



## STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

January 12, 2018

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

RE: Certificate of Review  
Proposed Initiative Amending Title 54, Chapter 25 Idaho Code, to Authorize  
Historical Horse Racing as a Form of Pari-Mutuel Betting

Dear Secretary of State Denney:

An initiative petition was filed on January 3, 2018 proposing to amend title 54, chapter 25 of the Idaho Code through the addition of the Save the Horse Racing in Idaho Act ("Act"). 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 insolate 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 them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative or the potential revenue impact to the state budget from likely litigation over the initiative's validity.

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

## MATTER OF FORM

Sections 1 and 2 of the proposed initiative contain, respectively, the law's title and its findings and purposes. As this office understands these sections, they will not be codified in the Idaho Code. Section 3 is in proper legislative format for showing new statutory provisions.

### SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

#### I. Summary of Proposed Initiative

The proposed initiative adds three sections to title 54, chapter 25, Idaho Code that authorize wagering through the use of "historical horse race terminals." The first section, to be codified as Idaho Code § 54-2512A, derives in part from the similarly-numbered provision repealed in 2015. 2016 Idaho Sess. Laws 3. The Idaho Supreme Court found the Governor's veto of the repealing legislation untimely and therefore ineffective. Coeur d'Alene Tribe v. Denney, 161 Idaho 508, 387 P.3d 761 (2015). The other two sections, to be codified as Idaho Code §§ 54-2512B and 54-2512C, have no counterparts in the repealed legislation.

**A. Section 54-2512A.** The proposed initiative makes three significant changes to the repealed provision.

1. Subsection (1) authorizes the operation of historical horse race terminals at facilities where (a) live and/or simulcast horse racing is conducted and where live horse racing occurs at least eight days per year or (b) where the simulcast facility is subject to Idaho Code § 54-2514(A)(1). The repealed § 54-2512A(1) deemed historical horse race wagering "within the scope of a license that authorizes a live race meet licensee to conduct and supervise the use of the pari-mutuel wagering simulcast and/or televised races" and further authorized such wagering "at any facility authorized to conduct and supervise to conduct and supervise wagering on simulcast and/or televised races." This change presumably alters the scope of facilities where historical horse race wagering will be permissible from that of the repealed provision. *E.g.*, Pearl v. Bd. of Prof'l Discipline, 137 Idaho 107, 113-14, 44 P.3d 1162, 1168-69 (2002). The precise effect on the number of potentially authorized facilities, however, is unclear.

2. Subsections (2) and (3) are new and largely replicate Idaho Code § 67-429B. Subsection (2) identifies the only functions that historical horse race video terminals may perform. Subsection (3) declares the terminals are neither slot machines nor electronic or electromechanical imitation or simulation of casino gambling.

3. Subsection (4) deals with the allocation of daily receipts generated by historical horse race wagering. It increases the amount reserved for distribution to winning wagers from 89 percent to 90 percent; reduces the amount reserved to the

Commission for specified public uses from 1.5 percent to 1.0 percent; and increases the amount paid to the licensee from 9.5 percent to 10 percent.

4. As under the repealed law, subsection (5) requires licensees to enter into an agreement with a horsemen's group, as defined in Idaho Code § 54-2502(4), establishing "the percentage of the historical horse race handle that is dedicated to the live horse race purse structure" and that must be paid into the "historical horse race purse moneys fund" created under subsection (6). Subsection (7) grants rule-making authority to the Idaho Racing Commission ("Commission") to implement the section's provisions.

**B. Section 54-2512B.** This section provides that the Act becomes effective upon voter approval and completion of the canvass by the Board of Canvassers. It expressly states that no further executive or legislative action is required for the Act's implementation.

**C. Section 54-2512C.** This section is titled "Severability" and includes standard statutory severability language; i.e., judicial invalidation of any term or provision in the Act that does not affect the validity or enforceability of the remaining provisions. However, it further states: "It is intent of the voters, that, to the extent any term or provision is declared to be illegal, void, or unenforceable, the legislature shall take all available steps to enact such term or provision in a legal, valid, and enforceable manner, whether through a statute or a proposed constitutional amendment to restore live horse racing in Idaho through the authorization of pari-mutuel wagering on historical horse races using video terminals."

Finally, the 2015 repeal of Idaho Code § 54-2512A left untouched the definition of "historical horse race" in Idaho Code § 54-2502(3). It provides: "'Historical horse race' means a race involving live horses that was conducted in the past and that is rebroadcast by electronic means and shown on a delayed or replayed basis for the purposes of wagering conducted at a facility that is authorized to show simulcast and/or televised races." A potential conflict between the definition and section 54-2512A(1) therefore exists that the proposed initiative sponsors may wish to address.

