

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>FILED IN THE SUPREME COURT APR 28 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2007) Appeal from Ballot Title Board</p>	
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2007-2008, #73 ("CRIMINAL CONDUCT BY BUSINESSES-LIABILITY) JOSEPH B. BLAKE, OBJECTOR, Petitioner, v. JOANNE KING AND LARRY ELLINGSON, PROponents; AND WILLIAM A. HOBBS, DANIEL L. CARTIN AND DANIEL DOMENICO, TITLE BOARD, Respondents.</p>	<p>▲ COURT USE ONLY ▲ Case No.: 08SA118</p>
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<p>OPENING BRIEF OF TITLE BOARD</p>	

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	3
I. #73 contains one subject: Establishing the scope of liability for criminal conduct by business entities	3
II. The titles are fair, clear and accurate	10
CONCLUSION	14

TABLE OF AUTHORITIES

PAGE

CASES

Animal Legal Defense Fund v. Mendes, 72 Cal. Rptr.3d 553 (Cal. App. 2008)	7
Colo. Const. art. X, § 20(2)(c)	9
In re Ballot Title 1999-2000 #25, 974 P.2d 458 (Colo. 1999).....	4
In re Proposed Initiative Concerning “Automobile Insurance Coverage”, 877 P.2d 853 (Colo. 1994).....	11
In re Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d 238 (Colo. 1994).....	13
In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256, 12 P.3d 246 (Colo. 2000).....	10
In re Title, Ballot Title and Submission Clause for 2001-2002 #21 and #22, 44 P.3d 213 (Colo. 2002).....	5, 10
In re Title, Ballot Title and Submission Clause for 2005-2006 #74, 136 P.2d 237 (Colo. 2006).....	8
In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02 #43, 46 P.3d 438 (Colo. 2002).....	4
In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2005-2006 #55, 138 P.3d 273 (Colo. 2002).....	4
In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74, 962 P.2d 927 (Colo. 1998).....	5
In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e), 8 P.3d 1194 (Colo. 2000).....	11
In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A), 4 P.3d 1094 (Colo. 2000).....	5, 9
Oja v. Grand Chapter of Theta Chi Fraternity, Inc., 684 N.Y.S.2d 344 (1999).....	8
People v. Huckleberry, 768 P.2d 1235 (Colo. 1989).....	13
State v. Nieto, 993 P.2d 493 (Colo. 2000).....	13

TABLE OF AUTHORITIES

	PAGE
Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #73, 135 P.3d 736 (Colo. 2006).....	5
United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir. 1990), cert. denied, 499 U.S. 921 (1991).....	8
 CONSTITUTIONS	
Colo. Const. art. V, § 1(5.5).....	3
Colo. Const. art. XXIX, § 5(2)(f).....	8
Colo. Const. art. XXVIII, § 9(1)(f).....	8
 STATUTES	
§ 1-40-106(3), C.R.S. (2005)	10
§ 18-1-606, C.R.S. (2007).....	1, 2, 9
§ 18-1-606(1), C.R.S. (2007)	2

William A. Hobbs, Daniel L. Cartin and Daniel Domenico, in their capacities as members of the Title Board (hereinafter “Board”), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

The Board adopts the statement of issues set forth in the Objector’s Petition for Review.

STATEMENT OF THE CASE

On March 7, 2008 the proponents filed Proposed Initiative #73 (#73) with the Secretary of State. The Board held a hearing to set the titles on March 19, 2008. The Board concluded that #73 had a single subject and set a title.

On March 26, 2008, Joseph Blake, the Objector, filed a motion for rehearing. He alleged that #73 contained multiple subjects; the text of the measure was unclear; the titles were misleading, incomplete, confusing and inaccurate; and the titles included a catch phrase. On April 2, 2008, the Board granted the motion for rehearing in part and set the titles. The Objector filed this appeal.

STATEMENT OF THE FACTS

Section 18-1-606, C.R.S. (2007) defines circumstances under which a business entity may be criminally responsible for certain conduct. Pursuant to the

present version of the statute, a business entity is guilty of an offense if “the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law” or “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.” Section 18-1-606(1), C.R.S. (2007).

