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# Economic Affairs Interim Committee

## 59th Montana Legislature

### SENATE MEMBERS

DONALD STEINBEISSER--Vice Chair  
JOHN BRUEGGEMAN  
VICKI COCCHIARELLA  
KEN HANSEN

### HOUSE MEMBERS

JIM KEANE--Chair  
DAVE GALLIK  
TOM MCGILLVRAY  
MIKE MILBURN

### COMMITTEE STAFF

PATRICIA MURDO, Lead Staff  
BART CAMPBELL, Staff Attorney  
DAWN FIELD, Secretary

# MINUTES

October 28, 2005

Room 102, State Capitol  
Helena, Montana

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

### COMMITTEE MEMBERS PRESENT

REP. JIM KEANE, Chair  
SEN. DONALD STEINBEISSER, Vice Chair

SEN. JOHN BRUEGGEMAN  
SEN. VICKI COCCHIARELLA

REP. DAVE GALLIK  
REP. TOM MCGILLVRAY  
REP. MIKE MILBURN

### COMMITTEE MEMBERS ABSENT

SEN. KEN HANSEN

### STAFF PRESENT

PATRICIA MURDO, Lead Staff  
BART CAMPBELL, Staff Attorney  
DAWN FIELD, Secretary

### AGENDA & VISITORS LIST

Agenda, [Attachment #1](#).  
Visitors' list, [Attachment #2](#).

## COMMITTEE ACTION

The Economic Affairs Interim Committee:

- moved to have audio minutes as the official record of committee meetings;
- approved continued review of the synopsis of the committee minutes prepared by the Committee secretary;
- approved the June 24, 2005, minutes, as written;
- appointed SEN. COCCHIARELLA, REP. MCGILLVRAY, and REP. MILBURN to serve on the SJR 35 Subcommittee;
- approved sending a letter to Governor Schweitzer requesting implementation of SB 133;
- placed SEN. KEANE's request to address concerns over the use of social security numbers on Blue Cross Blue Shield state accounts on the February meeting agenda; and
- approved funding for a teleconference call for the SJR 35 Subcommittee.

## PART 1

### TAPE 1 - SIDE A

#### CALL TO ORDER AND ROLL CALL

00:00:12 REP. KEANE called to order at 8:33 a.m. **Pat Murdo, Research Analyst, Legislative Services Division (LSD)**, explained that the Economic Affairs Committee could choose either the written form of the minutes or the audio file as its official record. SEN. COCCHIARELLA **moved** that the Committee continue to review the synopsis of the audio minutes as prepared by the Committee secretary and vote on those. The **motion passed** on a unanimous voice vote. REP. KEANE said the Committee must designate the audio minutes to be the official record of the meeting. SEN. COCCHIARELLA **moved** that the audio minutes be the official record of the meeting. The **motion passed** on a unanimous voice vote.

SEN. COCCHIARELLA **moved** that the June 24, 2005, minutes be approved as written. The **motion passed** on a unanimous voice vote.

#### IDENTITY THEFT OVERVIEW - NATIONAL AND LOCAL PERSPECTIVES

00:04:42 **Cort Jensen, Assistant Attorney General**, discussed identity theft in general and explained the remedies that are currently available under current state and federal law: He made the following points:

- Identity theft is one of the fastest growing crimes in the nation but it is difficult to determine the exact numbers of cases most people don't know that identity theft is supposed to be reported the Federal Trade Commission (FTC).
- The FTC estimates that approximately 10 million cases occur every year and that over 40 million cases have already occurred.
- Montana defines identity theft as the use of any personal information for an unlawful purpose and has a criminal provision that punishes identity

theft. It can be either a felony or a misdemeanor, depending on how much is taken or stolen.

- Most typical identity theft cases result in two crimes: the identity theft of the person whose information is stolen and a theft or forgery against a local business when that information is used to obtain funds.
- The real issue is what laws exist to slow down the rate of identity theft and what laws help the victim to recover from identity theft.
- If an identity theft crosses state line, it then can also be prosecuted federally.
- There many different of types of identity theft, ranging from a full-blown incident with the theft of name, social security number, bank and credit card number to open more accounts to people using a social security number to gain employment or apply for government programs, or to committing a crime under a false name, which could result in an arrest warrant for the person whose identity was stolen.

Mr. Jensen said that the 2005 Legislature passed House Bill (HB) 732 and HB110, both of which address identity theft:

- HB 110 - identity theft "passport" - will allow a victim of identity theft, with the help of local law enforcement, to apply to the Attorney General for a document stating that the person has been a victim of identity theft. This document can be shown to credit agencies and law enforcement agencies as proof that there has been an identity theft and the person is attempting to stop the theft. This will not solve all of the problems for a victim but is intended to ease the process of recovering from identity theft.
- HB 732 is intended to slow down the spread of identity theft. It imposes certain restrictions on credit card solicitations, requires that credit card machines display only the last several digits of a credit card on a customer receipt, and requires that, if a business collects personal information, that the records and documents must be destroyed once the information is no longer needed. The record disposal requirement applies only to businesses, but the practice is recommended for private individuals for additional protection. HB 732 also addresses security breaches.
- The federal law, which applies over and above Montana law, is known as the Fair Credit Reporting Act (FCRA). It was amended and is now known as the Fair and Accurate Credit Transaction Act (FACTA). FACTA established how businesses have to deal with credit reports and sets guidelines for what should be done when an identity theft occurs. It allows an individual who suspects they are a victim of identity theft to place a fraud alert on accounts, notifies creditors of the suspected theft, and allows the victim to receive several free credit reports. A fraud alert is not the same as a security freeze.

Mr. Jensen explained that FACTA also provides that any individual, regardless of whether or not the person has been a victim of identity theft, is entitled to receive one free credit report annually. He also explained the required steps to be taken, once an individual suspects he or she has been the victim of identity theft.

- 00:20:26 SEN. COCCHIARELLA asked Mr. Jensen to provide copies of the materials available from the AG to the Committee members. Mr. Jensen said he would provide copies.
- 00:20:52 REP. KEANE asked if the incidence of identity theft is increasing in Montana. Mr. Jensen said while there are no hard numbers, the numbers are steadily increasing.
- 00:21:27 REP. MCGILLVRAY asked for specific tips on how to prevent or avoid identity theft. Mr. Jensen said the AG's office is preparing a web page and materials on that topic and is scheduling prevention education workshops around the state. Mr. Jensen said the FTC also has many resources available at [www.ftc.gov](http://www.ftc.gov).
- 00:22:35 REP. KEANE asked if there are any correlations between identity theft and other crimes, such as drug use. Mr. Jensen said identity theft is used against all age groups, ranging from newborns to those who have been deceased for some time, and is used by many different types of criminals. Mr. Jensen gave the example of meth dealers who sell identity theft kits to users in order to help them get money to buy more methamphetamine. He said organized crime also uses identity theft for crimes such as securities fraud and terrorism. Mr. Jensen said this is viewed as a white collar crime and that punishment is not severe.
- 00:24:17 SEN. COCCHIARELLA asked how should people use their social security numbers. Mr. Jensen strongly recommended that an individual not print their social security number on any document and that, personally, he would be hesitant to provide it to anyone for any reason. He said a person's social security number is the key to all necessary information for identity theft and the more it is available, the more likely it is that the person will be a victim of identity theft.
- 00:25:40 REP. KEANE said the law requires a social security number to be printed on a commercial driver's license. Mr. Jensen said he has no power to change that law but that it makes a person much more likely to be an identity theft victim.
- 00:27:47 **Chantelle Mack, Consumer Data Industry Association, (CDIA) Washington D.C.,** discussed a summary of identity theft protections and solutions ([EXHIBIT #1](#)). Topics covered were:
- free credit reports;
  - fraud alerts and trade line blocking;
  - opt-out methods for consumers;
  - issues regarding social security numbers;
  - federal requirements for proper disposal of records; and
  - federal requirements for the accurate reporting of information.
- Ms. Mack also explained that:
- All CDIA members are required to comply with the federal Gramm-Leach-Bliley Act, which includes standards for safeguarding customer information and regulation of information outside of a credit report.

