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MEMORANDUM

March 5, 2008

TO: Joanne King and Larry Ellingson

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #73, concerning criminal conduct by businesses - liability

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.

An earlier version of this initiative was the subject of a memorandum dated January 18, 2008. Proposal 2007-2008 #57 was discussed at a hearing on January 22, 2008. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier hearing unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

This initiative was filed along with two other initiatives, Proposal 2007-2008 #74 and Proposal 2007-2008 #75, that address similar subjects.

Purposes

The major purposes of the proposed amendment appear to be:

1. To provide criminal liability for an executive official if the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law and the executive official knew or should have known of the specific duty to be performed.
2. To define an executive official as a natural person who is an officer, director, managing partner, managing member, or sole proprietor of a business entity.
3. To require that an executive official be subject to the fine range for the specified offense for which he or she was convicted.
4. To provide an affirmative defense to a charge pursuant to section 18-1-606 (1), Colorado Revised Statutes, if the executive official, prior to being charged, reports to the attorney general all of the facts he or she is aware of concerning the conduct of the business entity that is covered by section 18-1-606, Colorado Revised Statutes.
5. To allow a citizen to bring a civil cause of action on behalf of the state against a business entity or executive official for conduct covered by section 18-1-606 (1), Colorado Revised Statutes.
6. To pay any damages awarded as a result of the civil cause of action to the governmental entity that imposed by law the duty to be performed by the business entity of Colorado, and to make those moneys exempt from all revenue and spending limitations provided by law.
7. To provide the affirmative defense to the executive official in a civil action.
8. To permit a citizen who is successful in a civil cause of action to recover reasonable attorney fees and costs.

Comments and Questions

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

Technical questions:

1. In the headnote to section 18-1-606, you used strike type and a single underline to show a change to the headnote. Standard drafting practice permits a change to the headnote without using strike type or any other indication of the change.
2. On page 1, line 11 of the proposed initiative, the language has been changed from "or by a

high managerial agent" to "or by a executive official". In order to show the change, the original language of the statute must be shown in strike type and the new language should be in small capital letters. Also, the text should read "an executive official", not "a executive official".

3. On page 1, line 19 of the proposed initiative, the language has been changed from "and "high managerial agent" means" to "and "executive official" means". In order to show the change, the original language of the statute must be shown in strike type and the new language should be in small capital letters.
4. Standard drafting practice is to place definitions in alphabetical order. Because of this practice, the definition for "executive official" should be placed after the definition for "business entity" and be created as paragraph (c).
5. On page 2, line 9, of the proposed initiative, in the reference to section 18-1.3-401 (1) (A) (III), the "(A)" is shown in small capital letters, but should be in regular type.

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. 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 "executive official" 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, which describes the criminal liability of an individual for corporate conduct.
 - b. What is the intent of providing an affirmative defense for an individual ("executive official") in a section of law dealing with organizational culpability?
 - c. What is the intent of defining executive official both in section 18-1-606 (2) (a), Colorado Revised Statutes, and in section 18-1-606 (2) (a.5), Colorado Revised Statutes? How do the definitions differ? Are they intended to apply to different situations? If so, how does someone know when a particular definition applies?
3. What will be the effective date of the proposed initiative? The new language in section 18-1-606 (3), Colorado Revised Statutes, provides the new penalty language shall apply to offenses on or after January 1, 2009. However, the Governor may not proclaim the vote before January 1, 2009. Do you intend for it to be effective on January 1, 2009, only if the proclamation occurs before then, or do you intend a retroactive application to January 1, 2009, if the proclamation occurs after January 1, 2009?
4. The penalty provision for an executive official is limited to a fine within the presumptive

- range depending on the level of offense. Why are you limiting the penalty to a fine? Is it your intent that the executive official could not receive a sentence to probation or incarceration?
5. The previous questions regarding the affirmative defense in section 18-1-606 (4), Colorado Revised Statutes are incorporated herein, please see question 5 in the substantive questions section of the memorandum for proposal 2007-2008 #57.
 - a. The affirmative defense states it shall be an affirmative defense for any executive official charged under subsection (1) of this section, however an executive official would not be charged under subsection (1) of this section since it itself is not a crime. Would the proponents clarify the intent of the affirmative defense?
 6. Section 18-1-606 (5), Colorado Revised Statutes, creates a civil action against a business entity or its executive officials for conduct that meets the criteria set forth in section 18-1-606 (1), Colorado Revised Statutes.
 - a. What are the elements that a successful plaintiff would need to prove in order to make his or her claim under section 18-1-606 (5), Colorado Revised Statutes?
 - b. Is it the proponent's intent to limit the civil action to only the conduct specified in subsection (1) or do the proponents also intend for it to cover the new subsection (1.5)?
 - c. The civil action may be brought by any person residing in the state of Colorado? What is the purpose in limiting it to a person residing in the state of Colorado?
 7. Section 18-1-606 (5) (b), Colorado Revised Statutes, would award compensatory or punitive damages to any governmental entity that imposed, by law, the specific duty to be performed by the business entity.
 - a. What are the types of compensatory damages that the governmental entity could have?
 - b. Who would determine which governmental entity imposed by law the specific duty to be performed by the business entity? Would that government entity need to be made a party to the suit?
 - c. If the governmental entity is awarded damages, would the money be subject to appropriation by the body that has the power of appropriation for that governmental entity or would the governmental entity be able to appropriate that money on its own?
 8. Section 18-1-606 (5) (d), Colorado Revised Statutes, exempts the damages awarded to a governmental entity, when appropriated, from all revenue and spending limitations provided by law.

- a. What is the intent of this provision?
 - b. Would the proponents consider specifying the revenue and spending limitations that are being contemplated?
9. The previous questions regarding the attorney fee and cost award in section 18-1-606 (5) (e), Colorado Revised Statutes are incorporated herein, please see question 7 in the substantive questions section of the memorandum for proposal 2007-2008 #57.