

**SUPREME COURT OF COLORADO**

2 East 14<sup>th</sup> Avenue 4<sup>th</sup> Floor  
Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO  
§ 1-40-107(2), C.R.S. (2007)  
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE  
AND SUBMISSION CLAUSE FOR 2007-2008, #75

**Petitioner:**

JOSEPH B. BLAKE,  
Objector,

v.

**Respondents:**

JOANNE KING AND LARRY ELLINGSON,  
Proponents,

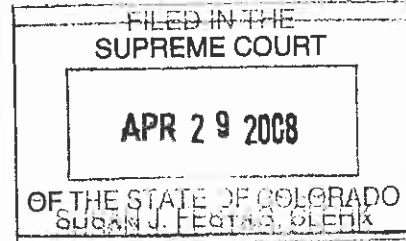
and

**Title Board:**

WILLIAM A. HOBBS, DANIEL L. CARTIN, and  
DANIEL DOMENICO.

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▲ COURT USE ONLY ▲

Case No. 08SA119

**PETITIONER'S OPENING BRIEF**

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On behalf of Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Opening Brief to appeal the Title Board's approval of the Title for Proposed Initiative 2007-2008 #75 ("Liability of Business Entities and Their Executive Officials - Civil Liability") (hereinafter "Initiative").

### **STATEMENT ISSUES PRESENTED FOR REVIEW**

1. Whether the proposed Initiative violates the single subject requirement of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106 and § 1-40-106.5.
2. Whether the Initiative's Title, ballot title, and submission clause are misleading, confusing, insufficient, unclear, and fail to reflect the Initiative's true meaning and intent.

### **STATEMENT OF THE CASE AND FACTS**

#### **A. Nature of the Case Course of Proceedings, and Disposition before the Title Board.**

On March 19, 2008, the Title Board conducted a public hearing on the Initiative pursuant to Colo. Rev. Stat. §1-40-106(1). The Title Board designated and fixed a title, ballot title, and submission clause for the Initiative. Petitioner, a registered elector, timely filed a Motion for Rehearing (the "Motion") pursuant to Colo. Rev. Stat. §1-40-108(1) on March 26, 2008. On April 2, 2008, the Title Board granted in part to the extent the Board amended titles and denied Petitioner's Motion in all other

respects. Thereafter, Petitioner initiated this original proceeding for review of the Title Board's action, pursuant to C.R.S. § 1-40-107(2).

**B. Statement of the Facts**

**1. Civil Liability.**

Any individual residing in Colorado may file a private right of action against any business entity for its conduct that meets the criteria set forth in C.R.S. §18-1-606(1)(a) or against the business entity's executive officials where such officials knew of the specific duty to be performed by law and knew that the business entity failed to perform that duty. If an award is made under this section, the individual filing the lawsuit shall be entitled to reasonable attorney fees and costs for defending the interests of the state.

**2. Damages to Governmental Entity, which is Exempt from TABOR.**

In a civil action brought under this section, compensatory or punitive may be awarded to any governmental entity that imposed by law the specific duty to performed by the business entity. The Initiative defines executive official to include any natural person who is an officer, director, managing partner, managing member, or sole proprietor of a business entity. The Initiative does not define "governmental entity".



Moneys received from the proceedings are exempt from all revenue and spending limitations provided by law.

### **3. Complete Affirmative Defense for Civil and Criminal Liability.**

An executive official can avoid being held criminally or civilly liable so long as he or she reports, prior to being charged, 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.

### **SUMMARY OF ARGUMENT**

The actions of the Title Board should be reversed because the Title violates the single subject rule set forth in C.R.S. § 1-40-106.5. The Initiative subject provides that it is "concerning civil liability for criminal conduct by business entities." The measure also seeks, however, to modify criminal conduct by business entities under C.R.S. § 18-1-606(1)(a). The Initiative also provides for a revenue source for governmental entities that is exempt from TABOR.

The Title is unclear, confusing, misleading, incomplete in not revealing that criminal defendants will be required to make their full disclosures to the attorney general prior to being charged in order to gain a complete affirmative defense; in failing to inform the voters that all awards of damages are paid to the governmental

entity that imposed the specific duty to be performed; and that these damages are then exempted from all revenue and spending limits.

## ARGUMENT

### I. THE INITIATIVE VIOLATES THE SINGLE SUBJECT RULE

#### A. Standard of Review

An initiative violates the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other. *See In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000) (“Implementing provisions that are directly tied to an initiative’s central focus are not separate subjects.”) The purpose of the single-subject requirement for ballot initiatives is two-fold: to forbid the treatment of incongruous subjects in order to gather support by enlisting the help of advocates of each of an initiative’s numerous measures and “to prevent surprise and fraud from being practiced upon voters.” *See* C.R.S. § 1-40-106.5(e)(I, II).

An initiative with multiple subjects may not be properly offered as a single subject by stating the subject in broad terms, however. *See In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873–74 (Colo.

2007 (holding measure violated single subject requirement in creating department of environmental conservation and mandating a public trust standard); *see also, In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A), supra*, 4 P.3d at 1097 (holding that elimination of school board’s powers to require bilingual education not separate subject; titles and summary materially defective in failing to summarize provision that no school district or school could be required to offer bilingual education program; and titles contained improper catch phrase).

“Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement.” *In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996) (citing *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X*, 900 P.2d 121, 124–25 (Colo. 1995)).

“The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative.” *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006) (holding that there were “at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing

taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits”).

“An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative.” *In re Title, Ballot Title and Submission Clause 2007-2008, #17, supra*, 172 P.3d at 875. In light of the foregoing, this Court has stated, “We must examine sufficiently an initiative’s central theme to determine whether it contains hidden purposes under a broad theme.” *Id.*

This Court may engage in an inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *Id.* (“While we do not determine an initiative’s efficacy, construction, or future application, we must examine the proposal sufficiently to enable review of the Title Board’s action.”); *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002) (“[W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.”).

**B. The Initiative Embraces Three Distinct Complex Subjects that Cannot be Properly Grouped Together under Colorado Law**

1. *The Initiative creates a new form of civil liability allows anyone living in Colorado to bring an action on behalf of any governmental entity for punitive and compensatory damages.*

Individuals residing in Colorado are allowed to seek civil damages based upon existing or expanded criminal conduct. This does not necessarily follow from making conduct criminal in the first place. Most criminal statutes do not carry with them private causes of action. *See, e.g. Hurtado v. Brady*, 165 P.3d 871, 875 (Colo. App. 2007) (“Where a statute does not provide for a private cause of action, a plaintiff may not pursue a claim for relief based upon the statute. *Silverstein v. Sisters of Charity*, 38 Colo. App. 286, 288, 559 P.2d 716, 718 (1976)”); see also *Shaw v. Neece*, 727 F.2d 947, 949 (10th Cir.1984) (holding claims under 18 U.S.C. §§ 241, 242 and 1503 were properly dismissed by trial court because a plaintiff cannot recover civil damages for alleged violation of criminal statute).

2. *Damages awarded go to the governmental entity, which are exempt from TABOR.*

The Initiative contains another subject: it provides that the “compensatory or punitive damages be awarded to the governmental entity that imposed by law the

specific duty to be performed by the business entity. This is unrelated to the typical private claim for relief for criminal actions. This is particularly true, where, as here, the state of Colorado or other governmental entity is not even involved in the lawsuit as a party.

Damages awarded to the governmental entity from these civil actions are exempt from all revenue and spending limitations provided by law. A budgetary provision exempting income from TABOR has no “necessary connection” with extension of liability of business entities to individuals. Thus, it is a separate topic from the rest of the Initiative, and one voters should be allowed to decide separately.

### 3. *Get out of Jail Free Card for Civil and Criminal Charges.*

The Initiative also creates a new concept of defense: it provides a “complete affirmative defense” for any executive official who, prior to being charged in a criminal action under C.R.S. § 18-1-606(1)(a) or this civil action, notifies the attorney general of all facts of which it is aware concerning the business entity’s conduct. *See, e.g., In re Regan*, 151 P.3d 1281, n.3 (Colo. 2007) (full payment by homeowner a complete affirmative defense to a lien).

The Initiative concerns with civil liability, not criminal liability. Hence, the inclusion of the “complete affirmative defense” to criminal liability is clearly a separate subject, unrelated to the civil component.

All criminal conduct under C.R.S. § 18-1-606(1) becomes immune from liability as long as after one commits a crime, they absolve themselves by notifying the attorney general. This “get out of jail free card” is a separate and distinct subject.

## **II. THE INITIATIVE IS CONFUSING, UNFAIR, MISLEADING, AND LIKELY TO SURPRISE THE VOTERS**

The Title Board’s chosen language for the titles and summary must be fair, clear, and accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A)*, *supra*, 4 P.3d at 1098.

“In fixing titles and summary, the Board’s duty is ‘to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice.’” *Id.* (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)); *see also*, *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative’s “not to exceed” language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity).

Eliminating a key feature of the initiative from the titles alone is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *See id*; *see also, In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 # 256*, 12 P.3d 246, 256 (Colo. 2000) *In re Ballot Title 1997-1998 #62, supra*, 961 P.2d at 1082.

**A. The Title is Misleading, Confusing and Unfair in Omitting Key Provisions and Failing to Provide Definitions**

The Title is misleading, confusing, and unfair in numerous ways; therefore, it should be stricken. The Title leaves out a number of key features that are likely to lead to misinterpretations by the voters. *See id*. In addition, it fails ‘to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice.’ *In re Ballot Title 1999-2000 #258(A), supra*, 4 P.3d at 1098.

