

Amendment 53 Criminal Accountability of Business Executives

1 **Amendment 53 proposes amending the Colorado statutes to:**

- 2 ♦ hold a business executive criminally responsible for the business's
3 failure to perform a duty required by law if the official knew of the duty
4 and the business's failure to perform it.

5 **Summary and Analysis**

6
7 **Accountability of business entities.** Businesses are subject to a wide variety of
8 state and federal laws, including environmental protections, securities regulations, and
9 consumer protection guarantees. Colorado law criminalizes certain acts committed by
10 or on behalf of a business. Businesses may be held criminally accountable for the
11 failure to perform specific legal duties and for illegal conduct authorized or tolerated by
12 a governing board, manager, or executive. When these types of laws are violated,
13 companies may be assessed fines.

14 **Expansion of accountability for business executives.** In Colorado, individuals
15 may be prosecuted for illegal conduct performed on behalf of a business and, in some
16 cases, for failure to perform a legal duty. Amendment 53 extends criminal
17 accountability to business executives who were aware of their business's failure to
18 perform a legal duty. Amendment 53 applies to an officer, director, managing partner,
19 managing member, or sole proprietor of a for-profit business or nonprofit entity.

20 In conjunction with the new criminal provisions, Amendment 53 applies existing
21 criminal penalties, including fines, imprisonment, or both, to business executives. The
22 measure provides a defense from prosecution for business executives who report
23 knowledge of their business's failure to comply with the law, as long as the report is
24 made prior to the filing of charges.

25 **Arguments For**

26 1) Amendment 53 addresses a gap in state law. While business entities
27 themselves can be prosecuted, their executives can currently avoid responsibility for
28 their businesses' failure to follow state law. The measure helps ensure that these
29 executives are held accountable when they know of a legal duty that their business
30 has failed to perform. Over time, Amendment 53 can foster a business environment
31 that attracts and retains responsible employers.

32 2) Amendment 53 may encourage a healthy and moral economic climate for
33 Colorado. When businesses fail to comply with state law, the state's economy can be
34 impacted in a variety of unexpected or far-reaching ways. The measure seeks to
35 eliminate cases where executives' failure to act or take responsibility for their

Final Draft

1 businesses' legal obligations affects the lives of employees, shareholders, or even the
2 state's citizens as a whole.

3 3) Amendment 53 could lead to additional disclosure about and charges for illegal
4 corporate conduct. The measure establishes a defense from prosecution for
5 executives, which may make executives feel more secure about reporting their
6 business's failure to perform duties required under the law.

7 **Arguments Against**

8 1) Amendment 53 may negatively impact a business climate in which most
9 businesses and their executives comply with the law. For example, the new criminal
10 penalties could drive higher insurance costs for law-abiding executives, which may
11 ultimately be passed along to consumers. Additionally, fear of prosecution could
12 hinder recruitment of top business talent and may leave community leaders reluctant
13 to serve on nonprofit boards.

14 2) State and federal laws already hold business executives accountable. For
15 example, executives can be prosecuted under Colorado law for their own criminal
16 conduct on behalf of their business. Recent federal laws have strengthened criminal
17 and civil penalties for business executives who commit fraud. High-profile
18 prosecutions of business executives demonstrate that current laws are sufficient to
19 address corporate wrongdoing.

20 3) Amendment 53 creates a way to avoid accountability. Business executives
21 who are aware of their business's failure to comply with the law, and who should be
22 held responsible, may escape prosecution through reports to the attorney general.

23 **Estimate of Fiscal Impact**

24 Amendment 53 is not expected to have a significant impact on either state or local
25 government spending in Colorado, assuming business executives comply with laws.
26 But, because law enforcement officials have the discretion to bring charges and the
27 courts have discretion over imposing criminal penalties for people convicted of a
28 crime, the exact fiscal impact cannot be determined. In the event that a person is
29 convicted of an offense, the measure could increase state spending for offenders
30 sentenced to state prison (for felonies) and local government spending for offenders
31 sentenced to county jail (for misdemeanors). The state court system may also see an
32 increase in activity, but no significant increase in costs is anticipated. Any conviction
33 that includes a fine would increase state revenue.

