



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WARDEN

January 5, 2006

**VIA HAND DELIVERY**

The Honorable Ben Ysursa  
Idaho Secretary of State  
STATEHOUSE

Re: Certificate of Review  
Proposed Initiative to Increase Sales and Use Taxes and Apply Revenues to  
Public Education

Dear Secretary of State Ysursa:

We reviewed the initiative petition filed with your office on December 5, 2005. As required by Idaho Code § 34-1809, we offer the following advisory comments. Due to the limited time within which we must respond and the complexity of the legal issues raised in this petition, our review can address only general issues or areas of concern. We cannot provide in-depth analysis of each issue that may present problems. Further, the review statute provides that the Attorney General's recommendations are "advisory only." The petitioners are free to "accept or reject them in whole or in part." Our review addresses only matters that may affect the initiative's legality. We offer no opinion about the policy issues raised by this proposed initiative.

**BALLOT TITLE**

Following the filing of the proposed initiative, we will prepare short and long ballot titles. The titles should impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. If petitioners wish to propose language with these standards in mind, we recommend that they do so. We will consider their proposed language in our preparation of the titles.

**MATTERS OF SUBSTANTIVE IMPORT**

**Summary of the proposal:**

We understand the proposed initiative intends the following results:

1. Two separate sections of the initiative set the rate of tax of sales and use tax imposed by the Idaho Sales Tax Act at six percent (6%) beginning on July 1, 2007.<sup>1</sup>
2. The additional revenue raised is to be placed into an "Idaho Public Schools Investment Fund" that would be created by the initiative.<sup>2</sup>
3. It directs that the revenue placed in the Idaho Public Schools Investment Fund be used for specified purposes related to public schools.<sup>3</sup>
4. Local school districts are required to make annual accountability reports about the use of the revenue and make the reports "easily available to the general public."<sup>4</sup>
5. It expresses several responsibilities and limitations on the Idaho legislature.
  - The operative language raising the sales tax rate requires that the increase rate be "maintained" at the six percent rate.<sup>5</sup> This seems to be an attempt to limit the ability of the legislature to reduce (or increase) the rate after the time the initiative becomes effective.<sup>6</sup>
  - It charges the legislature to develop "an alternative state-based revenue stream" in the event the legislature increases the sales and use tax rate before the effective date of the initiative.<sup>7</sup>

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<sup>1</sup> Proposed Idaho Code §§ 33-910 and 33-916.

<sup>2</sup> Proposed Idaho Code § 33-911.

<sup>3</sup> Proposed Idaho Code §§ 33-911 & 33-912. The former section provides the funds "shall be utilized for funding public education at the K-12 level." The latter limits the use of the funds to nine specified purposes and further provides that local school districts must use at least 90 percent of the revenue for "classroom instruction and support."

<sup>4</sup> Proposed Idaho Code § 33-913.

<sup>5</sup> See footnote 1.

<sup>6</sup> Ordinarily a tax rate, once set by law, remains in place until such time as it is changed by an amendment or repeal of the statute setting the rate. Thus, the "and maintained" language is either an attempt to direct future legislative action or it is unnecessary surplus. The rules of statutory construction advise against construing the statute to include surplus language. Eby v. Newcombe, 116 Idaho 838 (1989); Magnuson v. Idaho State Tax Commission, 97 Idaho 917 (1976).

<sup>7</sup> Proposed Idaho Code § 33-910.

- It requires that funds raised by the initiative “shall be utilized for funding public education at the K-12 level.”<sup>8</sup>
- It directs the legislature to enact prescribed minimum appropriations for “K-12 public school support” and limits the ability of the legislature in future years to reduce the “general account appropriation for K-12 public school support.”<sup>9</sup>
- It specifically directs the actions of the “2007 Idaho Legislature, in establishing the general account appropriation for K-12 public school support for fiscal year 2008.”<sup>10</sup>
- It directs that the Idaho legislature place on the general election ballot in 2020 a ballot question relating to the reauthorization of the act.<sup>11</sup>

**Comments:**

The Attorney General’s Office is required to “review the proposal for matters of substantive import and shall recommend to the petitioner such revision or alteration of the measure as may be deemed necessary and appropriate.”<sup>12</sup> We have reviewed the initiative and offer the following recommendations.

