

COST-BENEFIT ANALYSIS

In performing a cost-benefit analysis, each rulemaking entity must provide the information requested for the cost-benefit analysis to be considered a good faith effort. The cost-benefit analysis must be submitted to the Office of Policy, Research and Regulatory Reform at least ten (10) days before the administrative hearing on the proposed rule and posted on your agency's web site. For all questions, please attach all underlying data that supports the statements or figures stated in this cost-benefit analysis.

DEPARTMENT: Department of Law AGENCY: Consumer Protection Section

CCR: 4 CCR 904-2 DATE: September 2, 2021

RULE TITLE OR SUBJECT: COLORADO ATTORNEY GENERAL INVESTIGATIVE HEARINGS

Per the provisions of 24-4-103(2.5)(a), Colorado Revised Statutes, the cost-benefit analysis must include the following:

1. The reason for the rule or amendment;

Consumer Protection Section – Enforcement Responsibilities

The Colorado Attorney General (“Attorney General”) is responsible for enforcing the Colorado Consumer Protection Act, sections 6-1-101, *et seq.*, C.R.S. (“CCPA”) and the Colorado Antitrust Act, section 6-4-101, *et seq.*, C.R.S. (“CAA”).

The purposes of the CCPA are to protect the public, and to ensure full and fair competition. *See, e.g., May Dep’t Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 980 (Colo. 1993) (noting that CCPA was enacted to protect the public and abate evils arising from business pursuits); *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660, 665 (Colo. 1972) (declaring that the CCPA was “clearly enacted to control various deceptive trade practices in dealing with the public and as such is obviously designed to both declare and enforce an important public policy”). Colorado courts broadly interpret the CCPA to serve its remedial and deterrence purposes. *See Rhino Linings USA, Inc. v. Rocky Mountain Rhino Linings, Inc.*, 62 P.3d 142, 146 (Colo. 2003) (recognizing that the CCPA “deters and punishes businesses which commit deceptive trade practices in their dealings with the public by providing prompt, economical, and readily available remedies against consumer fraud”).

When the legislature enacted the CAA, it did so because:

“[C]ompetition is fundamental to the free market system and [] the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality commodities and services, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political, and social institutions.”

Colo. Rev. Stat. Ann. § 6-4-102.

The CCPA authorizes the Attorney General or district attorneys to “issue subpoenas to require the attendance of witnesses or the production of documents, administer oaths, conduct hearings in aid of any investigation or inquiry” when they have “reasonable cause to believe that” there has been a violation of the CCPA. C.R.S. § 6-1-108(1). Similarly, the CAA authorizes the Attorney General to request reports and “[i]ssue subpoenas to require the attendance of witnesses or the production of relevant documents, administer oaths, conduct hearings in aid of an investigation or inquiry” if the Attorney General has “reasonable cause to believe” there has been a violation of the CAA or federal antitrust laws. C.R.S. § 6-4-110(1)(b).

Reason for Proposed Rules

The proposed Investigative Hearing Rules are intended to aid in the efficient and fair administration of the investigative hearing process for matters involving the CCPA and the CAA. The rules are intended to provide certainty and transparency to the public and the individuals or entities participating in the investigative hearing process about that process.

The proposed rules establish who may conduct investigative hearings on behalf of the Attorney General. The CCPA and CAA give sole authority and discretion to the Attorney General and the district attorneys to determine who may conduct investigative hearings.

A second purpose of the proposed rules is to provide guidance on the confidential nature of these investigative hearings, pursuant to existing provisions found in the Colorado Open Records Act (CORA), C.R.S. §§ 24-72-101 *et seq.*, the CCPA and the CAA.

A third purpose of the proposed rules is to recognize that the issuance and enforcement of administrative subpoenas are not governed by the Colorado Rules of Civil Procedure. See *In People ex rel. Orcutt v. District Court*, 435 P.2d 374, 377 (Colo. 1967); *Feigin v. Colorado Nat. Bank, N.A.*, 897 P.2d 814, 819 (Colo. 1995). Further, in drafting the CCPA, the legislature explicitly stated where the rules of civil procedure apply and where they do not apply. For example, C.R.S. § 6-1-108, “Subpoenas, Hearings, Rules,” explicitly provides that service of investigative subpoenas “shall be made in the manner prescribed by law, or as provided by Rule 4 of the Colorado Rules of Civil Procedure.” C.R.S. § 6-1-108(2). C.R.S. § 6-1-110, “Restraining Orders, Injunctions, Assurances of Discontinuance,” explicitly provides that the Attorney General may seek a temporary restraining order or injunction, “pursuant to the Colorado rules of civil procedure.” C.R.S. § 6-1-110(1).

By comparison, C.R.S. § 6-1-108 describes the Attorney General’s authority to “conduct hearings in aid of any investigation or inquiry,” without reference to the rules of civil procedure. C.R.S. § 6-1-108(1). Similarly, the CAA, C.R.S. § 6-4-110 “Civil Discovery Request,” explicitly references the Attorney General’s authority to “enter a protective order as provided for in the Colorado rules of civil procedure,” yet makes no reference to the rules of civil procedure in describing its authority to “conduct hearings in aid of an investigation or inquiry.” See C.R.S. § 6-4-110. In fact, section 6-4-110 does not mention the Colorado Rules at all until subpart (d), making clear Civil Discovery Requests and hearings are not under the Colorado Rules of Civil Procedure.

