



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

February 11, 2010

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review
Proposed Initiative Related to Idaho Honest and Secure Money 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 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

A. Introduction

Entitled "Idaho Honest and Secure Money Act," the initiative proposes to create a monetary system that would be restricted to intrastate transfers in Idaho. The proposed monetary system would be "tied to individual electronic cards issued to persons." Only "Idaho persons" could hold the contemplated accounts "unless otherwise authorized by

the legislature of Idaho.”¹ The initiative contemplates a for-profit “Private Market Exchange” that would be incorporated under the laws of Idaho and would set the standards for private market currencies in Idaho, which would be backed at least 100% by tangible assets.

The initiative proposes that the “Private Market Exchange” be created with sixty million dollars from “[t]he state of Idaho or one of its agencies or [the] public.” According to the proposed legislation, “[s]uch monies can be appropriated from any Idaho public fund for which such appropriation is both lawful and appropriate as determined by the governor or as required by legislative action.”²

Most of the provisions of the proposed laws would be struck down by a reviewing court as violating Article I, Section 8 of the U.S. Constitution, which gives the federal government the exclusive power to coin money and issue bills of credit.

B. Article I, Section 8 of the U.S. Constitution Gives the Federal Government the Exclusive Power to Coin Money; States are Prohibited from Coining Money or Issuing Bills of Credit, Including Credit via “Electronic Cards”

Article I, Section 8 of the U.S. Constitution states, in relevant part:

[1.] The congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2.] To borrow money on the credit of the United States;

[3.] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4.] To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5.] **To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;**

[6.] To provide for the punishment of counterfeiting the securities and current coin of the United States;

.....

(Emphasis added.)

The United States Supreme Court has declared:

A state cannot do that which the federal constitution declares it shall not do; it cannot ‘coin money.’ Here is an act inhibited in terms so precise, that they cannot be mistaken; they are susceptible but of one construction.

¹ Idaho Code § 26-3805(11).

² Idaho Code § 26-3803.

And it is certain, that a state cannot incorporate any number of individuals and authorize them to coin money; such an act would be as much a violation of the constitution, as if money were coined by an officer of the state, under its authority; the act being prohibited, cannot be done by a state, directly or indirectly. The same rule applies to bills of credit issued by a state.

Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257, 258-59, 1837 WL 3545 (U.S. Ky.), 9 L. Ed. 928 (1837).

In Norman v. Baltimore & Ohio Railroad Co., 294 U.S. 240, 303, 55 S. Ct. 407, 414, 79 L. Ed. 885 (1935), the Supreme Court stated:

The broad and comprehensive national authority over the subjects of revenue, finance, and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, to regulate commerce with foreign nations and among the several states, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution' the other enumerated powers. [Citation omitted.]

The Constitution 'was designed to provide the same currency, having a uniform legal value in all the States.' It was for that reason that the power to regulate the value of money was conferred upon the federal government, while the same power, as well as the power to emit bills of credit, was withdrawn from the states. The states cannot declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in the Congress. [Citation omitted.]

As set forth above, the United States Constitution conferred the exclusive power to coin money and regulate its value on the federal government so that all states would have the same currency, with a uniform legal value in all states. The power to coin money, regulate its value, and issue bills of credit was withdrawn from the states. The states cannot declare what shall be money or regulate its value, and whatever power there is over currency is vested in Congress.³

The United States Constitution's prohibition on states coining money extends to every branch, agency, and instrumentality of state government.⁴ The U.S. Supreme Court has held that "trustees or representative officers of a parish, county, or other local jurisdiction" have no authority to issue negotiable securities or coupons payable in the

³ See also *Legal Tender Cases*, 79 U.S. 457 (1870).

⁴ Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, 5 WTR Kan. J.L. & Pub. Pol'y 59, 82 (Winter 1996).

future “of such a character as to be unimpeachable in the hands of bona fide holders.”⁵

Although the initiative does not use the phrase “coin money,” the initiative attempts to create an alternate system of legal tender, specifically: “a sound monetary unit that can be used as the basis of commerce if and when the current financial practices of the United States government significantly debase the U.S. dollar which has no hard backing.”⁶ This is impermissible under the United States Constitution. It does not matter that the sound monetary unit would be transferred electronically. If the monetary unit (“money”) must be accepted to discharge public or private debts, as contemplated by this initiative, then the monetary unit qualifies as legal tender, which only the United States government may produce.⁷

The United States Constitution’s prohibition on states coining money would extend to the “Private Market Exchange” because the “Private Market Exchange” is an instrumentality of state government. As described in the initiative, the “Private Market Exchange” would be an “Idaho corporation with at least a 50% economic interest, 50% of the representatives on the board, and 50% of the voting rights controlled by the state of Idaho.”⁸ The initiative specifies that “[t]he State of Idaho shall under no circumstances dilute its voting interest in the Private Market Exchange.”⁹ The “Private Market Exchange” would be funded by state monies as well.¹⁰ Because the “Private Market Exchange” would be an instrumentality of state government, the monetary system and currency created by the Exchange would be in violation of Article 1, Section 8 of the U.S. Constitution.

