

July 11, 2025

*Submitted via electronic form at
<https://coag.gov/privacy-protections-for-childrens-online-data/>*

The Honorable Philip J. Weiser
Attorney General
Colorado Department of Law
Ralph L. Carr Judicial Building
1300 Broadway, 10th Floor
Denver, CO 80203

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

Dear Attorney General Weiser,

On behalf of the Network Advertising Initiative ("NAI"), thank you for the opportunity to comment prior to initiating a rulemaking to amend the Colorado Privacy Act ("CPA") rules to clarify and enact amendments made to the CPA in Senate Bill 24-041 ("Children's Privacy Amendment" or "Amendment").¹ We have appreciated the opportunity to provide written comments throughout your rulemaking initiatives under the CPA, and we support the Department of Law's efforts to craft rules that implement the CPA, and specifically efforts to protect the privacy of children and teens.

The NAI is the leading self-regulatory association dedicated to responsible data collection and use for digital advertising.² In this role, the NAI is well-positioned to provide input to inform the drafting of effective rules that are consistent with the Children's Privacy Amendment's intent as it pertains to the collection and processing of minors' data for digital advertising. As a self-regulatory body, the NAI has been a leader in developing heightened voluntary standards and practices for digital advertisers, advancing privacy-protective policies that work for businesses and can be operationalized and adopted throughout the industry.

¹ See Children's Privacy Amendment, S.B. 24-041, 75th Gen. Assemb., Reg. Sess. (Co. 2024) (hereinafter the "Amendment").

² The NAI is a non-profit, self-regulatory association dedicated to responsible data collection and use for digital advertising. The NAI has been a leader in this space since its inception in 2000, promoting the highest voluntary industry standards for member companies, which range from small startups to some of the largest companies in digital advertising. The NAI's members are providers of advertising technology solutions and include ad exchanges, demand and supply side platforms, and other companies that power the digital media industry by helping digital publishers generate essential ad revenue, helping advertisers reach audiences interested in their products and services, and helping to ensure consumers are provided with ads relevant to their interests. Earlier this year, the NAI launched its new Self-Regulatory Framework Program (the "NAI Framework") to promote strong privacy practices for NAI members engaged in behavioral advertising. See *NAI Self-Regulatory Framework*, <https://thenai.org/self-regulatory-framework/>.

The NAI has long supported enhanced safeguards for children’s privacy online. In our 2020 Code of Conduct, we prohibited NAI members from creating advertising segments targeting children under the age of 16 without verified parental consent, a step further than federal law at the time.³ Within the digital advertising ecosystem, NAI members (with a few exceptions) are distinct from publishers (the websites and apps that display advertisements) and consumer-facing brands (the companies that pay for advertisements).⁴ Instead, NAI members provide the technology that facilitates the selection, delivery, and measurement of advertisements between publishers and brands.

The NAI is proud of its self-regulatory leadership spanning more than two decades, and the results have been demonstrable. However, there are inherent limitations in the self-regulatory model. Therefore, public policies that apply seamlessly across the entire digital media industry are critical, particularly when it comes to protecting children. The NAI believes that heightened standards need to be applied evenly across the entire industry, rather than merely to those companies that voluntarily embrace higher standards. Unfortunately, in the absence of a uniform federal law protecting children’s and minors’ data beyond the Children’s Online Privacy Protection Act (COPPA)—which was enacted more than two decades ago—the effort by states to increase protections for children online has created a patchwork of inconsistent requirements, particularly regarding minors’ data. As a result, uniform compliance is increasingly difficult for online advertisers. For instance, tailored advertising directed to minors is permissible in some states, but not others, and the covered age ranges are inconsistent.⁵

The NAI is the leading industry organization working to maintain a robust, ad-supported internet that keeps children’s and minors’ data safe and prevents its misuse. To that end, a key NAI goal is to harmonize disparate state and federal laws and regulations to the greatest extent possible in order to provide clarity for digital advertisers seeking to comply. We offer the following comments in response to several questions provided by the Department of Law, which we are hopeful will assist your office in meeting its objectives for the rulemaking while preserving an open, global, and secure internet for all consumers:

I. What factors should contribute to the evaluation of when a controller should be considered to “willfully disregard” that a consumer is a minor?

To promote certainty amongst controllers, the Department of Law should maintain the longstanding interpretation of the *willfully disregard* standard to mean a controller’s deliberate avoidance of affirmative indicators that a user is a minor—rather than a generalized awareness that minors may access a service. If the Department of Law develops regulations in this area, they would be well served to

³ Compare Network Advertising Initiative, 2020 NAI Code of Conduct § II.D.1 (prohibiting NAI member companies from creating tailored advertising segments specifically targeting children under 16 without obtaining verifiable parental consent) with 15 U.S.C. § 6501(1) (2024) (defining “child” as an individual under the age of 13).

⁴ The NAI’s member list is public, and our members range in size from smaller startups to some of the largest tech companies in the world. While some of the larger members have parts of their businesses that function as a publisher, their NAI membership is limited to their company’s ad tech business lines. See List of NAI Members, <https://thenai.org/about-the-nai-2/members/>.

