

SUPREME COURT, STATE OF COLORADO 2 E 14 th Avenue, Suite 400 Denver, CO 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, #57 ("Criminal and Civil Liability for Businesses and Individuals for Business Activities") 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.	<table border="1"><tr><td data-bbox="995 363 1360 594">FILED IN THE SUPREME COURT APR 01 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</td></tr><tr><td data-bbox="995 1192 1360 1224">▲ COURT USE ONLY ▲</td></tr></table>	FILED IN THE SUPREME COURT APR 01 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK	▲ COURT USE ONLY ▲
FILED IN THE SUPREME COURT APR 01 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK			
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RESPONDENTS' OPENING BRIEF			

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STATEMENT OF ISSUES PRESENTED

1. Whether the Title Board correctly found that an initiative that extends liability for criminal conduct of business entities comprises a single subject.
2. Whether the Title Board adequately conveyed the essential concepts of the criminal and civil liability for agents and civil liability of the business entity to voters in the title set.
3. Whether the Title Board's use of the phrase "criminal conduct" is a political catch phrase that taints voter understanding of this measure.
4. Whether the Title Board correctly accepted jurisdiction over this matter, given changes made by Proponents in direct response to issues raised by legislative staff at the statutorily mandated "review and comment" hearing.

STATEMENT OF THE CASE

Joanne King and Larry Ellingson (hereafter "Proponents") proposed an initiative to extend certain liability to business entities and their agents for the failure to perform duties imposed by law. This proposal was denominated as Initiatives 2007-08 #57.

This measure was considered by the offices of Legislative Council and Legislative Legal Services and submitted to the Secretary of State for title setting. The Title Board established titles for each measure on February 20, 2008.

The Denver Metro Chamber of Commerce and Joe Blake (hereafter "Blake") objected to the title set by the Title Board, and a rehearing was held on March 5, 2008. The Board denied the motion, and this appeal followed.

STATEMENT OF FACTS PRESENTED

Initiative 2007-08 #57 builds upon existing criminal statutes to extend liability for failure to perform duties that are imposed by law. Under current law, that failure can be treated as a criminal act by the business entity involved. The proposed initiative extends liability for such acts to certain "agents" of the business entity, as that term is defined by statute. As to such acts, whether performed by the business entity or its agent, the initiative permits persons residing in Colorado to sue for damages that would be paid to the governmental entity that imposed the duty. An affirmative defense is provided for agents who, prior to being charged, state to the attorney general all related facts of which they are aware.

The Title Board set the following title:

An amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses, and, in connection therewith, extending criminal liability to a business entity's directors, officers, and employees and agents who formulate a business's policies or supervise employees, if the business fails to perform duties that are required by law or if management engages in, authorizes, solicits, requests, commands, or knowingly tolerates the business's criminal conduct; allowing any Colorado resident to bring an action for civil damages against a business or its agent for such criminal conduct; requiring that awards in civil actions be paid to the general fund of the

state of Colorado; permitting an award of attorney fees and costs to a citizen who brings a successful civil action; and allowing persons who disclose to the attorney general all facts known to them concerning a business's criminal conduct to use that disclosure as an affirmative defense to criminal or civil charges.

SUMMARY OF ARGUMENT

Notwithstanding the many objections regarding the single subject of this measure and the sufficiency of its description of the initiative, the Board correctly found this measure constitutes one subject -- liability for criminal conduct caused by business entities. The Board balanced the need to address this measure's central features, while not burdening the title with secondary provisions or details that are not essential to voter understanding of this proposal. Its choice of language was balanced and not prejudicial to persons who support or oppose the measure. Given the express comments of the legislative staff during the review and comment hearing, the changes made responded to issues raised in that public forum, and the Title Board correctly exercised its jurisdiction to set the title for this proposal. As such, the Title Board's decision should be upheld.

LEGAL ARGUMENT

I. Legal standard of review.

In reviewing an action of the Board, this Court liberally construes the requirements for initiatives in order to facilitate the constitutional right of initiative. In re Amend TABOR 32, 908 P.2d 125, 129 (Colo. 1995). All legitimate presumptions must be resolved in favor of the Board. In re Proposed Initiative on Education Tax Refund, 823 P.2d 1353, 1355 (Colo. 1991). An initiative title will only be invalidated in a clear case. Id.