- The CDIA supports legislation that would remove social security numbers from documents such as a driver's license and a health insurance card.
- Social security numbers are considered a privacy paradox because too much information can cause harm, but some access is needed to prevent fraud or crime; such as tracing missing children, tracking convicted sex offenders, or monitoring child support payments.
- File freezing is not a federal law but can be adopted at the state level. Only the consumer can request that the file be unfrozen. Twelve states have enacted file freeze laws.
- California has developed many new ideas and serves as the industry standard. The goal of the CDIA is to maintain consistency on a national level and the CDIA would like to work with Montana to develop policy that is easy for consumers to understand and easy to implement.

Ms. Mack provided information on identity theft as an emerging state issue ([EXHIBIT #2](#)) and on FACTA ([EXHIBIT #3](#)).

## **TAPE 1 - SIDE B**

00:40:29

**Sarah Reznek, Consumer Protection Project Advisor for the National Association of Attorneys General (NAAG)**, addressed the difference between a fraud alert and a security freeze. Ms. Reznek said a security freeze:

- provides much better protection for consumers;
- allows the consumer to maintain control over their credit report and can block access; and
- allows no access until the consumer lifts the freeze using a unique PIN number.

Ms. Reznek said a fraud alert:

- still allows an identity thief to access a consumer's information by providing the consumer's identifiable information;
- does not prevent a potential creditor from seeing a credit report or a credit bureau from sharing a credit report, and leaves the decision of whether to share a credit report up to the bureau and not the consumer; and
- requires that the FCRA limit fraud-related information from release, but cannot prevent the release or selling of the credit report.

Ms. Reznek also reported that:

- the Gramm-Leach-Bliley Act requires covered entities to develop and submit a written security plan to Congress and to regulators and to maintain reasonable security over personal financial data;
- the NAAG thinks the Act is not working as well as it should and is urging Congress to establish stricter standards;
- tools available to attorneys general to combat identity theft are inadequate;
- most AGs typically prosecute identity theft cases under the Unfair Deceptive Acts and Practices (UDAP) statute, which most states have; and

- UDAP statutes take a long time to prosecute and don't allow for quick relief to the consumer.

Ms. Reznek discussed several specific cases prosecuted by AGs across the nation. She submitted a letter from NAAG to the United States House of Representatives and United States Senate urging the enactment of national security freeze and security breach notification laws ([EXHIBIT #4](#)).

- 00:56:23 SEN. COCCHIARELLA asked for the top five recommendations that Montana could do to prevent identity theft and how Montana stands, relative to best practices.
- 00:57:09 Mr. Jensen said he would have to consult with Attorney General McGrath before making any recommendations. He said the 2005 Legislature passed a security breach law but that it will not be effective until the spring of 2006. He said the AG office would prepare and submit recommendations to the Committee.
- 00:58:00 SEN. COCCHIARELLA asked Ms. Reznek for tips for consumer protection from identity theft. Ms. Reznek said besides consumer education, preventative, regulatory legislative measures are essential. She said the burden should fall mainly on data brokers because it is other peoples' information that the brokers are dealing with. Those that hold personal information should also be held accountable for when that information is divulged. Ms. Reznek said notification and security freeze laws also are essential.
- 01:01:15 Mr. Jensen listed the protections that Montana does and does not have regarding identity theft and said that Montana:
- does not have a security freeze law;
  - does not have a law regulating the use of social security number;
  - does not have laws regulating the sale of identity theft insurance or security protection insurance;
  - does not have general funding for education;
  - does have a security breach law for material breach only; and
  - does have a criminal identity theft law and a broad consumer protection law.
- 01:02:54 Ms. Mack said that consumer education very important and that her organization is willing to work with the Attorney General's office however it can. Best practices call for consistency across all states, consumer awareness of the federal law requirements, and to notify consumers of the problems that can be experienced when a file is unfrozen.
- 01:05:03 REP. GALLIK asked if, other than the normal negligence or fraud causes of action that an individual would have under these circumstances, are there any specific remedies under a private right of action or an attorney general statute that consumers would be able to use. Mr. Jensen said a Montana citizen would have recourse under consumer protection statutes, especially with a business that had promised to protect information and didn't. Montana law would allow a deception or unfairness claim against that business but harm has to be proven

and it can't be a class action suit. An intentional property tort is also an option under certain circumstances. The security breach law also includes a law just for the AG's right of action.

01:06:46 Ms. Mack said the FRCA allows a consumer to file suit, allows a state's attorney general to file suit on behalf of a consumer, and allows the FTC to file suit on behalf of a consumer.

01:07:09 REP. KEANE repeated his concern regarding the commercial drivers' license requirement for a social security number to be displayed on the license and asked Ms. Reznick to convey his concerns to her association. He said he would like a list of the consumer tips for avoiding and dealing with identity theft so the list could be posted on the Committee's website and said the list would be shared with the Attorney General. He also asked for information on the California identity theft law. Ms. Mack said the only statistic that the CDIA is allowed to give out is that 5,000 people have frozen their files as of September 2003. The CDIA estimates that number now closer to 9,000 but does not have a factual number at this time. Ms. Reznick said the nation's consumer protection attorneys met last week and a representative from California said that the California Department of Consumer Affairs keeps data on how well the notification law is working. She said she would get that information and provide it to the Committee. REP. KEANE said that would help committee make decisions regarding potential legislation.

01:09:51 REP. MCGILLVRAY asked how much identity theft occurs from online shopping and the online use of credit cards. Mr. Jensen said the statistics vary but his information indicates online shopping accounts for only a small number of identity thefts.

#### **LOCAL REPRESENTATIVES -- IDENTITY THEFT**

01:25:53 **Finance Sector -- Jill Jarman, Montana Credit Unions,** discussed how federal laws and regulations dictate business practices in financial institutions.

#### **TAPE 2 - SIDE A**

01:36:36 **Insurance Sector -- Jacqueline Lenmark, American Insurance Association, the American Council of Life Insurers, and on behalf of Greg Van Horssen, Bruce Spencer, and Larry Kibbee,** gave an overview of the statutory regulation of the insurance industry as it relates to identity theft:

- the insurance industry is comprehensively regulated under Title 33, chapter 19, MCA;
- the Gramm-Leach-Bliley Act and the Workers' Compensation Act also address privacy requirements; and
- Title 33, chapter 19, MCA contains a specific exemption for health insurers because it is covered by the Health Insurance Portability and Accountability Act (HIPAA).

