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The Honorable Representative Terrance Carroll
Colorado State Representative, District 7
200 East Colfax
Denver, CO 80203
terrance.carroll.house@state.co.us

Re: **Opposition to House Bill 1382, Sections 1 & 2**
THE RATIONALE FOR REJECTION OF "DEPOSIT BAIL" IN COLORADO

Dear Representative Carroll:

Prior to 2003 I was the Chair of the Colorado Bail Bond Roundtable. The Colorado Bail Bond Roundtable was a coordinated effort of all interested parties in Colorado's bail system and regulatory scheme, including the Colorado State Judicial Department, the Colorado Division of Insurance (*which regulates Colorado bail forfeitures, insurance company and bail agent insurance producer licensing*), Colorado District and Municipal Court Clerks, Colorado Sheriffs, Colorado District Attorneys, as well as Bail Insurance Companies, Professional Bail Bonding Agents and Cash Bail Agents. The Roundtable successfully developed the uniform bail bonds and forfeiture forms that are currently in use throughout Colorado. More importantly, the Roundtable's work led to and facilitated the Legislature's adoption of the Statewide Board System that now governs bail bond forfeitures.

The Purpose of Bail

The purpose of bail is to assure a defendant's appearance in court. *Stack v. Boyle*, 342 U.S. 1, 4, 72 S. Ct. 1, 3 (1951) (citing *Hudson v. Parker*, 156 U.S. 277, 285, 15 S. Ct. 450, 453 (1895)).

There is no legitimate legal rationale for implementing any "bail system" that commits the proceeds from appearance bonds, bail bond forfeitures, forfeiture judgments or remissions to the funding of pre-trial release programs or any other public agency, no matter how well intentioned. Any suggestion that Colorado's bail system should be used as a mechanism to fund

existing public programs, or to fund new programs, is not only disingenuous, it entirely ignores the historical purpose of bail.

The Current Colorado Bail System.

Under Colorado's current bail bond forfeiture system the release of any defendant from custody will result in the personal liability of the defendant and his appearance bond surety for **100%** of the appearance bond amount established by the Court. This very real threat of personal liability to a forfeiture judgment for **100%** of the face amount of the bond is the single most important incentive for any defendant to appear in court.

Since a licensed Colorado professional bail bonding agent is personally responsible for **100%** of the penal sum of an appearance bond, the family and friends of the defendant (*who typically indemnify the bail agent and bail insurance company*) also have an very strong incentive to encourage and facilitate the defendant's appearance at trial and whenever required by the court. It goes without saying that defendants are much more likely to appear if their relatives and friends would be financially jeopardized by their irresponsibility.

"Deposit Bail"

The "Deposit Bail" concept proposed by Sections 1 & 2 of HB 1382 cuts the very heart out what makes bail bonding work: it destroys the incentive for a defendant to appear.

Under HB 1382's ill-considered Deposit Bail proposal the defendant may lose his **15%** deposit upon his failure to appear. Unfortunately, the Deposit Bail defendant is likely to see this as a small price to pay for freedom. Every Deposit Bail defendant can rest assured that no one will take any action to compel his attendance at any future court proceeding. No bail agent will ever knock on his door. No bounty hunter will be on his trail. The defendant can also rest assured that relatives and friends will not be at risk and will not be inconvenienced, since Deposit Bail operates in an environment where absolutely no one, including pre trial release services, cares whether the other **85%** of the bond that was set by the court is actually paid. Thus, unlike the current bail system (*where a failure to appear gives rise to absolute liability of the defendant and surety for 100% of the face amount of the appearance bond*) under the proposed Deposit Bail system, absolutely nothing remains at risk when a Deposit Bail defendant fails to appear. The 15% deposit has already been paid. The Deposit Bail defendant gains his release from the system for a bargain basement price.

The Dismal Legacy of "Deposit Bail"

The only individuals who stand to benefit from a Deposit Bail program are: (1) Defendants, whose pre-trial release will be facilitated by only a fraction of the money previously required and (2) Criminal defense attorneys, who are much more likely receive their retainer when funding for **100%** exposure on an appearance bond. Exposure of the public to the obvious

dangers of Deposit Bail, however, cannot be justified by satisfying the needs of these special interest groups.

