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MEMORANDUM

January 18, 2007

TO: Joanne King and Larry Ellingson

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #57, concerning criminal and civil liability of businesses and individuals for business activities

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be to:

1. Create criminal liability for an associated person who violates section 18-1-606, Colorado Revised Statutes, concerning the criminal liability of business entities.
2. Define an associated person as a natural person who is an officer, director, member, partner, or sole proprietor of a business entity covered by section 18-1-606, Colorado Revised Statutes.
3. Provide a criminal affirmative defense to a charge pursuant to section 18-1-606, Colorado

Revised Statutes, when the associated person, prior to being charged, reports to the attorney general all of the facts she or he was aware of concerning the conduct of the business entity that is covered by section 18-1-606, Colorado Revised Statutes.

4. Allow a citizen to bring a civil cause of action on behalf of the state against a business entity or associated person for conduct covered by section 18-1-606 (1), Colorado Revised Statutes.
5. Pay any damages awarded as a result of the civil cause of action to the general fund of the state of Colorado and to make those moneys exempt from the revenue and spending provisions of section 20 of article X of the Colorado constitution.
6. Permit a citizen who is successful in a civil cause of action to recover reasonable attorneys fees and costs.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical Comments:

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado." To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
2. Standard drafting practice requires the use of an amending clause that identifies the statutory provision being amended and describes how it is being amended. The amending clause for the submission should look like this:

SECTION 1. 18-1-606, Colorado Revised Statutes, is amended to read:

3. When adding a new paragraph that would require using a decimal as you have done with paragraph (a.1) of subsection (2) of the proposed initiative, standard drafting practice calls for starting with (a.5) rather than (a.1), so that additional paragraphs may be added in the future either before or after the new paragraph.
4. Standard drafting practice requires the phrase "of this section" to follow any reference to a subsection. As an example, "under subsection (1) of this section that" There are a number of subsection references that do not include the "of this section" language.
5. The change to the introductory portion of subsection (1) of the proposed initiative states "business entity AND ASSOCIATED PERSON is guilty". If the proponents intended to use the "AND" then, the "is" should change to "ARE" or if the proponents intend to use "is", then it should be "business entity OR ASSOCIATED PERSON".

6. Statutory provisions are usually divided into component parts using the following structure: Subsection, or, for example, "(1)", followed by paragraphs, or, for example, "(a)" followed by subparagraphs, for example, "(I)", ending with sub-subparagraphs, or, for example, "(A)". There are a two places in subsection (5) of the proposed initiative that misidentify subsections as paragraphs.
7. Subsection (5) of the proposed initiative creates a civil cause of action. Generally, a civil cause of action is placed in title 13 of the Colorado Revised Statutes.
8. There are a few places in the proposed initiative in which the words "State" and "Constitution" are capitalized. Standard drafting practice calls for the words "state" and "constitution" to be in all lowercase letters.
9. In paragraph (c) of subsection (5) of the proposed initiative, the word "this" should be added before the phrase "subsection (5)" to conform with standard drafting practices.
10. Paragraph (e) of subsection (5) of the proposed initiative begins with "Where", however the sentence is not expressing a place, but rather it is expressing a condition, so "If" would be a more appropriate word choice.
11. In paragraph (e) of subsection (5) of the proposed initiative, "(5)" should be added after the phrase "this subsection" to conform with standard drafting practices.
12. In paragraph (e) of subsection (5) of the proposed initiative uses the term "ATTORNEYS FEES", standard drafting practice uses the term "ATTORNEY FEES"

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. What will be the effective date of the proposed initiative?
3. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
4. Section 18-1-606, Colorado Revised Statutes describes the circumstance under which a business may be guilty of an offense, it is not an offense itself.
 - a. What is the intent of adding an "associated person" to the description of how a business may commit a criminal offense? How does that intent differ with section 18-1-607, Colorado Revised Statutes that describes criminal liability of an individual for corporate conduct.
 - b. What is the intent of providing an affirmative defense for an individual ("associated person") in a section of law dealing with organizational culpability?

- c. What is the difference between the definition of "associated person" and "agent" in section 18-1-606, Colorado Revised statutes?
5. Subsection (4) of the proposed initiative provides a complete affirmative defense if the person "reported to the office of the attorney general all facts of which he or she was aware concerning the business entity's conduct covered by this section."
 - a. Who does the person make the report to in the attorney general's office?
 - b. What actions would satisfying reporting to the office of the attorney general? Does the report need to be in writing from the person? How long before charging do they have to go to the attorney general?
 - c. What is the obligation of the attorney general in taking a report pursuant to subsection (4) of the proposed initiative? If an oral report is provided, how does the attorney general document the report? How should the attorney general retain a report? Is the report considered private or is it a public document?
 - d. Is it the proponents intent to provide the affirmative defense to an actor who took positive actions toward the commission of the offense or only to those who become aware of the actions after the fact?
 - e. What is the significance of a complete affirmative defense as compared to an affirmative defense?
6. Paragraph (a) of subsection (5) of the proposed initiative creates a civil cause of action "for conduct covered by paragraph (1) (sic) of this section."
 - a. The phrase "for conduct covered by paragraph (1) (sic) of this section" is vague. Generally when creating a civil cause of action the statute specifically delineates the elements necessary to prove a successful civil cause of action. Would the proponents consider specifying the elements of the claim?
 - b. The civil cause of action is available only to Colorado citizens. Who is a Colorado citizen?
7. In proposed Section 18-1-606 (5), C.R.S., "any citizen of Colorado may seek civil damages against any business entity or associated person for conduct covered by paragraph (1)" However, the award for damages does not go to the plaintiff (or citizen filing the suit), but rather to the state.
 - a. The plaintiff would only receive "reasonable attorneys fees and costs for defending the interests of the State" Why?
 - b. What is the incentive for a person to sue if they do not receive any damages?

- c. Did you consider as an alternative stating that the Attorney General could file a civil lawsuit on behalf of the citizens rather than stating that any citizen may seek civil damages?
8. Paragraph (d) of subsection (5) of the proposed initiative states that "Such moneys shall be exempt from the revenue and spending provisions of section 20 of article X of the Colorado Constitution."
- a. To which revenue and spending provisions of section 20 of article X of the Colorado constitution are the proponents referring?
 - b. What do the proponents intend to exempt by the provision in paragraph (d) of subsection (5) of the proposed initiative?
 - c. The definition of "fiscal year spending" in section 20 of article X and section 24-75-201, Colorado Revised Statutes, excludes damage awards. What does the provision in paragraph (d) of subsection (5) of the proposed initiative add to or change in the current law?
 - d. The proposed initiative would credit the awards to the general fund. Those awards would then be subject to the six percent limit on appropriations found in section 24-75-201.1, Colorado Revised Statutes. Do the proponents intend for the limitation in section 24-75-201.1, Colorado Revised Statutes, to apply to the awards?
9. Paragraph (e) of subsection (5) of the proposed initiative permits a successful citizen to receive reasonable attorneys fees and costs for defending the interests of the state. Could a citizen also be compensated for his or her own time and costs associated with the lawsuit?
10. What form of civil damages would be available in a successful suit?