#73, if enacted, would amend § 18-1-606, C.R.S. (2007) to extend criminal liability of business entities to include individuals who are “executive officials” of a business. An “executive official” is defined as “any natural person who is an officer, director, managing partner, managing member, or sole proprietor of a business.” The measure makes an executive official guilty of an offense “if the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business by law and the executive official know of the specific duty to be performed and knew that the business entity failed to perform that duty.” An executive official may avoid liability if, prior to being charged, the person reports “to the office of the attorney general all facts of which he or she was aware concerning the business entity’s conduct that

meets the criteria set forth in” statute. The measure also allows Colorado residents to seek civil damages against any business entity or its executive officials for specified offenses. Any damages collected must be paid “to any governmental entity that imposed by law the specific duty to be performed by the business entity.” Any such damages are exempt from restrictions on state spending and appropriations. The individual bringing the lawsuit is entitled to reasonable attorneys fees for defending the interests of the state.

SUMMARY OF THE ARGUMENT

#73 contains only one subject: establishing the scope of liability from criminal conduct by businesses.

The titles set by the Board are fair, clear and accurate. Although the titles do not describe all of the details of the proposed measure, they do include its central features.

ARGUMENT

I. #73 contains one subject: Establishing the scope of liability for criminal conduct by business entities.

Objector contends that the Board should not have set titles because #73 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it “relate[s] to more than one subject and ... [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2005-2006* #55, 138 P.3d 273, 277 (Colo. 2002)(Colo. 2006) (#55) A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000* #25, 974 P.2d 458, 463 (Colo. 1999). The single subject rule both prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. #55, 138 P.3d at 277 *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02* #43, 46 P.3d 438, 442 (Colo. 2002)(#43).

The Court will not address the merits of a proposed measure, interpret it or construe its future legal effects. #43, 46 P.3d at 443; *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097-98 (Colo. 2000) (#258A). However, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause for 2001-2002 #21 and #22*, 44 P.3d 213, 216 (Colo. 2002). The single subject rule must be liberally construed to avoid unduly restricting the right of initiative. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74*, 962 P.2d 927, 929 (Colo. 1998). Sections of a measure that include “implementation or enforcement details directly tied to the single subject will not, in and of themselves, constitute a single subject.” *Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #73*, 135 P.3d 736, 739 (Colo. 2006).

The measure has only one subject: liability of businesses for criminal conduct. All of the sections of the measure relate to this subject. Section 1.5 states when an executive official of a business is guilty of an offense. Section 2(c) defines the term “executive official.” Section 3 of the measure establishes the

penalties for executive officials who are found guilty of an offense. Section 4 of the measure establishes the elements of an affirmative defense for executive officials. Section 5 authorizes private rights of action to collect civil damages for criminal conduct. These sections are related to the enforcement of the measure.

All of these provisions are related to the theme of the measure. Executive officials are integral to the operation of any business. It is elemental that persons conduct businesses. Therefore, adding executive officials of businesses to those subject to penalty for the conduct of businesses is logically connected to imposing penalties on businesses. Sections 3 and 5 of the measure address implementation and enforcement of the measure by extending criminal liability to executive officials of businesses, and imposing monetary damages on both business entities and their executives. Sections 4 and 5 discuss the availability of an affirmative defense, which is directly related to the question of liability. Section 5 and 6 deal with penalties and costs that may be imposed.

Objector raised several challenges to the Board's decision regarding single subject: (1) the measure creates new crimes, (2) the measure allows any citizen to bring a civil action for damages against a business entity or executive officials of a business entity without any injury in fact to a legally protected interest, (3) the

measure allows awards of compensatory and punitive damages to any “governmental entity”, (4) the measure allows governments to compete with private entities or persons for assets of a business entity, (5) the measure alters existing law regarding assessment of attorneys fees; (6) the measure does not discuss whether damages may be awarded for conduct that does not arise as the result of a violation of a specific governmental law, (7) any damages awarded to the government are exempt from spending and revenue limits, and (8) the measure creates an affirmative defense.

Objector’s arguments are without merit. With regard to the argument that the measure would criminalize traditional civil concepts such as breach of fiduciary duties and duty of loyalty, the claim is without any support. Part 6 of article 1, title 18 does not define offenses. It merely describes when a person is deemed a party to an offense. #73 says only that executive officials of business entities will be subject to the same criminal penalties as the business entities for which they work.