As such, the scope of this Court's review of Title Board actions is limited. The Court will not address the merits, nor interpret the language, nor seek to predict the application of a proposed initiative. Neither will it reverse the actions of the Title Board if improvements could be made to an otherwise legally sufficient title. In re School Pilot Program, 874 P.2d 1066, 1070 (Colo. 1994). Finally, the Board is not required to describe every nuance and feature of the proposed measure. In re Proposed Initiative Concerning "State Personnel System", 691 P.2d 1121, 1124 (Colo. 1984).

The goal of the title setting process is "to ensure that persons reviewing the initiative petition and voters are fairly advised of the import of the proposed amendment." In re Proposed Initiative on "Trespass - Streams with Flowing

Water," 910 P.2d 21, 23 (Colo. 1996). Only where the titles and submission clause are clearly vague, misleading, or confusing will a decision of the Title Board be overturned. In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito, 873 P.2d 733, 739-40 (Colo. 1994).

II. Initiative #57 contains a single subject.

A. Parameters of the single subject analysis.

Article V, sec. 1(5.5) of the Colorado Constitution requires that "[n]o measure shall be proposed by petition containing more than one subject." The Court has clearly set forth the tests for evaluating an initiative's compliance with the single subject requirement. In order to violate this requirement, a proposed ballot measure must: (1) relate to more than one subject; and (2) have at least two distinct and separate purposes which are not dependent upon or connected with each other. Matter of Title, Ballot Title and Submission Clause, and Summary for "Public Rights in Waters II," 898 P.2d 1076, 1078-79 (Colo. 1995).

In applying this test, the Court will assess whether the initiative tends to effectuate "one general objective or purpose" (in which case it presents only one subject) or whether it "addresses subjects that have no necessary or proper connection to one another" (in which case it will be disallowed as containing more than one subject). Matter of Title, Ballot Title and Submission Clause, Summary

Clause for 1999-2000 #25, 974 P.2d 458, 463 (Colo. 1999). However, the Court will not interpret a proposed initiative in order to determine whether more than one subject is addressed by the measure. "In determining whether a proposed initiative comports with the single subject requirement, '[w]e do not address the merits of a proposed initiative, nor do we interpret its language or predict its application if adopted by the electorate.'" Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 64, 960 P.2d 1192, 1197 (Colo. 1998), quoting Matter of Title, Ballot Title and Submission Clause, and Summary for an Amendment Adding Section 2 to Article VII (Petitions), 907 P.2d 586, 590 (Colo. 1995).

Further, a ballot measure encompasses a single subject, even if it includes "provisions that are not wholly integral to the basic idea of a proposed initiative." Amend TABOR 32, *supra*, 908 P.2d at 129. Thus, the fact that one or more of these provisions might stand alone as another initiative or that the measure itself is comprehensive or multi-faceted does not automatically make any aspect of the proposal a separate and distinct subject.

There is a limit on the degree to which the Court will entertain creativity in the nature of single subject objections by an initiative's opponents. "Multiple ideas might well be parsed from even the simplest proposal by applying ever more

exacting levels of analytic abstraction until an initiative measure has been broken into pieces. *Such analysis, however, is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution.*" Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 No. 74, 962 P.2d 927, 929 (Colo. 1998) (emphasis added). Thus, the single subject requirement is not violated merely because a measure is thorough and has several facets.

B. Civil and criminal remedies for the same conduct are not separate subjects.

Blake argues that the creation of criminal and civil remedies for corporate criminal conduct constitute separate and distinct subjects.

The single subject requirement does not prevent proponents from establishing appropriate mechanisms to ensure compliance. In fact, the opposite is true: provisions that accomplish a measure's essential purpose are well within a measure's single subject. As such, the Court analyzes whether implementation provisions tend "to effect or to carry out" the "one general object or purpose of the initiative." In re "Public Rights in Water II", 898 P.2d 1076, 1079 (Colo. 1995). Where details are "directly tied" to a proposal's "central focus," the Court will not find that a separate subject exists. In re Initiative for 1999-2000 #200A, 992 P.2d 27, 30 (Colo. 2000). Proposed statutes typically incorporate substantial detail in

order to “implement and enforce the substantive provisions of the associated legislative enactment.” Id. at 31, fn.2 (noting that reporting and penalty provisions are fundamentally related as part of the same single subject).

