



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

October 22, 2015

The Honorable Lawrence Denney
Idaho Secretary of State
Statehouse
VIA HAND DELIVERED

RE: Certificate of Review
Proposed Initiative Relating to The College, Not Cancer Act

Dear Secretary of State Denney:

An initiative petition was filed with your office on September 23, 2015. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and 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" the recommendations "in whole or in part." The opinions expressed in this review are limited to 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 TITLE

Following the 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, the petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

A. Summary of the Initiative.

The proposed initiative, which is entitled “The College, Not Cancer Act” (hereinafter “Act”), presents code sections that petitioners want added to Idaho Code title 33, chapter 37 (hereinafter “Education Code”) and title 56, chapter 10. These proposed code sections modify existing tax rates found in Idaho Code, title 63 (hereinafter “Tax Code”). The petitioners’ objectives are to raise revenue to decrease the cost of tuition for students attending public universities and to increase state funding for tobacco cessation programs. The petitioners propose to raise this revenue by increasing the cigarette tax from 57¢ to \$2.07 per package of 20 cigarettes. Additionally, petitioners propose raising the percentage-based tax on other tobacco products from 40% of the wholesale price to 52% of the wholesale price.

The Act specifies that portions of the funds raised by the increase of tax revenue coming from the cigarette tax should be continuously apportioned for the use of the State Board of Education to reduce the cost of tuition and to benefit public community and technical colleges. To facilitate this apportionment, the Act establishes a “State Board Affordable Higher Education Fund” and a “Community and Technical College Investment Fund,” both to be overseen by the State Board of Education. The Act directs the Board of Education to use the Higher Education Fund “for the sole purpose of direct and equal application to each resident undergraduate student’s tuition bill at Idaho’s public four-year colleges and universities.” Likewise, the Community and Technical College Fund may only be used “for public community and technical colleges.”

The Act further specifies that portions of the funds raised from the increase of tax revenue should be apportioned for the use of the Department of Health and Welfare to fund a tobacco cessation program. The Act establishes an “Idaho Tobacco Prevention and Cessation Fund” to be directed by the Department of Health and Welfare. The Department of Health and Welfare is to use the apportioned funds for the sole “purpose of funding a statewide tobacco prevention and control program.”

To fund these programs, the Act divides the “cumulative increased revenues derived from the cigarette tax increase . . . and the tobacco tax increase” so that 80% of this revenue is apportioned to the Higher Education Fund, 10% of the revenue is apportioned to the Community and Technical College Fund, and the remaining 10% of the revenue is apportioned to the Tobacco Prevention Fund.

B. Constitutionality of the Initiative.

The Act, as written, might not conform to the requirements of art. III, sec. 18 of the Idaho Constitution. That section states:

No act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length.¹

This section prohibits the insertion of words or substitution of phrases into a preexisting statute by mere reference.² In order to effectively amend statutory language, an act must set forth the language of the amended statute in its entirety.

The Act could be challenged for violating art. III, sec. 18. The plain language of the Act indicates its intent to amend the tax rates on cigarettes and other tobacco products as provided in Idaho Code sections 63-2506, 63-2552, and 63-2552A. The Act also does not set forth the complete language of these statutes, as amended. Rather, the Act describes how each section's rate should be modified. As such, the Act may violate the prohibition on substituting phrases into a preexisting statute by mere reference.

The Act can avoid art. III, sec. 18 challenges by making simple changes to the language of the Act. By directly amending the Tax Code sections referenced by the Act instead of creating new sections in the Education Code, the Act will avoid making an amendment by reference. Additionally, such a revision also plays a practical purpose: by amending the Tax Code section directly, the Act avoids the odd effect of defining tax rates in the Education Code.

C. Conformity to Statutory Framework.

The sections proposed by the Act could be reformulated to better adhere to the style and system of existing laws. Current statutes for cigarette and tobacco taxes already have a mechanism for taxing cigarette and tobacco products and appropriating revenue generated by these taxes. Rather than modifying the statutes, the Act proposes new sections that run parallel to existing ones. These parallel sections unnecessarily complicate existing laws and may lead to confusion when applying the Act and when collecting cigarette and tobacco taxes. Problems introduced by creating these parallel sections can be avoided by amending the statutes directly.

Presently, all taxation of cigarettes and other tobacco products and the distribution of revenues from such taxation is defined in chapter 25 of the Tax Code, Cigarette and Tobacco

¹ Idaho Const. art. III, § 18.

² Noble v. Bragaw, 12 Idaho 265, 276, 85 P. 903, 906 (1906).

Products Taxes. That chapter sets forth definitions related to cigarette and tobacco products, how these products are taxed, and how such taxes are enforced and collected. The chapter also establishes how revenue raised from cigarette and tobacco products taxes are appropriated.³

The Act proposes an additional layer of appropriation on to what is an already complex appropriation process. The Act would appropriate the “cumulative increased revenues” from the cigarette tax and tobacco tax increases while leaving the existing mechanism for appropriating revenue generated by these taxes in place. The existing statutory framework creates a cascading appropriation of funds, which includes appropriations to public schools to fund substance abuse prevention programs, the central cancer registry fund, and the cancer control fund.⁴ By adding another layer in a different code section rather than modifying the existing process, the Act introduces further complexity and ambiguity as to how funds should be appropriated.