⁵ Compare CAL. CIV. CODE § 1798.120(c)(1) (2024) (permitting cross-context behavioral advertising with affirmative consumer consent when consumer is under the age of 16) with MD. CODE ANN. § 14-4607(A)(4) (2024) (prohibiting the processing of personal data for targeted advertising when the controller knows or should know a consumer is under the age of 18).

identify a limited set of factors, where no one factor is dispositive,⁶ for businesses when evaluating whether a controller *willfully disregarded* that a consumer is a minor. This test could consider: (1) any age/identity verification of an individual user known to the controller, if available; and (2) the controller's knowledge that the target audience of the website or service is directed to children or minors, though it must be acknowledged that this can be an unreliable indicator, as discussed in greater in section III.

A test with clearly defined factors would be a win-win: it would achieve the objectives as outlined in the legislative declaration of the Amendment⁷ and help controllers and processors comply with the law by making processes predictable, simple, and straightforward. We elaborate further on these factors in the following sections.

Regarding a *controller's knowledge*, it is important to distinguish first-party publishers from third-party companies such as advertising technology companies that in most cases do not interact directly with users. In a collective effort to effectively comply with the COPPA Rule, the online advertising industry has embraced the use of the "COPPA flag" which gives a third-party company knowledge that the first party publisher's target audience is children.⁸ In short, the COPPA flag is an attribute within an advertising bid request that signals to third party advertising technology companies that the website is directed to children under COPPA. Most importantly, the use of this signal relies on the website publisher to determine whether its services are targeted to children.

As currently configured, the COPPA flag is tied to COPPA's definition for "[w]ebsite or online service directed to children" and thus is only received if the publisher website is targeted to children under the age of thirteen. Without a similar flag to signal that the consumer is a teenager, the current system would be extended for sites and services directed to minors. In either situation, most third party companies are not capable of independently determining the intended audience of a website or service, and therefore would be unable to make a fair assumption that the users are predominantly children or minors. This well-functioning framework relies on the website publisher to make the determination and pass that signal downstream, and it reflects the practical reality that the publisher possesses the context necessary to determine if its content is directed towards children or minors. Therefore, should the Department of Law develop further regulations, these should refrain from creating an unrealistic responsibility on third-party companies that do not directly interact with consumers to perform assessments to determine the age of consumers.

II. How does age and/or identity verification affect a determination that a controller willfully disregarded that a consumer was a minor?

Age and/or identity verification revealing a consumer to be a minor is a strong indicator to controllers. However, the Amendment was crafted to be *flexible* with regard to the diversity of online services and products available to Colorado consumers, and *mindful* of the reality that mandated age-gating systems often fail to accurately capture the age of consumers and may even lead users to intentionally subvert

⁶ See Federal Trade Commission, *Complying with COPPA: Frequently Asked Questions* (July 2020), <https://www.ftc.gov/business-guidance/resources/complying-coppa-frequently-asked-questions>, ("It's unlikely the receipt of a list of purportedly child-directed websites alone would constitute actual knowledge.").

⁷ See Amendment at § 6-1-1302(1)(c) ("By enacting this part 13, Colorado will be among the states that empower consumers, INCLUDING MINORS, to protect their privacy and require companies to be responsible custodians of data as they continue to innovate[.]").

⁸ See *generally Guide to Navigating COPPA*, Interactive Advertising Bureau (Oct. 2019), https://www.iab.com/wp-content/uploads/2019/10/IAB_2019-10-09_Navigating-COPPA-Guide.pdf.

safeguards or engage in deception.⁹ To that end, the Amendment explicitly does not require controllers to implement an age verification or age-gating system, or otherwise affirmatively verify the age of consumers.¹⁰ In lieu of implementing an age verification system, the Amendment suggests that a controller or processor may choose to conduct *Commercially Reasonable Age Estimation* to determine which consumers may be minors. Most notably, the Amendment declares that a controller or processor is not liable for any erroneous age estimation as a result of conducting *Commercially Reasonable Age Estimation*.¹¹

The NAI applauds these considerations in the Amendment as they reflect the legislature's understanding of the complexities involved in providing an online service or product. Nonetheless, the NAI recommends considering age and/or identity verification as a strong indicator to controllers and processors as to whether a consumer may be a minor. For example, if a controller uses a reasonable age verification system that indicates the consumer is not a minor, that should create a rebuttable presumption the controller has not willfully disregarded the minority status of the consumer.

However, as the Amendment does not mandate the use of either an age verification system or a *Commercially Reasonable Age Estimation* system, the Department of Law should avoid developing regulations that seek to interpret *willfully disregards* as an affirmative requirement to provide these systems.