On many occasions, the Court has considered and rejected alleged single subject violations of the sort suggested here. In so doing, even complex and wide-ranging measures are still deemed to constitute single subjects. Objectors in other matters often question the specificity in enforcement provisions and associated penalties of previous measures. See, e.g., In re Initiative for 2005-2006 #73, 135 P.3d 736 (Colo. 2006) (upheld Title Board’s single subject finding for pay-to-play measure that was to be enforced by lawsuits and remedies of invalidating elections and requiring refunds of revenue collected due to such elections); In re Initiative for 1997-98 #113, 962 P.2d 970, 971-72 (Colo. 1998) (per curiam) (no single subject violation in proposed initiative to limit pollution from hog farms that specified implementation measures and reporting requirements); In re Proposed Initiative “Petitions”, 907 P.2d 586, 591 (Colo. 1995) (proposed initiative establishing rules governing petitions did not violate the single subject requirement because it set forth detailed procedures and authorized citizen lawsuits to ensure compliance).

One initiative reviewed by this Court particularly underscores the breadth of remedy choice afforded to an initiative's proponents. Initiative #200A from the 2000 election cycle imposed informed consent requirements and reporting requirements on physicians who performed abortions or counseled patients about them. The Court found that regulation of doctor-patient interaction and the requirement of physician reporting to government agencies constituted a single subject. #200A contained enforcement mechanisms that applied to these two sets of relationships including: (1) criminal penalties against physicians who performed abortions without obtaining informed consent from the patient; (2) civil malpractice actions by patients against such physicians; (3) professional disciplinary actions through licensing boards against such physicians; (4) government agency fines against physicians who failed to file reports concerning patients counseled and abortions performed; and (5) civil actions by private citizens against governmental officials who failed to publish reports concerning information provided to patients about abortion and the number of abortions performed. 992 P.2d at 34. These various penalties, which were part and parcel of the two alleged topics about which objectors complained, did not create a single subject problem for the initiative.¹ See also In re Initiative 1997-98 #112, 962 P.2d

¹ Interestingly, the ballot title set for #200A did not even set forth this panoply

255, 256 (Colo. 1998) (per curiam) (initiative did not violate the single subject requirement by both invalidating existing laws and regulations and creating uniform requirements for laws and regulations to be enacted in the future).

The single subject requirement must be applied to initiatives in the same manner the General Assembly applies it to proposed legislation. § 1-40-106.5(3), C.R.S. This Court has previously pointed to statutes to find that an initiative complied with the single subject requirement. #200A at 32. The inclusion of criminal and civil provisions in an enacted statute has not offended the constitutional requirement that the General Assembly comply with a single subject requirement.² There are numerous examples of legislative measures that have been

of enforcement tools. Instead, the title simply referred to provisions "the administration and enforcement of the amendment's provisions." Id. at 33.

² See, e.g. Goldberg v. Musim, 427 P.2d 698, 704 (Colo. 1967), upholding the following legislative bill title as comprising a single subject:

"AN ACT TO PROMOTE PUBLIC MORALS, BY ABOLISHING CIVIL CAUSE OF ACTION FOR BREACH OF PROMISE TO MARRY, ALIENATION OF AFFECTIONS, CRIMINAL CONVERSATION, AND CERTAIN CAUSES OF ACTION FOR SEDUCTION, PROHIBITING THE BRINGING, PROSECUTION OR SETTLEMENT OF ANY SUCH ACTIONS, ESTABLISHING LIMITATIONS THEREON, REGULATING THE PROCEDURE IN SUCH ACTIONS AND IN ACTIONS AND PROCEEDINGS FOR DIVORCE, SEPARATE MAINTENANCE, ANNULMENT OF MARRIAGE, AND FOR CUSTODY OR SUPPORT OF

enacted with both civil and criminal enforcement provisions.³ The legislature and the people would be frustrated in the exercise of their legislative prerogatives, should Blake's argument be granted here. And since the people's reserved power to legislate is actually the greater of the two legislative powers provided in the Constitution, Colo. Const., art V, sec. 1, it would be particularly anomalous to begin to draw a line here because a statute provided for civil and criminal remedies.

