

September 10, 2025

By Electronic Filing

Attorney General Phil Weiser
Office of the Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, CO 80203

RE: Proposed CPA Regulations Amendments

To Whom it May Concern:

The Entertainment Software Association (“ESA”) submits these comments in connection with the proposed children’s privacy amendments to the Colorado Privacy Act (“CPA”) regulations. ESA is the U.S. association for the video game industry. Our members are the innovators, creators, publishers, and business leaders reimagining entertainment and transforming how America plays video games on consoles, handheld devices, and personal computers.¹ With over 115 video game companies in the state of Colorado, the industry has an economic impact of more than \$805 million in the state.²

ESA and its members are committed to protecting the privacy and online safety of video game players, including minors. ESA appreciates the Office of the Attorney General’s (“OAG”) effort to develop workable regulations that promote this goal. ESA requests that the OAG make the following additional adjustments to the draft CPA regulations in order to provide further clarification and closer alignment with the text of the statute:

- Revise the “directed to minors” factors for assessing whether a controller has “willfully disregarded” that a user is a minor to better align with the statute.
- Avoid discouraging controllers from taking proactive minor protection efforts by removing age estimates made for “internal business purposes” as a factor in assessing whether a controller has “willfully disregarded” that a user is a minor.
- Clarify that design features will be restricted under the CPA only if they lead to addictive use by minors based on competent and reliable empirical evidence.
- Remove provisions purporting to provide voluntary, informal guidance from the formal regulations.

Each of these proposals is discussed further in sections I-IV below.

¹ Entertainment Software Association, Our Members, <https://www.theesa.com/our-members>.

² Entertainment Software Association, Impact of the Video Game Industry, Colorado, <https://www.theesa.com/video-game-impact-map/state/colorado>.

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I. THE PROPOSED REGULATIONS SHOULD PROVIDE A CLEAR AND WORKABLE TEST THAT ALIGNS WITH THE STATUTE FOR DETERMINING WHEN A WEBSITE OR SERVICE IS DIRECTED TO MINORS.

As regulators have recognized, the task of differentiating between services that are directed to a general audience and those that are directed to minors is challenging because many online “services of general interest may be visited by minors aged 13 to 17.”³ The stakes in developing a test that is administrable are high because failing to do so puts consumers’ most fundamental free speech rights at risk. For example, the Federal Trade Commission has recognized the difficulties of regulating the online activities of teens without unintentionally burdening the speech rights of adults.⁴ Moreover, multiple courts across the country have found statutory schemes to be unconstitutional where they burden adult and minor access to constitutionally protected speech.⁵ Accordingly, the process for determining whether a service is directed to minors should enable operators to understand their compliance obligations and avoid burdening the protected speech of adults.

To provide controllers much needed clarity regarding the minor-directedness test, the regulations should clarify that, similar to the test for whether a site or service is directed to children under the Children’s Online Privacy Protection Act (“COPPA”), the Attorney General must consider the totality of circumstances and that no single factor is determinative. The Federal Trade Commission has explained that a holistic, multi-factor approach provides “the most practical and effective means” of determining a service’s age-directedness, because that analysis “is necessarily fact-based and requires flexibility as individual factors may be more or less relevant depending on the context.”⁶

Moreover, COPPA contains some objective factors that help provide clear guidance for assessing whether a site or service is directed to minors. These objective factors include (i) whether teens are used as models on the service or in promotions for the site or service; (ii)

³ See, e.g., Office of the New York Attorney General, New York Child Data Protection Act Implementation Guidance (May 19, 2025), <https://ag.ny.gov/sites/default/files/2025-05/nycdpa-guidance.pdf>.

⁴ See 76 Fed. Reg. 59804, 59805 (Sept. 27, 2011) (“[G]iven that adolescents are more likely than young children to spend a greater proportion of their time on Web sites and online services that also appeal to adults, the practical difficulties in expanding COPPA’s reach to adolescents might unintentionally burden the right of adults to engage in online speech.”).

