



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

February 3, 2010

The Honorable Ben Ysursa  
Idaho Secretary of State  
**STATEHOUSE MAIL**

Re: Certificate of Review  
Proposed Initiative Relating to the Health Supplements and Therapeutics  
Protection Act

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 19, 2010. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our 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 that may affect the legality of the initiative. This office offers no opinion with regard to the policy issues raised by the proposed initiative.

### BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must 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 titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

### MATTERS OF SUBSTANTIVE IMPORT

At the outset, I note that there is a typographical error in the proposed initiative ("Initiative"). The last sentence of Section 29-9102 states, "[t]his Act shall not be construed to limit the State of Idaho's ability in its capacity to *regulation* pharmaceutical or biologic therapeutics." (Emphasis added) I believe that the sponsors intended to state "regulate"

instead of "regulation." If this is correct, the sponsors should correct this error.

Further, in Section 29-9103, the Initiative defines "Nutrition or therapeutic product." Other sections of the Initiative refer to "*nutritional* or therapeutic product." (Emphasis added.) The Initiative should be drafted so that the term is consistent throughout its language.

### **The Initiative is Inconsistent with the United States Constitution and Federal Laws:**

The Initiative seeks to prohibit federal law or regulation of "nutritional or therapeutic products" that are manufactured in Idaho and that remain within the orders of Idaho. "Nutrition or therapeutic product" is defined broadly in Section 29-9103(b) of the Initiative, so as to include pharmaceutical, biological, and "nutritional" supplements. As worded, this definition could include not only pharmaceutical and dietary supplement products, but also controlled substances or "illegal drugs."

The Initiative is inconsistent with the U.S. Constitution. Article VI of the U.S. Constitution, commonly referred to as the "Supremacy Clause," states, in part:

This Constitution, and laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The U.S. Supreme Court has held that state laws that conflict with federal law are "without effect" under this Article. As the U.S. Supreme Court explained in M'Culloch v. State of Maryland, 17 U.S. 316, 1819 WL 2135 (U.S. Md.), 4 L. Ed. 579 (1819):

The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on state governments, and certain other powers on the national government. As it was easy to foresee that question must arise between these governments thus constituted, it became of great moment to determine, upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith . . . The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding.

M'Culloch, 17 U.S. at 326-27. The Idaho Supreme Court has ruled consistently. See, e.g., Zimmerman v. Volkswagen of America, Inc., 128 Idaho 851, 920 P.2d 67 (1996), *cert. denied*, 520 U.S. 1115, 117 S. Ct. 1245, 137 L.Ed.2d 327 (1997) ("It is well settled that any

Secretary of State Ysursa

February 3, 2010

Page 3 of 3

state law which conflicts with federal law is 'without effect' as provided under the Supremacy Clause of the United States Constitution.”).

This Initiative has the potential to conflict with a number of federal laws, including but not limited to, the federal Food, Drug, and Cosmetic Act, the Dietary Supplement Health and Education Act, and the Comprehensive Drug Abuse Prevention and Control Act. Because of this conflict, it will be considered “without effect.”

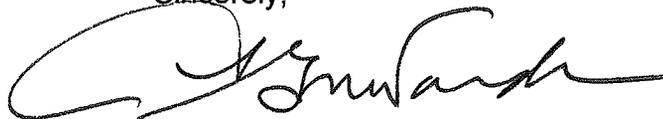
The Initiative’s limitation to intrastate activities does not remedy the Supremacy Clause issue. Congress is authorized to regulate intrastate activities that substantially affect interstate commerce, and courts have held that the regulation of drugs falls within that category. See Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L.Ed.2d 1 (2005) (holding that the application of the federal Controlled Substances Act provisions criminalizing the manufacture, distribution or possession of marijuana to intrastate growers and users did not violate the Commerce Clause); Deyo v. United States, 396 F.2d 595 (9<sup>th</sup> Cir. 1968) (holding that the application of the federal Food, Drug, and Cosmetic Act provisions criminalizing LSD regardless of whether the drug crossed state boundaries is constitutional).

In addition, certain federal laws governing the manufacture, sale, and distribution of drugs clearly apply not only to interstate activities, but to intrastate activities as well. See, e.g., 21 U.S.C. § 331 (2009) (prohibited acts and penalties under the federal Food, Drug, and Cosmetic Act). There are also federal laws specifically precluding states from establishing regulations regarding drugs that are different from the federal laws. See, e.g., 21 U.S.C. § 379r (1997) (statute regarding national uniformity for nonprescription drugs). An Idaho state law can not “override” or preempt such laws. A court would likely rule that the Initiative, if passed, was without effect regardless of its limitation to intrastate activities.

#### CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certificate of Review, deposited in the U.S. Mail to Alanna Grimm, 2817 E. St. James Ave., Hayden, Idaho 83835-7544.

Sincerely,



LAWRENCE G. WASDEN  
Attorney General

#### Analysis by:

JANE E. HOCHBERG  
Deputy Attorney General