Ms. Lenmark explained what insurers can and cannot do with personal information:

- Montana is the most protective and restrictive of all 50 states regarding insurance laws and insurers cannot sell personal information unless individual, separate, written authorization is provided. The statute that allows the marketing of information, with the insured's permission is 33-19-307, MCA.
- Information cannot be disclosed, regardless of sale, except under strictly limited circumstances, without the individuals separate written authorization. The restriction on disclosure of information is contained in 33-19-301, MCA.
- In 33-19-306, MCA, there are certain exceptions to these restrictions and they are very narrowly defined and strictly construed.
- In all instances, if the insurer makes a disclosure, it must keep a record and sometimes must even inform the consumer of the disclosure. All disclosures are strictly limited to that which is "reasonably necessary" for the transaction that is under scrutiny. When there is a necessary disclosure under these exceptions, and those disclosures need to go to a non-affiliate, there must be a written agreement between the entity making the disclosure and the entity receiving the information that the information may not be further disclosed and that it will be protected to prevent further disclosure.
- The definition of what "personal information" is protected under the insurance code is very comprehensive and broad in scope. There is no limiting factor for information that might be available in the public record.
- If an insurance entity makes an adverse decision about a consumer request, the consumer must be informed by the company and is entitled to know the reasons why.
- If the decision was based on incorrect information, there is a separate procedure to allow the consumer to correct the information and to reapply.
- Security breach was added to the insurance code as part of HB 732. The insurance association did not feel it was necessary but supported the amendment for consistency in the statute. Those provisions regarding security breach track almost identically to the security breach language that was also codified under the Consumer Protection Act. This was based on the California model and only minor deviations were made to have that section conform to the other provisions in the insurance code.
- Enforcement of the security breach provision can be done in three different ways:
  - ▶ the Insurance Commissioner can enforce for any breach of privacy or security breach information;
  - ▶ a private right of action may be pursued to address either the failure of a company or support organization to comply with the protection requirements or for a breach of protection provisions. Damages are limited to actual damages but attorney fees are available to the prevailing party; and
  - ▶ there is a criminal penalty at the felony level as an additional enforcement.

Ms. Lenmark said that, as the Committee considers the many legislative options, the insurance industry would urge the Committee to keep consistency and uniformity with other states as a high priority. Cost shouldn't be the highest consideration and uniformity will operate as a safeguard for consumers and will result in fewer mistakes. Ms. Lenmark recommended that the Committee consider the National Association of Insurance Commissioners (NAIC's) model of security regulations when crafting possible legislation. Ms. Lenmark asked to respectfully disagree with Mr. Jensen's statement regarding absence of law that regulates insurance selling personal information. Ms. Lenmark said that type of insurance is fully regulated under the insurance code and the product is reviewed and approved by the Insurance Commissioner.

01:51:46 REP. GALLIK asked why the same damage factors under the consumer protection statute aren't applicable to insurance companies. Ms. Lenmark said that the privacy act in the insurance codes predates the other legislation and it was developed for a different purpose initially. The purpose was to ensure that insurance companies had to comply and that if consumers were damaged, then they would be able to recover their damages. REP. GALLIK asked if there are any substantive differences between the statutes that should be changed to make them more uniform. Ms. Lenmark said there is a rationale for treating them differently because the scope of the information that is protected under the insurance code is far broader than what is protected under other areas of the law and there are more stringent requirements or limitations on that information under the insurance code.

01:56:10 REP. GALLIK said it his understanding that the consumer protection statute, like the insurance code, allows for recovery of attorney fees but that under the consumer protection statute, fees can be awarded only to the party bringing the suit and are not awarded to the prevailing party. Statute also allows for recovery of damages. Ms. Lenmark said she has not reviewed the consumer protection act but noted that another statutory provision requires that, if attorney fees are guaranteed by statute to one party, it always is interpreted as a reciprocal. Ms. Lenmark said because of that provision, she would expect that even if the attorney fee statute is in the consumer protection act, that attorney fees are going to be available to the prevailing party, based on the other legal principles.

01:57:28 **Tanya Ask, Blue Cross Blue Shield (BCBS)**, discussed health insurance costs and issues that arise due to identity theft:

- In 1996, the Congress passed the Health Insurance Portability and Accountability Act (HIPAA).
- Under HIPAA, two components of that law - privacy protection and security protection - dovetail clearly with the types of issues this Committee is considering and the data ramifications.
- Congress initially mandated stringent information protection and security measures for doctors, insurance companies, or any other health care entity.
- In implementing that act, Blue Cross Blue Shield has undergone two major series of modifications.

- BCBS's hard costs of implementing this legislation have amounted to several million dollars. That does not include soft costs, such as mailings and notifications.

Ms. Ask requested that any considerations made by the Committee also take into consideration what has already been done at the federal level. There are a number of areas that overlap and create the potential for additional costs, which get passed onto consumers.

02:00:48 REP. MCGILLVRAY asked what BCBS plans to do regarding the use of social security numbers on health insurance cards. Ms. Ask said that BCBS is in the process of converting to a state-of-the-art system that will allow the removal of social security numbers from health insurance cards. She notes that individuals have always had the option of requesting a system-generated identification number in lieu of a social security number. Ms. Ask also noted that, at the State's request, state employees' social security numbers will continue to be used for two additional years, in order to give the State additional time to address other systematic issues that need to be dealt with.

02:02:13 REP. GALLIK said Montana has a statute that allows a workers' compensation company or examiner to obtain healthcare information on a claimant directly from a physician or health care provider and that the Workers' Compensation Court recently ruled that statute to be unconstitutional. He asked for comment on the impact that ruling will have on the healthcare industry, within the context of workers' compensation. Ms. Lenmark said the decision from the Workers' Compensation Court is so recent that there has not been adequate time to evaluate the consequences but that she anticipates that the affected parties and other companies who have relied on that statute will consider challenging the ruling at the Supreme Court level.

02:04:49 REP. GALLIK asked, whether because of the decision, if workers' compensation insurers feel there is a necessity that they start getting permission from the claimant to obtain information, due to the potential for liability if they don't. Ms. Lenmark said several issues must be considered:

- Plan 2 companies have additional privacy requirements, under the Montana insurance code, to protect that information.
- This same protection doesn't not apply to employers who are insuring under Plan One companies or the State Fund.
- The court decision will slow the claims process but will probably not add any additional liability issues.
- All insurers will likely comply with the decision until the Supreme Court either upholds or strikes it down.

02:07:19 SEN. COCCHIARELLA asked who to contact regarding the state's use of state employees' social security numbers on identification cards. Ms. Ask said to contact Connie Welsh at the Employee Benefits Bureau, Department of Administration. SEN. COCCHIARELLA commented that she would like to discontinue the use of state employees' social security numbers as soon as possible. REP. KEANE said the Committee could take the issue up as a Committee issue.

02:08:37

**Retail Sector -- Barbara Ranf, Montana Chamber of Commerce**, discussed a profile of Montana businesses and discussed the requirements of HB 732 ([EXHIBIT #5](#)). She said identity theft presents three challenges for a business owner:

- the need to protect employee information;
- the need to protect the customer information; and
- the need to protect the business' private information.

Ms. Ranf said the Chamber believes that all must work together to ensure a balance between protecting individuals and allowing for routine commercial transactions and that the focus should be on prevention, education, enforcement, and resolution. Montana has limited resources and future efforts should target those resources wisely.

Ms. Ranf also provided identity theft victim complaint data compiled by the FTC ([EXHIBIT #6](#)). Identity theft costs individuals and businesses \$53 billion per year. It is important that both consumers and businesses know the proper steps to take to protect their information, what to do if they do become a victim of identity theft, and what resources are available to them for help. Ms. Ranf said the Chamber encourages the vigorous enforcement of current laws, appropriate penalties for criminals, victim restitution, and that law enforcement has the necessary resources, training, and tools to deal with identity theft. The Chamber would like the privacy paradox that faces businesses to be taken into consideration when drafting new legislation and to find a good balance in the availability of information.