In *In re Ballot Title 1999-2000 #258(A), supra*, the Title was materially defective for failure to include a key feature of the initiative, which resulted in misleading and confusing the voters. The approved title for Initiative 258(A) failed to articulate that school districts and schools could not be required to offer bilingual programs. *See id.* at 1099.

In considering the language of the title for Initiative 258(A), voters could conclude that parents of non-English speaking students would have a meaningful



choice between an English immersion program and a bilingual program. *See id.* This Court concluded that a misinterpretation of the Title could cause voters to favor the proposal as assuring both programs, which it did not. *See id.* at 1099.

The Initiative here is like #258(a). It fails to articulate that the Initiative actually concerns both criminal and civil liability (the affirmative defense applies to civil and criminal liability). Voters will be surprised to learn that by voting for this Initiative they have provided executive officials a complete affirmative defense to criminal charges when nothing else in the Initiative relates to criminal conduct.

In addition, the Initiative omits what specific type of affirmative duties will subject an executive official to liability. While one can presume that a violation of a criminal statute would create criminal liability, the Initiative fails to state which “specific duty of affirmative performance imposed by law,” and potentially many civil wrongs, fall within the measure.

The Title does not inform the voters that in order for a defendant to avail himself of the affirmative defense he must make his full disclosure to the attorney general prior to being charged. *See Proposed C.R.S. § 18-1-606(4) see also, Title ll. 9–11.* In addition, the Title does not reveal that the measure provides complete immunity to criminal charges under 18-1-606(1)(a). *See, e.g., In re Regan, 151 P.3d 1281, n.3*

(Colo. 2007) (full payment by homeowner a complete affirmative defense to a lien). In other words, all criminal conduct becomes immune from liability as long as after one commits a crime, he absolves himself by notifying the attorney general.

The Title lacks accuracy in using language that is inconsistent with that of the Initiative. The Title states that it allows “a Colorado resident to bring an action for civil damages against a business or its executive official for such criminal conduct.” Title at ll. 5–7 (emphasis added). It fails to indicate that “resident” is not defined and could include any person residing in the state such as a business entity, a legal alien, or an illegal alien; and it does not define “civil damages.”

The Initiative, however, provides that “any individual residing in Colorado may file a private right of action.” Proposed C.R.S. § 18-1-606 at ¶ (5)(a) (emphasis added). By definition, an “individual” is a natural person. BLACK’S LAW DICTIONARY 777 (7th ed. 1999) (“Of or relating to a single person or thing, as opposed to a group.”)

This inconsistency of identity of potential plaintiffs is likely to create confusion because the voter will not know who may bring these actions based on the plain language of the Title and the Initiative.

The Initiative makes clear that the money collected by the state and governmental entities as damages are exempt from all revenue and spending limits

provided by law. The Title is silent regarding this subject, though; hiding a potentially controversial feature of the Initiative from the public. The Initiative and the Title are silent as to whom damages will be awarded where the duty that has been breached is not duty imposed by a governmental entity.

**B. The Title, Ballot Title and Submission Clause Contain an Impermissible Catch Phrase, “Criminal Conduct”**

The Title uses the impermissible catch phrase of “criminal conduct” that is likely to mislead the voters because it has an accepted meaning that does not reflect the content of the Initiative. Executive officials in Colorado business entities—whether one person companies or large, publicly traded companies—risk criminal liability for failures to make administrative reports or for negligent acts of the company. The words “criminal conduct” provoke thoughts of what most voters would consider “real crimes” rather than unidentified “duties that are required by law” that should continue to be considered civil wrongs.

“It is helpful to recall that voters place primary, if not absolute, reliance upon the board’s product when deciding whether to support or oppose proposed initiatives. . . .

Recognizing the profound influence such language could have on voters, this court has steadfastly prohibited the use of ‘catch phrases’ when words chosen by the board in drafting titles have suggested particular meanings of a proposal rather than merely

summarizing its contents.” *In re Proposed Initiative Concerning Drinking Age in Colo.*, 691 P.2d 1127, 1134 (Colo. 1984) (Kirshbaum, J. dissenting).

“A ‘catch phrase’ consists of ‘words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment.’” *In re Proposed Initiative Designated “Governmental Business”*, 875 P.2d 871, 876 (Colo. 1994) (“*Governmental Business*”). “Evaluating whether particular words constitute a slogan or catch phrase must be made in the context of contemporary public debate.” *Id.* (citing *In re Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993)).

*Governmental Business* disallowed the inclusion of the catch phrases “consumer protection” and “open government,” in spite of that fact that those phrases were included in the Initiative itself. The Court concluded that they could form the basis of slogans for use in a campaign favoring the Initiative, which imposed tort liability on governmental business activities intended for consumer protection, tax liability on governmental business activities, and restriction of governmental lobbying. *See id.* at 875.

In considering the phrases, the Court decided that:

[g]iven the negative implication of “closed government,” it is clear that the phrase “open government” could be used as a slogan for proponents of the Initiative. . . . Similarly, the phrase ‘consumer protection’ could be used as a slogan by those supporting the Initiative. As used in contemporary public debate, ‘consumer protection’ encompasses issues pertaining to the safety of goods and services, the assurance that those goods and services comport with governmental standards, and the absence of fraud in labeling and advertising.

*Id.* at 876; *see also*, *Matter of Title, Ballot Title, Submission Clause, and Summary, Adopted April 4th, 1990, Pertaining to the Proposed Initiative on Surface Mining*, 797 P.2d 1275, 1281 (Colo. 1990) (holding that the Title, which included words surface mining project “may scar the land,” was fair and accurate because repeated operative language of proposed amendment).

Here, the Initiative does not include the words “criminal conduct,” using instead “conduct constituting the offense.”. *See e.g.*, Proposed C.R.S. § 18-1-606 (1)(a), (1)(b), and (1.5). On the other hand, the Title contains the words “criminal conduct” two times. The words “criminal conduct” are likely to work to the proposal’s favor twice without contributing to voter understanding. *See* Title at ll. 1, 6, 10.

Criminal conduct is prominent in the minds of many Colorado voters in the wake of business scandals created by actual crimes committed by corporate officers at

Enron, for example. Many employees and shareholders of Qwest are frustrated by the reversal and remand of Joe Nacchio's 2007 conviction by the Tenth Circuit Court of Appeals. *See U.S. v. Nacchio*, 519 F.3d 1140, 2008 WL 697382 (10th Cir. 2008).

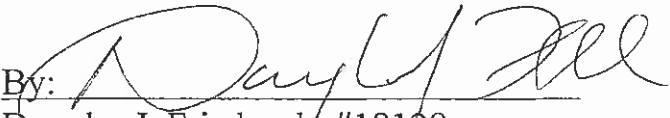
Even in today's heightened awareness of business crimes, contemporary public debate considers "criminal conduct" of businesses to be acts like insider trading, embezzlement, fraud, and theft. "Criminal conduct" is unlikely to bring to mind civil wrongs, which the Initiative encompasses with "a specific duty of affirmative performance imposed on the business entity by law." That could be something as minor as filing in duplicate a report that was supposed to be filed in triplicate.

## CONCLUSION

Petitioner requests the Court to reverse the actions of the Title Board and to direct it to strike the Title, ballot title, and submission clause and return proposed Initiative for 2007-2008 #75 to its proponents.

Respectfully submitted this 29<sup>th</sup> day of April, 2008.

FAIRFIELD AND WOODS, P.C.

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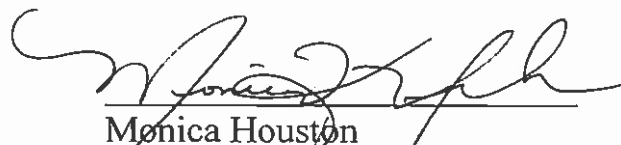
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of April, 2008, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was hand delivered to the following:

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Monica Houston

RECEIVED

MAR 07 2008

*Ch. 218*

*Proposed Initiative  
2007-2008 #75  
FINAL*

Be it enacted by the People of the State of Colorado:  
ELECTIONS  
SECRETARY OF STATE

SECTION 1. Article 21 of Title 13 of the Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

(1) ANY INDIVIDUAL RESIDING IN COLORADO MAY FILE A PRIVATE RIGHT OF ACTION AGAINST ANY BUSINESS ENTITY FOR ITS CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SECTION 18-1-606(1)(a) OR AGAINST THE BUSINESS ENTITY'S EXECUTIVE OFFICIALS WHERE SUCH OFFICIALS KNEW OF THE SPECIFIC DUTY TO BE PERFORMED AS REQUIRED BY LAW AND KNEW THAT THE BUSINESS ENTITY FAILED TO PERFORM THAT DUTY.

(2) AS USED IN THIS SECTION:

(a) "BUSINESS ENTITY" MEANS A CORPORATION OR OTHER ENTITY THAT IS SUBJECT TO THE PROVISIONS OF TITLE 7, C.R.S.; FOREIGN CORPORATIONS QUALIFIED TO DO BUSINESS IN THIS STATE PURSUANT TO ARTICLE 115 OF TITLE 7, C.R.S., SPECIFICALLY INCLUDING FEDERALLY CHARTERED OR AUTHORIZED FINANCIAL INSTITUTIONS; A CORPORATION OR OTHER ENTITY THAT IS SUBJECT TO THE PROVISIONS OF TITLE 11, C.R.S.; OR A SOLE PROPRIETORSHIP OR OTHER ASSOCIATION OR GROUP OF INDIVIDUALS DOING BUSINESS IN THE STATE.