**Amendment 53
Criminal Accountability of Business Executives OFFICIALS**

1 **Amendment 53 proposes amending the Colorado statutes to:**

- 2 ♦ ~~hold a business executive criminally responsible for the business's~~
3 ~~failure to perform a duty required by law if the official knew of the duty~~
4 ~~and the business's failure to perform it.~~
- 5 ♦ EXTEND LIABILITY FOR CRIMINAL CONDUCT BY BUSINESSES TO EXECUTIVE
6 OFFICIALS. EXECUTIVE OFFICIALS INCLUDE ANY NATURAL PERSON WHO IS AN
7 OFFICER, DIRECTOR, MANAGING PARTNER, MANAGING MEMBER, OR SOLE
8 PROPRIETOR OF A BUSINESS ENTITY, NONPROFIT CORPORATION, OR
9 HOMEOWNERS ASSOCIATION;
- 10 ♦ CRIMINALIZE CIVIL AND REGULATORY CONDUCT BY PROVIDING THAT AN
11 EXECUTIVE OFFICIAL IS GUILTY OF AN OFFENSE IF THE CONDUCT
12 CONSTITUTING THE OFFENSE CONSISTS OF AN OMISSION TO DISCHARGE A
13 SPECIFIC DUTY OF AFFIRMATIVE PERFORMANCE IMPOSED ON THE BUSINESS
14 ENTITY BY LAW AND THE EXECUTIVE OFFICIAL KNEW OF THE SPECIFIC DUTY
15 TO BE PERFORMED AND KNEW THAT THE BUSINESS ENTITY FAILED TO
16 PERFORM THAT DUTY; AND
- 17 ♦ ALLOW AN EXECUTIVE OFFICIAL TO AVOID BEING HELD CRIMINALLY OR CIVILLY
18 LIABLE SO LONG AS HE OR SHE REPORTS TO THE OFFICE OF THE ATTORNEY
19 GENERAL ALL FACTS THAT HE OR SHE IS AWARE OF CONCERNING THE
20 BUSINESS ENTITY'S CONDUCT THAT MEETS THE CRIMINAL CONDUCT PROVIDED
21 BY THE INITIATIVE.

22 **Summary and Analysis**

23
24 **Accountability of business entities.** Businesses are subject to a wide variety of
25 state and federal laws, including environmental protections, securities regulations, and
26 consumer protection guarantees. Colorado law criminalizes certain acts committed by
27 or on behalf of a business. Businesses may be held criminally accountable for the
28 failure to perform specific legal duties and for illegal conduct authorized or tolerated by
29 a governing board, manager, or executive. When these types of laws are violated,
30 companies may be assessed fines.

31 **Expansion of accountability for business executives.** In Colorado, individuals
32 may be prosecuted for illegal conduct performed on behalf of a business and, in some
33 cases, for failure to perform a legal duty. Amendment 53 extends criminal
34 accountability to ~~business executives~~ OFFICIALS who were aware of their business's
35 failure to perform a legal duty. Amendment 53 applies to an officer, director,
36 managing partner, managing member, or sole proprietor of a for-profit business or
37 nonprofit entity.

Mr. Doug Friednash

1 In conjunction with the new criminal provisions, Amendment 53 applies existing
2 criminal penalties, including fines, imprisonment, or both, to ~~business~~ executives
3 OFFICIALS. The measure provides a COMPLETE defense from prosecution for ~~business~~
4 executives OFFICIALS who report knowledge of their business's failure to comply with
5 the law, as long as the report is made prior to the filing of charges.

6 Arguments For

7 1) Amendment 53 addresses a gap in state law. While business entities
8 themselves can be prosecuted, their executives can currently avoid responsibility for
9 their businesses' failure to follow state law. The measure helps ensure that these
10 executives are held accountable when they know of a legal duty that their business
11 has failed to perform. Over time, Amendment 53 can foster a business environment
12 that attracts and retains responsible employers.