## **TAPE 2 - SIDE B**

02:16:25

**Claudia Clifford, AARP Montana**, said AARP members are very concerned about identity theft and that it is a top priority of the Association. Ms. Clifford provided some statistics about identity theft:

- In 2004, 10 million Americans were affected by identity theft, according to the FTC.
- Individual economic losses, due to identity theft, total about \$5 billion per year.
- Business economic loss totals about \$58 billion per year.
- Identity theft is the number one crime in America and for the fifth year in a row, ID theft topped the list of complaints filed with the FTC, accounting for 39% of all consumer fraud cases filed with the FTC.
- This crime is growing because an identity thief has only a 1 in 700 chance of getting caught.
- The AARP is concerned about the difficulty consumers experience in getting police to take a report.
- The AARP has encouraged the AG to train officers to take these reports but currently there is no law to require that.

Ms. Clifford provided handouts on identity theft:

- New York Times article ([EXHIBIT #7](#));
- an identity theft study conducted by the Identity Theft Resource Center ([EXHIBIT #8](#));

- 2005 disclosure of United States identity theft incident data ([EXHIBIT #9](#));

Ms. Clifford discussed AARP membership statistics. She said that a security freeze is the strongest tool for preventing identity theft. She suggested researching how other states have structured their security freeze laws. Ms. Clifford said the New Jersey model, in particular, is very well structured and said that she would provide more detail on these laws, if needed.

Ms. Clifford reported on the growing trends of online "pharming" and "phishing", in which a thief intercepts electronic information and runs away with it. The only way to protect information from this type of theft is a security freeze and AARP strongly recommends consideration of this remedy. Ms. Clifford handed out a testimony and fact sheet from Consumers Union on security freezes ([EXHIBITS #10](#) and [#11](#)). Ms. Clifford said the AARP is willing to assist the Committee in whatever manner it can and that she is available to assist the Committee.

02:32:58 REP. GALLIK asked what AARP tells its members regarding computer information protection and if it provides training for members. Ms. Clifford said information is provided through its national magazine, bulletins, and fraud workshops.

02:34:21 **Healthcare Provider Sector -- Bob Olson, Montana Hospital Association (MHA)**, discussed HIPAA, saying that Congress enacted it in 1996. HIPAA directs health care providers, insurance companies, and all covered entities to engage in new regulations to protect the privacy of health information. Mr. Olson explained the rigorous requirements that healthcare providers must meet to comply with HIPAA and how this meshes with Montana's Uniform Health Care Information Act. He noted that the federal rules were intended to standardize how medical records were treated but that states are able to enact stricter standards, if desired. He discussed emerging technology and said that it is very difficult to keep up with all of the different ways identity thieves attempt to gain access to private information. He related several personal experiences in which identity theft was attempted. Mr. Olson said there must be a process of balancing convenience and demand for information with protecting information.

Mr. Olson discussed the issue of notification for breach of security. He provided an example of a bank that lost its records, how the breach left many people very vulnerable to identity theft, and the fact the bank was not required to do anything more than notify the consumer that the information was lost. He said there is an urgent need for greater protection.

Mr. Olson said the HIPAA protections extend to not just providers but everybody they do business with, which means the protection is only as strong as the weakest link in the chain. Mr. Olson gave several examples of how information was breached through inadvertent mistakes, such as forgetting to erase the hard drive on computers before disposal, and said that everyone must become more aware of how data is handled and that this should be a consideration when creating law.

Regarding the court ruling on workers' compensation, Mr. Olson said the ruling had a chilling effect on medical providers and would have to be assessed.

02:48:27 Cort Jensen provided materials from the Attorney General's office, as requested by the Committee ([EXHIBIT #12](#) and [EXHIBIT #13](#)).

02:49:03 **Telecommunications Sector - Geoff Feiss, General Manager, Montana Telecommunications Association (MTA)**, said the scope of this issue is very broad and makes the potential for solution difficult. He supported and agreed with much of the information presented at the day's meeting. He discussed different methods and definitions of identity theft. Mr. Feiss noted that he recently learned that 26% of identity theft victims knew the person who committed the theft. He agreed with the privacy paradox issue, saying that it is relevant to the telecommunications industry. **TAPE 3 - SIDE A** Mr. Feiss updated the Committee with emerging telecommunications technology, saying that the new technology provides clear consumer benefits but does create information that would have to be protected. He said that he is of the opinion that many of the causes of identity theft are low tech, as are many of the solutions. He said some of the most effective measures at the state level would be to ensure consistency, enforcement, early intervention, early notice, and customer education. He also suggested providing additional support for the Office of Consumer Affairs and suggested adding a toll free number and more staff to assist Montana citizens. Mr. Feiss said the MTA is available to educate consumers on what to be watchful of and how to proceed when an incident takes place. He listed several measures for citizens to take to protect themselves from identity theft: check credit report yearly, guard social security number, guard personal information, watch for individuals who attempt to eavesdrop, shred documents before disposing of them, and be suspicious of telephone and online solicitors.

02:59:41 **Government Information Technology Sector -- Mike Boyer, Department of Administration (DOA)** said the issue of computer spyware had not been addressed previously in the meeting and cautioned the Committee members that it is an insidious problem. In reference to a comment made by Mr. Feiss, he said it is not enough to erase the hard drive on a computer before disposal and that a machine must go through a cleansing process before it can be considered safe to dispose of. Mr. Boyer then provided an overview of identity theft and discussed four main points ([EXHIBIT #14](#)):

- that it is a hostile world outside and a complex inside;
- responsibilities within the state;
- key issues; and
- actions already completed, actions underway, and actions anticipated.

03:10:52 REP. GALLIK asked if anyone has been prosecuted for attempting to break into state databases. Mr. Boyer said to his knowledge, there have been no prosecutions on the attempts. He said that most of the attempts originate in foreign countries and explained how computer programs are designed to search for vulnerable sites. Mr. Boyer said these types of perpetrators are all but

impossible to trace. REP. GALLIK said that perhaps policy makers should consider making the attempts a criminal offense. Mr. Boyer said that when hackers are caught, they get little more than a slap on wrist and a job as a high paying consultant. He said he was not prepared to say exactly what should be done but supported the idea of penalties for these crimes.

03:15:14 SEN. COCCHIARELLA asked if Montana has had any identity theft prosecutions and what the Montana university system is doing, if anything, to address this issue. Mr. Boyer said that Ray Ford, University of Montana - Missoula, and Mark Sheehan, Montana State University - Bozeman, would best be able to answer her question. He said there are many challenges facing the university system and that it faces the additional paradox factor, which is that a university environment, by its very nature, is a very open environment.

Mr. Jensen said that identity theft cases are being prosecuted, usually by county attorneys. The Attorney General's office does not conduct criminal prosecutions, but does assist the county attorneys in gathering information needed for the prosecution. He said he would try to find out the exact number of cases of identity theft prosecutions. Regarding computerized access, Mr. Jensen said in addition to the overseas factor, it is very time consuming and expensive to track these perpetrators and that currently, there is no power to prosecute.

03:19:08 REP. MCGILLVRAY asked if the State's policy on cleansing computers before disposing of them is in writing. Mr. Boyer said the policy is in writing and that he would provide copies to the Committee. He said it is modeled after the Department of Defense's Level 3 defense standards.