**General Comments:**

The language needs more specificity in its financial controls and accountability. We understand the language to require the annual “general account appropriation” for public schools to include funds from several sources,<sup>13</sup> including the proposed Idaho Local Public Schools Investment Fund, which shall then be “distributed to local public schools as provided in chapter 10, title 11, Idaho Code.”<sup>14</sup> There are several conflicts and ambiguities in this process that need clarification. First, the funds from the Idaho Local Public Schools Investment Fund will be subject to limitations that may not apply to

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<sup>8</sup> Proposed Idaho Code § 39-911.

<sup>9</sup> Proposed Idaho Code § 33-914.

<sup>10</sup> Proposed Idaho Code § 33-916(b)

<sup>11</sup> Proposed Idaho Code § 33-917.

<sup>12</sup> Idaho Code § 34-1809.

<sup>13</sup> Proposed Idaho Code § 33-914.

<sup>14</sup> Proposed Idaho Code § 33-915.

other funds in the annual public schools appropriations. Simply lumping the funding sources together may result in losing the ability to account for the earmarked funds, thereby making the required annual accountability reports<sup>15</sup> problematic at best.

The initiative could be improved by using more consistent language to describe the schools or districts to which the additional revenue to be raised is to be distributed. For example, proposed Idaho Code § 33-912 provides that "local school districts" shall spend the revenue to help improve "local schools" which includes providing support of "all public schools." Proposed Idaho Code § 33-914 provides the additional revenues are to be included within the appropriation for "K-12 public schools." These inconsistent terms lead to potential confusion over "local schools" vs. "public schools"<sup>16</sup> as well as potential confusion over the participation of charter schools in the proposed additional funding. All charter schools are public schools<sup>17</sup>. Some charter schools have been authorized by school districts,<sup>18</sup> and some charter schools have been authorized or otherwise fall under the jurisdiction of the Public Charter School Commission.<sup>19</sup> All public charter schools are operated by nonprofit entities and function independently of the governing board of the entity that chartered them.<sup>20</sup> However, the chartering entities remain responsible to see that their authorized public charter schools operate within the bounds of the approved charter<sup>21</sup> and applicable law.<sup>22</sup> Consequently, the proposed legislation needs to clarify the participation of charter schools in the proposed funding mechanism and the level of participation of the chartering entities and of the directors of the nonprofit entities that operate the charter schools with respect to reporting obligations and the like.

#### Specific Comments:

**Item 1.** It is unclear why the operative language "[t]he sales and use taxes imposed upon each sale or purchase subject to taxation under the Idaho Sales Tax Act, Chapter 36, Title 63, Idaho Code shall be returned to and maintained at the six percent (6%) rate

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<sup>15</sup> Required by proposed Idaho Code § 33-913.

<sup>16</sup> The terms "local school districts" and "local schools" imply a distinction between districts and schools that are "local" and those that are not. Unless a distinction is intended (in which case the distinguished class requires a definition), the word "local" is surplus and should be stricken.

<sup>17</sup> Idaho Code § 33-5203(1) provides that "[p]ublic charter schools shall be part of the state's program of public education."

<sup>18</sup> Idaho Code § 33-5203(3).

<sup>19</sup> Idaho Code §§ 33-5203(5) and 33-5207(6).

<sup>20</sup> Idaho Code § 33-5204(1).

<sup>21</sup> Idaho Code § 33-5209.

<sup>22</sup> Idaho Code § 33-52010(2).

in effect on June 30, 2007” is reiterated in proposed Idaho Code §§ 33-910 and 33-916. Only the latter follows the language with the phrase “effective July 1, 2007.” Rules of statutory construction require that all language in a statute be given some effect.<sup>23</sup> Thus, the unnecessary repetition raises possible interpretations that are not consistent with the petitioner’s apparent intent. We recommend modifying the language to remove the repetition.

**Item 2.** As written, the requirement that the revenues received as a result of the rate change be placed in the specified fund requires that any expenditure from the fund be by future appropriation by the legislature.<sup>24</sup> We do not understand the language that the funds “shall be utilized” for public education to constitute an appropriation. If it is the petitioner’s intent to effect an appropriation, this language should be modified accordingly.<sup>25</sup>

The initiative requires that the “portion of the increased revenues, after refunds, derived from” the increased rate “shall be placed in the ‘Idaho Local Public Schools Investment Fund.’”<sup>26</sup> This language takes no account of Idaho Code §§ 63-3203 or 63-3709. These reduce distributions for tax anticipation notes and certain multi-state tax collections.