There is a well-documented track record of abject failure in each state where Deposit Bail has been implemented. Although the side effects of Sections 1 and 2 of HB 1382 Deposit Bail program may be concealed, misrepresented or unintended by proponents, its hazardous side effects are highly predictable. If HB 1382 is enacted, history will simply repeat itself. This time, however, that repetition will be at the cost of Colorado taxpayers.

Fundamental deficiencies exist in every state where Deposit Bail programs have been implemented. As previously noted a defendant released on Deposit Bail has no incentive to ever appear in court. Further Deposit Bail programs give pre trial services no incentive to actively seek the return to any non-appearing defendant to custody. This lack of incentive is compounded by two rather obvious additional deficiencies:

(1) pre trial service programs lack the expertise and training necessary to return defendants to custody without further jeopardy to public safety and

(2) any active field work conducted by pre trial services to actually locate a defendant who failed to appear or to encourage a defendant to appear would require its overburdened staff to do the every day job of professional bonding agents at public expense.

As a result of these and many other glaring deficiencies Deposit Bail programs have a long and uniform history of soaring FTA (failure to appear) rates. More specifically, as noted in Attachment 1, a paper entitled "10% DEPOSIT BAIL – A FAILED SYSTEM" authored by Jerry Watson, Esq. of AIA Surety, Illinois and Oregon experienced extremely high FTA rates among Deposit Bond defendants. Similar Deposit Bond programs have been entirely abandoned in California and New Jersey where it was also found that taxpayers experienced a much higher financial burden while receiving no colorable benefit whatsoever.

A Verifiable Impact on Public Safety

Proponents of Deposit Bail would have legislators believe that concerns being raised about Public Safety are a subterfuge and that bill opponents are simply crying wolf. Fortunately, there is no need to take the word of bail industry proponents or, for that matter, the criminal defense bar proponents of HB 1382. Completely unbiased studies from the United States Department of Justice and other unbiased studies of Deposit Bail programs are widely available. See Exhibits A and B to Attachment 1 for references to only a few of the many independent studies that have been undertaken.

The public safety impact arises from a simple fact that is not the subject of any reasonable dispute: Deposit Bail INCREASES the population of individuals freely circulating in society who have simply failed to appear in court on criminal charges, or who are actively

evading prosecution. Any suggestion that this population is likely to contain a high percentage of unsavory and dangerous individuals is a massive understatement.

The following bullet list of risks to public safety are independently verifiable by a wide variety of impartial papers and studies that can be promptly made available. Indeed, public safety has been the primary reason why states such as California and New Jersey have dismantled their Deposit Bail Programs:

- Deposit Bond programs significantly increase the number of bail fugitives.
- There is a direct correlation between the number of bail fugitives at large in any community and the number of serious crimes committed in that community. In effect, Deposit Bail programs breed crime.
- Individuals released on Deposit Bail are almost TWICE as likely to be rearrested while released on bail than individuals who are released on a standard appearance bond.
- There is a higher recidivism rate in the population of individuals released on Deposit Bond than those released on standard appearance bonds.

In effect, the passage of HB 1382 will create a Colorado governmental program with the unique capacity to generate new crime victims.

Financial Implications.

Ignoring for the moment the significant cost of the higher criminal activity that is the most common by-product of Deposit Bail programs, consideration must also be given to the prospective loss of a significant revenue stream from premium tax now paid by bail insurance companies under the current bail system. Under HB 1382 that premium tax income stream will greatly diminish.

Consideration should be given to bail forfeiture judgments that will no longer be paid into court registries by bail agents and can be made available to Courts when the funds are no longer subject to remission claims under the current forfeiture system. Under HB 1382, the loss of access to these funds cannot be ignored.

The Current Colorado Bail Forfeiture System: Another Unintended Victim

I regularly represent bail insurance companies in regulatory matters and with respect to their contractual arrangements with bond producers. I am also a Colorado citizen and taxpayer who has great respect for the importance of a well-functioning bail bond forfeiture system. I firmly believe in addressing any difficulties with this system in the light of day, where all parties

who may be impacted can be heard. All of the public and private participants in the Bail Bond Roundtable process mentioned above were quick to appreciate that very small changes in any provision in any one of the three titles of the Colorado Revised Statutes that regulate appearance bonds and bail forfeitures could have a major impact and cause unintended ripple effects throughout Colorado's highly integrated bail system. Thus, each and every proposed change in even the smallest provision must be fully considered, fully discussed and thoroughly understood before any substantive change is made.