03:20:09 REP. MCGILLVRAY said he would like a copy. He asked how to detect spyware on a computer. Mr. Boyer said there are some tools available but spyware is difficult to detect. He described the symptoms indicative of spyware on a machine and said he would provide a knowledgeable contact person for REP. MCGILLVRAY if he wanted additional information. Mr. Boyer said an additional concern is that 36 counties utilize the state network and internet access. This provides a tremendous service to these counties but also provides great security challenges. Many counties do not have adequate funding or staff to properly maintain their computers, which makes the State system vulnerable. Mr. Boyer recommended that this issue be addressed.

## **PUBLIC COMMENT**

03:22:54 **Rep. Diane Rice, HD 71, and member of Identity Theft Working Group,** distributed an October 23, 2005, St. Petersburg Times article on identity theft ([EXHIBIT #15](#)). Rep. Rice read an excerpt from the article. She addressed the privacy paradox. She said that on one hand, consumers are told to never use their social security number, but on the other hand, it is required for many different documents. There have been multiple bills introduced to remove the requirement for social security numbers for hunting and fishing licenses and all have been opposed by the Department of Public Health and Human Services, which says such legislation would jeopardize federal funding. Rep. Rice said

Alaska, Wyoming, and New Hampshire have all passed legislation exempting the use of social security numbers. Montana has not reapplied for exemption since 2001 and Rep. Rice said that re-application should be done as soon as possible and would provide some solution. Issues in congressional legislation must also be dealt with, such as the Real ID Act, passed in the spring of 2005. Rep. Rice said she introduced HB 305 in the 2005 session, which would have prevented the Department of Justice from implementing this until Montana had time to discuss within the Legislature the impact of this bill. The Real ID Act will create a standardized driver's license for all 50 states and create a national database. This information, through the provisions of NAFTA, can be shared with Canada and Mexico. Rep. Rice said she views this as counterproductive legislation and that it would create many problems.

## **PART 2**

### **WORKERS' COMPENSATION ISSUES**

00:00:02 REP. KEANE called the meeting back to order.

00:00:58 **Mike McCarter, former Workers' Compensation judge**, distributed an outline to guide his discussion ([EXHIBIT #16](#)). Judge McCarter explained common fund doctrine, what type of situations give rise to a common fund, and provided examples. Judge McCarter also discussed eight pending common fund and potential common fund cases.

### **TAPE 3 - SIDE B**

00:30:35 SEN. COCCHIARELLA asked when the retroactive applicability year may be or how a determination of retroactivity will be made. Judge McCarter said there is no cut off date for retroactivity and the only possibility for cutting it off would be a statute of limitations or a LACHES defense. Regarding retroactivity, the United States Supreme Court laid down a three-factor test in a 1970s case and Montana has followed that test. The three factors are:

- determining whether or not clear law is being changed;
- whether or not it is equitable to apply it; and
- whether or not the plaintiffs or claimants are benefitted and the hardship of applying the retroactivity.

The Montana Supreme Court has said that if one of those three factors favors a claimant, then it is retroactive. This case was later disavowed by the Montana Supreme Court, but another U.S. Supreme Court case in the 1990s ruled that all judicial decisions are retroactive. Because the two lines of decisions did not reconcile, the Montana Supreme Court revisited the issue in 2004 and ruled that the factor test must be applied but in order not to be retroactive, the insurer or the defendant must show that all of the factors are in its/his favor. Judge McCarter said after his own review of several of the cases, he is doubtful that the argument will hold on appeal.

00:33:42 SEN. COCCHIARELLA asked for more explanation regarding the common fund fees taken out of a claimant's benefits to pay the prevailing attorney. Judge

McCarter the attorney fees are not added on to the benefits and that the insurer doesn't have any additional liability over and above what they have to pay the claimant.

- 00:35:26 REP. MCGILLVRAY said he is curious where the Constitution addresses cases number 7 and number 8. Judge McCarter said the Constitutional provision that was invoked to attack those provisions is the equal protection clause. Judge McCarter explained how the provision was used to rule on the cases.
- 00:39:43 REP. MCGILLVRAY asked if that would have a chilling effect on the insurance companies' right to contract. Judge McCarter said that is the argument that will likely be used in the appeal. He discussed the probable arguments that would be used by the two sides.
- 00:40:45 REP. GALLIK asked if there is an opt out provision for those claimants who don't want to be in the common fund for legal reasons. Judge McCarter said that is possible and has been done in a few instances. REP. GALLIK asked if that would also apply to the Satterlee case. Judge McCarter said a claimant will not have to settle and will keep his right to file an action.
- 00:44:23 SEN. BRUEGGEMAN asked Judge McCarter to speak to the impact of the recent Thompson decision. Judge McCarter said that he had not read the decision and could not comment.
- 00:45:00 SEN. COCCHIARELLA asked about the latitude that a workers' compensation judge has regarding constitutional decisions. Judge McCarter said the jurisdiction of a workers' compensation court is fairly broad so it can decide constitutional issues. If those constitutional decisions are not appealed, then they become law. If a case is appealed, the Supreme Court has the final say and will ultimately determine the issue. However, that does not prevent another case from being filed on the same issue, if the person filing was not a party to the original decision.
- Judge McCarter said it becomes awkward in situations where there is only a single judge with statewide jurisdiction because when a new case is filed, the judge must reconsider his own decision made in a previous case. It is not likely that the judge will change his mind, unless there are compelling reasons to do so. At the District Court level, one court may rule that law unconstitutional and another court, using the same facts and circumstances, may rule differently. That sort of conflict also occurs at the federal level.
- SEN. COCCHIARELLA asked for confirmation that a workers' compensation judge has the latitude to make any type of decision that a district court could make. Judge McCarter said that is true, within the jurisdiction of the court and within the statutory criteria.
- 00:48:24 REP. GALLIK asked for instance, if a workers' compensation court judge ruled that a state statute is unconstitutional and the ruling is appealed, what is the law between the time it is appealed and the time a Supreme Court decision is issued.

Judge McCarter said the decision is executed and becomes law unless there is a request for a stay of decision on appeal, which is usually what occurs.

## **TAPE 4 - SIDE A**

### **DEPARTMENT OF LABOR AND INDUSTRY PRESENTATION**

01:01:07 **Keith Kelly, Commissioner, Department of Labor and Industry (DOLI)**, gave overview of the Department: the Department has five divisions; has approximately 800 employees; its current biennial budget is \$136 million, up from \$121 million in the last biennium; 53% of revenues for the Department comes from the federal government; and 47% of revenues comes from state special revenue funds. Commissioner Kelly updated the Committee regarding the five divisions within the Department:

- **Centralized Services Division** - Effective October 1, 2005, all divisions and units have negotiated with their unions and approved a pay plan effective October 20, 2005. The Hearings Bureau heard, in fiscal year 2005, 1,140 unemployment insurance cases and 161 other cases, usually discrimination or civil rights cases.
- **Business Standards Division** - A new web page for licensing registration has been created. It has received approximately 2,200 hits per day and is available 24 hours a day, seven days a week. Twenty-seven of the Division's 40 licensing boards and programs can renew licenses online and approximately 20% of Montana licensees renew their licenses online. There are 142,000 documents available on the Division's website for downloading and approximately 34,000 documents are downloaded by consumers each month. Several Business Standards Division boards are going paperless and are using electronic transfer of information in an attempt to create greater efficiency and to decrease costs. The Bureau developed a new board member training manual in 2004 and in 2005, will convert the manual to an interactive CD for board members to train at their own convenience. The manual explains the role and responsibility of board members.
- **Buildings Codes Bureau** - Permitting problems experienced due to the high level of construction activity resulted in an emergency exemption to add five additional FTE to handle customer service (building permits).
- **Governor's Office of Community Service** - Montana Conservation Corps crews were mobilized to help winterize low-income Montana homes and the Corps also sent three crews to Louisiana to help with Hurricane Katrina cleanup.
- **Workforce Services Division** - The Department requested and received a waiver from the United States Department of Labor to modify the state plan to make Montana a single statewide planning area under the Workforce Investment Act. The reasoning for this request was to eliminate redundancies and to make the program as efficient and cost effective as possible.
- **Employer Relations Division** - The passage of SB 108 (independent contractor bill) had a large impact on the Division. The changes were needed to respond to a Supreme Court decision. The new process

requires verification and allows the Department the ability to perform field audits to check for compliance. It is projected that the new process will reduce the number of exemption certificate holders from 33,000 to 20,000. Work is ongoing to convert workers' compensation medical fee schedules to a resource-based relative values system to more accurately measure costs. Currently, Blue Cross Blue Shield, Medicare, and most private payers use this system. This will simplify and streamline the billing system for medical providers.

- Unemployment Insurance Division - Montana was one of the first states to offer assistance to hurricane struck Louisiana and has provided unemployment assistance to over 10,000 Louisiana citizens. The system was shut down to Montanans for a period of time daily to focus help the hurricane victims; this could be done without jeopardizing Montana workers because of the availability of online filing. Montana just received a Government to Citizens national award for its webpage design for unemployment online filing.
- Contributions Bureau - Unemployment Insurance Tax Accounts Receivables have been reduced from over \$18 million to less than \$9 million. The number of delinquent reports has been reduced from 12,000 to less than 3,000 in the same time period, which is a major improvement. The Unemployment Insurance Trust Fund is strong and is able to respond quickly. Montanans filed 56,000 benefits claims, with \$80 million paid out in unemployment benefits. The average benefit payment totaling about \$210/week.

Commissioner Kelly concluded his update by saying that the Department is operating effectively despite tight budgets.

01:23:29 SEN. COCCHIARELLA asked if the Subsequent Injury Fund for workers' compensation is being accessed more frequently now than in the past. **Jerry Keck, Director, Employment Relations Division**, said he would investigate and provide that information to SEN. COCCHIARELLA.

01:24:15 REP. KEANE said the board issue is a continuing problem. He said he has heard from constituents and board members, mostly regarding fee increases, and said there is a lot of controversy. The Committee will have to make decisions on board licensing and fees. Commission Kelly responded that work has been done to equalize fees and that most of the complaints are coming from the boards that have experienced a fee increase. He said some boards may have to consider merging in order to control costs.

### **WORK SESSION ON SJR 35**

01:27:42 Ms. Murdo asked the Committee to decide how the study group should operate. She asked the Committee if it wished to receive all the board information being provided or if the information should be routed to the study group only. REP. KEANE said he thought it should go to the study group. SEN. COCCHIARELLA requested that she get the information. Ms. Murdo said the information that is received electronically is being posted to the Committee website. Ms. Murdo presented a comparison of how boards are set up and administered in

neighboring states ([EXHIBIT #17](#)). The document covered a board by board comparison, such as budgets, licensees, renewal fee costs, structure, and costs.

#### **TAPE 4 - SIDE B**

Ms. Murdo said the study group has requested more direction from the Committee and has also requested that a member of the Committee participate. She said the group is considering dividing into subgroups and that the subgroups would meet independently without staff but would keep staff apprised of its work. Ms. Murdo asked the Committee for its input.

- 01:46:51 REP. KEANE said he didn't support broadening the SJR 35 study.
- 01:47:43 SEN. COCCHIARELLA asked if the work group is operating by the rule that special interests are to be set aside. Ms. Murdo said the work group members were all asked to deal with the broad issue of boards but she did not recall if she said specifically to not deal with their particular board. She said she did respond to individual people with issues specific to their own board that the work group would be dealing with the broad issue only.
- 01:48:57 SEN. COCCHIARELLA said it is her hope that a procedure for creating a board or creating licensure of a board will be the result of the SJR 35 study. There is a need to have a policy statement for a purpose of a board, how it would serve and protect citizens, and to develop basic ground rules for Montana regarding the existence of boards.
- 01:52:13 REP. GALLIK referred to *Summary of Montana Boards* ([EXHIBIT # 18](#) - athletic agents page) and asked if this program is wanted or needed. **Bart Campbell, Staff Attorney, LSD**, said that the legislation was drafted in response to a situation that arose at the University of Montana. The bill required licensing for agents to operate in Montana and was requested to protect student athletes and to regulate those agents who wish to represent athletes.
- 01:56:44 **Margaret Morgan, Morgan Consulting**, asked to respond to the confusion regarding the direction of the work group from her perspective. She explained that many attending the work group meeting had issues with fees, and with who is administering the boards, or complaints about individual board situations. Ms. Morgan pointed out that these issues are not addressed in the resolution and that she left the meeting with the idea that no one knew what to do. She said that is why the work group requested direction from the Committee and is why the work group decided to divide into subgroups in order to address the many concerns.
- 01:59:51 SEN. COCCHIARELLA said that she had heard similar reports. She agreed that the group came to a good conclusion of dividing up to address the SJR 35 resolution, which is an appropriate approach. She said it is a good beginning point and that issues, such as fees, will eventually be addressed, if a good model is built. She said the Committee had not had adequate discussion on what should be done and what it wanted the work group to accomplish.

- 02:02:07 Ms. Murdo said she had consulted with Todd Everts, Staff Attorney, Legislative Environmental Policy Office (LEPO), about how the Environmental Quality Council (EQC) has dealt with the issue of workgroups. She related how the EQC operates and staffs its workgroups. Ms. Murdo said there are many people willing to work on this issue. The Committee also has the option of not dealing with SJR 35.
- 02:04:19 REP. KEANE said the issue must be dealt with.
- 02:04:37 **Representative Paul Clark**, said he is in the unique position of being a legislator and of being appointed to a recently created board, established in the 2003 Legislature under HB 628. Rep. Clark distributed a booklet [EXHIBIT #19](#). Rep. Clark said the working group is badly in need of leadership but that he is confident that with some direction, the group can accomplish the directives of the study resolution. He said that the board issue arises at every legislative session and that it is his opinion that it would be better dealt with between the boards and the associations. He said it has been a learning experience to serve on a board.
- 02:07:33 REP. KEANE agreed with Rep. Clark's point that the Legislature has repeatedly had to deal with board issues, and that he thinks the process has proved to be ineffective. REP. KEANE recommended that the work group first work on how to form a board and what constitutes a board's right to exist. He said the issue of fees must also be dealt with and suggested that the Department explain the new fee matrix to the working group and how the matrix is working, so the issue can be thoroughly discussed.
- 02:09:39 SEN. STEINBEISSER said that he voted for SJR 35 resolution so that the issue of board consolidation could be examined. REP. KEANE said that board size and cost of operation could be included in the fee discussion. REP. KEANE said he would like to have a process for creating a new board.
- 02:10:59 REP. MILBURN said he would like there to be, as a part of the process, a form showing why the new board is necessary.
- 02:11:23 REP. KEANE asked for volunteers to help lead the work group. SEN. COCCHIARELLA suggested forming a subcommittee of three Committee members to attend the work group. REP. KEANE appointed SEN. COCCHIARELLA, REP. MCGILLVRAY, and REP. MILBURN as the Subcommittee members, saying they would provide the leadership and perspective needed and that SEN. COCCHIARELLA would chair the subcommittee.