## **II. Substantive Analysis**

### **A. The Status of Historical Horse Race Wagering as Pari-Mutuel Betting**

Art. III, sec. 20 of the Idaho Constitution, as presently configured, generally prohibits gambling. However, it excepts three forms of gaming if conducted in conformity with enabling legislation: a state lottery, pari-mutuel betting, and bingo or raffle games "operated by qualified charitable organizations in pursuit of charitable purposes." This provision does not define the term "pari-mutuel." As explained in greater detail below, the status of historical horse racing as legally permissible pari-mutuel betting under art. III, sec. 20 is uncertain and likely to draw a legal challenge.

1. Pari-mutuel betting has a lengthy history in Idaho.

At the time of the 1992 amendments to the constitutional provision, there was nonetheless a general understanding of pari-mutuel wagering established with reference to live horse racing as a result of the decision in Oneida County Fair Bd. v. Smylie, 86 Idaho 341, 386 P.2d 374 (1963) ("Oneida County"). There, the Supreme Court issued a writ of mandate compelling the Governor to appoint members to the Idaho Racing Committee created under the Idaho Horse Racing Act adopted in 1963. 1963 Idaho Sess. Laws 246. The majority opinion rejected the contention that the new statute's authorization of pari-mutuel betting violated art. III, sec. 20 of the Idaho Constitution. That provision, as then constituted, prohibited "any lottery or gift enterprise under any pretense of for any purpose whatever." The statute itself did not define "pari-mutuel," but the Court accepted the petitioners' description:

The pari mutuel system is a term of art for the mathematical method by which the amounts to be paid to successful patrons are computed. All money paid into the system is paid out to the patrons except for a small percentage retained by the state and fair board pursuant to the act. Odds on a particular horse are determined only by the amount of money paid on such horse by patrons in comparison to other horses in the race.

86 Idaho at 345, 386 P.2d at 376. The majority opinion reviewed at length decisions from other states addressing the question whether pari-mutuel wagering on horse races embodied a constitutionally-proscribed lottery and, adopting the majority view, held that "the pari-mutuel system of wagering on horse racing meets, as provided [under the new statute], is not one solely based on chance, which constitutes an essential requisite of a lottery." *Id.* at 368, 386 P.2d at 391.

Several of the decisions reviewed in Oneida County commented on the nature of pari-mutuel betting. See 86 Idaho at 352, 386 P.2d at 380-81 ("The pari-mutuel system of betting does not come within the definitions given above. While the amount of money to be divided is indefinite as to dollars and cents, it is definite in that the amount of money to be divided is the total stakes on the winning horse, less a given percentage to the management. The persons among whom the money is to be divided are not uncertain, as they are those who bet on the winning horse.") (quoting People v. Monroe, 182 N.E. 439, 442 (Ill. 1932) (internal quotation marks omitted); *id.* at 356, 386 P.2d at 383 ("Said dictionary defines pari-mutuel as a form of betting on horses in which those who bet on the winning horse share the total stakes, less a small per cent to the management. It describes a pari-mutuel machine as a machine for registering and indicating the number and nature of bets made on horse races, used in the pari-mutuel system of betting.") (quoting Rohan v. Detroit Racing Ass'n, 22 N.W.2d 433, 438 (Mich. 1946) (internal quotation marks omitted). A key feature to pari-mutuel gambling is thus the existence of odds as determined by the wagers placed on horses in a particular race or series of races that, collectively, are the "pool" to be shared by successful bettors. *Id.* at 371-72, 386 P.2d at 394 (Taylor, J., dissenting) ("[u]nder this system the exact "odds" on a particular

dog to “win, place or show” cannot be determined until the betting is closed and information regarding the number and amount of bets is tabulated by the pari-mutuel machine, which, in the last analysis, is simply a device for calculating the odds”) (quoting *State ex rel. Moore v. Bissing*, 283 P.2d 418, 423 (Kan. 1955)). In sum, a necessary element of pari-mutuel wagering, as traditionally understood, is the *competition* between pool participants with respect to the *same* race or group of races, whose differing views of likely outcomes give rise to the odds that determine eventual pool payouts. See generally Bennett Liebman, *Pari-Mutuels: What Do They Mean and What Is at Stake in the 21<sup>st</sup> Century?*, 27 Marq. Sports L. Rev. 45, 100-01 (2016) (identifying the “six core elements or attributes” of a pari-mutuel system as including, inter alia, “players wager[ing] against each other in the pool” with “[t]he actual return to the winning bettors . . . not known until after wagering on the pool has closed”).

