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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 #74, concerning liability of business entities and their executive officials - criminal 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 #73 and Proposal 2007-2008 #75, that address similar subjects. It appears that this proposal incorporates portions of Proposal 2007-2008 #73. Therefore, issues that are also identified in this proposal that were addressed in Proposal 2007-2008 #73 shall be incorporated into this memo by appropriate reference.

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, 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.

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 a single underline to show a change to the headnote. Standard drafting practice permits a change to the headnote without using any indication of the change.
2. On page 1, line 9 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 17 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. Questions 1 through 5 from the memo for Proposal 2007-2008 #73 are hereby incorporated by reference.