### **SB 133 REPORT AND DISCUSSION**

- 02:23:57 Mr. Campbell discussed the options for encouraging implementation of SB 133 ([EXHIBIT #20](#)). Mr. Campbell said it is still his opinion that SB 133 is constitutional and that the Legislature, as a body, passed a law mandating certain actions, and that it must be implemented.

02:32:46 REP. MILBURN said the Governor had originally listed two reasons why SB 133 is not constitutional and asked if there is another reason why he will not appoint the board. Mr. Campbell said that the issue of tax credits may be an additional reason for the Governor's reluctance to implement the bill, but that he did not want to speak for the Governor.

02:34:07 REP. KEANE addressed the letter to the Committee from Governor Schweitzer, received the day before the meeting ([EXHIBIT #21](#)) He said his interpretation of the Governor's letter is that it doesn't say he won't appoint the board, but that he needs clarification that there would not be ramifications for the State if he did appoint the board. He asked REP. GALLIK to comment. REP. GALLIK agreed with Mr. Campbell's assessment that until the bill has been declared unconstitutional, it is constitutional and should be implemented. He said his interpretation of the Governor's letter is that the Governor has great concern and will leave it in limbo.

#### **TAPE 5 - SIDE A**

02:36:02 REP. KEANE said the question of why a Montana Equity Capital Investment board is needed must be answered first. He said the board would be a tool for the State of Montana to use to develop economic opportunities for Montana. He pointed out that other states have created these types of boards and that this model was chosen because it is a proven model. He thought that if the Governor's concerns about a lawsuit or SB 133 being an unfunded mandate are addressed, the Governor would be willing to appoint a board.

02:37:49 **Jon Marchi, Chairman, Big Sky Airlines; Chairman, Glacier Venture Fund; Owner of Marchi Angus Ranch,** said the constitutional issues in SB 133 have been addressed in depth in the bill drafting process, long before it was introduced in the 2005 Legislature. He said the composition of the five person board is very important and that he had written a letter to the Governor addressing his concern ([EXHIBIT #22](#)). He said one of the issues pointed out by the Governor's staff and not yet discussed by the Committee is the level of involvement, to date, of Credit Suisse First Boston (CSFB). Mr. Marchi said there are only six months remaining on the Montana Board of Investments contract with CSFB. No money has been committed yet. Mr. Marchi discussed the compatibility of the CSFB initiative with SB 133 and said the two are very compatible with one another and are not competitive. Mr. Marchi said it would be great if both programs could be had, but that SB 133 is needed because it concentrates on Montana. Mr. Marchi said his calculations indicate that for every month this is delayed, Montana businesses are being deprived of access to approximately \$500,000.

02:43:48 REP. KEANE asked if the Committee could be assured that, if the Governor appoints the board, that there will not be a cost to the State of Montana. Mr. Marchi said yes, that he could assure the Committee of that. He asked to have Brian O'Keefe address this issue.

- 02:44:45 REP. GALLIK asked if the State of Montana could legally treat this board differently. Mr. Campbell said that this action is legal under Title 17, which states that a government entity can take money by bequest. The only general obligation is that the money taken for a specific purpose must be used for that purpose.
- 02:46:09 **Brian O'Keefe, Associate with AA Capital Partners, Inc. of Chicago, Illinois,** said that he is confident that funds could be procured and that all of the required procedures, such as proper documentation and hiring of a fund manager, would be followed. Mr. O'Keefe said to his knowledge, five private equity firms have actively pursued this opportunity. Many of the up front costs could be borne by the fund manager, rather than the State. He said the cost for the board to meet would be minimal and that options, such as a teleconference meeting, could be used to minimize expenses. Mr. O'Keefe said there was approximately \$12 billion invested in the private equity market in the United States in the last business quarter alone and that Montana was one of 14 states that did not benefit from those investments. He said that there are no investment dollars to draw entrepreneurs to Montana and that there are no entrepreneurs to draw investment dollars. He said Montana has to create the supply of capital up front to break this cycle and bring investments into the state.
- 02:50:08 REP. KEANE said the Committee would be willing to draft a letter to the Governor reiterating Mr. O'Keefe's position that SB 133 could be implemented at no additional cost to the State. Mr. O'Keefe said that such a letter would have to be worded carefully to make clear that the board would serve without compensation until a fund manager is hired and that the RFP process would be pursued through private funding, to be reimbursed by the State at a later date.
- 02:51:53 Ms. Murdo pointed out that SB 133 does say that the board can receive compensation, so if a board member requested compensation, he would have to be paid.
- 02:52:22 REP. GALLIK asked, if Mr. O'Keefe's firm ended up being the fund manager and the bill was implemented using the approach described by Mr. Marchi, if that could create concern from a government watchdog organization or concerned citizens. Mr. Marchi said the fund manager would be reimbursed over time for those costs but not out of the profits of the fund. REP. GALLIK said because of the legal opinions and the Governor's concern that this is an unfunded mandate, this Committee has been forced to do "government by bake sale". If it turns out that the people who have been pushing this legislation from the beginning are the ones hired to administer the program, one could ask why was legislation needed and if this could have been accomplished in the private sector. Mr. O'Keefe agreed that it would be inappropriate for him to participate in writing the RFP and then be selected as the fund manager. He said that he has deliberately avoided being involved in that process in any way. Mr. O'Keefe said that once the fund manager is selected, all costs from that point could be paid by fund manager and be paid back later. REP. KEANE asked if any interested party could bid in the RFP process. Mr. O'Keefe said yes. REP. KEANE said that the board would establish criteria and select the fund manager based on that criteria. He said the

remaining issue is the constitutionality issue and that in his opinion, that is also related to the potential cost to the State. The Governor needs assurance that if there is a test case or a constitutional challenge to this that the State won't have to pay the costs. Mr. Campbell said the Attorney General would be required to defend the law, in the event of a lawsuit.

02:59:16 **Andy Poole, Department of Commerce**, said regarding the administrative costs of implementing SB 133, that not only would an RFP create a cost but that the cost of staff must also be taken into consideration.

03:00:11 SEN. BRUEGGEMAN stated that the discussion had been one of the most painful discussions he had ever sat through. He said the Legislature created the Office of Economic Development in 2000 for the sole purpose of fostering economic development. He said it is his opinion that "red herrings" of cost and constitutionality are being thrown out by the Governor's Office. If the Governor had the will to implement the law, the constitutionality issue could be overlooked, for the good of the State and that the State is stepping over billions to pick up pennies by not moving forward with the bill. This isn't a question of money or of constitutionality. It is a fundamental disagreement with the policy of this bill and even though this bill has been signed into law, it isn't being implemented. He said the Committee could consider using a *writ of mandamus* but that a *writ of mandamus* is a treacherous path and the fact that it is even being discussed should be an embarrassment to the entire State. SEN. BRUEGGEMAN said he doesn't like the idea of having private entities solely fund this because it does cast a strange light on the appearance of the independence of the board. He suggested that the Committee send another letter with a very specific cost breakdown and that he would fully support a supplemental bill request, in the event of a special session. He said he believes the funds exist within the Office of Economic Development and that this is not about funding or constitutionality, but rather, a fundamental disagreement with the law.

03:05:12 REP. KEANE recommended sending one more letter to the Governor asking him to appoint a board, along with a specific cost list.