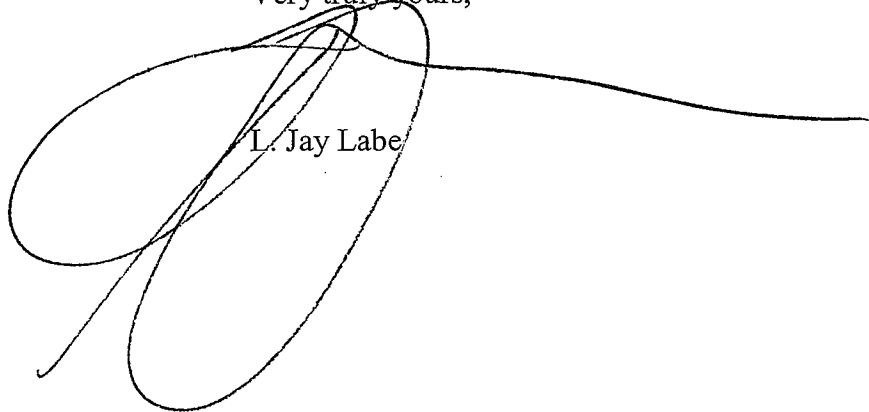
Hard fought battles in the Colorado legislature over bail forfeiture procedures and related regulatory issues have been all too common. Fortunately, these battles subsided after 2003 because great care was taken by the legislature to enact reasonable solutions to complex problems. The overriding interest of the public in a smooth functioning bail bond system, where defendants actually had an incentive to appear in court, was the paramount concern. The passage of HB 1382 will take Colorado back to square one.

As noted above, HB 1382 provides no incentive: (a) for a Deposit Bail defendant to appear in the first instance; (b) for anyone to return a fleeing Deposit Bail defendant to custody; (c) for anyone to pay the remaining 85% of the face amount of the appearance bond; or (d) for collateralization securing payment of the remaining 85% of the appearance bond penalty. However, if proponents of HB 1382 suggest that pre trial services will fulfill the roles of bail bonding underwriter, administrator, agent and/or enforcer, the detrimental effects of HB 1382 become even more pronounced. The current bail regulatory and forfeiture system simply does not allow for pre trial services staff to engage in complex insurance-related bail underwriting and collateralization activities. If such a technical role is actually undertaken by pre trial services personnel, its staff would be engaging in this activity without the benefit of licensing, supervision, training or any of the qualifications that would otherwise be required of qualified insurance producers regulated by the Colorado Division of Insurance.

As written, the HB 1382 Deposit Bail system would be administered by the unlicensed, unregulated and ill-prepared. Worse yet, the current bail forfeiture system, which has been created in the context of commercial bail, becomes unrecognizable and potentially unworkable given this new class of Deposit Bail defendants and the new faces who will somehow be administering the Deposit Bail system. It should also be kept in mind that if any actual attempt is made by pre trial services to collateralize or secure any part of these Deposit Bail appearance bonds, the rights of third-party indemnitors will be entirely unclear on critical operational matters such as: (a) entitlement to the return of collateral; (b) when and if that collateral must be returned; (c) the priority of other creditors of the defendant in the collateral and (d) who is entitled to benefit from an otherwise lawful award of remission. An entirely unintended impact of HB 1382 is rampant confusion in the respective roles of the Colorado Judicial System and the Colorado Division of Insurance as the current bail forfeiture system will become entirely muddled and ineffectual.

At a very minimum, every legislator owes it to his or her constituents to halt HB 1382 in its tracks and send it to a study committee if only to properly assess risks to public safety. If any legislator believes that the opponents of HB 1382, the U. S. Department of Justice and the many states that have abandoned their experimental Deposit Bail programs could be even partially correct in their assessment of the public safety risk of Deposit Bail, delaying the enactment of HB 1382 for at least a year would be the most prudent course of action.

Very truly yours,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal tail extending to the right. The signature is written over the printed name "L. Jay Labe".

L. Jay Labe

LJL/sej