If the Act is adopted, the tax rate on cigarette and tobacco products and the appropriation of revenue from such taxes would not be plainly found within the language of chapter 25 of the Tax Code. Taxpayers or other interested individuals may find it difficult to discover the tax rate on cigarettes or the appropriation of such revenue if they have to look in other chapters to find that information. If the Act instead modifies the existing code sections, it will prevent taxpayer confusion by grouping all cigarette and tobacco taxation and related revenue appropriation sections within the same chapter.

Furthermore, the language that the Act uses to appropriate funds does not follow the typical legislative style. It is atypical for specific appropriation language to appear in the

³ See Idaho Code §§ 63-2506, 63-2520, 63-2552A, and 63-2564.

⁴ Revenue from the 57¢ tax on cigarettes is presently appropriated thusly, ordered by statutory preference: \$3,315,000 to public schools to provide substance abuse programs; \$3,315,000 to juvenile probationary services; any necessary funds to the state refund account; \$5,000,000 to the state building fund; \$120,000 to the central cancer registry fund; \$300,000 to the cancer control fund; an amount equal to the annual general fund appropriation to the general fund; to the permanent building fund for Capitol Building restoration; \$4,700,000 to GARVEE; \$5,000,000 to the secondary aquifer planning management and implementation fund; and then to the state highway fund.

This distribution model is scheduled to change in 2019, at which time the cigarette tax will be appropriated thusly: \$3,315,000 to public schools to provide substance abuse programs; \$3,315,000 to juvenile probationary services; any necessary funds to the state refund account; 17.3% to the permanent building fund; 0.4% to the central cancer registry fund; 1% to the cancer control account; the amount equal to the annual general fund appropriation for bond levy equalization; for 2005 through 2006, all money shall be appropriated to the economic recovery reserve fund; to the permanent building fund for Capitol Building restoration; and the remainder to the economic recovery reserve fund.

The revenue from the 5% tax on other tobacco products is appropriated thusly, in order of statutory preference: 50% of this amount to public schools for safety improvements and substance abuse prevention programs less \$200,000 to the State Police toxicology lab and \$80,000 to the Commission on Hispanic affairs for substance abuse prevention programs. The other 50% is to be used by juvenile corrections.

The revenue from the 35% tax on other tobacco products is appropriated thusly, in order of statutory preference: to the state refund account, as needed with the remainder to the general fund.

same section as the fund created to receive the appropriated revenue. When creating funds, instead of specifically appropriating revenue to the fund, the legislature often uses a phrase similar to the following: “subject to appropriation by the legislature.”⁵ It is more typical for specific appropriation language to be found in the revenue-generating sections than in fund-creating sections.⁶ Thus, while the Act’s language related to the creation of funds may be appropriately located, the specific appropriation of revenue to these funds likely should be moved to the revenue-generating code sections.

The language the Act uses to create funds also does not follow the typical legislative style because it does not specify that the funds created by the Act are created in the state treasury. When establishing a fund, the legislature typically employs a phrase similar to the following: “the fund is hereby created in the state treasury.” This language is likely used to ensure compliance with art. VII, sec. 7 and 13 of the Idaho Constitution, which requires “[a]ll taxes levied for state purpose [to] be paid into the state treasury” and that “[n]o money shall be drawn from the treasury, but [by] appropriations made by law.” The Act does not state that the funds it proposes to create are created in the state treasury. While using this language may be overly formalistic, adopting the phrase “created in the state treasury” complies with legislative style and may avoid challenges to the Act.

D. Recommended Revisions, Alterations, and Miscellaneous Issues.

1. The “Section 2. Purpose” of the Act states that it wants to reduce the tuition costs of “students and families” and wants to promote achievement at public “two and four-year colleges and universities,” however it only proposes to use tax revenue to decrease the tuition of undergraduate students at four-year colleges or universities. For two-year colleges and technical colleges, the Act proposes a fund to benefit the institutions, but does not propose a fund tasked with reducing the tuition for such students. It is unclear if this different treatment of students of two-year colleges and students of four-year colleges is intentional.

2. The title of Proposed Idaho Code section 33-3717D does not have a period at the end of the title.

3. The phrase “cumulative increased revenues,” found in Proposed Idaho Code sections 33-3717F, 3717G, and 56-1055 is ambiguous as it may refer to year-to-year gross tax increases or to the amount by which the new tax rate increases revenue generated in a single taxable year above what would have otherwise been generated under the superseded statutory language. If the former interpretation of the phrase is controlling, then it is unclear whether the Act’s proposed appropriations would occur if there is a year-to-year decline in

⁵ E.g., Idaho Code § 56-1018.

⁶ E.g., Idaho Code § 49-452.

tax revenue. This ambiguity may be avoided by defining how cumulative increased revenues are to be calculated.

4. Proposed Idaho Code section 56-1055 currently reads, “[T]hat portion of the cumulative increased revenues derived from the tobacco tax increase . . . and the tobacco tax increase.” The first instance of “tobacco tax increase” should be changed to “cigarette tax increase” as the petitioners drafted it in Proposed Idaho Code sections 33-371 F and 33-3717G.

5. All instances of the phrase “any other currently relevant sections, Idaho Code” should be changed to “any other currently relevant Idaho Code sections” to improve clarity and to be consistent with the rest of the Idaho Code.

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 Certification of Review, deposited in the U.S. Mail to William Moran II, 17322 Can-Ada Road, Nampa, Idaho 83687.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

Nathan Nielson
Deputy Attorney General