Blake's reliance on In re Initiative 2005-06 #55, 138 P.3d 273 (Colo. 2006), does not affect these conclusions. #55 does not stand for the proposition that measures of broad impact or general applicability offend the single subject requirement. There, the measure restricted the provision of "non-emergency services" to certain persons in the state of Colorado. Of concern to this Court was the very real possibility that voters would not understand that the services targeted by the amendment went beyond non-emergency medical or social services. In

CHILDREN, PRESCRIBING PENALTIES FOR THE VIOLATION
OF THIS ACT."

³ See e.g., § 11-59-115(1), (3), C.R.S. (same facts can establish for criminal and civil liability under securities statutes); § 10-3-810(1), (2), C.R.S. (same facts can establish basis for criminal and civil penalties under insurance statutes); § 8-81-101(3) (civil and criminal penalties available for employer's wrong-doing associated with unemployment benefits claims); § 8-4-119(1), C.R.S. (same facts can establish basis for criminal and civil penalties for failure to timely pay employees).

failing to define "services," proponents of that measure intended to and did craft a measure that contained "the additional purpose of restricting access to unrelated administrative services." Id. at 282. The proponents admitted they had both of these purposes in crafting the measure in the way that they did. Id. at 280-81. The Court found that the multiple levels on which the measure could be understood and applied would constitute a surprise to many voters and thus found it to violate the single subject requirement.

Initiative #57 suffers from no such infirmity. It does not conceal its applicability, either as to persons affected (business and agents) or as to potential liability (criminal and civil). This initiative contains no "facial vagueness" that "makes it impossible for a voter to be informed as to the consequences of his or her vote." Id. at 282. Thus, #55 does not mandate a reversal of the Title Board's decision.

C. Exemption for spending and revenue limits is not a separate subject.

Blake also suggests that an exemption from spending limits comprises a single subject. To date, he has not explained how a measure could be advanced if its sole purpose was to exempt a singular type of revenue from these legal restrictions. Indeed, it would be odd for voters to de-Bruce a non-existent revenue

source. Provisions such as this one are necessary elements of virtually all post-TABOR measures that create revenue streams for government.

- D. Blake's contention that tortuous acts and civil wrongs will be treated as "crimes" is unfounded and does not reflect a single subject concern.

Blake claimed before the Title Board that the duties covered by the initiative included those imposed by common law and corporate law, rather than just by the criminal laws.

This claim ignores the clear language of the statute. Section 18-1-606, C.R.S., currently creates liability for "offenses" where a business entity or agent is found to be "guilty." Initiative #57 retains this wording and thus applies to duties, the nonperformance of which would be treated by law as criminal acts.⁴

Further, Blake's assertion is just that. It calls for a level of interpretation of "duties imposed by law" that is a step beyond the inquiry given to a single subject claim. The title setting process is not one where projected interpretations of the measure may be entertained. In re Proposed Initiative 1999-2000 #104, 987 P.2d 249, 254 (Colo. 2000). Given that Blake's interpretation departs from the express wording of existing law and the specific wording of the initiative, it is not a legal

⁴ Ironically, Objectors complain both that the title contains a catch phrase in referring to "criminal conduct" and that, here, such reference is accurate but incomplete.

basis for preventing this measure from proceeding to the next phase of the initiative process.

III. The title is clear and accurate.

A. The Title Board did not err by refusing to catalog potential effects of the measure in the title.

Blake argued before the Board that the title was incomplete for failure to refer to: (a) definition of parties that are "specifically affected by the civil provisions"; (b) the "new substantive crimes" that apply to persons affected by the initiative; (c) civil liability arising from application of measure "to traditionally civil duties created by law"; (d) new substantive requirement in the affirmative defense to civil and criminal liability that disclosure to the attorney general occur prior to filing of charges; and (e) exemption from "popular revenue and spending limits". See Motion for Rehearing at 7-8.

