDIX

HB 1352 directs the six named agencies to each make a submittal to the AGO

1. Identifying any provisions in their governing statutes, administrative rules, policy statements, guidance, or directives that list rights or protections afforded parties selected for inspection, audit, or other enforcement actions by that agency along with a copy or hyperlinks to the source material; and
2. Including a copy of or link to any statement of rights or similar materials the agency provides to small business owners in advance or at the time of audit, inspection, enforcement action, and appeal process.

Those submittals – which are voluminous - are included in the Appendix to this Report at the following link: <http://www.atg.wa.gov/policy/HB1352>.

The information contained in the Appendix is summarized in the section to this Report titled “Overview of Governing Laws and Policy for Agency Audits, Inspections or Enforcement Actions and Identification of Materials Provided by Agencies to Businesses.”