MATTERS OF FORM

Idaho Code § 26-3805(12) states that the private market exchange shall be free to “extend its business activities other related core competencies . . .” This sentence appears to be missing a word. The preposition “to” could be inserted so that it would read to “extend its business activities to other related core competencies.”

Idaho Code § 26-3803 appears to be missing the words “the” and “Idaho Code §” as shown here: “The state of Idaho or one of its agencies or [the] public shall invest a sum not to exceed \$60 million dollars in a Private Market Exchange except as provided by [Idaho Code §] 26-3804.”

Idaho Code § 26-3802 provides that “[t]he only currency which shall not be backed by tangible assets shall optionally be the currency of any sovereign nation.” It is

⁵ Policy Jury of Parish of Tensas v. Britton, 82 U.S. 566 (1872)). See also Valley v. Rapides Parish Sch. Bd., 434 F.2d 144, 158 (5th Cir. 1970) (acknowledging that a school board cannot print or coin money.)

⁶ Idaho Code § 26-3801(2).

⁷ See generally Kerry Lynn Macintosh, How to Encourage Global Electronic Commerce: the Case for Private Currencies on the Internet, 11 Harv. J.L. & Tech. 733 (1998).

⁸ Idaho Code § 26-3803.

⁹ Idaho Code § 26-3807.

¹⁰ Idaho Code § 26-3803.

not clear what is meant by "optionally."

Idaho Code § 26-3804 states that the "governor shall submit such proposal to the legislature for approval within one year of the enactment of this bill, unless no bids are submitting meeting the minimum requirements as set forth in this legislation or allow for an adequate risk adjusted expected return on public assets." It is unclear what is meant by "allow for an adequate risk adjusted expected return on public assets." Additionally, the word "submitting" should be "submitted."

Idaho Code § 26-3805(6) refers to "the corporation," where "the corporation" is undefined. Is "the corporation" the same as the "Private Market Exchange"? If so, this should be clarified. On a related note, the "Private Market Exchange" is sometimes capitalized and sometimes lowercase. Whether capitalized or not, the phrase should be consistent throughout.

Idaho Code § 26-3805(10) refers to the issuance of a warrant based upon "probably cause." The word "probably" should be "probable."

Idaho Code § 26-3805(11) refers to "a United States government choosing to respect the purposes for which the exchange were establishes and as such" The word "establishes" should be "established." Additionally, it is unclear what is meant by "a" United States government – "the" United States government?

This section also states that "[a]ll accounts shall be held by Idaho persons unless otherwise authorized by the legislature of Idaho." "Idaho persons" is not defined. It is unclear what is meant by Idaho persons. Does this phrase mean Idaho residents? Or those who have been in Idaho for a specified period of time, regardless of whether they are official residents? Does Idaho resident include those who are officially residents, but are living in another state?

Idaho Code § 26-3807(2) refers to duties of various persons "to the extent that their actions effect the financial health of the Private Market Exchange." The word "effect" should be "affect."

Idaho Code § 26-3808 states: "If a part of this Act shall be submitted to the qualified electors of the State of Idaho, for their approval or rejection at the regular general election, to be held on the second day of November, A.D., 2010, and each for himself says:

I have personally signed this petition; I am qualified elector of the State of Idaho; my residence and post office are correctly written after my name." It is unclear why this sentence begins with "[i]f a part of this Act," when no conclusion follows. If a part of this Act shall be submitted... then what?

Idaho Code § 26-2805(3) states that "[o]ne or more customer numbers of appropriate entropy shall be stored on the card and shall be indeterminable by any card

reader, absent private codes stored on the shared serves encompassing the exchange.” Sub-section (4) also refers to “a private alphanumeric code of sufficient entropy known only to the holder of the card.”

“Entropy” is defined at the online Merriam-Webster’s Dictionary as follows:

- 1**: a measure of the unavailable energy in a closed thermodynamic system that is also usually considered to be a measure of the system's disorder, that is a property of the system's state, and that varies directly with any reversible change in heat in the system and inversely with the temperature of the system; *broadly* : the degree of disorder or uncertainty in a system
- 2 a** : the degradation of the matter and energy in the universe to an ultimate state of inert uniformity **b** : a process of degradation or running down or a trend to disorder
- 3** : CHAOS, DISORGANIZATION, RANDOMNESS

Substituting the word “randomness” for “entropy” in the two sections above might be clearer.

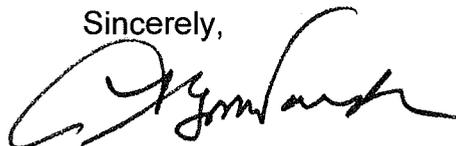
CONCLUSION

The power to coin money and issue bills of credit is reserved to the Federal Government. The proposed initiative, if passed, would likely be struck down by a reviewing court because it attempts to give the State of Idaho power that it does not have under Article I, Section 8 of the U.S. Constitution.

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 the 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:

MELISSA MOODY
Deputy Attorney General