

Notice of Proposed Rulemaking
Department of Law
Attorney General - Consumer Protection Section
Proposed Draft Amendments to the Colorado Privacy Act Rules
4 CCR 904-3

Date & Time of Public Hearings
Thursday, November 7, 2024, at 10:00 AM MST

I. Notice

As required by the Colorado Administrative Procedure Act found at C.R.S. § 24-4-103, the Department of Law (the “Department”) gives notice of a proposed rulemaking to consider proposed draft amendments to the Colorado Privacy Act (CPA) Rules located at 4 CCR 904-3. The proposed draft amendments are intended to: (1) govern the implementation of statutory changes to the CPA enacted by House Bill 24-1130 and Senate Bill 24-041; and (2) to create rules governing the process of issuing opinion letters and interpretive guidance to develop an operational framework for businesses that includes a good faith reliance defense of an action that may otherwise constitute a violation of C.R.S. §§ 6-1-1301 through 6-1-1314.¹

The proposed rulemaking hearing is scheduled for November 7, 2024, at 10:00 AM, and will continue as needed. The hearing will be conducted both in person and by video conference. All parties interested in attending the public hearing virtually must register through the registration link provided in the table below to receive the Zoom meeting link. While parties interested in attending the public hearing in person are not required to register, we do encourage advanced registration for planning purposes. Any party in attendance will be invited to provide oral comments even if not registered in advance.

Date	Location	Time	Registration Link
November 7, 2024	<u>In Person:</u> Room 103 The Conference Center State Services Building 1525 Sherman Street Denver, CO 80203 <u>Video Conference:</u> Link available upon registration	10:00 AM	https://us02web.zoom.us/join/register/WN_b6Ik9_O1REaLnh17Sbc4Kg

¹ C.R.S. § 6-1-1313(3)

How to Register for the Rulemaking Hearing

You must click on the registration link provided in the table above to register to attend the hearing remotely. You may also register in advance to attend the hearing in person but are not required to do so. When you register, you must provide your full name and email address. You may also provide the name of the organization that you are representing, if any. Finally, please indicate whether you plan on attending the hearing in person or remotely by video conference, and whether you plan to testify during the hearing. When you submit your registration, you will receive a confirmation email including details about how to join the hearing virtually or attend in person. The registration link for the hearing is also available on the Department's CPA rulemaking website at coag.gov/CPA.

II. Subject

The Department is considering draft amendments and additions to the CPA Rules. The purposes of the draft amendments are: (1) to govern the implementation of statutory changes to the CPA enacted by House Bill 24-1130 and Senate Bill 24-041; and (2) to create rules governing the process of issuing opinion letters and interpretive guidance to develop an operational framework for businesses that includes a good faith reliance defense of an action that may otherwise constitute a violation of C.R.S. §§ 6-1-1301 through 6-1-1314.²

Only the rule provisions included in the proposed draft amendments will be open for comment during this rulemaking period. A detailed Statement of Basis, Purpose, and Specific Statutory Authority and the complete set of proposed draft amendments follow this notice and are incorporated herein by reference.

The Department invites comments from all members of the public regarding the proposed draft amendments during the rulemaking process.

III. Statutory Authority

The specific authority under which the Attorney General shall establish these proposed draft amendments is set forth in C.R.S. §§ 6-1-108(1), and 6-1-1313. Additionally, these rules include amendments to be consistent with C.R.S. § 6-1-1314, effective January 1, 2025.

IV. Copies of the Notice, Proposed Draft Amendments, and the Statement of Basis, Purpose & Authority

This Notice of Proposed Rulemaking, the proposed draft amendments, and the Statement of Basis, Purpose, and Specific Statutory Authority are available for review at the Department's CPA rulemaking website at coag.gov/CPA. If there are changes made to the proposed draft amendments prior to the hearing, the updated proposed draft amendments

² All undefined terms capitalized herein shall be interpreted as defined in the CPA, the CPA Rules, or the proposed draft amendments.

will be provided to the CPA rulemaking mailing list and posted on the Department's website by October 30, 2024. The Department encourages all interested parties to sign up for the CPA rulemaking mailing list (available at <https://lp.constantcontactpages.com/su/zIKnX1I/CPA>).

Please note that the proposed draft amendments being considered are subject to further changes and modifications after the public hearing and the deadline for the submission of written comments.

V. Opportunity to Testify and Submit Written and Oral Comments

The Attorney General and Department of Law strive to make the rulemaking process inclusive to all. Interested and affected parties are welcome to testify at the rulemaking hearing and to submit written comments through the online CPA rulemaking comment portal.

Rulemaking Hearing (Thursday, November 7, 2024)

The format of the rulemaking hearing will proceed as follows:

- The Hearing Officer will open the hearing and provide a brief introduction of the hearing procedures.
- The Department staff will present a summary of the proposed draft amendments and discuss public input, feedback, and suggestions provided through written comments.
- Participants will then have the opportunity to give testimony regarding the proposed draft amendments.