The various elements that Blake claims should be inserted are either Blake's conjecture (new substantive crimes and liability for traditionally civil duties imposed by law) or are not central elements of this measure (listing persons who are also affected by civil liability, elements of affirmative defense, or revenue and spending limits). The proposed ballot title would be a wordy exercise, so much so that it would run headlong the requirement that the Board be concise in titling a measure. § 1-40-106(3)(b), C.R.S. The title is intended to be a "relatively brief

and plain statement by the Board setting forth the central features of the initiative for the voters" rather than "an item-by item paraphrase of the proposed constitutional amendment or statutory provision." In re Proposed Initiative 1997-98 No. 62, 961 P.2d 1077, 1082 (Colo. 1998). A title need only provide voters with an overview of the "central features" of an initiative, In re Amendment to Article XVI, Section 6, Colorado Constitution. Entitled "W.A.T.E.R.", 875 P.2d 861, 864-65 (Colo. 1994), and it need not set forth each and every nuance and subtlety of a measure. In re Proposed Initiative Designated Governmental Business, 875 P.2d 871, 878 (Colo. 1994). Given these standards, the Board did not err in setting this title.

B. "Criminal conduct" is not a catch phrase.

Blake claims that the ballot title impermissibly contains a catch phrase, "criminal conduct."

Title 18 of the Colorado Revised Statutes sets forth crimes under state law. It is replete with elements, circumstances, definitions, and punishments applicable to such crimes. The specific statute that this initiative would amend, § 18-1-606, C.R.S., refers to "conduct" that is undertaken by a business entity or its agents, including its high managerial agents. Under current law, when such "conduct" becomes an "offense" for which a business or agent may be "guilty," § 18-1-

606(1), C.R.S., the criminal laws are triggered. *Id.* This initiative merely extends the liability for that conduct, which now applies only to business entities, to agents working for those entities. It also allows businesses and agents to be civilly liable for their criminal acts, the very same acts that could be addressed under the state's criminal laws. Given that, how else could the Title Board have accurately described this measure without referring to "criminal conduct"? Had the Board omitted such a reference, Blake would likely have argued that the title was misleading since the voting public was not informed as to the true basis for this measure.

In any event, "criminal conduct" is not a political slogan of which this Court has been wary. "'Catch phrases' are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." In re Initiative 1999-2000 # 258(A), 4 P.3d 1094, 1100 (Colo. 2000). As noted above, "criminal conduct" is a description of the initiative, similar to "concerning the management of growth," which the Court found to be "a neutral phrase, with none of the hallmarks that have characterized catch phrases in the past." In re Proposed Initiative 1999-2000 #256, 12 P.3d 246, 257 (Colo. 2000). It

is certainly no more inflammatory than “protect the environment and human health” which does not rise to the level of a catch phrase. #112, 962 P.2d at 256.

The mere assertion by Blake that “criminal conduct” is a politically loaded phrase does not satisfy his burden for this claim to be sustained. Blake was required to adduce some evidence that this phrase is something other than merely descriptive of the proposal. #256, 12 P.3d at 257. Having failed to do so, this claim cannot be the basis for a successful appeal to this Court.

IV. The Board did not need to refer the matter back to the legislative staff for another review and comment hearing.

Blake contends that the proponents’ deletion of their proposed definition of “associated person” and use of the existing definition of “agent” was beyond the scope of the review and comment hearing held on Initiative #57.

Question 4.a. and Question 4.c. of the substantive questions posed to the proponents by the legislative staff addressed the intended scope of the measure.

They asked:

“What is the intent of adding an ‘associated person’ to the description of how a business may commit a criminal offense?”

“What is the difference between the definition of ‘associated person’ and ‘agent’ in section 18-1-606, Colorado Revised statutes (sic)?”

(See Appendix 1, attached hereto.) Originally, the proponents had defined “associated person” to mean “any natural person who is an officer, director,

member, partner, or sole proprietor of a business entity covered by this section." (See Appendix 2, attached hereto.) Based on the staff's questions and the suggestion that there was an unnecessary overlap between existing and proposed definitions, the proponents revised their draft before submitting to the Title Board to use the existing definition of "agent" and omit the proposed definition of "associated person." This change was made in the belief that their intent was furthered by using existing provisions of law.⁵ Thus, no resubmission to the legislative offices was necessary, In re Proposed Initiative 1997-98 #10, 943 P.3d 897, 901 (Colo. 1997), and the Board correctly so held.

