

March 5, 2003

The Honorable Ben Ysursa
Secretary of State
HAND DELIVERED

Re: Certificate of Review
Proposed Initiative to Create a Sales Tax Exemption for Food

Dear Mr. Ysursa:

An initiative petition was filed with your office on February 12, 2003. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, this office's review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." The opinions expressed in this review are only those which may affect the legality of the initiative. This office offers no opinion with regard to the policy issues addressed or the potential revenue impact to the state budget.

BALLOT TITLE

Following the filing of the proposed initiative, our office will prepare short and long ballot titles. The ballot titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, if petitioners would like to propose language with these standard in mind, we would recommend that they do so and their proposed language will be considered.

MATTERS OF SUBSTANTIVE IMPORT

Petitioners seek to create a new section in the exemptions to the Sales Tax Act, Idaho Code §§ 63-3601, *et seq.* The purpose of the proposed initiative is to exempt "food products" from the sales and use tax. The definition of "food products" is not spelled out in the proposed statute, but instead is identified as "those items that can be purchased by food stamps issued by the Department of Agriculture of the United States of America" and a "list of such items can be found in C.F.R. 271.2, as it presently reads, or as it may be amended to read in the future." There are several problems with this reference to the federal regulation which may constitute an unconstitutional delegation of state legislative power to another government.

A. A Function of the Legislature Cannot Be Delegated to Another Entity

Article III, § 1 of the Idaho Constitution vests the legislative power of the state in the senate and house of representatives, and in the people through the initiative process. This legislative power cannot be delegated to any other governmental authority. State v. Nelson, 36 Idaho 713, 213 P. 358 (1923). In Idaho Savings & Loan Ass'n v. Roden, 82 Idaho 128, 350 P.2d 225 (1960), the legislature enacted a statute which, as a condition precedent of doing business, required all local savings and loans to comply with the regulations adopted by certain federal agencies, and abide and conform with any amendment to Title 4 of the National Housing Act (12 U.S.C.A. §§ 1701, *et seq.*) which may become effective after the Idaho statute. The court struck down the Idaho statute, holding it was an unconstitutional delegation of authority contrary to art. III, § 1. The court held that all legislative power is vested in the legislature of the State of Idaho, and the legislature cannot delegate its authority to another government or agency in violation of the Idaho Constitution. Idaho Savings and Loan v. Roden, 82 Idaho at 134, 350 P.2d 228-29.

The same rationale applies to legislation enacted by the initiative process. Laws passed by initiative are on equal footing with legislation enacted by the legislature, and the two must comply with the same constitutional requirements. Westerberg v. Andrus, 114 Idaho 401, 757 P.2d 664 (1984). In short, an initiative cannot delegate a legislative function to another governmental entity.

Here, the proposed initiative refers to the definition of food as contained in the Code of Federal Regulations, as it may be amended from time to time. It appears that by using this definition, the drafters of the initiative may be delegating the legislative function to another governmental body in violation of art. III, § 1. A court of competent jurisdiction could find all or part of the exemption initiative, if enacted, to be unconstitutional.

One remedy the drafters should consider is to list the specific items from the Code of Federal Register as it exists in its present state, or to develop a different definition of food and specify that in the proposed statute. One possible source for a uniform definition of “food and food products” is contained in the proposed multistate “Streamlined Sales and Use Tax Agreement.” For your reference, a copy of the agreement may be found on the web page of the National Conference of State Legislatures (www.ncsl.org).

B. The Definition of “Food Products” is Confusing

Notwithstanding the above concern, the reference to the Code of Federal Regulations is flawed for several other reasons. First, the correct citation should be 7

C.F.R. § 271.2 (2003). As it now reads, the initiative refers to “C.F.R. 271, Section 271.2.”

Second, there is no definition of “food products” in the referenced federal regulation. There is a definition of “eligible foods” which includes, among other things, “any food or food product intended for human consumption except alcoholic beverages, tobacco, and hot foods and hot food products prepared for immediate consumption.” 7 C.F.R. § 271.2. Thus, the reference to “food products” should, at a minimum, be changed to “eligible foods.”

The definition of eligible foods in C.F.R. excludes hot foods prepared for immediate consumption. The proposed initiative statute excludes food products when furnished, prepared, or served for consumption at or near the location where the food products are sold. Thus, in some respects, the exclusions overlap and may result in some confusion. For example, since most restaurant food is excluded in the C.F.R. definition, is the statute attempting to exclude other food or is it simply repetitive? The solution to this problem is dependent upon the definition of food that the drafters adopt.

CONCLUSION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Ronald D. Rankin by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

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