03:06:49 SEN. BRUEGGEMAN asked that the letter be very specific and clearly state that the Committee believes there is a mechanism for funding without incurring a cost to the State, and if that is the case, except for the RFP, ask if the Governor is willing to appoint the board and begin the process. He said the Committee should exhaust all options before pursuing a *writ of mandamus*.

03:07:46 REP. GALLIK asked if there are any entities involved with syntropes or synfuels that are considering coming to Montana, should there be a venture capital fund established. He said that could make a difference.

03:08:21 **Debra Hayden, Executive Director, Gateway Economic Development**, said that she supports SEN. BRUEGGEMAN's comment about having the Office of Economic Development fund the implementation of SB 133 and of addressing the issue in a special session. She suggested the possibility of involving the Board of Investments to perform many of the board functions and then use the

SB 133 board as an oversight group. Ms. Hayden said the Board of Investments works with investment groups and examines fund managers regularly in the course of its normal operations. Ms. Hayden said another possibility would be to have interested and qualified parties of an independent nature form an ad hoc advisory committee to the Governor to help implement SB 133. Ms. Hayden said that there are people willing to act without compensation to get SB 133 implemented.

03:11:57 Mr. O'Keefe responded to REP. GALLIK's question about a coal gasification project, saying his company is considering several possible investment opportunities in Montana. He said that Montana has a lot of great investment concepts and opportunities related to energy development that will add interest and attract investors.

03:14:41 **Liz Marchi, President, Montana West Economic Development, and CEO, Flathead County Port Authority**, said that over the last four years, she has seen small investments, averaging about \$50,000, to two over \$5 million. Ms. Marchi said venture capitalists don't invest in Montana because there is no infrastructure to have oversight of and guide these companies. A key piece of SB 133 is that the venture capitalist has to establish an office in the State, which would indicate to investors that Montana intends to provide support for venture capital investments. Ms. Marchi said she predicts growth in the coming years and that a very critical opportunity will be missed if there is not quick action. Ms. Marchi supports the funding of SB 133 through the Governor's Office of Economic Development and does not support the involvement of the Board of Investments in the management of SB 133 investment funds.

#### **TAPE 5 - SIDE B**

03:18:02 REP. KEANE said the Committee will send one more letter to the Governor asking him to implement SB 133. REP. KEANE said that the concern about the constitutionality of SB 133 has been addressed by Greg Petesch's legal opinion. He suggested that the letter point out that other states have successfully implemented similar programs and that the Committee wishes Montana to have that same success by implementing SB 133.

03:19:04 REP. KEANE **moved** to send the letter to the Governor. The **motion passed** on a unanimous voice vote. SEN. BRUEGGEMAN reiterated for staff what should be included in letter

- that the constitutional issue has been resolved to the Committee's satisfaction;
- that the Committee believes the monetary issue is navigable; and
- if the Governor decides against implementing SB 133, SEN. BRUEGGEMAN said he would like an explanation of the decision.

REP. KEANE said the Committee will continue to work with the Governor's Office to address any further concerns.

03:20:04 Mr. Campbell said he and Ms. Murdo would review the minutes to make certain the letter contained all of the points discussed by the Committee. SEN. BRUEGGEMAN asked that copies of the draft letter be provided to Committee members.

### **RULE REVIEW ISSUES**

03:20:57 REP. MILBURN said it was brought to his attention that under a Department of Labor rules hearing for HB 249 ([EXHIBIT #23](#)), which created the Big Sky Economic Development Fund, that the application for this fund stipulates that there would have to be an increase of at least 10 jobs. He said that the intent of the legislation, as passed by the Legislature, was that there be no stipulation for the number of jobs created. REP. MILBURN asked that the Committee address this. Mr. Campbell said he recalled the discussion and suggested that the Committee allow him to contact the Department of Commerce for discussion and report back to the Committee. He said if the Committee is dissatisfied with the Department's response, an appropriate response could be discussed at a future meeting.

03:24:28 Mr. Poole said there would be no need for Mr. Campbell to contact the Department because this issue had already been addressed by the Department at the rules hearing two weeks previous. He said the Department made the decision to remove the stipulation.

03:25:42 Mr. Campbell said 2-4-302, MCA, passed in 1997, requires an agency, when adopting rules for the first time, that when the substantive work begins on those rules and at the time that notice of adoption is published, that they inform the sponsor of the bill. Mr. Campbell said it has been brought to his attention that the statute is not always being followed. He said individual departments will be contacted and asked to follow the statute and that the State Administration and Veterans' Affairs Interim Committee plans to draft legislation regarding this issue.

03:29:58 **Eve Franklin, Montana Nurses Association**, provided and discussed a packet of information regarding a rules hearing for the licensing of medical assistants scheduled for November 17, 2005:

- HB 321 ([EXHIBIT #24](#)) from the 2003 session;
- an October 23, 2003 letter to the Economic Affairs Committee regarding this issue ([EXHIBIT #25](#));
- the rules notice published by the Department for the November 17, 2005, hearing ([EXHIBIT #26](#)); and
- a letter from the Montana Nurses' Association to the Committee asking that the rules be scrutinized ([EXHIBIT #27](#)).

REP. FRANKLIN said this the rules, as proposed, do not meet the Montana Administrative Procedures Act (MAPA) and that this is not a scope of practice issue but a patient safety issue.

03:34:41 REP. KEANE said this issue be addressed at the next meeting and asked REP. FRANKLIN to continue working with Mr. Campbell.

## UPDATE ON GOVERNOR'S ENERGY CONFERENCE

03:35:48 REP. KEANE asked for an update on the Governor's energy conference held recently in Bozeman. Ms. Murdo said she has prepared a report on the energy summit ([EXHIBIT #28](#)) and asked the members to please call her if they have questions.

## NATIONAL CONFERENCE OF STATE LEGISLATURES TRAINING OPPORTUNITY

03:36:24 **Susan Fox, Research Analyst, LSD**, reported that the National Conference of State Legislatures (NCSL) has agreed to come to Helena to conduct a one-day seminar to provide strategies to empower low-income working families ([EXHIBIT #29](#)). Ms. Fox said she is trying to schedule the training for January 2006. She asked the EAIC to consider co-sponsoring and/or attending the conference, considering the potential economic impact this training could have on Montana families. Ms. Fox briefly discussed the topics that would be covered at the conference. REP. KEANE said the Committee would participate and asked Ms. Fox to coordinate with Ms. Murdo on the specifics of the conference. He said he supports the idea of trying to help low-income Montana families gain economic independence.

## INSTRUCTIONS TO STAFF AND ADJOURNMENT

03:39:11 REP. KEANE asked to have a letter drafted to the Blue Cross-Blue Shield insurance company from the Economic Affairs Committee requesting that social security numbers be removed from the state health insurance cards. Mr. Campbell suggested the issue be put on the February agenda.

03:40:15 Ms. Murdo said the next meeting is scheduled for February 10, 2006. She noted that Judge Jim Shea, Workers' Compensation Court, has already accepted an invitation to address the Committee on the February 10 date. Ms. Murdo said the SJR 35 Subcommittee may need funding for a teleconference call. REP. KEANE **moved** to approve funding for a teleconference call for the Subcommittee. The **motion passed** on a unanimous voice vote.

03:41:23 With no further business, REP. KEANE adjourned the meeting at 5:15 p.m. The next meeting of the Economic Affairs Committee will be held on February 10, 2006, in Helena, Montana.

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