13 2) Amendment 53 may encourage a healthy and moral economic climate for
14 Colorado. When businesses fail to comply with state law, the state's economy can be
15 impacted in a variety of unexpected or far-reaching ways. The measure seeks to
16 eliminate cases where executives' failure to act or take responsibility for their
17 businesses' legal obligations affects the lives of employees, shareholders, or even the
18 state's citizens as a whole.

19 3) Amendment 53 could lead to additional disclosure about and charges for illegal
20 corporate conduct. The measure establishes a defense from prosecution for
21 executives, which may make executives feel more secure about reporting their
22 business's failure to perform duties required under the law.

23 Arguments Against

24 1) Amendment 53 ~~creates a way to avoid accountability.~~ MAY HAVE THE OPPOSITE
25 EFFECT OF WHAT IS INTENDED BECAUSE IT PROVIDES COMPLETE IMMUNITY TO ANYONE WHO
26 BREAKS THE LAW, PROVIDED THAT THEY SELF-REPORT THEIR WRONGFUL CONDUCT BEFORE
27 THEY ARE CHARGED OR SUED. ~~business~~ Executives OFFICIALS who are aware of their
28 business's failure to comply with the law, and who should be held responsible, may
29 escape prosecution through reports to the attorney general.

30 2) State and federal laws already hold ~~business~~ executives OFFICIALS accountable.
31 For example, executives can be prosecuted under Colorado law for their own criminal
32 conduct on behalf of their business. Recent federal laws have strengthened criminal
33 and civil penalties for business executives who commit fraud. High-profile
34 prosecutions of ~~business~~ executives OFFICIALS demonstrate that current laws are
35 sufficient to address corporate wrongdoing.

1 3) THE MEASURE CRIMINALIZES TRADITIONALLY CIVIL AND REGULATORY CONDUCT.
2 AMENDMENT 53 CRIMINALIZES THE FAILURE "TO DISCHARGE A SPECIFIC DUTY OF
3 AFFIRMATIVE PERFORMANCE IMPOSED ON THE BUSINESS ENTITY BY LAW." BY WAY OF
4 EXAMPLE, TYPICAL BUSINESS TORTS MIGHT INCLUDE THE BREACH OF A CORPORATION'S DUTY
5 TO MAINTAIN CERTAIN RECORDS; A CORPORATION'S DUTY TO MAINTAIN RECORDS FOR
6 INSPECTION BY SHAREHOLDERS; AND A CORPORATION'S DUTY TO PROVIDE ANNUAL REPORTS
7 TO THE SECRETARY OF STATE. FURTHER, ANY VIOLATION OF ANY STATUTE, ORDINANCE,
8 REGULATION, HEALTH STANDARD, ETC., WOULD CONSTITUTE A CRIMINAL OFFENSE UNDER
9 THE STATUTE.

10 4) Amendment 53 may negatively impact a business climate in which most
11 businesses and their executives comply with the law. For example, the new criminal
12 penalties could drive higher insurance costs for law-abiding executives, which may
13 ultimately be passed along to consumers. Additionally, fear of prosecution could
14 hinder recruitment of top business talent and may leave community leaders reluctant
15 to serve on nonprofit boards.

16 **Estimate of Fiscal Impact**

17 Amendment 53 is not expected to have a significant impact on either state or local
18 government spending in Colorado, assuming business executives comply with laws.
19 But, because law enforcement officials have the discretion to bring charges and the
20 courts have discretion over imposing criminal penalties for people convicted of a
21 crime, the exact fiscal impact cannot be determined. In the event that a person is
22 convicted of an offense, the measure could increase state spending for offenders
23 sentenced to state prison (for felonies) and local government spending for offenders
24 sentenced to county jail (for misdemeanors). The state court system may also see an
25 increase in activity, but no significant increase in costs is anticipated. Any conviction
26 that includes a fine would increase state revenue.

DOUG FRIEDNASH'S COMMENTS ON LAST DRAFT OF AMENDMENT 53

Thank you for the opportunity to comment. I would incorporate my previous comments to this version. In addition, I would note the following corrections, modifications, and suggestions:

1. Title states: Accountability for Business Executives. It should read, Accountability for Executive Officials. This does not apply to all business executives, but only executive officials as defined by the proposed measure. This is misleading to the voters who will believe it is much broader than it actually is.

