

# COLORADO DEPARTMENT OF LAW

## Colorado Attorney General Investigative Hearings - Colorado Consumer Protection Act and Colorado Antitrust Act Statement of Basis, Specific Statutory Authority, and Purpose

### 4 CCR 904-2

#### The Attorney General's Authority to Promulgate Rules for Investigative Hearings

In the 1969 legislative session, the Colorado General Assembly passed the Colorado Consumer Protection Act, sections 6-1-101, *et seq.*, C.R.S. ("CCPA"). In the 1992 legislative session, the Colorado General Assembly passed the Colorado Antitrust Act, sections 6-4-101, *et seq.*, C.R.S. ("CAA").

The CCPA authorizes the Attorney General to "prescribe such forms and promulgate such rules as may be necessary to administer the provisions of" the CCPA. C.R.S. § 6-1-108(1). Similarly, the CAA provides that the Attorney General may "prescribe such forms and promulgate such rules as may reasonably be deemed to be necessary to administer the provisions" of the CAA. C.R.S. § 6-4-110(1)(b).

#### Purposes of the Proposed Rules

The Attorney General finds it necessary to propose rules to aid in the efficient and fair administration of the investigative hearing process for matters involving the CCPA and the CAA. Regarding these investigative hearings, 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).

An initial purpose of these proposed rules is to 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 al.*, the CCPA and the CAA. Pursuant to the exceptions found in CORA, the Attorney General has

authority to exempt its investigative records from open records requests. C.R.S. § 24-72-204(2)(a)(IX)(A).

In tandem with CORA, the CCPA confers discretion to the Attorney General to determine whether investigative records obtained under the CCPA statute may be deemed public records available for inspection by the general public. C.R.S. § 6-1-111(2). The CAA authorizes the Attorney General to disclose information obtained pursuant to an investigation under section 6-4-110 to any law enforcement agency or department of any governmental or public entity of Colorado or any other state or to the federal government so long as the receiving entity executes an agreement that information will remain confidential. C.R.S. § 6-4-110(4).

Pursuant to these confidentiality provisions, the Attorney General has authority to determine who may attend investigative hearings and to retain all documents, transcripts, and recordings related to these hearings to preserve the confidential nature of its investigations. The proposed rule starts from the premise that the Attorney General will exercise its authority to preserve the confidentiality of its investigations in all matters related to these investigative hearings. However, the Attorney General may permit representatives of other law enforcement agencies to attend investigative hearings and the Attorney General maintains the discretion to provide copies of recording or transcripts of hearing to other State or Federal law enforcement agencies.

A third purpose of the proposed rules is to ensure that investigative hearings are not governed by the Colorado Rules of Civil Procedure. 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, 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. This authority should be construed as analogous to the authority granted parties under C.R.C.P. 30(b)(6).

#### Similar Investigative Hearing Rules, Federal Agencies

While the Attorney General has historically conducted investigative hearings without these proposed rules, federal agencies with similar investigative powers have promulgated rules that address investigative hearings. **Federal Trade Commission (FTC):** *See 16 CFR § 2.7(f), Compulsory Process in Investigations* (addressing process for FTC investigative hearings, non-public nature of hearings, and limitations on attendance); *See 16 CFR § 2.9 Rights of Witnesses in Investigation* (addressing form of objections and proper decorum for FTC investigative hearings); **Consumer Financial Protection Bureau (CFPB):** *See 12 C.F.R. § 1080.7, Investigational Hearings* (addressing who may conduct and who may attend CFPB hearings); *See 12 C.F.R. § 1080.9, Rights of Witnesses in Investigations* (addressing form of objections and proper decorum for CFPB investigative hearings); *See 12 C.F.R. § 1080.14, Confidential Treatment of Demand Material and Non-Public Nature of Investigations* (describing the confidential nature of CFPB investigative materials and hearings). **Securities and Exchange Commission (SEC):** *17 C.F.R. § 203.5 Non-public Formal Investigative Proceedings* (stating that all formal SEC investigative proceeding shall be non-public); *17 C.F.R. § 203.7 Rights of Witnesses* (addressing who may attend SEC investigative proceedings).