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

(3) IN A CIVIL ACTION BROUGHT UNDER THIS SECTION, COMPENSATORY OR PUNITIVE DAMAGES MAY BE AWARDED TO ANY GOVERNMENTAL ENTITY THAT IMPOSED BY LAW THE SPECIFIC DUTY TO BE PERFORMED BY THE BUSINESS ENTITY.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY EXECUTIVE OFFICIAL WHO IS A DEFENDANT IN AN ACTION FILED UNDER SUBSECTION (1) OF THIS SECTION THAT, PRIOR TO FILING OF SUCH CIVIL ACTION OR ANY CRIMINAL CHARGES UNDER SECTION 18-1-606(1)(a), HE OR SHE REPORTED TO THE OFFICE OF THE ATTORNEY GENERAL ALL FACTS OF WHICH HE OR SHE WAS AWARE CONCERNING THE BUSINESS ENTITY'S CONDUCT THAT MET THE CRITERIA SET FORTH IN SECTION 18-1-606(1)(a).

(5) SUCH MONEYS, WHEN APPROPRIATED, SHALL BE EXEMPT FROM ALL REVENUE AND SPENDING LIMITATIONS PROVIDED BY LAW.

(6) IF AN AWARD IS MADE UNDER THIS SECTION, THE INDIVIDUAL FILING THE LAWSUIT SHALL BE ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS FOR DEFENDING THE INTERESTS OF THE STATE. NO SUCH AWARD SHALL BE MADE FOR CLAIMS THAT LACKED SUBSTANTIAL JUSTIFICATION OR WERE INTERPOSED FOR DELAY OR HARASSMENT.



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SECRETARY OF STATE  
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via **HAND DELIVERY**  
Ms. Cesi Gomez  
Colorado Secretary of State  
Elections Division  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Re: Initiative 2007-08 #75

Dear Ms. Gomez:

Attached please find the required draft of Initiative 2007-08 #75, which our office is filing on behalf of the Proponents for this measure.

Thank you very much.

Sincerely,



Amy Knight  
Legal Assistant to Mark G. Grueskin

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enclosure  
1768878\_1.doc

**Joanne King**  
**8306 Katherine Way**  
**Denver, Colorado 80221**  
**303-429-2191**

**Larry Ellingson**  
**8517 Bluegrass Circle**  
**Parker, Colorado 80134**  
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**Ballot Title Setting Board**

**Proposed Initiative 2007-2008 #75<sup>1</sup>**

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes concerning civil liability for criminal conduct by business entities, and, in connection therewith, allowing a Colorado resident to bring a civil action against a business entity or its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning executive officials' liability upon their knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty to be performed by the business entity; permitting an individual who brings a successful civil action to be awarded attorney fees and costs; and allowing an executive official who discloses to the attorney general all facts known to the official concerning a business's criminal conduct to use that disclosure as an affirmative defense to the civil charges.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes concerning civil liability for criminal conduct by business entities, and, in connection therewith, allowing a Colorado resident to bring a civil action against a business entity or its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning executive officials' liability upon their knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty to be performed by the business entity; permitting an individual who brings a successful civil action to be awarded attorney fees and costs; and allowing an executive official who discloses to the attorney general all facts known to the official concerning a business's criminal conduct to use that disclosure as an affirmative defense to the civil charges?

*Hearing March 19, 2008:*

*Single subject approved; staff draft amended; titles set.*

*Hearing adjourned 3:14 p.m.*

*Hearing April 2, 2008:*

*Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.*

*Hearing adjourned 3:00 p.m.*

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<sup>1</sup> Unofficially captioned "Criminal Conduct by Businesses – Civil Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

INITIATIVE TITLE SETTING REVIEW BOARD  
Wednesday, March 19, 2008  
Secretary of State's Blue Spruce Conference Room  
1700 Broadway, Suite 270  
Denver, Colorado

2007-2008 #75  
Criminal Conduct by Businesses - Civil Liability

William A. Hobbs, Deputy Secretary of State  
Daniel D. Domenico, Solicitor General  
Daniel L. Cartin, Deputy Director of the  
Office of Legislative Legal Services  
Maurice G. Knaizer, Deputy Attorney General  
Cesl Gomez, Secretary of State's Office

A P P E A R A N C E S

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**RECEIVED**

MAR 28 2008

FAIRFIELD & WOODS, P.C.

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<p>1 PROCEEDINGS 2 MR. HOBBS: Let's move on then to #74 – 3 2007-2008 #75, Criminal Conduct by Businesses - Civil 4 Liability. Again, I believe this one is a measure 5 where Mr. Grueskin represents proponents. Perhaps we 6 could find out if there are any questions for 7 Mr. Grueskin. 8 Mr. Grueskin, I wanted to ask, in subsection 9 (1), the first provision – the provision says that 10 individuals residing in Colorado may file a private 11 right of action, et, cetera, et cetera – well, against 12 the business entity or against the business entity's 13 executive officials, plural, where such officials knew 14 of the specific duty, et cetera. You know, would that 15 private right of action have to be filed against all of 16 the executive officials as a group, or could it be any 17 one of them? 18 MR. GRUESKIN: The intent is clearly to 19 permit the – first of all, it's permissive, so I think 20 that it is – it leaves the discretion in the hands of 21 the plaintiff. 22 But, secondly, the intent there was simply an 23 economy of language: not to say official or officials 24 where one was clearly subsumed within the other. So 25 the answer is no. Because an individual could file an</p>	<p>1 the measure complies with the single-subject 2 requirement. 3 Mr. Friednash, do you have any comments about 4 that issue? 5 MR. FRIEDNASH: Yeah. Thank you. Briefly, 6 again, Doug Friednash, for the record. 7 First, from two different perspectives, the 8 measure – and I've outlined this argument more than 9 once, so I'll do it again but briefly. I believe that 10 civil liability is one subject, the damage portion and 11 the exemption of damages from spending and revenue 12 limits is a separate and distinct issue. I'd also 13 point out that 18-1-606, which this references, does 14 not address the conduct of an executive official, it 15 only deals with the conduct of business. 16 Now, this private right of action measure 17 deals with executive officials and businesses, two 18 different liability portions that would attach – to 19 different civil liability provisions that would attach 20 under this proposal; and then it allows a resident to 21 bring an action against a business, a business entity, 22 for conduct that's violated under 18.1.606, and that's 23 something can you follow by reading 18.1.606, but also 24 against an executive official for conduct that would be 25 a violation under 18.1.606.</p>
Page 3	Page 5
<p>1 action, they could file against the official that 2 actually met the criteria in the statute. 3 MR. HOBBS: Thank you. 4 Any other questions for Mr. Grueskin? 5 MR. DOMENICO: Am I right that effectively 6 that the difference between this and 73 is that – the 7 only really effective difference is the executive 8 officials under this version, on 75, would be only 9 subject to the civil penalties and would not themselves 10 be subject to the criminal penalties, right? 11 MR. GRUESKIN: That's correct. One of the 12 issues that came up in review and comment was is this 13 measure – did you intend for 74 and 75 to be tied 14 together, in other words, require the passage of both, 15 and the answer we provided was no and that's why we 16 made some of the changes we did. They could pass 17 independently, they could be circulated independently, 18 et cetera, et cetera. So, no, there is no necessary 19 predicate of criminal liability in order to pursue this 20 remedy. 21 MR. DOMENICO: Okay. That's what I thought. 22 MR. HOBBS: Any other questions? 23 MR. GRUESKIN: Thank you. 24 MR. HOBBS: Thank you. 25 Let's turn then to the question of whether</p>	<p>1 I think that because of that piece there's 2 got to be a stronger nexus between the two, and I think 3 they can only – this one can only be – go in effect 4 if 74 goes into effect; in other words, they are – 5 this is dependent upon 74 in order to be passed. And I 6 think that needs to be spelled out because I think 7 that's a separate issue as well. It doesn't contain 8 the executive official, it's unclear what those 9 elements would be because of its reliance on the 10 criminal statute. 11 MR. DOMENICO: Well, why would it be 12 dependent on 74? I think Mr. Grueskin said it's not. 13 And I don't – I mean, I don't see what in here – if 14 there's no criminal liability for the executive 15 officials, where – what's the problem? 16 MR. FRIEDNASH: Well, it's using a new term, 17 the concept of executive official – 18 MR. DOMENICO: Right. 19 MR. FRIEDNASH: – and talking about – in 20 fact, in part of the damage portion it talks about the 21 conduct – that, "Compensatory or punitive damages may 22 be awarded to any governmental entity that imposed by 23 law the specific duty to be performed by the business 24 entity." 25 There's no corresponding language in 18.1.606</p>

2 (Pages 2 to 5)