⁵ See, e.g., *Free Speech Coal., Inc. v. Colmenero*, No. 1:23-CV-917-DAE, 2023 WL 5655712 at *11 (W.D. Tex. Aug. 31, 2023); *NetChoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 WL 5660155 at *21 (W.D. Ark. Aug. 31, 2023); *NetChoice, LLC v. Yost*, No. 2:24-CV-00047, 2024 WL 555904, at *14 (S.D. Ohio Feb. 12, 2024); *NetChoice, LLC v. Reyes*, No. 2:23-CV-00911-RJS-CMR, 2024 WL 4135626, at *8 (D. Utah Sept. 10, 2024). In explaining its support for the COPPA age cutoff to remain at 12 years old, the FTC also acknowledged that “as children age, they have an increased constitutional right to access information and express themselves publicly.” 76 Fed. Reg. 59805 (Sept. 27, 2011).

⁶ See 89 Fed. Reg. 2034, 2046 (Jan. 11, 2024).

whether the site or service refers to “minors” or “teens” or similar language as an intended audience; (iii) whether advertising promoting or appearing on the website or online service is directed to minors; and (iv) competent and reliable empirical evidence regarding audience composition and intended audience, including marketing or promotional materials or plans or representations to consumers or to third parties. These indicators may provide a more reliable basis for distinguishing between minor-directed and general audience services, as they offer specific information about the site’s intended users. For example, if the marketing materials for a service state that players can “sign up for a tournament through your middle or high school,” this is clear evidence that the service is directed to minors.

Some of COPPA’s child-directedness factors, however, are impractical when assessing whether a site or service is directed to teens, as opposed to children under the age of 13. For example, considering the subject matter, visual content, use of animated characters, incentives, music or other audio content, and presence of celebrities who appeal to minors would be problematic in determining whether a service is directed to minors because these factors are indistinguishable across teen and general audience demographics. In the context of video games, for example, many of the games that are of interest to teens may similarly be of interest to adults. Game elements (such as animated characters), activities (such as racing), and incentives (such as unlocking new characters and skills) are prevalent across games played by users of all ages. And celebrities featured in video games, such as professional athletes or musicians, appeal to both teens and older players. Consideration of these factors when assessing whether a site or service is directed to minors would result in an overly broad application of the statutory text and unduly burden older users’ access to constitutionally protected speech. In lieu of these content-based factors, the proposed regulations should consider instead whether the controller processes minors’ personal data for targeted advertising, sells minors’ personal data or engages in profiling of minors. This approach would have the advantage of tracking the data processing concerns reflected in the CPA itself.⁷

In addition, the OAG should clarify that a determination that a site or service is directed to minors can be overcome by a showing that a particular user is not a minor. This approach is consistent with the proposed regulations’ recognition that minor-directedness is only one, non-determinative factor that may be considered in assessing whether a controller has “willfully disregarded” a user’s age. For example, a controller that operates an educational video gaming site directed to high school students should not have to treat teachers interested in classroom versions of the game as minors. If a controller has a reasonable belief that a user is *not* a minor, it would be unreasonable to treat the controller as having willfully disregarded the user’s age based only on other general characteristics of the website or service.

To implement these revisions and better align the proposed regulations with the statute, ESA recommends the following modified language for proposed Rule 6.13(A)(2):

If the Controller has directed the website or service to Minors, considering **competent and reliable evidence of the following factors:** (i) Minors are used as models on the site or service or in promotions for the site or service; (ii) whether the site or service refers to “minors” or “teens” or uses similar language as the intended audience; (iii) whether advertising promoting or appearing on the website or online service is directed to Minors; (iv) competent and reliable empirical evidence regarding audience composition and intended audience, including marketing or

⁷ See C.R.S § 6-1-1308.5(2)(a).

promotional materials or plans or representations to consumers or to third parties; and (v) whether the Controller processes Minors' personal data for targeted advertising, sells Minors' personal data, or engages in profiling of Minors. In applying these factors, the totality of the circumstances must be considered, and no one factor will be determinative. If the website or service is directed to Minors, a Controller shall not be required to treat a Consumer as a Minor if the Controller has a reasonable belief that the Consumer is not a Minor~~*different factors such as subject matter, visual content, language, and use of Minor-oriented activities and incentives.*~~

II. TREATING A CONTROLLER'S ESTIMATED INTERNAL AGE CATEGORIZATIONS AS EVIDENCE OF "WILLFUL DISREGARD" WOULD INHIBIT EFFORTS TO PROACTIVELY PROTECT MINORS.