2. The bullet points describes the impact of this on business executives. Again, this is completely misleading. It should read that it * Extends liability for criminal conduct by businesses to executive officials. Executive officials include any natural person who is an officer, director, managing partner, managing member, or sole proprietor of a business entity, nonprofit corporation or homeowners association.

3. The bullet points should include the following:

*Criminalizes civil and regulatory conduct. Provides that an executive official is guilty of an offense 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 of the specific duty to be performed and knew that the business entity failed to perform that duty. In other words, any violation of any statute, ordinance, regulation, health standard, fiduciary duty, would constitute a criminal offense under the statute.

*An executive official can avoid being held criminally or civilly liable so long as he or she reports to the office of the Attorney General all facts which he or she is aware of concerning the business entity's conduct that meets the criminal conduct provided by the Initiative.

4. The analysis needs to clarify that the measure doesn't merely provide a defense, but rather a complete defense for timely self reporting.

5. I have some serious concerns about the first argument against this measure.. I think it still is written in a way that can be easily interpreted as an argument for the measure. At a minimum, it needs to be re-worded and listed as the last of the arguments against. Here is some alternative arguments. The first can be incorporated in the third argument and the latter one should be added as it captures the far-reaching implications of this measure which are hidden from the voters and have not been otherwise addressed.

The initiative may have the opposite effect of what is intended. The initiatives provide complete immunity to anyone who breaks the law, provided that they self-report their wrongful conduct before they are charged or sued.

The measure criminalizes traditionally civil and regulatory conduct. The amendment criminalizes the failure "to discharge a specific duty of affirmative performance imposed on the business entity by law." By way of example, typical business torts might include the breach of a corporation's duty to maintain certain records; a corporation's duty to maintain records for inspection by shareholders, and a corporation's duty to provide annual reports to the secretary of state. Further, any violation of any statute, ordinance, regulation, health standard, etc., would constitute a criminal offense under the statute.

Should you have any questions, please do not hesitate to contact me.

Very Truly Yours,

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Last Draft as Mailed to Interested Parties

Initiative #74 Criminal Accountability of Business Executives

1 **Amendment __ proposes amending the Colorado statutes to:**

- 2 ♦ hold a business executive criminally responsible for the business's
3 failure to perform a duty required by law if the official knew of the duty
4 and the business's failure to perform it.

5 **Summary and Analysis**

6
7 **Accountability of business entities.** Businesses are subject to a wide variety of
8 state and federal laws, including environmental protections, securities regulations, and
9 consumer protection guarantees. Colorado law criminalizes certain acts committed by
10 or on behalf of a business. Businesses may be held criminally accountable for the
11 failure to perform specific legal duties and for illegal conduct authorized or tolerated by
12 a governing board, manager, or executive. When these types of laws are violated,
13 companies may be assessed fines.

14 **Expansion of accountability for business executives.** In Colorado, individuals
15 may be prosecuted for illegal conduct performed on behalf of a business.
16 Amendment __ extends criminal accountability to business executives who were
17 aware of their business's failure to perform a legal duty. Amendment __ applies to an
18 officer, director, managing partner, managing member, or sole proprietor of a for-profit
19 business or nonprofit entity.

20 In conjunction with the new criminal provisions, Amendment __ applies existing
21 criminal penalties, including fines, imprisonment, or both, to business executives. The
22 measure provides a defense from prosecution for business executives who report
23 knowledge of their business's failure to comply with the law, as long as the report is
24 made prior to the filing of charges.

25 **Arguments For**

26 1) Amendment ____ addresses a gap in state law. While business entities
27 themselves can be prosecuted, their executives can currently avoid responsibility for
28 their businesses' failure to follow state law. The measure helps ensure that these
29 executives are held accountable when they know of a legal duty that their business
30 has failed to perform. Over time, Amendment __ can foster a business environment
31 that attracts and retains responsible employers.