This traditional understanding of pari-mutuel wagering appears to be incorporated in the section 54-2502(8) definition of that term: “‘Pari-mutuel’ means any system whereby wagers with respect to the outcome of a *race* are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under state law, and in which the participants are wagering with each other and not against the operator.” (Emphasis added.) The term “pool” is further defined as “the total sum of all moneys wagered *in each race* for each type of bet. Types of bets include win, place, show, quinella, daily double, exacta, trifecta, etc., and such other types as are approved by the commission from time to time.” *Id.* Idaho Code § 54-2502(10) (emphasis added).

The proposed initiative does not define the nature of historical horse race wagering pools or whether pool participants compete against one another with respect to the outcome of the same race or series of races. It is also silent on whether any odds exist upon which pool distributions can be calculated. It is similarly silent on whether the entirety of a wager is placed into the pool from which the payouts will be made; i.e., whether bettors or the “house” is responsible for ensuring that a sufficient corpus exists in the pool to make the required payouts.

2. Equating historical horse racing wagering to pari-mutuel betting may be legally vulnerable.

The operational nature of historical horse race gambling in other states, though, has been examined, and it appears probable that the same type of video terminals will be used if the proposed initiative is approved. The Nebraska Attorney General has explained succinctly how historical horse racing, also known as “instant racing,” wagering functions:

The wagering on “historic horseraces” which would be authorized under LB 1102 thus appears to refer to the patented wagering system known as “Instant Racing.” “Instant Racing” was developed as a joint venture between Amtote International and RaceTech, LLC. The “Instant Racing” system allows bettors to wager on the results of previously run or “historic” races through electronic “Instant Racing Terminals” [“IRTs”]. The

machines reportedly can access over 200,000 historic races. Wagers are made by coin or currency. Players can utilize limited Daily Racing Form past performance data (i.e. winning percentages, average earnings per start, trainer and jockey success, etc.) provided in graphic form before making their selections. The data is provided in such a way that bettors cannot identify the exact race. The machines contain a video screen which allows bettors to view the entire race after placing their wagers, or only a short clip of the stretch run of the race.

Wagering generally is limited to selections involving the order of finish of the first three horses, such as selecting the first three finishers in order, the top two finishers, or the winner and any two of the top three finishers. Variations on such wagering are provided for under the Association of Racing Commissioners international Model Rules for Instant Racing. RaceTech promotes the product as a true parimutuel wagering system. The machines are connected to the same wagering pool and wagers are processed through a central totalisator. Unlike most parimutuel wagering, where many wagers are made on a single race, Instant Racing involves wagers on many different races. Winners receive graduated payoffs based on their correct selection of the order of finish. Payoffs are also determined by timing—the bettor who hits first receives the highest payoff.

Neb. Op. Att’y Gen. No. 10009, 2010 WL 1251447, at 1-2 (Mar. 29, 2010); see also Ariz. Att’y Gen. Op. No. I14-008, at 2 (Dec. 30, 2014) (describing operation of RaceTech, LLC, Instant Racing terminals); Ky. Op. Att’y Gen. No. 10-001, 2010 WL 81969, at 1-2 (Jan. 5, 2010) (same); 94 Md. Op. Att’y Gen. 32, 2009 WL 998670, at 1-2 (Mar. 17, 2009) (same). Whether “instant racing” wagering falls within the ordinary understanding of pari-mutuel betting presents a significant issue. The Wyoming Supreme Court has held that it does not. Wyo. Downs Rodeo Events, LLC v. State, 134 P.3d 1223, 1230 (Wyo. 2006) (“We agree with the district court’s tacit conclusion that we are not dealing with a new technology here, we are dealing with a slot machine that attempts to mimic traditional pari-mutuel wagering. Although it may be a good try, we are not so easily beguiled.”).

More recently, two state attorneys general have issued opinions explaining why they had grave doubts over the pari-mutuel status of instant racing wagering. The Nebraska Attorney General stated:

[W]hile the Instant Racing system is promoted as a parimutuel wagering system, there is a question as to whether the manner in which “Instant Racing” would be conducted is truly “parimutuel” wagering. It may be true that “Instant Racing” can be said to involve parimutuel wagering in a broad sense, since there is a pooling of wagers and a distribution of amounts wagered to winners. There appears, however, to be a distinction between parimutuel wagering on traditional live and simulcast races, and Instant

Racing. Unlike most parimutuel wagering on live and simulcast races, where many wagers are made on a single race or series of races, Instant Racing involves wagers on many different races. The pools also do not pertain to specific races. It is not clear that wagering on historic horseraces through IRTs is truly “parimutuel” in nature.