Objector also contends that the addition of civil penalties constitutes a separate subject. Civil penalties attached to criminal statutes and enforced through private actions are not unusual. The connection was recently acknowledged in *Animal Legal Defense Fund v. Mendes*, 72 Cal. Rptr.3d 553 (Cal. App. 2008). Violations of criminal law can result in civil actions, can establish a breach of

standard of care, or can be used to supplement criminal penalties. *Id.* at 556. A criminal statute can form the basis for a private right of action seeking monetary damages. *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344, 346 (1999).

Objector also contends extends standing to enforce civil penalties to any private resident, thereby constituting a separate subject. The measure merely authorizes *qui tam* enforcement. *Qui tam* proceedings are enforcement mechanisms which can be brought by any citizen, acting as a private attorney general for the state and not for himself, to enforce statutes with the proceeds divided between the citizen and the government. *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 19 n.2 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).¹ The enforcement details do not, by themselves, constitute a separate subject. *In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.2d 237, 239 (Colo. 2006). The fact that action is brought by a private attorney general and the proceeds are paid to the state's general fund does not transform the enforcement provision into a separate subject.

¹ *Qui tam* proceedings are authorized in the Colorado Constitution. Voters recently have authorized citizens to act as private attorneys general to enforce penalties. Colo. Const. art. XXVIII, § 9(1)(f); Colo. Const. art. XXIX, § 5(2)(f) (“Any person may file a written complaint with the independent ethics commission”)

The remainder of Objector's concerns focus on the changes the measure would bring to existing laws regarding assessment of attorneys fees, uncertainty regarding the assessment of damages for conduct that may arise from the common law, exemption of damages from spending and revenue limits and the creation of an affirmative defense. Objector frames his argument in broad terms, implying that the changes affect laws other than § 18-1-606. To the contrary, these provisions are limited to this section of the law. The mere fact that a proposed measure "would have the effect of changing the status quo in some respects if adopted by the voters" does not transform a single subject measure into one that contains multiple subjects. #258(A), 4 P.3d at 1098.²

Because all sections of the measure are related to its main subject, the Court must conclude that the measure meets the single subject requirement.

² The statement that damages are exempt from spending and revenue limits does not alter existing law. Colo. Const. art. X, § 20(2)(c) exempts damage awards from spending and revenue limits. This provision of the measure merely states how the damages will be accounted for. Therefore, it is directly connected to the substance of the measure.

II. The titles are fair, clear and accurate.

Section 1-40-106(3), C.R.S. (2005) establishes the standard for setting titles.

It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo. 2000) However, the Board is not required to set out every detail. #21, 44 P.3d at 222. In setting titles, the Board may not ascertain the measure’s efficacy, or its practical or legal effects. #256, 12 P.3d at 257; *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e)*, 8 P.3d 1194, 1197

(Colo. 2000). The Court does not demand that the Board draft the best possible title. #256, at p. 219. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994).

The titles accurately mirror the measure. The general subject is liability for criminal conduct by business entities. This provision restates the general subject of the law which is being amended. The next phrase within the title states that the measure extends "the criminal liability of a business entity to its executive officials for the entity's failure to perform a specific duty imposed by law." This section reflects the first substantive amendment contained in section 1.5. The next phrase in the title summarizes the last clause in section 1.5, which states that "the executive official knew of the specific duty to be performed and knew that the business entity failed to perform that duty.

The next three phrases in #73 state (1) a Colorado resident may bring a civil action against a business entity or an executive official (2) an award of damages will be given to the governmental entity imposing the duty: and (3) attorneys fees

will be awarded. The last clause within the titles tells the voters that an affirmative defense is available to the executive official.

Objector argues that the titles are inaccurate because the first clause does not inform the voters that the measure extends liability to executive officials. Objector ignores the fact that the very next clause states that the measure extends liability to executive officials of a business.

Objector also asserts that the measure creates new substantive laws. Contrary to Objector's assertion, the measure does not create a new substantive crime. It merely extends the existing law to executive officials. It does not add new offenses or change the definition of existing offenses.

Objector also claims that the titles do not state that the measure does not define the terms "resident", "civil damages" or "government entity", or explain who must pay for attorneys fees. Objector misapprehends the role of the titles. The titles summarize the measure. They are intended to reflect the content of a measure. They are not intended to explain what is not in the measure.