32 2) Amendment __ may encourage a healthy and moral economic climate for
33 Colorado. When businesses fail to comply with state law, the state's economy can be
34 impacted in a variety of unexpected or far-reaching ways. The measure seeks to
35 eliminate cases where executives' failure to act or take responsibility for their

Last Draft as Mailed to Interested Parties

1 businesses' legal obligations affects the lives of employees, shareholders, or even the
2 state's citizens as a whole.

3 3) Amendment __ could lead to additional disclosure about and charges for illegal
4 corporate conduct. By establishing a defense from prosecution for executives, they
5 may feel more secure about reporting their business's failure to perform duties
6 required under the law.

7 **Arguments Against**

8 1) The implementation of Amendment ___ may lead companies to reconsider
9 locating in Colorado and negatively impact economic development. In the corporate
10 world, the new criminal accountability provisions could drive higher insurance costs for
11 executives and hinder recruitment of top business talent. Similarly, fear of prosecution
12 may leave community leaders reluctant to serve on nonprofit boards.

13 2) State and federal laws already hold business executives accountable. For
14 example, executives can be prosecuted under Colorado law for their own criminal
15 conduct on behalf of their business. Recent federal laws have strengthened criminal
16 and civil penalties for business executives who commit fraud. High-profile
17 prosecutions of business executives demonstrate that current laws are sufficient to
18 address corporate wrongdoing.

19 3) Rather than providing an effective tool to prosecute illegal conduct,
20 Amendment __ creates a way to avoid accountability. Business executives who are
21 aware of their business's failure to comply with the law, and who should be held
22 responsible, may escape prosecution through reports to the attorney general.

23 **Estimate of Fiscal Impact**

24 Amendment __ is not expected to have a significant impact on either state or local
25 government spending in Colorado, assuming business executives comply with laws.
26 However, it could increase the number of people incarcerated in both state prison (for
27 felonies) and county jail (for misdemeanors). If one person is sentenced to state
28 prison, costs would increase \$125,000 in budget year 2010 and \$28,800 in budget
29 year 2011. The first-year cost pays for expanding the state prison system to
30 accommodate an additional inmate sentenced to prison; the second-year cost is for
31 state prison operations related to that inmate. The state court system may also see
32 an increase in activity, although no significant increase in costs is anticipated. County
33 jail costs will vary, but average between \$45 and \$65 per day of incarceration.
34 Amendment __ will also increase state revenue from fines. Because the courts have
35 the discretion of sentencing a person to jail or imposing a fine, the exact impact on
36 county jails and fine revenue cannot be determined.

AMENDMENT 53
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Amendment 53
Criminal Accountability of Business Executives

1 **Ballot Title:** An amendment to the Colorado Revised Statutes extending the criminal
2 liability of a business entity to its executive officials for the entity's failure to perform
3 a specific duty imposed by law, and, in connection therewith, conditioning an executive
4 official's liability upon his or her knowledge of the duty imposed by law and of the
5 business entity's failure to perform such duty; and allowing an executive official who
6 discloses to the attorney general all facts known to the official concerning a business's
7 criminal conduct to use that disclosure as an affirmative defense to criminal charges.

8 **Text of Proposal:**

9 *Be it enacted by the People of the State of Colorado:*

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

11 **18-1-606. Criminal liability of business entities and their executive officials.**

12 (1) A business entity is guilty of an offense if:

13 (a) The conduct constituting the offense consists of an omission to discharge a
14 specific duty of affirmative performance imposed on the business entity by law; or

15 (b) The conduct constituting the offense is engaged in, authorized, solicited,
16 requested, commanded, or knowingly tolerated by the governing body or individual
17 authorized to manage the affairs of the business entity or by a "high managerial agent"
18 acting within the scope of his or her employment or in behalf of the business entity.

19 (1.5) AN EXECUTIVE OFFICIAL IS GUILTY OF AN OFFENSE IF THE CONDUCT
20 CONSTITUTING THE OFFENSE CONSISTS OF AN OMISSION TO DISCHARGE A SPECIFIC DUTY
21 OF AFFIRMATIVE PERFORMANCE IMPOSED ON THE BUSINESS ENTITY BY LAW AND THE
22 EXECUTIVE OFFICIAL KNEW OF THE SPECIFIC DUTY TO BE PERFORMED AND KNEW THAT
23 THE BUSINESS ENTITY FAILED TO PERFORM THAT DUTY.