Hybrid Hearing Procedures

At the beginning of the hearing, we will mute all public participants attending online. After the introduction, a summary of the rulemaking, and a review of any proposed revisions to the rules, we will open the hearing to testimony as follows:

- For the sake of efficiency, those who are attending this hearing in person will be called upon first to provide their public comment. We will reference the sign-up sheet provided and individually call upon participants who wish to provide their testimony. Once we have exhausted the sign-up sheet, we will move forward with the testimony of online participants.
- Referencing registration records, we will identify and individually unmute online participants who indicated that they plan to testify during the hearing.
- When we exhaust the list, we will ask whether any additional attendees wish to testify. In-person attendees may raise their hands to indicate their intention to testify, and online attendees may raise/lower their hand virtually.
- To ensure that the hearing is prompt and efficient, oral testimony may be time limited.

Webinar Audio Requirements: We strongly encourage attendees to join the webinar through their computer or Zoom meeting app, even if they use their telephone to dial in for audio. To testify during the hearing, it is best to use your computer microphone and speakers or a headset or headphones. As outlined above, we will first receive online testimony from attendees whose registration indicates that they plan to provide testimony and then we will offer attendees the option to raise their hand to testify.

Written Comments

You may submit written comments through our comment portal available at <https://coag.gov/resources/colorado-privacy-act/rulemaking-comment-form/> during the comment period between September 25, 2024, and November 7, 2024. If the formal rulemaking hearing continues beyond November 7, 2024, the comment period will continue through the last day of the formal rulemaking hearing. Please submit written comments by October 23, 2024, to be considered for any proposed revisions presented at the hearing. Any updates to the proposed draft amendments will be provided to the CPA rulemaking mailing list and posted on the Department of Law's website by October 30, 2024. All written comments must be received on or before Tuesday, November 7, 2024 at 11:59 P.M. MST, or if the formal rulemaking hearing continues beyond November 7, 2024, before 11:59 P.M. MST on the last day of the formal rulemaking hearing.

As soon as possible after receipt, written comments will be posted online at the Colorado Privacy Act Rulemaking Comment website: <https://comments.coag.gov/s/colorado-privacy-act-2024>. All written comments will be added to the official rulemaking record.

To promote timely sharing of information among all stakeholders, the Department strongly encourages stakeholders to submit written comments early in this process.

VI. Recording of the Hearing

The hearing will be recorded. Both the hearing and recordings will be part of the public rulemaking record. After the hearing concludes, the recording will be available on the Colorado Department of Law's CPA Rulemaking website at coag.gov/CPA.

VII. Special Accommodations

If you need special accommodations, please contact our office at coprivacy@coag.gov at least two (2) weeks prior to the scheduled hearing date.

COLORADO DEPARTMENT OF LAW
Colorado Privacy Act Rules
Statement of Basis, Specific Statutory Authority, and Purpose

4 CCR 904-3

Basis and Specific Statutory Authority

On July 7, 2021, Governor Polis signed Senate Bill 21-190: Protect Personal Data Privacy, establishing the Colorado Privacy Act, C.R.S. §§ 6-1-1301, *et seq.* (“CPA”). The CPA was codified as part of the Colorado Consumer Protection Act (“CCPA”), which grants the Attorney General the authority to “promulgate such Rules as may be necessary to administer the provisions” of the CCPA. C.R.S. § 6-1-108(1).

In addition to several provisions concerning Consumer rights and Controller obligations¹, the CPA gives the Colorado Attorney General enforcement and rulemaking authority, including the authority to “promulgate rules for the purpose of carrying out ... Part 13,”² and to “adopt rules that govern the process of issuing opinion letters and interpretive guidance to develop an operational framework for business that includes a good faith reliance defense of an action that may otherwise constitute a violation of ... Part 13.”³

On May 31, 2024, Colorado passed Senate Bill 24-041, “Concerning Adding Data Protections for a Minor’s Online Activity”, and House Bill 24-1130, “Concerning Protecting the Privacy of an Individual’s Biometric Data.” Senate Bill 24-041 amends Part 13 to add provisions strengthening Personal Data protections and requirements for Minors, and House Bill 24-1130 amends Part 13 to add additional protections and requirements for Biometric Data. House Bill 24-1130 grants the Department of Law additional authority to “promulgate rules for the implementation of [that]section.”⁴

These proposed draft amendments to the Colorado Privacy Act Rules, 4 CCR 904-3 (the “CPA Rules”) are for the purpose of carrying out the CPA, including creating the process of issuing Opinion Letters and Interpretive Guidance contemplated by C.R.S. §6-1-1313(3), as well as modifying current language to be consistent with the CPA as amended by Senate Bill 24-041 and House Bill 24-1130.

¹ All undefined terms capitalized herein shall be interpreted as defined in the CPA, the CPA Rules or the proposed draft amendments to the CPA Rules.

² C.R.S. § 6-1-1313(1).

³ C.R.S. § 6-1-1313(3).

⁴ House Bill 24-1130 at C.R.S. § 6-1-1314(7).

Purpose of the Proposed Amendments

The specific subject matter of this rulemaking falls into two discrete categories: rules governing the process of issuing Opinion Letters and Interpretive Guidance; and amendments to current rule language for the purpose of carrying out Part 13 as amended by House Bill 24-1130 and Senate Bill 24-041.