III. How should the target audience of content¹² or a website impact the presumption that the viewer is a minor?

Determining the target audience of a website may be a useful indicator that could impact a controller's understanding of whether a viewer is a minor. However, this must be balanced with the reality that it can also be an unreliable indicator for presuming any single viewer is a minor, as many online services and types of content have mixed-age audiences. Additionally, unlike other laws such as COPPA or New York's Child Data Protection Act ("CDPA"), that apply to services that are *directed* to children or minors,¹³ it is unclear as to whether the Amendment relies on, or even contemplates, audience composition.¹⁴ If the Department of Law develops regulations, clarity in this area would be helpful. In our comments to New York regarding its definition of "Primarily directed to minors," we distinguished children (under the age of thirteen) from the broader group of minors (under the age of eighteen), and recommended

⁹ Mark Sweney, *More than 80% of children lie about their age to use sites like Facebook*, the Guardian (Jul. 25, 2013), <https://www.theguardian.com/media/2013/jul/26/children-lie-age-facebook-asa>.

¹⁰ See Amendment at § 6-1-1304(3)(f) ("The obligations imposed on controllers or processors under this part 13 do not... [r]equire a controller or processor to implement an age verification or age-gating system or otherwise affirmatively collect the age of consumers[.]").

¹¹ See *id.* ("[A] controller that chooses to conduct commercially reasonable age estimation to determine which consumers are minors is not liable for an erroneous age estimation[.]").

¹² The Amendment is scoped to controllers that offer "any online service, product, or feature to a consumer" and notably does not mention "content." See Amendment at § 6-1-1308.5(2).

¹³ See 16 C.F.R. § 312.2 ("Website or online service directed to children means a commercial website or online service, or portion thereof, that is targeted to children.") (emphasis added); New York Child Data Protection Act, S.B. S7695A (2023) at § 899-EE(6) ("Primarily Directed to Minors shall mean a website, online service, online application, mobile application, or connected device, or a portion thereof, that is targeted to minors.") (quotations removed).

¹⁴ See Amendment at § 6-1-1308.5(2) (creating restrictions on controllers that "offers any online service, product, or feature to a consumer whom the controller actually knows or willfully disregards is a minor").

developing two different frameworks for determining websites primarily directed to children as compared to websites primarily directed to teenagers.¹⁵

For children, as opposed to minors, regulations may be unnecessary, as the CPA appears to exempt personal data regulated by COPPA,¹⁶ therefore the COPPA Rule's definition of "Website or online service directed to children"¹⁷ is applicable. Nonetheless, if the Department of Law feels differently and decides to develop regulations pertaining to children's data, these should align with the COPPA Rule as it provides an established precedent that has proven workable for regulators and operators alike for decades.

As for teenagers, there is a substantial difference between sites and services directed to children under the age of thirteen, and those intended for teenagers. Even more challenging, there is substantially less difference between what interests a covered seventeen-year-old and an adult at the age of eighteen. Many of the factors the FTC uses in the COPPA Rule could potentially be more broadly applied to teenagers, but some factors are inappropriate and could potentially lead to general audience websites being considered "directed to minors" when they do not intend to specifically direct their content to minors.¹⁸ As an example, a website that appears to target a general audience but incorporates the word "teen" in its title would naturally lean towards a determination that the target audience is minors. But without a clear indicia, it should not be presumed that a general audience website is directed to minors.

IV. Conclusion

The NAI is grateful for this opportunity to comment on the pre-rulemaking considerations for the Colorado Privacy Act Children's Privacy Amendment. If we can provide any additional information, or otherwise assist your office as it continues to engage in the rulemaking process, please do not hesitate to contact me (david@thenai.org) or Nick Meyer, Counsel, Compliance and Policy (nick@thenai.org).

Respectfully Submitted,

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Network Advertising Initiative (NAI)

¹⁵ The Network Advertising Initiative, Comment Letter on Proposed Rulemaking on NY Child Data Protection Act (Sep. 30, 2025),

https://thenai.org/wp-content/uploads/2024/10/NAI-Comments-to-NY-OAG-re-CDPA-09_30_2024.docx.pdf.

¹⁶ See Colo. Rev. Stat. § 6-1-1304(2)(j)(IV) ("This part 13 does not apply to... [p]ersonal data... [r]egulated by the federal "Children's Online Privacy Protection Act of 1998", 15 U.S.C. secs. 6501 to 6506, as amended, if collected, processed, and maintained in compliance with that law[.]").

¹⁷ See 16 C.F.R. § 312.2 (2024) ("In determining whether a website or online service, or a portion thereof, is directed to children, the Commission will consider its subject matter, visual content, use of animated characters or child-oriented activities and incentives, music or other audio content, age of models, presence of child celebrities or celebrities who appeal to children, language or other characteristics of the website or online service, as well as whether advertising promoting or appearing on the website or online service is directed to children. The Commission will also consider competent and reliable empirical evidence regarding audience composition and evidence regarding the intended audience, including marketing or promotional materials or plans, representations to consumers or to third parties, reviews by users or third parties, and the age of users on similar websites or services.").

¹⁸ For example, celebrities such as Zendaya or Taylor Swift likely appeal to both minors and adults.