24 (2) As used in this section:

25 (a) "Agent" means any director, officer, or employee of a business entity, or any
26 other person who is authorized to act in behalf of the business entity, and "high
27 managerial agent" means an officer of a business entity or any other agent in a position
28 of comparable authority with respect to the formulation of the business entity's policy

1 or the supervision in a managerial capacity of subordinate employees.

2 (b) "Business entity" means a corporation or other entity that is subject to the
3 provisions of title 7, C.R.S.; foreign corporations qualified to do business in this state
4 pursuant to article 115 of title 7, C.R.S., specifically including federally chartered or
5 authorized financial institutions; a corporation or other entity that is subject to the
6 provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of
7 individuals doing business in the state.

8 (c) "EXECUTIVE OFFICIAL" MEANS ANY NATURAL PERSON WHO IS AN OFFICER,
9 DIRECTOR, MANAGING PARTNER, MANAGING MEMBER, OR SOLE PROPRIETOR OF A
10 BUSINESS ENTITY.

11 (3) Every offense committed by a corporation prior to July 1, 1985, which would
12 be a felony if committed by an individual shall subject the corporation to the payment
13 of a fine of not less than one thousand dollars nor more than fifteen thousand dollars.
14 For such offenses committed on or after July 1, 1985, the corporation shall be subject
15 to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401
16 (1) (a) (III). Every offense committed by a corporation which would be a misdemeanor
17 or petty offense if committed by an individual shall subject the corporation to the
18 payment of a fine within the minimum and maximum fines authorized by sections 18-
19 1.3-501 and 18-1.3-503 for the particular offense of which the corporation is convicted.
20 For an offense committed on or after July 1, 2003, a business entity shall be subject to
21 the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1)
22 (a) (III). An offense committed by a business entity that would be a misdemeanor or
23 petty offense if committed by an individual shall subject the business entity to the
24 payment of a fine within the minimum and maximum fines authorized by sections 18-
25 1.3-501 and 18-1.3-503 for the particular offense of which the business entity is
26 convicted. FOR AN OFFENSE COMMITTED ON OR AFTER FEBRUARY 1, 2009, AN
27 EXECUTIVE OFFICIAL SHALL BE SUBJECT TO THE PAYMENT OF A FINE WITHIN THE
28 PRESUMPTIVE RANGES AUTHORIZED BY SECTION 18-1.3-401 (1) (a) (III) OR A TERM OF
29 IMPRISONMENT WITHIN THE PRESUMPTIVE RANGES AUTHORIZED BY SECTION 18-1.3-
30 401(1) (a) (V), OR BOTH. AN OFFENSE COMMITTED BY AN EXECUTIVE OFFICIAL THAT
31 WOULD BE A MISDEMEANOR OR PETTY OFFENSE SHALL SUBJECT THE EXECUTIVE OFFICIAL
32 TO THE PAYMENT OF A FINE WITHIN THE MINIMUM AND MAXIMUM FINES AUTHORIZED BY
33 SECTIONS 18-1.3-501 AND 18-1.3-503 OR A TERM OF IMPRISONMENT WITHIN THE RANGES
34 AUTHORIZED BY SECTIONS 18-1.3-501 AND 18-1.3-503, OR BOTH, FOR THE PARTICULAR
35 OFFENSE OF WHICH THE EXECUTIVE OFFICIAL IS CONVICTED.

36 (4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY EXECUTIVE OFFICIAL
37 CHARGED UNDER SUBSECTION (1.5) OF THIS SECTION THAT, PRIOR TO BEING CHARGED,
38 HE OR SHE REPORTED TO THE OFFICE OF THE ATTORNEY GENERAL ALL FACTS OF WHICH
39 HE OR SHE WAS AWARE CONCERNING THE BUSINESS ENTITY'S CONDUCT THAT MET THE
40 CRITERIA SET FORTH IN SUBSECTION (1)(a) OF THIS SECTION.