**Item 3.** The initiative limits the purposes for which the funds raised by the increase in sales and use tax rates may be used. However, these limitations are expressed differently in different parts of the initiative. Proposed Idaho Code § 33-911 says the new revenue must be used for “funding public education at the K-12 level.” Proposed Idaho Code § 33-912(a) says it must be used on “any” of nine designated purposes. Proposed Idaho Code § 33-912(b) says 90% must be used for “classroom instruction and support.” These limitations may not be consistent. We recommend a single provision setting out the petitioner’s intent in regard to the use of the funds. That provision would be improved by a definition of “classroom instruction and support.”

The proposed initiative charges the legislature<sup>27</sup> with developing an “alternative state-based revenue stream” in the event the legislature increases the sales and use tax rates before the effective date of the initiative. The alternative must hold “funding for all

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<sup>23</sup> Potlatch Corp. v. U.S., 134 Idaho 912 (2000); Peterson v. Franklin County, 130 Idaho 176 (1997).

<sup>24</sup> Art 7, § 13, *Idaho Constitution*, “No money shall be drawn from the treasury, but in pursuance of appropriation made by law.”

<sup>25</sup> See Idaho Code § 33-1513 for an example of funds “continuously appropriated,” in this instance for pupil transportation.

<sup>26</sup> Proposed Idaho Code § 33-911.

<sup>27</sup> See Item 5 below for a discussion of the effectiveness of such a charge.

other existing public services harmless.”<sup>28</sup> No standard by which the legislature or a court could determine if this requirement has been met is expressed. There is a similar problem with the requirement that the annual general account appropriation “augment, rather than replace K-12 public school support . . . .”<sup>29</sup>

The proposed initiative requires that the “annual general account appropriation for K-12 public school support” include “an annual inflationary factor, based on a percentage change in the consumer price index for all urban consumers.”<sup>30</sup> Greater specificity about how to make this calculation would remove doubt about which potential calculation is correct.<sup>31</sup>

The same section requires that the “annual general account appropriation for K-12 public school support” include “federal funds.”<sup>32</sup> The reference to federal funds is problematic because their allocation, distribution, and use is governed by federal and not state law.

**Item 4.** Our only recommendations regarding the requirements in proposed Idaho Code § 33-913 for local accountability reports on use of revenues relate to the ambiguity of the term “local school district” discussed above under general comments.

**Item 5.** The multiple provisions expressing limitations and duties for the legislature are problematic. Efforts to direct or limit actions by future sessions of the legislature are of no legal effect. The initiative process in Idaho is limited to proposing and adopting changes in statutory law.<sup>33</sup> Initiative legislation is on equal footing with the legislation enacted by the Idaho legislature.<sup>34</sup> Like any other statute, a statute enacted by initiative may be repealed or amended by the legislature.<sup>35</sup> This power to make, repeal, or amend existing law is constitutionally based.<sup>36</sup> A statute may not usurp a

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<sup>28</sup> Proposed Idaho Code § 33-910.

<sup>29</sup> Proposed Idaho Code § 33-914

<sup>30</sup> Proposed Idaho Code § 33-914(e).

<sup>31</sup> An example of such language can be found in Idaho Code § 63-3024.

<sup>32</sup> Proposed Idaho Code § 33-914(b).

<sup>33</sup> See Chapter 18, Title 34, Idaho Code.

<sup>34</sup> Westerberg v. Andrus, 114 Idaho 401 (1988); Simpson v. Cenarrusa, 130 Idaho 609 (1997)

<sup>35</sup> Luker v. Curtis, 64 Idaho 703 (1943); Gibbons v. Cenarrusa, 140 Idaho 316 (2002).

<sup>36</sup> Article III, section I, *Idaho Constitution*.

constitutionally granted power.<sup>37</sup> It follows that future legislatures are not effectively constrained by these provisions.

### 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 the petitioner, Idaho Education Association, c/o Jim Shackelford, P.O. Box 2638, Boise, Idaho 83701, by deposit in the U.S. Mail of a copy of this certificate of review.

Sincerely,



LAWRENCE G. WASDEN  
Attorney General

Analysis by:

Theodore V. Spangler, Jr.  
Deputy Attorney General

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<sup>37</sup> Williams v. State Legislature of Idaho, 111 Idaho 156 (1986)