<p style="text-align: right;">Page 6</p> <p>1 that addresses that or the executive official, these 2 are new terms that fall within the scope of this 3 proposal. So it's making a reference to a damage 4 provision that's not even contemplated under 18.1.606. 5 I think in order for this to become effective, to go 6 after an executive official, it has to be contingent 7 upon the other measure passing. 8 I don't see anywhere -- if you look at 9 18.1.606, in its current status, there's no discussion 10 about governmental entities, there's no discussion 11 about specific duties to be performed by a governmental 12 entity under the current status of the law, this is a 13 new aspect to it. 14 MR. DOMENICO: No, I agree with you. But 15 even if -- but I don't see why that requires 74 or 73 16 or anything -- I guess it wouldn't -- 74 to pass as 17 well. I mean, because that doesn't help clarify any of 18 those problems, right? I mean, the question of are 19 there some duties imposed by law that aren't imposed by 20 a specific entity is a problem whether there's 74 or 21 not 74, right? I mean, because 74 doesn't do anything 22 to clear that up, as you pointed out earlier. 23 MR. FRIEDNASH: Well, what -- I guess the 24 question is for the drafters of this measure, what is 25 contemplated by subsection (3)? I mean, "In a civil</p>	<p style="text-align: right;">Page 8</p> <p>1 that I can't set a title. I mean, there's lots of 2 things that we get in these initiatives that we don't 3 understand the full effect and are going to have to 4 rely on the legislature spelling it out or litigation 5 to spell it out. 6 And that -- the damages issue, what someone's 7 going to actually have to prove, where the money goes 8 if there's no obvious governmental entity, I agree with 9 you, are sort of open questions, but I'm not sure that 10 is something we can -- that's within our jurisdiction 11 to -- to resolve. 12 I do wonder -- you know, my concern with the 13 other versions of this, the previous versions, was 14 adopting kind of a broadly worded single subject of 15 liability for criminal acts of business entities and 16 then doing two sort of related things in some ways but 17 not necessarily related and sort of surprising, which 18 is, extending liability for a business entity's 19 misbehavior to certain individuals and then also 20 extending the civil liability. 21 This kind of seems to get around that, don't 22 you think, because all you're doing now is creating 23 civil liability. But I wonder if you think there's 24 some similar problem to what I expressed before. 25 MR. FRIEDNASH: Yeah, I appreciate that.</p>
<p style="text-align: right;">Page 7</p> <p>1 action brought under this section, compensatory or 2 punitive damages may be awarded to any governmental 3 entity that imposed by law the specific duty to be 4 performed by the business entity." I don't know 5 exactly what that's addressing in relationship to 6 18.1.606, and that is a specific measure of conduct 7 that this civil claim is based on. 8 MR. DOMENICO: Right. And, I mean, I agree 9 with you. I think that that damages thing leaves a lot 10 to be figured out in the future. I don't think it's 11 clear to me. 12 I mean, part of the point of this, I think, 13 is that under current law nobody can recover damages, 14 presumably because they haven't personally been injured 15 or something like that, suffered a tort-type injury 16 that they could recover for, and this is attempting to 17 do something other than what tort law does. 18 But tort law already provides for 19 compensatory and punitive damages where somebody can 20 actually show they were damaged by someone's failure to 21 live up to a legal duty. And so I'm -- I agree with 22 you that I'm not sure exactly what this -- what kind of 23 damages this is going to result in. 24 I'm not sure, though, that that makes it a 25 single-subject violation or that it makes it so unclear</p>	<p style="text-align: right;">Page 9</p> <p>1 Yeah, you know, it's got two aspects of civil 2 liability, one is to say you can go after a business 3 entity for conduct that took place under 18.1.606, and 4 then saying, as a separate and distinct aspect to civil 5 liability, you can go against executive officials, not 6 for what the business did but as a separate and 7 distinct basis for going after them for conduct that 8 they knew of and didn't report or where the business 9 entity failed to act in a particular manner. 10 And that's what's confusing to me. Because 11 when you start talking about executive official, it's 12 something that wasn't contemplated, it's not 13 contemplated under current law, under 18.1.606, and 14 then you start talking about damages that result from 15 that and tie it into governmental conduct. It's 16 particularly confusing as to what exactly the elements 17 of this claim look like for specifically the executive 18 official. 19 And I guess that's kind of the crux of what 20 I'm trying to say, is, you know, they really are two 21 much different pieces of the civil liability component. 22 And what is the civil liability for an executive 23 official? I don't know. And because there is no 24 discussion about specific duties owed by governmental 25 entities under 18.1.606, I think this is a separate and</p>

<p style="text-align: right;">Page 10</p> <p>1 distinct issue as it applies to executive officials. 2 So it's not just creating a civil remedy, 3 it's creating different types of civil remedies. And 4 within that framework, it's real confusing as to what 5 this is doing. It seems like it's expanding the type 6 of liability that's contemplated by 18.1.606. 7 MR. HOBBS: Thank you. 8 Is there anybody else who wishes to testify 9 on the question of the single-subject issue? 10 If not, is there discussion by the Board? 11 Mr. Cartin? 12 MR. CARTIN: Mr. Chairman, if I might, could 13 I just ask one quick question? Under the terms of the 14 measure, is it only individuals that can bring suit, 15 and by "individual" does that mean human being? I 16 guess that question would be for Mr. Grueskin. In 17 other words, it doesn't include an entity under the 18 language of the proposal, it says, "An individual 19 residing in Colorado." So it's exclusive to humans 20 residing in Colorado? 21 MR. GRUESKIN: Natural persons, yes. 22 MR. CARTIN: Okay. Thank you. 23 MR. HOBBS: Thank you. 24 Discussion by the Board. 25 MR. DOMENICO: Well, I mean, this, to me,</p>	<p style="text-align: right;">Page 12</p> <p>1 not so broad that we can fit almost everything within. 2 And so I think I'm willing to go along with this one, 3 but I'm troubled. 4 MR. HOBBS: Um-hum. 5 Mr. Cartin, do you have any comments? 6 MR. CARTIN: No, I - thank you, 7 Mr. Chairman. I won't elaborate. It seems to me that 8 there's a central theme, that there's a single subject. 9 If they're - if the purpose or purposes interrelate 10 and that I personally, in my reading of the text and 11 the discussion here, can find - I find an absence of 12 surprise or some type of hidden outcome. So I would be 13 supportive of moving forward and setting it to ballot 14 title. 15 MR. HOBBS: And I agree. And I agree with 16 Mr. Domenico, this is a better case for single subject 17 than #73. 18 So with that, is there a motion? 19 MR. CARTIN: I'd move that the Title Board 20 find 2007-2008 #75 contains a single subject and 21 proceed with setting a ballot title. 22 MR. HOBBS: I'll second that. 23 Any further discussion? If not, all those in 24 favor say aye. 25 Aye.</p>
<p style="text-align: right;">Page 11</p> <p>1 solves part of the problem I've had like with 73 and 2 some of the other ones in that it doesn't include the 3 extension of criminal liability to business entities. 4 And I've been going back and forth on whether it solves 5 enough of the problem to push me to the other side. 6 I mean, this really, to me, goes right up to 7 the line of a single subject in that it does relate to, 8 as the staff draft says, civil liability for criminal 9 conduct by business entities, which I think the fact 10 that you're able to narrow the statement of the single 11 subject is helpful and helpful to me in the idea that 12 we're not relying on too broad of a subject in order to 13 fit everything under it. 14 On the other hand, it's still - to me, the 15 single subject - I think there's a real potential for 16 a surprise that someone thinking, well, we're voting on 17 civil liability for criminal conduct by business 18 entities, they're surprised that we're also making new 19 individuals subject to this liability. And so this is 20 a tough one for me. 21 I think at the moment I'm leaning towards 22 finding it to be a single subject because it removes 23 the - we've narrowed the subject significantly from 24 the previous versions that I had trouble with and the 25 statement that civil liability for criminal conduct is</p>	<p style="text-align: right;">Page 13</p> <p>1 MR. CARTIN: Aye. 2 MR. DOMENICO: Aye. 3 MR. HOBBS: All those opposed no. 4 That motion carries 3-0. 5 Let's turn to the staff draft which Ms. Gomez 6 has displayed on the screen in the room. 7 I'll ask Mr. Grueskin if he's had an 8 opportunity to review that and if he has any concerns 9 about the staff draft. 10 MR. GRUESKIN: I have just a couple of 11 thoughts, and I've got a proposed revision. 12 MR. DOMENICO: Thanks. 13 MR. GRUESKIN: To prove my flexibility, 14 you'll see certain handwritten changes there to reflect 15 the actions you've already taken on the comparable 16 titles. 17 I think the reference to 18.1.606(1)(a) in 18 the title is not going to mean a lot of things to a lot 19 of people. So I've just tried to clarify, using 20 language that you have already adopted in other ballot 21 titles, making it clear that what the reference 22 provision does, which is it relates to the entity's 23 failure to perform a specific duty imposed by law, and 24 then also the conditioning language that you've already 25 adopted. Those would be my two proposed changes.</p>

4 (Pages 10 to 13)

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1 MR. HOBBS: Can I ask you one quick question?  
 2 It seems like a good approach. Would you mind – this  
 3 relates to a minor point that I raised in a question to  
 4 you earlier – in line 3, changing "executive official"  
 5 to the plural? I'm trying to be more faithful to the  
 6 text of the measure and suggest amending that to say,  
 7 "Against a business entity or its executive officials."  
 8 MR. GRUESKIN: I think those are both good  
 9 changes.  
 10 MR. HOBBS: Thank you.  
 11 MR. GRUESKIN: If I could take a look at the  
 12 language. You may then want to, on line 5, say  
 13 "conditioning" and strike "and," make "executive  
 14 officials" plural possessive, so transpose the  
 15 apostrophe and the S, and strike "his or her" and  
 16 insert "their."  
 17 I think that the use of the singular in  
 18 the -- of executive official on line 9 is consistent  
 19 with the language in the text which allows the use of  
 20 the affirmative defense by any individual.  
 21 MR. HOBBS: Okay. Thank you.  
 22 MR. GRUESKIN: Um-hum.  
 23 MR. HOBBS: Mr. Friednash, you've had an  
 24 opportunity, if you want to comment on Mr. Grueskin's  
 25 suggestions.

