



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

February 21, 2012

The Honorable Ben Ysursa
Idaho Secretary of State
Statehouse
VIA HAND DELIVERY

Re: Certificate of Review
Proposed Initiative to Privatize Liquor Sales

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 23, 2012. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe in 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 policy issues raised by the proposed initiative. Similarly, the accuracy of the potential revenue impact to the state budget is beyond the scope of this review.

BALLOT TITLE

Following filing of the proposed initiative, this 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 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. An Overview of the Initiative

The purpose of the proposed initiative is to “privatize” the retail sale of alcoholic liquor in the State of Idaho. If successful, this initiative will overturn Idaho’s current liquor sales regime. It will eliminate the Idaho State Liquor Division (“state liquor division” or “division”) and terminate existing state authority to import and sell alcoholic liquor.

By repealing the current title 23, chapter 2, Idaho Code, the initiative eliminates a surcharge currently added to the price of alcoholic liquor and other merchandise. Idaho Code § 23-217. This surcharge is currently credited monthly to the benefit of the drug court, mental health court, and family court services fund, as set forth in Idaho Code § 1-1635. While it appears that the initiative provides for a distribution to this fund, see proposed Idaho Code § 23-404(1)(v), the fund referenced there is not identified by a statutory reference. If the intent is to continue funding these programs, the proponents of the initiative should ensure that the appropriate language is contained within these provisions.

The proposal requires sale of all buildings, warehouses, retail stores or other facilities owned, as of July 1, 2013, by the State of Idaho as part of the state liquor division. This sale is required to take place after July 1, 2014. See proposed Idaho Code § 23-301(1). The provision prohibits these properties from being declared state surplus property and mandates that the property be sold for no less than 10% below the property’s fair market value. There is no stated rationale as to why the properties should not be declared surplus, but instead seeks to prohibit continued state ownership or use of these properties for any purpose by the state. The statute does not include a provision for calculating fair market value, and it contains no rationale as to why the property cannot be sold for less than 10% of that value. There is no similar provision, mandating sale, pertaining to any personal property or fixtures which might be in the possession of the state liquor division.

Product and merchandise owned by the liquor division and unsold by the effective date of the act are required to be either returned to product wholesalers for a refund or sold at a fair market price to privately-owned liquor retailers in the state. See proposed Idaho Code § 23-301(2). Currently, product is paid for at the time it is put into the stores. It is likely that it would not be possible for product that has been put into stores to be returned to product wholesalers for a refund.

Product being held for distribution at the division warehouse is held in bailment. It isn’t owned by the division and likely could be returned to the

wholesaler. A question remains as to who would bear the cost of returning the product and ensuring its safety while it was being returned to the wholesaler. Likewise, it is unclear what would happen to any product that could not be returned but was not acquired by the privately-owned liquor retailers. In order to avoid these issues, and to provide for a smoother transition, the initiative proponents may want to include a grandfather clause as well as an effective date that would permit the orderly liquidation of existing inventory, whether owned or in the possession of the division.

Proposed Idaho Code § 23-201(3) mandates all contracts or agreements existing as of the effective date of the act, between the division and any person, "relating to the operation of a contract liquor store or relating to the purchase of any product, merchandise or other material or relating to any other matter," shall terminate no later than one year after the effective date of the act. In addition to being vague ("or relating to any other matter"), this provision does not address the potential legal ramifications if the state, in complying with the statutory directive, breaches existing agreements. The proposal does not include any budgetary provisions for legal fees, costs, or damages arising out of any such breaches.

Proposed Idaho Code § 23-301 includes a definition of "liquor." This definition may conflict with how existing Idaho Code § 23-105, which will not be changed as a result of the initiative, currently defines "alcoholic liquor." Additionally, proposed Idaho Code § 23-301(5) defines "retail liquor license." This subpart seeks to differentiate the retail sale of alcoholic liquor by the drink from the retail sale of "packaged" alcoholic liquor, using the phrase "for consumption off the licensed premises." This phrasing might benefit from some additional consideration and review of existing provisions to ensure consistency with the law.

Proposed Idaho Code § 23-302(1) prohibits the county commissioners from limiting the number of retail liquor stores that may be established within a county, but does not mention the authority of cities in this regard. Proposed Idaho Code § 23-305(3) provides for county licensing fees. These provisions are problematic. They appear to conflict with Idaho Code § 23-916, which recognizes that in any given county, there may be licenses for the retail sale of liquor by the drink that are issued within incorporated city limits over which counties would have no control. Additionally, the initiative does not appear to provide or recognize the express authority for counties or cities to require a local license for retail sale of liquor for off-premises consumption. It is difficult to ascertain whether a county or a city would have discretion to deny a license since the number of licenses cannot be limited. Currently, both counties and cities have specific authority to require licenses for by-the-drink liquor sales

(existing Idaho Code § 23-901), retail beer sales (existing Idaho Code § 23-1009), and wine (existing Idaho Code § 23-1315).