The promulgation of these proposed draft amendments to the CPA Rules does not preclude any rulemaking the Attorney General chooses to conduct at a later date pursuant to C.R.S. §§ 6-1-108(1) or 6-1-1313.

A. A Process of Issuing Opinion Letters and Interpretive Guidance

The proposed draft amendments to Part 10 of the CPA Rules were written by the Department to create a framework enabling interested parties to submit requests for Opinion Letters and Interpretive Guidance as contemplated by C.R.S. § 6-1-1313(3).

Draft Rule 10.02 sets forth the scope and effect of the Opinion Letter process, providing an understanding of when Opinion Letters may be issued and when an Opinion Letter may be used as the basis for a good faith reliance defense. For instance, draft Rule 10.02(D) explains that individuals or entities who are subjects of an Opinion Letter may use that Opinion Letter as the basis of a good faith reliance defense, while draft Rule 10.02(E) explains that Opinion Letters may not be relied upon by third parties. Proposed draft Rule 10.03 provides important information on how an individual or entity may request an Opinion Letter and describes the information that must be included in such a request. Setting forth the scope, use, and limitations of Opinion Letters will give the public a better understanding of when and how to pursue this process.

Draft Rules 10.05 and 10.06 describe the scope of, and process for requesting, Interpretive Guidance. These proposed draft rules make clear that Interpretive Guidance – as opposed to Opinion Letters – will be issued as non-binding, informational guidance to help the public better understand the CPA’s application. The draft rules concerning Interpretive Guidance serve the important functions of distinguishing general, non-binding Interpretive Guidance from narrow, binding Opinion Letters, and providing a clear process for requesting such guidance.

B. Draft Amendments Relating to House Bill 24-1130: Concerning Protecting the Privacy of an Individual’s Biometric Data

House Bill 24-1130, amends the CPA to add C.R.S. § 6-1-1314, which provides additional definitions related to Biometric Data and Identifiers; requires Controllers that Process one or more Biometric Identifiers to adopt a written policy subject to the requirements in that section; requires Processors to maintain specific security breach protocols related to Biometric Data and Identifiers; requires Controllers to fulfil specified obligations before Collecting or Processing Biometric Identifiers; adds specific “right to access” requirements related to Biometric Data; adds obligations relating to the Processing of Biometric Identifiers in the employment context; and provides the Department of Law with authority to promulgate rules for the implementation of C.R.S § 6-1-1314. House Bill 24-1130 also amends definitions contained in C.R.S § 6-1-1303 and widens the CPA’s scope of application in the case of Controllers Processing Biometric Identifiers.

The proposed draft amendments to the CPA Rules implement the changes made to the CPA by House Bill 24-1130. For instance, the proposed draft amendments revise the definitions of “Biometric Data” and “Biometric Identifiers” to conform to the definitions in House Bill 24-1130. They also add definitions for “Employee” as it applies to the new Biometric Data protections and for “Biometric Identifier Notices,” which are notices required by the bill. Part 4 of the Rules was amended to account for additional information that a Controller must include in a response to a request to access Biometric Data, and Part 6 describes the information that a Controller must include in a Biometric Identifier Notice. The draft amendments in Part 7 account for considerations that must be made with respect to Consent as it relates to the Processing of Biometric Data and Identifiers.

By clearly describing the way Biometric Data and Biometric Identifiers must be accounted for in the CPA Rules, the proposed draft amendments stemming from House Bill 24-1130 ensure that Biometric Data and Biometric Identifiers are protected in the way that the law intends.

C. Draft Amendments Relating to Senate Bill 24-041: Concerning adding data protections for a minor’s online activity

Senate Bill 24-041 expands the CPA to provide additional protections for the Personal Data of Minors, including by creating additional Controller and Processor obligations, and by establishing additional requirements for data protection assessments that must be conducted when Controllers offer online services, products, or features to Minors.

The proposed draft amendments account for the changes made to the CPA by Senate Bill 24-041 by incorporating the definition of “Minor” into the rules; by

accounting for Minors with respect to disclosures, notifications, and other communications; by incorporating Senate Bill 24-041's Consent requirements into the Consent processes established by the CPA Rules; and by incorporating Senate Bill 24-041's data protection assessment requirements into the data protection assessment processes and guidelines established by the CPA Rules. By clearly accounting for Senate Bill 24-041, the proposed draft amendments to the CPA Rules ensure that the intended Personal Data protections are provided to Minors.

D. Other Rules

While the Department has endeavored to make this Statement of Basis, Specific Statutory Authority, and Purpose comprehensive, the details contained herein may not fully delineate the issues that are discussed or the rules that are eventually adopted. The Department intends to take stakeholder input sincerely, and this may result in additional rules and amendments, significant changes to the proposed draft amendments, or additional portions of rules that are not detailed herein. For this reason, the Department strongly encourages all interested persons to sign-up for updates through the mailing list on the Department's CPA Rulemaking webpage at coag.gov/CPA, and to check the webpage periodically for updates.