

Pre-Rulemaking Considerations for the Colorado Privacy Act Children's Privacy Amendment

I. Introduction

In May 2024, Colorado enacted SB24-041, which amended the Colorado Privacy Act (CPA) to add data protections for a minor's online activity. Specifically, SB24-041 (the "Children's Privacy Amendment" or "Amendment") requires controllers offering an online service, product, or feature to a consumer "who the controller knows or willfully disregards is a minor" to, among other things, use reasonable care and conduct data protection assessments related to any heightened risk of harm to minors; to obtain consent prior to engaging in targeted advertising to a minor, selling the minor's data, or profiling a minor; and to obtain consent prior to using a "system design feature to significantly increase, sustain, or extend a minor's use of the service, product, or feature". The Children's Privacy Amendment applies to any controller that conducts business in Colorado or delivers products or services that are targeted at Colorado residents, regardless of the volume of or amount of revenue derived from that activity. Pursuant to the Colorado Privacy Act, the Colorado Attorney General is given the authority to promulgate rules.¹

The Colorado Department of Law seeks input from interested persons to inform the drafting of effective rules that are consistent with the Amendment's intent. The Department has developed a public input and outreach strategy to provide a means to contribute feedback, perspective, and expertise in connection with the CPA. In the first, and current, phase of this strategy we welcome informal input from all members of the public about any aspect of the Department's upcoming rulemaking regarding the Children's Privacy Amendment. Feedback is being collected through a publicly available comment form² and we may consider additional opportunities for informal input in the future.

If the Department publishes a proposed draft set of rules related to the Amendment, the Department will begin a formal notice-and-comment rulemaking phase by providing a notice of rulemaking and accompanying draft regulations on the Colorado Secretary of State Website.³ Any notice-and-comment phase will include at least one formal hearing as well as the continued opportunity to submit comments. Formal rulemaking will be governed by the Colorado Administrative Procedures Act (APA) and comments received during the formal rulemaking process will be automatically included in the rulemaking record.

We encourage consumers, regulated entities, and other interested parties to participate in each phase of this process by providing comments and input relevant to the Children's Privacy Amendments. Comments may address, but are not limited to, areas that need clarification, consumer concerns, anticipated compliance challenges, impacts of the Amendment on business or other operations, cost concerns, and any underlying or related research or analyses. In addition, we provide a list of topics and questions below for which we welcome specific feedback. Please note that these topics and questions are not intended to limit input or indicate that the Attorney General is predisposed to any position or action.

¹ C.R.S. § 6-1-1313(1).

² Online comment form available at: <https://coag.gov/resources/colorado-privacy-act/rulemaking-comment-form/>.

³ When published, the rules will be available at sos.state.co.us. To receive updates from the Secretary of State, please sign up at <https://www.coloradosos.gov/CCR/EmailSubscription.do>.

II. Principle-guided rulemaking

To enhance the public's understanding of how the Office of the Attorney General will be approaching this rulemaking, we offer five principles to help implement this amendment. In the Department's rules, we seek to:

- **Promote consumer rights.** The rules should protect consumers, understanding that consumers need to understand and exercise the rights granted to them under the law.
- **Clarify ambiguities.** The rules should clarify the law where necessary to promote compliance and minimize unnecessary disputes.
- **Facilitate efficient and expeditious compliance.** The rules should help controllers and processors comply with the law, by making processes simple and straightforward for consumers, entities, and enforcement agencies.
- **Harmonize.** The rules should facilitate interoperability and help situation the amendment alongside the competing protections and obligations created by other state, national, and international frameworks.
- **Allow for innovation.** The rules should not unduly burden anybody from developing creative adaptive solutions to address challenges presented by advances in technology.

As the Department considers public input, it will examine how any recommendations and concerns address and advance these key principles.

III. Targeted questions for informal input

Below are topics and questions for which the Department believes informal, pre-rulemaking feedback will be particularly beneficial. The Department hopes to hear from a diverse group of stakeholders to guide the drafting of balanced and impactful regulations.

1. *System Design Features*

The Amendment imposes restrictions on a controller's use of "any system design feature to significantly increase, sustain, or extend a minor's use of the online service, product, or feature."⁴ Specifically, controllers offering an online service, product, or feature to a consumer whom the controller actually knows or willfully disregards is a minor must obtain consent prior to using such a system design feature. Consent may consist of the minor's consent, or, if the minor is a child, the consent of the minor's parent or legal guardian.⁵

Receiving information responsive to the following questions will assist the Department in considering regulations regarding system design features:

- What is a system design feature?
- What is the threshold for "significantly" increasing, sustaining, or extending a minor's use of the online service, product, or feature? How should this threshold be measured?
- How should countervailing measures be evaluated, if at all? For example, a prompt that encourages users to take a break after scrolling for a certain amount of time.

⁴ C.R.S. § 6-1-1308.5(2)(b).

⁵ C.R.S. § 6-1-1308.5(2)(b); C.R.S. § 6-1-1308.5(3).

- What are examples of practices that significantly increase, sustain, or extend a minor’s use of the online service, product, or feature?
- What constitutes consent of a minor or consent of a child’s parent or legal guardian?
- What methods work best for obtaining consent from a minor, or a child’s parent or legal guardian?

2. *Willfully Disregards*

The Amendment imposes requirements on controllers when they offer an online service, product, or feature to consumers “whom the controller actually knows or willfully disregards is a minor.”

- What factors should contribute to the evaluation of when a controller should be considered to “willfully disregard” that a consumer is a minor?
- How does age and/or identify verification affect a determination that a controller willfully disregarded that a consumer was a minor?
- How should the target audience of content or a website impact the presumption that the viewer is a minor?

3. *Additional Topics*

The Department invites any additional input relating to this amendment that should be considered during the rulemaking process. This may include, but is not limited to, areas that may need further guidance or clarity, areas that may be confusing to consumers, compliance obstacles, the impact of the law on business operations, and any information, analysis, or examples that can further illustrate or support any comments or positions.

IV. Further information

To submit a comment on these considerations, the CPA comment portal is available at: <https://coag.gov/privacy-protections-for-childrens-online-data/>. The Department further encourages members of the public to visit <https://comments.coag.gov/s/colorado-privacy-act-2024> to view submitted comments, join the CPA mailing list, and to find additional information about the CPA.