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1 MR. FRIEDNASH: Let me just take one more  
 2 second. You know, I have no comment with respect to  
 3 the changes that he just made. I mean, my general  
 4 comments are, you know, pretty much in line with what  
 5 I've already said. I think it's confusing. I think  
 6 the aspect of the governmental damage portion of it is  
 7 particularly confusing, as to how that's going to work;  
 8 the fact that there are compensatory or punitive  
 9 damages that can be awarded to a governmental entity,  
 10 it's not in there. I think that should be addressed.  
 11 I think it is substantive. There's no discussion of  
 12 the exemption of revenue and spending limits for those  
 13 local and state governmental entities.  
 14 And I guess I would echo the thought that,  
 15 you know, I think there is real potential for surprise,  
 16 that new people will be exposed to civil liability as a  
 17 result of this change. So those are my general  
 18 comments. And I may like to have some other comments  
 19 after I've looked through the changes, but at this  
 20 point I don't.  
 21 MR. HOBBS: Okay. Thank you.  
 22 MR. FRIEDNASH: Thank you.  
 23 MR. HOBBS: Mr. Cartin?  
 24 MR. CARTIN: Mr. Chairman, I have a -- I have  
 25 a follow-up question. I apologize for this if this is

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1 kind of what has been fleshed out in Mr. Friednash's  
 2 comments and Mr. Domenico's response.  
 3 But in focusing on the staff draft language,  
 4 the clause "requiring that damages in the civil action  
 5 be awarded to the governmental entity that imposed the  
 6 specific duty to be performed by the business entity,"  
 7 and the language of the measure in subsection (3)  
 8 states, "In a civil action brought under this section,  
 9 compensatory or punitive damages may be awarded to any  
 10 governmental entity that imposed by law the specific  
 11 duty to be performed by the business entity" -- and I  
 12 guess my question -- and, again, I apologize,  
 13 Mr. Grueskin -- under the measure, can damages only be  
 14 awarded to a governmental entity, or can the individual  
 15 who brings suit -- can an award of damages be made to  
 16 the individual who brought the suit as well?  
 17 MR. GRUESKIN: Under this provision, the only  
 18 award of damages that's permitted is to the  
 19 governmental entity.  
 20 MR. CARTIN: Okay.  
 21 MR. GRUESKIN: Presumably, if there's some  
 22 other statutory or common-law right of action, they  
 23 could join the two together. But in light of your  
 24 comment, you're absolutely right, you've already made a  
 25 change on #73. It seems to me that language was -- was

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1 adopted by the Board and would certainly be acceptable  
 2 to the proponents as reflecting the intent and not  
 3 using the "requiring" language. I know that's a  
 4 slightly different issue than the point you raised,  
 5 Mr. Cartin --  
 6 MR. CARTIN: Yeah.  
 7 MR. GRUESKIN: -- but I wanted to make sure I  
 8 covered that.  
 9 MR. CARTIN: I appreciate that. Thank you.  
 10 MR. DOMENICO: Yeah. And I think -- I think  
 11 probably just putting in the language we used in 73  
 12 would be an improvement.  
 13 The way I think I interpret -- part of the  
 14 problem here is there are -- I guess there may be some  
 15 duties imposed by law that aren't -- that you can't  
 16 point to a specific entity, which was what I was  
 17 confused about, what would happen in those cases.  
 18 Because I do interpret this as not allowing the  
 19 individual to get anything other than attorney's fees.  
 20 But now that I've sort of thought that  
 21 through, I think that, at the very least, if there's  
 22 some kind of a common-law or just sort of general  
 23 statutory duty imposed that's not -- you can't point to  
 24 the health department or whomever, the state of  
 25 Colorado, as a governmental entity who is essentially



<p style="text-align: right;">Page 18</p> <p>1 imposing that duty. And I guess that's where those 2 damages would go to. Or they could go to the Solicitor 3 General as a governmental entity, as an individual I'd 4 recommend. 5 MR. CARTIN: Well, then I -- 6 MR. DOMENICO: That's the best I can do to 7 clear that up. I do think it's -- it's a little bit 8 imprecise and unclear. 9 MR. CARTIN: And going back -- thank you. 10 And going back to #73, the language on line 6 requiring 11 that damages -- I've already forgotten what we -- 12 allowing? 13 MR. GRUESKIN: Allowing an award of. 14 MR. HOBBS: I think that's right, allowing an 15 award of damages in the civil action to the 16 governmental entity. 17 MR. CARTIN: So on line 6, strike "requiring 18 that" and insert "allowing an award of" and on line 7 19 strike "be awarded." 20 MR. HOBBS: Yes, I think that's correct. 21 Mr. Friednash, comments? 22 MR. FRIEDNASH: Real quickly. You know, this 23 is part of the problem. 18.1.606 doesn't just apply to 24 duties imposed by governmental entities, it's much more 25 far-reaching than that. And that's why I think this is</p>	<p style="text-align: right;">Page 20</p> <p>1 law essentially. And so I really do wonder what, in 2 practice, this would be like. 3 I mean, would it mean that an individual 4 could come in -- would this be interpreted in such a 5 way that any individual who hears that a business has, 6 say, been accused by the State of committing some 7 crime, would then every individual in the state be 8 allowed to come into court and file a civil action and 9 recover some damage even though they can't personally, 10 under tort law, show that they've been injured? 11 I don't know. I would think that that would 12 be sort of an outlandish result, if every citizen could 13 bring a separate suit without limitation. And on the 14 other hand, if that's not what this does, I don't know 15 what it does do. 16 And so it's -- it's -- it is a confusing 17 effort, trying to give people the right to civil 18 damages for something that it seems to me they already 19 have the right to if they can show they've been harmed. 20 If this means anyone can bring it as sort of a private 21 attorney general, then maybe that's the way it will be 22 interpreted, but it's not clearly written to do that 23 and -- and I wish it were. I guess that's all I'll 24 say. 25 MR. HOBBS: Mr. Cartin?</p>
<p style="text-align: right;">Page 19</p> <p>1 so confusing. 2 Because if the only damages that are 3 allowable for civil damages are damages that would be 4 provided by governmental entities -- from duties owed 5 by governmental entities, I think this has to clearly 6 indicate that it's limiting damages to those type of 7 damages. 8 MR. DOMENICO: Well, I mean, I have to say, 9 and I think I've said it before, probably not very 10 clearly, it really is unclear to me what effect this is 11 going to have. Because if -- I mean, if -- creating a 12 private right of action, as this does, as 73 does, 13 doesn't, to me, necessarily take away the requirement 14 when you're saying that you can bring an action for 15 civil damages. Well, in a typical action for civil 16 damages, you still have to show that you were 17 personally harmed, you have damages that you want to 18 recover. So it's unclear to me really what this adds 19 to existing law. 20 I mean, if an individual is personally harmed 21 by the criminal conduct, by the failure of a business 22 entity to live up to a duty imposed by law and they're 23 damaged by it, they should already have, under existing 24 law, the right to bring an action for civil damages. 25 So it's unclear to me what -- what this adds to tort</p>	<p style="text-align: right;">Page 21</p> <p>1 MR. CARTIN: Thank you, Mr. Chair. 2 I guess just to be responsive to 3 Mr. Friednash, I understand your position and your 4 statement and argument relative to have the exclusivity 5 of damages award for government entities. And I think 6 what you're arguing is that the title should include 7 that. I'm reluctant -- I think that the language in 8 the title as it is adequately describes what's in the 9 measure relative to the damages. 10 I think our discussion surrounding who or 11 what those damages can be awarded to is an 12 interpretation that at this point I'd be reluctant to 13 insert into the title. So I -- I appreciate the 14 argument, but I would support moving forward with the 15 language on the award of damages as it presently 16 appears in the staff draft. 17 MR. HOBBS: And I think there are some good 18 questions being raised here about the meaning and 19 effect of the measure, but I -- but I think the -- the 20 changes, as they now appear on the screen, I can 21 support. 22 Ms. Gomez has made those changes to reflect, 23 I think, Mr. Grueskin's suggestions as well as what we 24 did in, I believe, #73. 25 I suppose I would just go ahead, for the sake</p>

6 (Pages 18 to 21)

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<p>1 of discussion, and move those changes as shown on the 2 screen. We'll see if there's other changes as well, 3 but just to see if there's support for that. And then 4 if that's adopted -- at some point I'll read it into 5 the record since we don't have that in front of us 6 right now. 7 Is there a second to adopt those changes? 8 MR. CARTIN: Second. 9 MR. HOBBS: Ms. Gomez has changed the display 10 so we can see how the title then would read with those 11 changes incorporated. Since I'm going to do this any 12 way, I'll go ahead and read it into the record as how 13 the title would read if that motion is adopted and no 14 further changes were documented. 15 The title would say, "An amendment to the 16 Colorado Revised Statutes concerning civil liability 17 for criminal conduct by business entities, comma, and, 18 comma, in connection therewith, comma, allowing a 19 Colorado resident to bring an action for civil damages 20 against a business entity or its executive officials 21 for the entity's failure to perform a specific duty 22 imposed by law, semicolon, conditioning executive 23 officials, apostrophe, liability upon their knowledge 24 of the duty imposed by law and of the business entity's 25 failure to perform such duty, semicolon, allowing an</p>	<p>1 MR. DOMENICO: Second. 2 MR. HOBBS: That's been moved and second. 3 If there's no other discussion, all those in 4 favor please say aye. 5 Aye. 6 MR. CARTIN: Aye. 7 MR. DOMENICO: Aye. 8 MR. HOBBS: All those opposed no. 9 That motion carries 3-0. 10 That concludes action on #75, and the time is 11 3:14 p.m. 12 We'll take about a 5-minute break. 13 (Recess taken.) 14 (The proceedings were concluded at 3:14 15 p.m. on the 19th day of March, 2008.) 16 17 18 19 20 21 22 23 24 25</p>
<p>Page 23</p> <p>1 award of damages in the civil action to the 2 governmental entity that imposed the specific duty to 3 be performed by the business entity, semicolon, 4 permitting an individual who brings a successful civil 5 action to be awarded attorney fees and costs, 6 semicolon, and allowing an executive official who 7 discloses to the attorney general all facts known to 8 the official concerning a business's criminal conduct 9 to use that disclosure as an affirmative defense to the 10 civil charges," with the understanding that the same 11 changes would be made in the ballot title and 12 submission clause. 13 That has been moved and seconded. 14 Any further discussion? If not, all those in 15 favor say aye. 16 Aye. 17 MR. CARTIN: Aye. 18 MR. DOMENICO: Aye. 19 MR. HOBBS: All those opposed no. 20 That motion carries 3-0. 21 Are there any further suggested changes to 22 the staff draft as amended? If not, is there a motion 23 to adopt the staff draft as so amended? 24 MR. CARTIN: Move to adopt the staff draft as 25 amended.</p>	

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C E R T I F I C A T E

STATE OF COLORADO )  
COUNTY OF DENVER )

I, SHELLY R. LAWRENCE, Registered Professional Reporter and Notary Public within and for the State of Colorado, commissioned to administer oaths, do hereby state that the said proceedings were taken in stenotype by me at the time and place aforesaid and was hereafter reduced to typewritten form by me; and that the foregoing is a true and correct transcript of my stenotype notes thereof.