Neb. Op. Att’y Gen. No. 10009, 2010 WL 1251447, at 9 (footnote omitted). The Maryland Attorney General expressed similar concerns:

In traditional pari-mutuel wagering, those who successfully bet on the same winning outcome share a betting pool. . . . This is not the case with Instant Racing. There, individual players — even those using machines in the same location — are each wagering on different races with different horses and different outcomes. A bettor who successfully chooses a winning horse can therefore never “share the mutuel pool” with another who has done the same, for the simple reason that *no one else is betting on the same race*. In traditional pari-mutuel wagering, only the same type of bets on the same race or series of races are pooled together. By contrast, with Instant Racing, wagers on completely different races are pooled together based only on the various types of “wins” available to the players. Instead of each betting pool being shared by all of those who selected the correct order of finish in a particular race, the Instant Racing winner takes all of the money that has accumulated in the applicable betting pool at the time of that person’s successful bet. This may be pooled betting, but it is not pari-mutuel betting as contemplated in the Maryland Horse Racing Act.

Furthermore, bettors in a traditional pari-mutuel system, through their differing opinions and the money wagered on such opinions, participate directly in setting the odds on the various possible outcomes of a given race. Typically, the bettors are the only determinant of what the odds will be. For obvious reasons, this *cannot* occur in Instant Racing because, as noted above, no two players are ever betting on the same race. To the extent the success or failure of other players, or other factors such as the timing of “wins,” may influence the size of payouts available in Instant Racing, it does not occur through the same process which is at work in traditional pari-mutuel wagering. Indeed, from the materials provided, it is not always possible to determine what precise method, formula or procedure Race Tech will use to arrive at an appropriate payout in any given situation. What is clear, however, is that the method used is fundamentally different.

94 Md. Op. Att’y Gen. 32, 2009 WL 998670, at 4-5 (citation omitted). The Maryland opinion also pointed to a unique aspect of instant racing—seed pools—that are composed of a portion of all wagers to ensure that sufficient funds exist to pay successful players. *Id.* at 2 (explaining the creation and use of seed pools); 5 (“Instant Racing eliminates the potential for a minus pool by utilizing the seed pool, which is made up of monies wagered



by the bettors, as opposed to money supplied by the race track owner.”). Such deductions are foreign to traditional pari-mutuel wagering.

3. Absent a constitutional amendment, litigation likely appears the only means for resolving these issues under Idaho law.

There are, in sum, significant questions over whether the historical horse race wagering authorized under the proposed initiative—if similar to the instant racing betting analyzed in these attorney general opinions—constitutes pari-mutuel betting. See *generally*, Liebman, 27 Marq. Sports L. Rev. at 109-10 (concluding that instant racing wagering does not comport with traditional pari-mutuel betting). This office offers no recommendation concerning whether the proposed initiative’s sponsors should consider pursuing an amendment to art. III, sec. 20 of the Idaho Constitution, but it does appear quite possible that the initiative’s adoption will result in litigation over whether historical horse race wagering, if conducted on instant racing video terminals comparable to those discussed above, is pari-mutuel gambling exempted under the constitutional provision.

#### **B. The Severability Section’s Directive to Future Legislatures**

The Idaho Supreme Court established long ago that “[a] legislative session is not competent to deprive future sessions of powers conferred on them, or reserved to them, by the constitution.” Johnson v. Diefendorf, 56 Idaho 620, 636, 57 P.2d 1068, 1075 (1936). So, too, it is settled that “once a law is enacted in the initiative process it is like any other law. It may be amended or repealed by the legislature or subsequent initiative.” Gibbons v. Cenarrusa, 140 Idaho 316, 320, 92 P.3d 1063, 1067 (2002). These principles, taken together, render the second sentence of the proposed Idaho Code § 54-2512C hortatory and of no binding effect.

#### **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 copy of this Certificate of Review, deposited in the U.S. Mail to Benn Brocksome, 420 W. Main St., Ste. 205, Boise, Idaho 83702.

Sincerely,



LAWRENCE G. WASEN  
Attorney General

**Analysis by:**

Clay R. Smith  
Deputy Attorney General