In determining whether a controller "willfully disregards that a Consumer is a Minor," the proposed regulations consider whether the controller has categorized that consumer as a Minor for other internal business purposes. While well-intentioned, this approach has the unintended consequence of disincentivizing controllers from taking voluntary, proactive steps to protect minors online. For example, a video game publisher might use an algorithm to predict that a player is a minor — even if she in fact is a mother — based on the ages of the other players (her children) she is friends with in the game.⁸ The controller might use this prediction to apply certain default protections to the mother's account, such as profanity filters, because it promotes minor protection while having minimal impact on the user if the prediction is wrong. Under the proposed regulations, however, this overinclusive and unreliable prediction used for the internal business purpose of a default profanity filter also would impact whether the controller would need to apply all of the CPA's protections to the account. This not only would have a negative impact on the mother's gameplay experience, but also could have the unintended effect of discouraging the controller from continuing to use an age prediction to apply the profanity filter at all in order to avoid having it used against the controller in determining CPA obligations. To avoid undermining controllers' good-faith efforts to proactively protect minor users, ESA recommends that the OAG strike internal business purposes from Rule 6.13(A)(3).

III. REQUIREMENTS FOR SYSTEM DESIGN FEATURES SHOULD APPLY ONLY TO FEATURES THAT LEAD TO ADDICTIVE USE BY MINORS BASED ON COMPETENT AND RELIABLE EMPIRICAL EVIDENCE.

As drafted, the proposed regulations are overbroad in the factors that they consider to determine whether a system design feature is subject to the consent requirements of C.R.S. § 6-1-1308.5. As explained further below, the proposed regulations include design features that lead to increased use broadly, rather than addictive use specifically. This inadvertently discourages well-designed game experiences that are beneficial to minors and integral to the gameplay experience. In addition, the proposed regulations are vague in how a controller should evaluate whether a design feature "has been shown" to increase use or addictiveness of the online service, product, or feature. To clarify that speculative claims and anecdotal evidence

⁸ See ESA, *At a Glance: The Numbers That Matter*, <https://www.theesa.com/resources/essential-facts-about-the-us-video-game-industry/2025-data> (finding that 82 percent of surveyed parents who play video games, play with their kids).

are insufficient, the regulations should specify that only features that are shown to cause addiction of minors through competent and reliable empirical evidence are in scope.

As drafted, the proposed Rule would appear to apply to nearly any design feature that improves the user experience. All good video game design at some level is “developed or deployed” to “increase, sustain, or extend” a player’s engagement with the video game — including that of minors. Such experiences could be seen as “encouraging” or “prompting” the use of the service by making the service enjoyable. Notwithstanding the breadth of the language, however, the OAG presumably does not intend to capture video game features, such as automatically continuing to the next level after one level is complete or earning badges for completing a quest. These features are beneficial for users and integral to the experience of playing video games. An overbroad interpretation could require video game publishers to modify core gameplay mechanics depending on the age of the user, potentially compromising the integrity of the video game itself. To avoid such absurd results, the regulations should be limited to design features that cause addictive use by minors.