Objector criticizes the titles because they do not disclose that a prerequisite to an affirmative defense is disclosure of all pertinent facts prior to being charged. The requirement that an action constituting affirmative defense must be taken before the filing of charges or of a lawsuit is not unique. As this Court has noted:

[T]he essence of an affirmative defense is the admission of the conduct giving rise to the charged offense. Having acknowledged presence at and participation in the event, the participant in effect justifies the conduct on grounds deemed by law to be sufficient to render the participant exempt from criminal responsibility for the consequences of the conduct.

People v. Huckleberry, 768 P.2d 1235, 1239 (Colo. 1989). Likewise, in the civil context, “an affirmative defense is a legal argument that a defendant, who is capable of being sued, may assert to require the dismissal of a claim or to prevail a trial.” *State v. Nieto*, 993 P.2d 493, 507 (Colo. 2000). The commonly-accepted definitions of “affirmative defense” presume that the defendant’s actions occurred prior to the filing of criminal charges or a civil complaint. #73 does not adopt a new legal or controversial standard for the term. Therefore, the Board properly exercised its discretion by not noting that disclosures must be made prior to the filing of a criminal charge or a civil complaint. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1994).

Objector complains that the measure fails to disclose that any damages paid to the government will be exempt from applicable spending and revenue limits.

The ultimate disposition of the funds is immaterial to the key element of the measure: holding executives responsible for actions of the businesses they run.

Objector also claims that the titles should have set forth the definition of “executive official”. The term, standing by itself without a definition, adequately identifies who is covered by the measure.

CONCLUSION

For the above-stated reasons, the Board respectfully requests that the Court approve the titles set by the Board.

JOHN W. SUTHERS
Attorney General



MAURICE G. KNAIZER, 05264*
Deputy Attorney General
Public Officials
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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same, overnight by DHL at Denver, Colorado, this 28th day of April 2008 addressed as follows:

Mark Grueskin, Esq.
Isaacson Rosenbaum, PC
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Denver, CO 80202

Douglas Friednash Esq.
John Tanner, Esq.
Susan Fisher, Esq.
Fairfield and Woods PC
1700 Lincoln Street, Suite 2400
Denver, CO 80203



A handwritten signature in dark ink, appearing to read "Mark Grueskin", is written over a horizontal line.

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. FOR AN OFFENSE COMMITTED ON OR AFTER FEBRUARY 1, 2009, AN EXECUTIVE OFFICIAL 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 AN EXECUTIVE OFFICIAL THAT WOULD BE A MISDEMEANOR OR PETTY OFFENSE SHALL SUBJECT THE EXECUTIVE OFFICIAL 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 EXECUTIVE OFFICIAL IS CONVICTED.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY EXECUTIVE OFFICIAL CHARGED UNDER SUBSECTION (1.5) OF THIS SECTION 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 THAT MET THE CRITERIA SET FORTH IN SUBSECTION (1)(a) OF THIS SECTION.

(5) (a) ANY INDIVIDUAL RESIDING IN COLORADO MAY FILE A PRIVATE RIGHT OF ACTION AGAINST ANY BUSINESS ENTITY OR ITS EXECUTIVE OFFICIALS FOR THEIR CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SUBSECTION (1) OR SUBSECTION (1.5) OF THIS SECTION.

(b) 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.

(c) THE AFFIRMATIVE DEFENSE SET FORTH IN SUBSECTION (4) OF THIS SECTION SHALL APPLY TO CIVIL ACTIONS INITIATED UNDER THIS SUBSECTION (5).

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

(e) IF AN AWARD IS MADE UNDER THIS SUBSECTION (5), 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.

Ballot Title Setting Board

Proposed Initiative 2007-2008 #73¹

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

An amendment to the Colorado Revised Statutes concerning liability for criminal conduct by business entities, and, in connection therewith, extending the criminal liability of a business entity to its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning an executive official's liability upon his or her knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing a Colorado resident to bring a civil action against a business entity or executive official for such criminal conduct; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty on 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 criminal or 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 liability for criminal conduct by business entities, and, in connection therewith, extending the criminal liability of a business entity to its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning an executive official's liability upon his or her knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing a Colorado resident to bring a civil action against a business entity or executive official for such criminal conduct; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty on 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 criminal or civil charges?

Hearing March 19, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 2:13 p.m.

Hearing April 2, 2008:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all

¹ Unofficially captioned "Criminal Conduct by Businesses - Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

other respects.

Hearing adjourned 2:28 p.m.