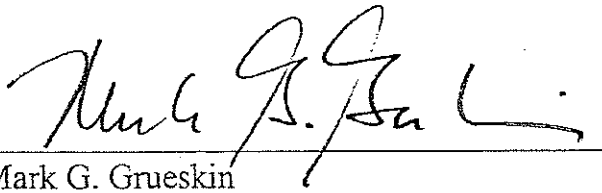
CONCLUSION

The Court's review is only the beginning of the initiative marathon. Nevertheless, it ensures a fair start by validating the Board's decision that the measure comprises a single subject and that the voters can understand the basic issue before them. The Board properly performed its duty, and that conclusion should be affirmed as quickly as possible by this Court.

⁵ Proponents have since revised their measure and incorporated a new definition that is similar to their original drafts. See Initiatives 2007-08 #73, 74, and 75. However, they resubmitted to the legislative staff in order to make this revision effective.

Respectfully submitted this 1st day of April, 2008.

ISAACSON ROSENBAUM P.C.

By: 
Mark G. Grueskin

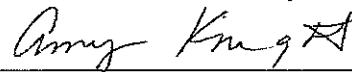
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2008, a true and correct copy of the foregoing RESPONDENTS' OPENING BRIEF was hand delivered to the following:

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MEMORANDUM

January 18, 2007

TO: Joanne King and Larry Ellingson

FROM: Legislative Council Staff and Office of Legislative Legal Services

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

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

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

Purposes

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

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

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

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

Comments and Questions

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

Technical Comments:

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

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

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

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

Substantive questions:

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

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

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

INDIVIDUAL LIABILITY FOR CORPORATE WRONGDOING

18-1-606 Criminal Liability of Business Entities

(1) A business entity AND ANY ASSOCIATED PERSON is guilty of an offense if:

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

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

(2) As used in this section:

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

(a.1) "ASSOCIATED PERSON" MEANS ANY NATURAL PERSON WHO IS AN OFFICER, DIRECTOR, MEMBER, PARTNER, OR SOLE PROPRIETOR OF A BUSINESS ENTITY COVERED BY THIS SECTION.

(b) "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.

(3) Every offense committed by a corporation prior to July 1, 1985, which would be a felony if committed by an individual shall subject the corporation to the payment of a fine of not less than one thousand dollars nor more than fifteen thousand dollars. For such offenses committed on or after July 1, 1985, the corporation shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). Every offense committed by a corporation which would be a misdemeanor or petty offense if committed by an individual shall subject the corporation to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the corporation is convicted. For an offense committed on or after July 1, 2003, a business entity shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). An offense committed by a business entity that would be a misdemeanor or petty offense if committed by an individual shall subject the business entity to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the business entity is convicted.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY INDIVIDUAL CHARGED AS AN ASSOCIATED PERSON UNDER SUBSECTION (1) THAT, PRIOR TO BEING CHARGED, 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 COVERED BY THIS SECTION.

(5) (a) NOTWITHSTANDING PARAGRAPH (4), ANY CITIZEN OF COLORADO MAY SEEK CIVIL DAMAGES AGAINST ANY BUSINESS ENTITY OR ASSOCIATED PERSON FOR CONDUCT COVERED BY PARAGRAPH (1) OF THIS SECTION.

(b) ANY SUCH AWARD OF DAMAGES SHALL BE PAID TO THE GENERAL FUND OF THE STATE OF COLORADO TO BE APPROPRIATED BY THE GENERAL ASSEMBLY.

(c) THE AFFIRMATIVE DEFENSE SET FORTH IN SUBSECTION (4) SHALL NOT APPLY TO CIVIL ACTIONS INITIATED UNDER SUBSECTION (5).

(d) SUCH MONEYS SHALL BE EXEMPT FROM THE REVENUE AND SPENDING PROVISIONS OF SECTION 20 OF ARTICLE X OF THE COLORADO CONSTITUTION.

(e) WHERE AN AWARD IS MADE UNDER THIS SUBSECTION, THE CITIZEN FILING THE LAWSUIT SHALL BE ENTITLED TO REASONABLE ATTORNEYS 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.