A focus on addictive features is consistent with language already included in the proposed regulations, some of which appears to be borrowed from “addictive feed” laws in other states.⁹ ESA agrees with the OAG’s approach of focusing on those features that cause addictive use by minors, rather than those features that provide user-friendly functionality in line with user expectations. Consistent with this approach, ESA understands proposed Rule 6.14(B) to exclude functionality that would allow players to “subscribe” to certain types or categories of media (for example, asking a platform to recommend more racing games) and functionality that would give players recommendations for media similar to a specific piece of media (for example, recommending more games like the one the player just finished playing).¹⁰

In addition, ESA encourages the OAG to provide controllers more objective criteria with which to evaluate whether a design feature leads to addictive use by minors. As drafted, the proposed regulations state that OAG will consider whether a design feature “has been shown” to increase use, engagement, or addictiveness when determining whether such feature is in scope for the statute’s consent requirements. Importantly, however, the proposed regulations do not explain *who* must have shown increased use or addictiveness of the feature or *how* this increased use or addictiveness must be demonstrated. This lack of clarity creates unworkable standards for controllers and the potential for arbitrary and capricious enforcement. To avoid this result, the proposed regulations should make clear that anecdotal and speculative claims of addictiveness are not sufficient to require compliance with the statutory consent requirements. Instead, the proposed regulations should explicitly state that only design features that are shown to be addictive to minors based on competent and reliable empirical evidence, such as peer-reviewed studies demonstrating that a particular feature caused addictive use, will be considered when determining the design features that are in scope for the statutory consent requirements.

⁹ Compare Proposed Rule 6.14(B) with Cal. Health & Safety Code § 27000.5(a)(1)–(7); N.Y. Gen. Bus. § 1500(1)(a)–(h) (sharing criteria excluding certain design features from regulation).

¹⁰ This interpretation would be consistent with proposed Rule 6.14(B)(1), which exempts media that the minor expressly and unambiguously requested that is not recommended, selected, or prioritized for display based, in whole or in part, on other information associated with the minor or the minor’s device.

Accordingly, ESA recommends the following modified language for the proposed Rule 6.14(A):

~~A. The following factors may be considered when determining if a A system design feature~~ **will be considered significantly increases, sustains, or extends a Minor's use of an online service, product, or feature and is subject to the consent requirement as contemplated in C.R.S. § 6-1-1308.5:**

~~1. Whether the controller developed or deployed the system design feature in order to significantly increase, sustain, or extend a Minor's use of or engagement with an online service, product, or feature;~~

~~2. Whether the system design feature has been shown to increase use of or engagement with an online service, product, or feature beyond what is reasonably expected of that particular type of online service, product, or feature when it is used without the system design feature;~~

~~3. Whether if the system design feature has been shown to~~ **directly cause an increase in the addictiveness of the online service, product or feature, or otherwise harm Minors when deployed in the specific context offered by the Controller based on competent and reliable empirical evidence.**

IV. INFORMAL GUIDANCE THAT CONTROLLERS ARE PERMITTED TO CONSIDER STATUTES, ADMINISTRATIVE RULES, AND ADMINISTRATIVE GUIDANCE FROM OTHER JURISDICTIONS SHOULD BE REMOVED FROM THE REGULATIONS.

The proposed amendments state that controllers “may consider” laws, regulations, and guidance from outside the state when applying the CPA’s knowledge standard or provisions related to system design features. ESA understands the proposed amendments to be permissive, non-binding guidance. A mandatory directive incorporating by reference all laws, regulations, and guidance of other jurisdictions would exceed the statutory authority granted to the OAG under the CPA.

While the language appears intended to provide controllers more flexibility, incorporating this non-binding guidance into legally binding regulations creates ambiguity over how the OAG will treat laws and guidance from other jurisdictions when considering controllers’ compliance with the CPA statute and regulations. Non-binding, permissive guidance is more appropriately published as such outside the four corners of otherwise binding regulations. Accordingly, ESA requests that proposed Rules 6.13(B) and 6.14(D) be removed from the final regulations.

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ESA and its members remain steadfastly committed to providing minors with meaningful online experiences in a safe and privacy-protective manner. We believe that this rulemaking presents an important opportunity for the OAG to clarify the regulations to better advance the purposes of the CPA. ESA looks forward to continue engaging with the OAG on this important topic.

Sincerely,



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