That I am not an attorney nor counsel nor in any way connected with any attorney or counsel for any of the parties to said action, nor otherwise interested in the outcome of this action.

IN WITNESS THEREOF, I have affixed my signature and seal this 24th day of March, 2008.

My commission expires: 03/18/2009.



My Commission Expires 03/18/2009

Shelly R. Lawrence  
SHELLY R. LAWRENCE, RPR  
Notary Public, State of Colorado

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Exhibits



STATE OF COLORADO  
Department of State  
1700 Broadway  
Suite 270  
Denver, CO 80290



Mike Coffman  
Secretary of State

Holly Z. Lowder  
Director, Elections Division

March 10, 2008

**NOTICE OF MEETING**

You are hereby notified that the Secretary of State,  
Attorney General, and the Director of the Office of Legislative

Legal Services will meet for a hearing

for a proposed initiative concerning

2007 - 2008 #75\*

Wednesday, March 19, 2008 at 1:30 p.m.

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 270

Denver, Colorado

You are invited to attend.

Mike Coffman  
Secretary of State

AUDIO BROADCASTS NOW AVAILABLE. PLEASE VISIT [WWW.SOS.STATE.CO.US](http://WWW.SOS.STATE.CO.US) AND CLICK ON THE "INFORMATION CENTER".

PROPOSED INITIATIVE TEXT ALSO AVAILABLE ON OUR WEBSITE, LOCATED ON THE INITIATIVE INFORMATION PAGE UNDER "TITLE BOARD FILINGS".

\* Unofficially captioned "Criminal Conduct by Businesses - Civil Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

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MAR 07 2008

ELECTIONS  
SECRETARY OF STATE

*Proposed Initiative*  
*2007-2008 #75*  
FINAL

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

**SECTION 1.** Article 21 of Title 13 of the Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

(1) ANY INDIVIDUAL RESIDING IN COLORADO MAY FILE A PRIVATE RIGHT OF ACTION AGAINST ANY BUSINESS ENTITY FOR ITS CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SECTION 18-1-606(1)(a) OR AGAINST THE BUSINESS ENTITY'S EXECUTIVE OFFICIALS WHERE SUCH OFFICIALS KNEW OF THE SPECIFIC DUTY TO BE PERFORMED AS REQUIRED BY LAW AND KNEW THAT THE BUSINESS ENTITY FAILED TO PERFORM THAT DUTY.

(2) AS USED IN THIS SECTION:

(a) "BUSINESS ENTITY" MEANS A CORPORATION OR OTHER ENTITY THAT IS SUBJECT TO THE PROVISIONS OF TITLE 7, C.R.S.; FOREIGN CORPORATIONS QUALIFIED TO DO BUSINESS IN THIS STATE PURSUANT TO ARTICLE 115 OF TITLE 7, C.R.S., SPECIFICALLY INCLUDING FEDERALLY CHARTERED OR AUTHORIZED FINANCIAL INSTITUTIONS; A CORPORATION OR OTHER ENTITY THAT IS SUBJECT TO THE PROVISIONS OF TITLE 11, C.R.S.; OR A SOLE PROPRIETORSHIP OR OTHER ASSOCIATION OR GROUP OF INDIVIDUALS DOING BUSINESS IN THE STATE.

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

(3) IN A CIVIL ACTION BROUGHT UNDER THIS SECTION, COMPENSATORY OR PUNITIVE DAMAGES MAY BE AWARDED TO ANY GOVERNMENTAL ENTITY THAT IMPOSED BY LAW THE SPECIFIC DUTY TO BE PERFORMED BY THE BUSINESS ENTITY.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY EXECUTIVE OFFICIAL WHO IS A DEFENDANT IN AN ACTION FILED UNDER SUBSECTION (1) OF THIS SECTION THAT, PRIOR TO FILING OF SUCH CIVIL ACTION OR ANY CRIMINAL CHARGES UNDER SECTION 18-1-606(1)(a), HE OR SHE REPORTED TO THE OFFICE OF THE ATTORNEY GENERAL ALL FACTS OF WHICH HE OR SHE WAS AWARE CONCERNING THE BUSINESS ENTITY'S CONDUCT THAT MET THE CRITERIA SET FORTH IN SECTION 18-1-606(1)(a).

(5) SUCH MONEYS, WHEN APPROPRIATED, SHALL BE EXEMPT FROM ALL REVENUE AND SPENDING LIMITATIONS PROVIDED BY LAW.

(6) IF AN AWARD IS MADE UNDER THIS SECTION, THE INDIVIDUAL FILING THE LAWSUIT SHALL BE ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS FOR DEFENDING THE INTERESTS OF THE STATE. NO SUCH AWARD SHALL BE MADE FOR CLAIMS THAT LACKED SUBSTANTIAL JUSTIFICATION OR WERE INTERPOSED FOR DELAY OR HARASSMENT.

**ISAACSON**  
**ROSENBAUM P.C.**  
Law . Client . Community®

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MAR 07 2008  
ELECTIONS  
SECRETARY OF STATE  
*(M) 2/26/08*

via **HAND DELIVERY**  
Ms. Cesi Gomez  
Colorado Secretary of State  
Elections Division  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Re: Initiative 2007-08 #75

Dear Ms. Gomez:

Attached please find the required draft of Initiative 2007-08 #75, which our office is filing on behalf of the Proponents for this measure.

Thank you very much.

Sincerely,



Amy Knight  
Legal Assistant to Mark G. Grueskin

aak  
enclosure  
1768878\_1.doc

**Joanne King**  
**8306 Katherine Way**  
**Denver, Colorado 80221**  
**303-429-2191**

**Larry Ellingson**  
**8517 Bluegrass Circle**  
**Parker, Colorado 80134**  
**720-530-5592**

Ballot Title Setting Board

Proposed Initiative 2007-2008 #75<sup>1</sup>

The title as designated and fixed by the Board is as follows:

1           An amendment to the Colorado Revised Statutes concerning civil liability for criminal  
2 conduct by business entities, and, in connection therewith, allowing a Colorado resident to bring  
3 an action for civil damages against a business entity or executive official for criminal conduct  
4 pursuant to section 18-1-606 (1) (a), C.R.S.; requiring that damages in the civil action be awarded  
5 to the governmental entity that imposed the specific duty to be performed by the business entity;  
6 permitting a citizen who brings a successful civil action to be awarded attorney fees and costs;  
7 and allowing an executive official who discloses to the attorney general all facts known to the  
8 official concerning a business's criminal conduct to use that disclosure as an affirmative defense  
9 to the civil charges.

The ballot title and submission clause as designated and fixed by the Board is as follows:

10           Shall there be an amendment to the Colorado Revised Statutes concerning civil liability  
11 for criminal conduct by business entities, and, in connection therewith, allowing a Colorado  
12 resident to bring an action for civil damages against a business entity or executive official for  
13 criminal conduct pursuant to section 18-1-606 (1) (a), C.R.S.; requiring that damages in the civil  
14 action be awarded to the governmental entity that imposed the specific duty to be performed by  
15 the business entity; permitting a citizen who brings a successful civil action to be awarded  
16 attorney fees and costs; and allowing an executive official who discloses to the attorney general  
17 all facts known to the official concerning a business's criminal conduct to use that disclosure as an  
18 affirmative defense to the civil charges?

---

<sup>1</sup> Unofficially captioned "Criminal Conduct by Businesses – Civil Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

INITIATIVE TITLE SETTING REVIEW BOARD  
Wednesday, April 2, 2008  
Secretary of State's Blue Spruce Conference Room  
1700 Broadway, Suite 270  
Denver, Colorado

---

2007-2008 #75  
Criminal Conduct by Businesses - Civil Liability

---

William A. Hobbs, Deputy Secretary of State  
Daniel D. Domenico, Solicitor General  
Daniel L. Cartin, Deputy Director of the Office  
of Legislative Legal Services  
Maurice G. Knaizer, Deputy Attorney General  
Cesi Gomez, Secretary of State's Office

A P P E A R A N C E S

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For the Objectors: Douglas J. Friednash, Esq.  
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Denver, CO 80203  
303.830.2400  
dfriednash@fwlaw.com

1 WHEREUPON, the following proceedings  
2 were taken:

3 CHAIRMAN HOBBS: The next agenda  
4 item is 2007-2008 No. 75, Criminal Conduct by  
5 Businesses - Civil Liability. This is on a  
6 Motion for Rehearing.