Finally, similar to depositions of entities permitted by the Colorado Rules of Civil Procedure, the proposed rules establish that the Attorney General has the authority to compel an entity or organization to designate persons with knowledge of the subpoena topics, and whose testimony can bind the entity or organization, to testify at investigative hearings.

2. The anticipated economic benefits of the rule or amendment, which shall include economic growth, the creation of new jobs, and increased economic competitiveness;

The proposed rules will assist the Attorney General in enforcing the CCPA and CAA and will provide clarity and certainty to the individuals and entities participating in the investigative hearing process. The proposed rules will support the Attorney General’s mandates to identify offenders and protect the public and businesses from conduct that threatens consumers and the marketplace. Given that the CAA and CCPA are designed to ensure a fair and competitive marketplace (CRS § 6-4-102; See *May Dep’t Stores, supra*), any tool that advances these goals will economically benefit society.

Absent implementation of the proposed rules, the Attorney General may face delays caused by confusion and objections among parties subpoenaed to attend investigative hearings. The proposed rules will streamline the Attorney General’s investigations for all parties involved by increasing transparency so that subpoenaed parties and their counsel can reasonably prepare and participate in the investigative hearing process. This transparency may lower legal costs for both the Attorney General and subpoenaed parties. Ensuring expeditious investigations will further benefit the public by more quickly identifying and ceasing activity in violation of the CCPA or the CAA. This will also increase economic competitiveness for individuals and businesses that are not violating the CCPA or the CAA.

3. The anticipated costs of the rule or amendment, which shall include the direct costs to the government to administer the rule or amendment and the direct and indirect costs to business and other entities required to comply with the rule or amendment;

There is no anticipated increase in costs in implementing this proposed rule to government or the Colorado Attorney General's Office. The Attorney General already enforces the CCPA and CAA by conducting investigative hearings that largely mirror the procedures articulated in the proposed rules.

An overarching purpose and anticipated result of the proposed rules is to give certainty to all parties involved in the investigative hearing process. The proposed rules impose no obligations on consumers. Rather, the proposed rules provide a clear, efficient mechanism for investigating compliance with the CCPA and CAA, which benefits consumers by creating a systematic process to protect them from unlawful behavior.

The proposed rules impose certain obligations on persons subpoenaed to appear and give testimony in investigative hearings. Specifically, the proposed rules establish that an investigative hearing shall continue for a reasonable amount of time unless and until the Attorney General specifies that it has ended. The proposed rules also establish that the Attorney General may issue subpoenas requiring a commercial entity to produce witnesses to appear and give oral testimony, which shall be binding on the entity.

The proposed rules explain how the Attorney General will maintain the confidential nature of its investigations under the CCPA and CAA and what that means for the treatment of transcripts and records related to the investigative hearing. Maintaining the confidentiality of investigative hearings provides certainty to consumers, witnesses, and persons subject to an investigation that information provided to the Attorney General will not be made public unless and until the Attorney General finds it necessary to do so in order to protect the public, e.g. an enforcement action or consumer education.

Most obligations in the proposed rules stem from express language in the CCPA and CAA and do not impose additional burdens on persons subpoenaed to appear at investigative hearings. To the extent that the proposed rules include provisions not expressly required by statute, these provisions benefit subpoenaed persons or entities by providing clarity and certainty. The rules may actually decrease costs to parties involved in CCPA or CAA investigation as counsel and witnesses will know what to expect and can prepare for investigative hearings in a more efficient manner.

4. Any adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness; and

No adverse effects on the economy are expected. The proposed rules may streamline the Attorney General's investigations under the CCPA and CAA and reduce confusion and debate over the process. This will allow the Attorney General to identify violators early and seek prompt relief to protect consumers and competing businesses from unfair and deceptive trade practices and to ensure a competitive marketplace. The proposed rules thus could potentially save witnesses and investigative targets costs and attorney fees related to the Attorney General's investigations.

5. At least two alternatives to the proposed rule or amendment that can be identified by the submitting agency or a member of the public, including the costs and benefits of pursuing each of the alternatives identified.

The alternatives to the proposed rules include:

1. The Attorney General could elect not to promulgate rules related to investigative hearings. This option would decrease clarity of the investigative hearing process, could increase the costs to respondents and could result in delays in investigating and stopping violations of the CCPA or the CAA which would increase costs to all consumers and competing businesses.
2. The Attorney General could promulgate rules under only the CCPA and delay rulemaking under the CAA in order to gather relevant experience under one statute. However, it is likely that this option would ultimately result in

two rulemakings, which is a less efficient and more costly path than a single rulemaking, with amendments in the future based on experiences under both statutes. A single rulemaking under the CCPA would also raise questions and debate among parties attending investigative hearings under the CAA as to whether the process is the same or similar to the investigative hearing rules under the CCPA.