Proposed Idaho Code § 23-302(5) includes a reference to the director of the state liquor division. The reference should be deleted.

Applicants for licensure are required to demonstrate that they meet all the qualifications and possess none of the disqualifications for licensure; a similar provision exists with regard to the transfer of liquor licenses. See proposed Idaho Code §§ 23-303 and 23-306. Under the caption "qualifications for retail liquor license," proposed Idaho Code § 23-304 details what appear to be *disqualifying* conditions, but the initiative makes no mention of *qualifying* conditions. Because the statute does not establish specific licensure requirements, or *qualifications*, such as age, business licenses, documented training, work history, and bonding, proposed Idaho Code § 23-304 is somewhat confusing. The proponents of this provision may wish to revise the section so that it lists both qualifying and disqualifying conditions or re-title the section to accurately reflect that it lists only disqualifying conditions. If the second option is chosen, both proposed Idaho Code §§ 23-303 and 23-306 should be revised to maintain continuity in the requirements.

Proposed Idaho Code § 23-304 also appears to be missing a word or term. The section requires an applicant to submit an application and fee for "each [?] sought to be licensed." It appears that the missing word might be "premises."

Proposed Idaho Code § 23-306 provides for the approval of a request to transfer a license issued under the act, upon application providing "substantially" the same information required of an applicant for licensure. There is no stated rationale for why it might be appropriate for the recipient of a license pursuant to a transfer to provide anything other than information equivalent to that required of the original licensee. This provision also refers to "qualifications" and "disqualifications" for licensure. If the proponents make changes addressing the questions concerning qualifications and disqualification that were raised previously, this section will likely need some revision to maintain harmony between the sections.

The initiative requires liquor to be "sold [?] purchased" only in the original package. See proposed Idaho Code § 23-307. It appears that the word "or" has been omitted from the phrase. Additionally, proposed Idaho Code § 23-307(3) references an official seal or label "prescribed by the division." As there will be no division, this provision would benefit from some additional revision.

An excise tax is established in proposed Idaho Code § 23-308. The provision requires the State Tax Commission to promulgate rules, and then it states that “[s]uch rules shall be approved by the legislature.” Because Idaho’s Administrative Procedures Act, title 67, chapter 52, Idaho Code, already requires legislative review and approval of agency rules, it is difficult to tell whether the purpose of this language is to prevent the legislature from rejecting the Tax Commission’s proposed rules, or whether it was intended as a reference to the requirements of the Administrative Procedures Act. Additionally, the number “46” has been inserted into proposed Idaho Code § 23-308(2), but this appears to be a typographical error and should be corrected.

Continuing the prohibition against locating liquor stores near schools, proposed Idaho Code § 23-312 provides for a 300 foot buffer zone. While the provision is clear that the buffer is to be 300 feet, it continues a flaw that existed in the previous version. The proposed section should be revised to make it clear that the buffer zone is measured from whatever entry door on the school that is located closest to the nearest entry door on the licensed premises.

The initiative leaves in place Idaho Code § 23-403. In light of the other funding provisions, which are included in the initiative, consideration should be given to deleting this section or at least subsection (a). Under the proposed initiative, there would be no division, and so no obligations to pay.

The initiative proposes amendments to Idaho Code § 23-404, pertaining to distribution of monies in the liquor account. As amended, there is a provision for the transfer of a percentage “beginning in FY 2010.” As the state has passed FY 2010, this reference should be updated. Additionally, in the absence of the state liquor division, it is unclear as to who will be responsible for making the actual distributions and transfers out of this account.

Current Idaho Code § 23-409 contains a reference to monies being remitted to the drug and mental health court supervision fund *by the division*. If successful, the initiative will eliminate the division, so this reference should be corrected.

The proposed amendments to Idaho Code § 23-901 would benefit from the addition of the phrase “by the drink.” This phrase should be included in the title (“retail sale of liquor by the drink”) and elsewhere in the section. Additionally, throughout this section there are references to this “act.” The correct reference should be to the “chapter,” since it is only chapter 9 that deals with the retail sale of liquor by the drink.

The amendments to Idaho Code § 23-914 neglect to delete the reference to the division that is contained in the title, as well as the reference to price. The

new requirement is that liquor by the drink licensees must obtain their alcoholic liquor from a retail liquor store licensed pursuant to the provisions of title 23, chapter 3, Idaho Code.