7 Mr. Friednash?

8 MR. FRIEDNASH: Thank you. For the  
9 record, Doug Friednash, appearing on behalf of  
10 Fairfield & Woods and the objector, Joe Blake.  
11 I just want to put it in context, you know, to  
12 the extent, again, I'm not trying to regurgitate  
13 things already said, so to the extent I've  
14 already said them and restate them, I apologize.

15 This one's a little more difficult  
16 to deal with in and of itself, even though  
17 it's -- I think the object of 75 and 76 were  
18 largely probably insurance purposes in case the  
19 Supreme Court decides 57 or 62 are -- create  
20 single-subject problems, but there were initial  
21 concerns expressed at the initial hearing with  
22 respect to this measure, that voters could be  
23 surprised by what it does and that it has a  
24 confusing nature of the measure and that it's a  
25 close call.

1 private right of action looks like, and I really  
2 would ask that you really -- not that you  
3 haven't seriously considered these, all right,  
4 but just think about it in its own context, if  
5 this makes sense, because it is real difficult,  
6 I think, to kind of ascertain what this really,  
7 truly gets at and the type of conduct that  
8 really is at issue and what a prima facie case  
9 would actually look like in this context, and I  
10 assume, you know, you can make the same changes  
11 you made last time.

12 Obviously, to the extent it  
13 clarifies the measure, we support it, but  
14 ultimately it has the same fatal problems that  
15 the prior one had, and maybe even some  
16 additional ones, just because it's a separate  
17 and distinct measure to the criminal conduct  
18 that is dealt with in a separate and distinct  
19 measure or under current law that's not included  
20 here.

21 It makes reference to criminal  
22 conduct by business entities. This is just  
23 strictly a civil liability statute that I think  
24 doesn't just deal with criminal conduct. I  
25 mean, I think that's the problem with the

1 The title concerns civil liability  
2 for criminal conduct by business entities and I  
3 just want to restate -- I think what  
4 Mr. Domenico commented was I think there's real  
5 potential for surprise, that voters think they  
6 are voting on civil liability for criminal  
7 conduct by business entities and they're  
8 surprised that they're also making new  
9 individuals subject to this liability, and, you  
10 know, I've already told you the various elements  
11 of why I think this is unclear and confusing and  
12 misleading.

13 My concerns are the same with  
14 respect to this one, but I really, truly  
15 think -- and I think I just want to kind of  
16 amplify something we've already discussed about  
17 the type of new type of private right of action  
18 this creates, and even though this just deals  
19 with the civil context, you're dealing with it  
20 as a separate and distinct measure.

21 I mean, if this is theoretically  
22 stand-alone and 18.1606, in its current form, I  
23 think there's really some disconnect to the  
24 voter and signers of the petition of what this  
25 truly does and how it works and what that

1 subject of this to begin with, so unless there's  
2 questions, I think we probably talked and kind  
3 of fleshed out a lot of these issues that we  
4 have to address.

5 CHAIRMAN HOBBS: Mr. Cartin?  
6 MR. CARTIN: Just a quick question  
7 just for my clarification. I'd appreciate it.

8 Mr. Friednash, are you arguing  
9 that your motion -- one of the arguments is  
10 there's a single-subject issue. Based on what  
11 you just said, is it your argument, not that  
12 there are multiple -- well, are you arguing  
13 that, because of surprise and the fact that it's  
14 confusing and misleading, that the Board should  
15 not set a title for it, or that, based on those  
16 grounds and decisions such as 55, since there's  
17 an element of surprise for voters, that there's  
18 a single-subject issue with the measure? Is  
19 that the argument?

20 MR. FRIEDNASH: Well, I think  
21 there's both. I mean, I think you have the type  
22 of surprise and concern you had in 55. I think  
23 it's impossible to say exactly what the single  
24 subject is in this measure, but it really  
25 doesn't concern criminal conduct by business

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1 entities so much, so I think there's really two  
2 separate and distinct issues.  
3 One is whether it violates the  
4 single subject, whether you can kind of even  
5 discern what it does, and how it applies and who  
6 it applies to and the scope of which it applies  
7 and creates new rights, and, second, the  
8 language itself -- the title is analogous to the  
9 argument I've already made in 73, which is that  
10 it's misleading, confusing, unclear, and  
11 incomplete in its context, and I'm happy to kind  
12 of go through those specific things, if you  
13 want.  
14 MR. CARTIN: For example, 73 -- and  
15 this really oversimplifies it -- but, you know,  
16 generally the argument was that you have a  
17 measure that extends criminal liability and that  
18 creates a private right of action and that those  
19 are subjects that are issues under the  
20 single-subject requirement, because of that  
21 secondary private right of action. Could you  
22 restate for me what you see as the multiple  
23 subjects.  
24 MR. FRIEDNASH: Sure.  
25 MR. CARTIN: Aside from the issues

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1 arising from the text being misleading or  
2 confusing that you allege --  
3 MR. FRIEDNASH: Sure.  
4 MR. CARTIN: -- or hidden outcomes  
5 or speculative results, what are the multiple?  
6 MR. FRIEDNASH: Sure, let's start  
7 with that. The title says, "Concerning Civil  
8 Liability for Criminal Conduct by Business  
9 Entities." It suggests it's already law, that  
10 civil liability for criminal conduct by business  
11 entities is already a law. It's not. That  
12 would be one subject, right? That's how we  
13 start this.  
14 I think voters are going to be  
15 surprised by the fact that, beyond voting for  
16 that subject, they're also voting on making new  
17 individuals subject to liability, executive  
18 officials, when, in fact, there are only two.  
19 They're going to be surprised to learn they're  
20 really expanding the type of liability that I  
21 think this measure does.  
22 I know you haven't bought the  
23 argument ever that I've made with respect to the  
24 governmental exemptions for damages, but I think  
25 that's a separate subject, and I think it's that

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1 whole -- that context. We're not just talking  
2 about expanding for executive officials but also  
3 creating, you know, this new component, new  
4 private right of action, and then that last  
5 piece. I think that's the single-subject  
6 problem.  
7 MR. CARTIN: Thank you.  
8 MR. FRIEDNASH: And then the  
9 "Misleading" is the same thing I talked before  
10 about, you know, the language of it, the  
11 affirmative duties, the damage portion of it. I  
12 can go through them. I think they're all  
13 enumerated already, but they're the same ones  
14 I've just argued on 73 as it pertains to this  
15 piece.  
16 MR. CARTIN: Thank you.  
17 CHAIRMAN HOBBS: Any other questions  
18 or comments?  
19 Mr. Grueskin, would you like to  
20 respond?  
21 MR. GRUESKIN: Mark Grueskin for the  
22 proponents, appearing on Ground Hog Day, No. 75.  
23 If you haven't heard an argument, it's  
24 because -- it's not because Mr. Friednash and I  
25 haven't made them over and over again. I'm not

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1 going to do that to you anymore.  
2 I do think that the topic here is  
3 pretty darn narrow. It's rooted to specific  
4 conduct addressed by existing statute, and I  
5 think it is something the voters can get their  
6 arms around. I would suggest that the changes  
7 made to No. 73 could be parallel here and,  
8 unfortunately, I wasn't omniscient enough to  
9 know what Mr. Domenico was going to say, but,  
10 nonetheless, I have a proposed revision that I  
11 think would serve as the basis for a change.  
12 It's the inclusion of "Compensatory  
13 or punitive," as you did here, and I suppose, if  
14 you made a parallel change, it would happen, in  
15 addition to this one, it would happen on Lines 2  
16 and 3, where it says, "Allowing Colorado  
17 resident to bring a civil action against a  
18 business entity or its executive officials,"  
19 rather than an action for civil damages, and  
20 given the repeated focus on civil liability and  
21 civil actions, I think that that change makes a  
22 lot of sense, so in the name of civility, I'll  
23 sit down.  
24 MR. DOMENICO: Can I ask you a  
25 couple questions that have to do with all of



1 these? Or maybe it's just one, and I probably  
2 should have asked it before because it's really,  
3 I think, related more to the prior versions of  
4 these that involve the criminal liability in  
5 Mr. Friednash's argument that this extended to  
6 new types of behavior.

7 I think, after our first hearing on  
8 this, I read a newspaper article characterizing  
9 what happened and was sort of surprised to see  
10 that it was somehow supposed to address the  
11 Nacchio situation, and I was struggling to  
12 figure out how this would resolve anybody's  
13 anger at Joe Nacchio without doing what  
14 Mr. Friednash -- what you and I seem to agree it  
15 doesn't do, but what Mr. Friednash feared that  
16 this would do, which was make fraud and other  
17 things that are normally civil issues crimes,  
18 right? I mean, do you understand what I'm  
19 saying?

20 MR. GRUESKIN: I read the same  
21 article and I was probably as curious as you  
22 were about the representations made, either by  
23 the people speaking the article or the reporters  
24 reporting what the people had said. It seems to  
25 me that the Joe Nacchio situation is different

1 because it occurs under federal law, because it  
2 was a proceeding that was specific to federal  
3 security statutes.

4 I suppose that it would be analogous  
5 if there was a state security statute that had  
6 been violated, that Mr. Nacchio was aware of the  
7 violation and aware of the duty imposed by that  
8 security statute, and did nothing.

9 MR. DOMENICO: Right, and so how  
10 that relates to this part of it, then, is -- I  
11 don't understand, if this is basically a Quitam  
12 provision, what's the damage that the plaintiff  
13 is going to be recovering on behalf of the  
14 state? In that situation, there's a duty owed  
15 to the public who is buying stock not to lie  
16 about what is going on in their company.

17 I don't understand how the -- I  
18 really am confused how these cases are going to  
19 work under this and under 73, how these cases  
20 are going to work, because it seems to me that  
21 there's already a private right of action if you  
22 suffer damage. If the State has suffered  
23 damage, there's already a public right of  
24 action, that the State can bring some kind of  
25 suit, but in those situations, I don't see --

1 this seems to create a new right of action  
2 without creating a new substantive provision  
3 that would give rise to the suit, and I just am  
4 very confused about how it would work.

5 MR. GRUESKIN: Well, I think that  
6 the way it would work would be that, if a  
7 specific legal duty had been violated, the  
8 plaintiff in that instance would be authorized  
9 to seek either compensatory or punitive damages,  
10 or presumably could seek both. The Court could  
11 award either.

12 If there was no compensatory damage  
13 to be awarded, then obviously the award would be  
14 zero. There might be a potential for punitive  
15 damages based upon the nature of the offense and  
16 the discretion of the Court.

17 MR. DOMENICO: So that's my  
18 question: If there's no damage in the sense  
19 that there's no compensatory aspect to it, are  
20 Courts just going to get to say, you know, "We  
21 just want to punish you," or how will they -- or  
22 are we going to have to wait and figure that out  
23 through clarifying legislation and court cases,  
24 what punitive damages mean and how they're  
25 calculated?

1 Or I just -- it's hard for me to  
2 conceptualize these suits without anyone  
3 actually having suffered damage, without anyone  
4 actually having to show someone suffered damage,  
5 whether themselves or the State.

6 MR. GRUESKIN: Well, I mean, I guess  
7 my response would be, in any civil action that  
8 seeks compensatory or punitive damages, the  
9 Court can find that there was no basis for any  
10 compensatory damages, or can award a dollar but  
11 then make a suitable award of punitive damages,  
12 depending upon the egregiousness of the conduct  
13 and all the other contributing factors, so  
14 that's not really that different from anything  
15 under existing law in terms of the way the civil  
16 courts operate.

17 The difference is that this is  
18 triggered by behavior that violates Colorado  
19 state criminal statutes under a series of  
20 conditions relative to either the business  
21 entity or the business executive official.

22 MR. DOMENICO: Okay, thanks.  
23 CHAIRMAN HOBBS: Any other  
24 questions?

25 Any response, Mr. Friednash?

1 MR. FRIEDNASH: No, thank you.  
2 CHAIRMAN HOBBS: Board discussion?

3 MR. DOMENICO: Well, if I can, I  
4 think I was on the fence on this one last time,  
5 but I voted for it, but I'm struggling with it  
6 this time even more to address, I think, what  
7 Mr. Cartin was raising with Mr. Friednash. It  
8 seems to me this has a similar -- it's not quite  
9 as obvious to me that this is two subjects, but  
10 it's basically the same concern, which is you're  
11 not only creating a new type of lawsuit, which  
12 this one clearly does, and is more up front  
13 about that, but you are also subjecting a new  
14 class of people to liability under that.

15 Now, the difference between this one  
16 and 73 is basically that those people are only  
17 subject to the civil liability and they're not  
18 also being subjected to criminal liability,  
19 which is important, was important to me when I  
20 voted against 73, but it's still -- I'm not sure  
21 if that's a pure single-subject issue or more  
22 along the lines of what we've been talking about  
23 with some of the others, the surprising thing  
24 that's sort of hard to pull out of the measure,  
25 both hard to pull out of the measure and hard to

1 matter of, perhaps, editorial comment and  
2 thinking in response to Mr. Domenico, I think a  
3 number of these measures that have come up here  
4 in the past month or so before the Board that  
5 I've sat on -- and I think it's kind of a result  
6 of 55 and maybe, to some extent, 17, recently,  
7 we seem to get into these discussions of  
8 surprise and surreptitiousness and potential  
9 unforeseen outcomes and what the voters may not  
10 know that they should know or would be surprised  
11 by, and all I can boil it down to is that I  
12 think that, personally, I may take more of a  
13 strict kind of adherence to the text of 14106.5  
14 and those decisions that have us look at  
15 congruity and a central theme and interrelated  
16 purposes, and I personally am not one that's --  
17 I'm a little reluctant to step into the land of  
18 surprise and surreptitiousness on a number of  
19 these measures.

20 Although I think that they're  
21 legitimate arguments, I think it's a legitimate  
22 discussion, I'm not ready to base a decision --  
23 base my own decision where there isn't -- where  
24 there isn't really more of a concrete,  
25 old-school, single-subject issue involved on the

1 capture in a single subject that conveys what  
2 you're doing.

3 This one, I think, is better, but  
4 I'm really struggling to see how -- well, I  
5 guess what I'm saying is I understand pretty  
6 much all of Mr. Friednash's concerns. Only one  
7 of them really strikes me as a concern that  
8 would give me reason to vote against this here  
9 at the Title Board, which is this concern  
10 that -- this idea that it's not just business  
11 entities being subjected to civil liability but  
12 also individuals is, while, again, related, is  
13 something of a surprise and a hidden purpose in  
14 the measure, not in the sense that it's  
15 intentionally hidden or intentionally  
16 misleading, which is, by its nature, it gets  
17 kind of overwhelmed by the rest of it, so that's  
18 the single-subject concern I have, and I'd like  
19 to listen to responses because I'm not sure how  
20 I'm going to vote.

21 MR. CARTIN: Very briefly -- and I  
22 appreciate that follow-up -- I still feel as  
23 though there's a single subject. I think this  
24 single subject is stated adequately in the title  
25 that we set for 75, and I think, just as a

1 surprise and surreptitiousness and confusion and  
2 those types of things, when that, to me, is not  
3 crystal clear as well, and so, again, I  
4 appreciate this kind of ongoing dialogue in this  
5 area, but I would stick with my initial decision  
6 on 75 and would be amenable to amending the  
7 title to 75 to sync it up with, I think, with  
8 73.

9 CHAIRMAN HOBBS: I think that's kind  
10 of where I am as well. I just, you know -- it  
11 is interesting, some of the discussions we're  
12 having about surprise and surreptitiousness,  
13 because I think that I look at -- sort of going  
14 back and think, if I had to look at this, I  
15 think 1-40-16.5 characterizes the issue of  
16 surreptitiousness or surprise, you know, as  
17 guides to -- this is kind of legislative  
18 findings about when or how to determine if  
19 there's a single-subject violation.

20 In other words -- and I don't know  
21 how to say this very clearly -- but they're  
22 not -- mere surprise is not a single-subject  
23 violation. Again, as I indicated before, I  
24 think you can make surprising policy. It's  
25 rather where you approach that from the reverse

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1 side.  
 2 If you sense that there may be more  
 3 than one subject, then it's helpful to know why  
 4 the single-subject rule exists as a guide to  
 5 interpreting the prohibition against multiple  
 6 subjects, and the legislature said in 106.5 that  
 7 understand that, in referring this measure to  
 8 the people to prohibit multiple subjects, here  
 9 are the practices we intended to prevent, and  
 10 like I say, it's kind of a legislative  
 11 declaration issue that helps guide us in  
 12 determining violations of single subject, and I  
 13 don't think I'm describing it very well, but I  
 14 think I have to start with the belief that  
 15 there's possibly more than one subject, and for  
 16 this one I'm not really there right now, so I  
 17 don't know how to think about surprise or  
 18 surreptitiousness, and I probably am not --  
 19 Mr. Domenico is usually way ahead of  
 20 me, but I am probably not caught up with his  
 21 thinking on this yet, but I would still, in that  
 22 respect, would deny the Motion for Rehearing,  
 23 although I would like to incorporate the changes  
 24 to the titles that we've talked about, and I  
 25 think Ms. Gomez has marked them on the title as

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1 That motion carries, three to zero,  
 2 and that concludes action on No. 75. The time  
 3 is 3 o'clock.  
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1 it appears on the screen, and if that's  
 2 accurate, I guess I will move those changes.  
 3 MR. CARTIN: Second.  
 4 CHAIRMAN HOBBS: Is there any  
 5 further discussion? If not, all those in favor  
 6 say, "Aye."  
 7 MR. DOMENICO: Aye.  
 8 MR. CARTIN: Aye.  
 9 CHAIRMAN HOBBS: Aye.  
 10 All those opposed, "No."  
 11 That motion carries, three to zero.  
 12 I guess I'll go ahead and move that  
 13 the Board grant the Motion for Rehearing to the  
 14 extent that the Board has amended the titles and  
 15 deny the Motion for Rehearing in all other  
 16 respects.  
 17 MR. CARTIN: Second.  
 18 CHAIRMAN HOBBS: Any further  
 19 discussion? If not, all those in favor say,  
 20 "Aye."  
 21 MR. DOMENICO: Aye.  
 22 CHAIRMAN HOBBS: Aye.  
 23 MR. CARTIN: Aye.  
 24 CHAIRMAN HOBBS: All those opposed,  
 25 "No."

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1  
 2 CERTIFICATION  
 3  
 4 I, Mary S. Parker, Registered  
 5 Professional Reporter, Registered Merit  
 6 Reporter, and Certified Realtime Reporter,  
 7 certify that the above proceedings were had;  
 8 then reduced to typewritten form, by means of  
 9 computer-aided transcription.  
 10 I further certify that I am not  
 11 related to any party herein or their counsel and  
 12 have no interest in the result of this matter.  
 13 IN WITNESS WHEREOF, I have hereunto  
 14 set my hand and seal.  
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 Mary S. Parker  
 Registered Professional Reporter  
 Registered Merit Reporter  
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