Idaho Code § 23-919 has also been revised to delete the reference to state liquor stores, replacing it with a reference to licensed retail liquor stores. The phrase "or state distributor" should also be eliminated. The title would benefit by inserting the word "retail" before the phrase "LIQUOR STORE SALES NOT AFFECTED."

It is unclear whether, and if so, how, the responsibilities of the director of the Idaho State Police will be changed by the initiative. Additionally, it is likely that the director may need to promulgate some additional rules. Nothing in the initiative speaks to these subjects, and, because rules promulgation takes time and additional responsibilities may require additional resources, it seems appropriate to consult the director of the Idaho State Police in this regard.

This review did not include any analysis of other potential references to the state liquor division or the director of the division, which might appear elsewhere in statute. It would be appropriate for the proponents to incorporate and address any such additional references in the initiative.

B. Significant Constitutional Issues May Be Raised by the Initiative

Art. III, Sec. 16 of the Idaho Constitution Requires a Unity of Subject and a Single Subject

Reviewing the initiative, it appears that it may require additional amendments to insure compliance with art. III, sec. 16 of the Idaho Constitution. These amendments are necessary because the title must reflect all of the code sections amended within the body of the legislation. The current title does not appear to comply with this requirement. Federated Publications, Inc. v. Idaho Business Review, Inc., 146 Idaho 207, 211, 192 P.3d 1031, 1035 (2008) ("Consequently the substance of the statute not included within the title is void."). Cohn v. Kingsley, 5 Idaho 416, 429, 49 P. 985, 989 (1897).

A second requirement under art. III, sec. 16 is that every act embraces a single subject and all matter that is reasonably related thereto. Although this appears to provide a broad umbrella under which to legislate, the Courts have noted that a revenue-raising measure must be separated from a substantive measure. Reviewing this initiative, it appears that revenue is being raised through the creation of a tax (and which may run afoul of another constitutional limitation on the origin or revenue-raising measures), as well as substantive repeal and creation of a new liquor regime. A similar mixing of purposes was

rejected when a salary increase for an officer was placed into a general appropriation bill that made no mention of the increase within its title. Hailey v. Huston, 25 Idaho 165, 168, 136 P. 212, 214 (1913). The proponents may desire to determine whether this should be introduced as two separate measures—one repealing and creating a new liquor regime, and another raising the necessary revenue—to assure strict compliance with Idaho's constitution.

Art. III, Sec. 14 of the Idaho Constitution May Prohibit the Use of an Initiative to Raise Revenue

By establishing an excise tax and creating fees for issuance of licenses, the initiative appears to raise revenue for the State of Idaho. In fact, the initiative specifically provides for the allocation and distribution of this revenue (in the form of the liquor fund). This raises the question whether an initiative that raises revenue may not be allowed because it is contrary to art. III, sec. 14 of the Idaho Constitution. This section provides that all revenue raising bills originate in the House. At a minimum, there is an argument that an initiative to raise revenue is prohibited by art. III, sec. 14, which provides that “[b]ills may originate in either house, but may be amended or rejected in the other, except that bills for raising revenue shall originate in the house of representatives.”

We think it likely, however, that the rationale for requiring revenue-raising measures to originate in the House seems inapplicable to initiatives. If, in fact, the motive is to give the power to the body closest to the people, it follows that the initiative process—which is the people's process—could be used to raise revenues.

Art. III, Sec. 26 of the Idaho Constitution Expressly Authorizes the Legislature Control Over Intoxicating Liquors

The initiative could also be challenged as falling outside the ambit of the initiative power. Based on the Idaho Constitution's express delegation of the plenary power over intoxicating liquors to the legislature, it could be considered that the specific charge to the legislature indicates that power is restricted solely to the legislature. Art. III, sec. 26 states:

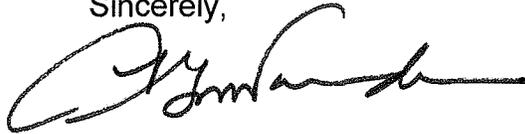
§ 26. Power and authority over intoxicating liquors. — From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

Since this provision grants the legislature "full power and authority," a question arises as to whether the legislature's power in this arena can be checked by the people's exercise of the initiative power. No case law exists on this issue, but in the event the initiative passes, this provision may reflect one avenue by which the initiative could be challenged under the Idaho 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 Jeffrey L. Ward, Idaho Federation of Reagan Republicans, P.O. Box 1274, Post Falls, Idaho 83877.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Wasden", written over a horizontal line.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

TIMOTHY DAVIS
Deputy Attorney General