IDAHO ATTORNEY GENERAL'S ANNUAL REPORT

CERTIFICATES OF REVIEW

AND

SELECTED ADVISORY LETTERS

FOR THE YEAR

2013

Lawrence G. Wasden
Attorney General

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Lawrence G. Wasden
Attorney General

INTRODUCTION

Dear Fellow Idahoan:

2013 was again an exceptionally busy year for my Office. The Office of the Attorney General continued to successfully represent Idaho and protect the state's legal interests throughout the state, Western region and nationally.

My Office continues to work with the State Board of Land Commissioners to ensure that the endowments of the State of Idaho achieve market-rate returns. These returns translate into added dollars for some of Idaho's most deserving constituencies—public schools, mental health hospitals, and higher education. My Office will continue these efforts to make certain the noble purpose behind the creation and management of these endowment lands is not lost.

The Consumer Protection Division recovered $7,355,498 for Idaho consumers and taxpayers. Importantly, this Division completed its litigation related to Average Wholesale Pricing (AWP). Within that litigation, certain drug companies inflated the prices of medications in order to receive higher reimbursements from Medicaid. My attorneys recovered more than $28 million from these companies. The Division has also continued its efforts in the ongoing claims surrounding the Tobacco Master Settlement Agreement, as well as efforts regarding Average Wholesale Pricing in the pharmaceutical arena.

Public corruption continues to be an issue throughout Idaho. My Office investigates and prosecutes these cases, when invited, throughout the State of Idaho. These efforts have resulted in the removal of corrupt leaders and employees around the state, but this work is never complete. My Office will continue to investigate and prosecute public corruption throughout Idaho as a means to instill confidence in our government and our leaders.

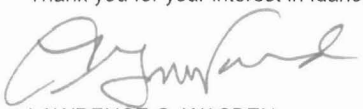
This past year my Office has spent many hours addressing the water supply issues throughout the state. I am pleased to report that the Snake River Basin Adjudication will be completed in 2014. Significant progress has also been made in resolving the conjunctive management litigation. Meanwhile, the Coeur d' Alene Spokane Basin Adjudication is beginning to gear up.

My Office has continued presenting Open Meetings and Public Records seminars around Idaho. In conjunction with the League of Women Voters, the Idaho Press Club, and Idahoans for Open Government, I went to eastern Idaho and presented open government training to the communities of Blackfoot, Hailey, Twin Falls, and Rexburg. These efforts will continue in north Idaho during the coming year. An informed citizenry is the truest guardian of our republic!

The Attorney General's Office is the single best resource, and most cost-effective option, for providing Idaho with legal representation. I continue to urge the Legislature, and my fellow elected officials, to further consolidate and provide the resources to the Office of the Attorney General, thereby minimizing Idaho's legal expenditures.

I encourage you to visit my website at http://www.ag.idaho.gov where you will find details about my Office and our work, including a variety of consumer and legal publications.

Thank you for your interest in Idaho's legal affairs.



LAWRENCE G. WASDEN
Attorney General

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LAWRENCE G. WASDEN
ATTORNEY GENERAL
2013
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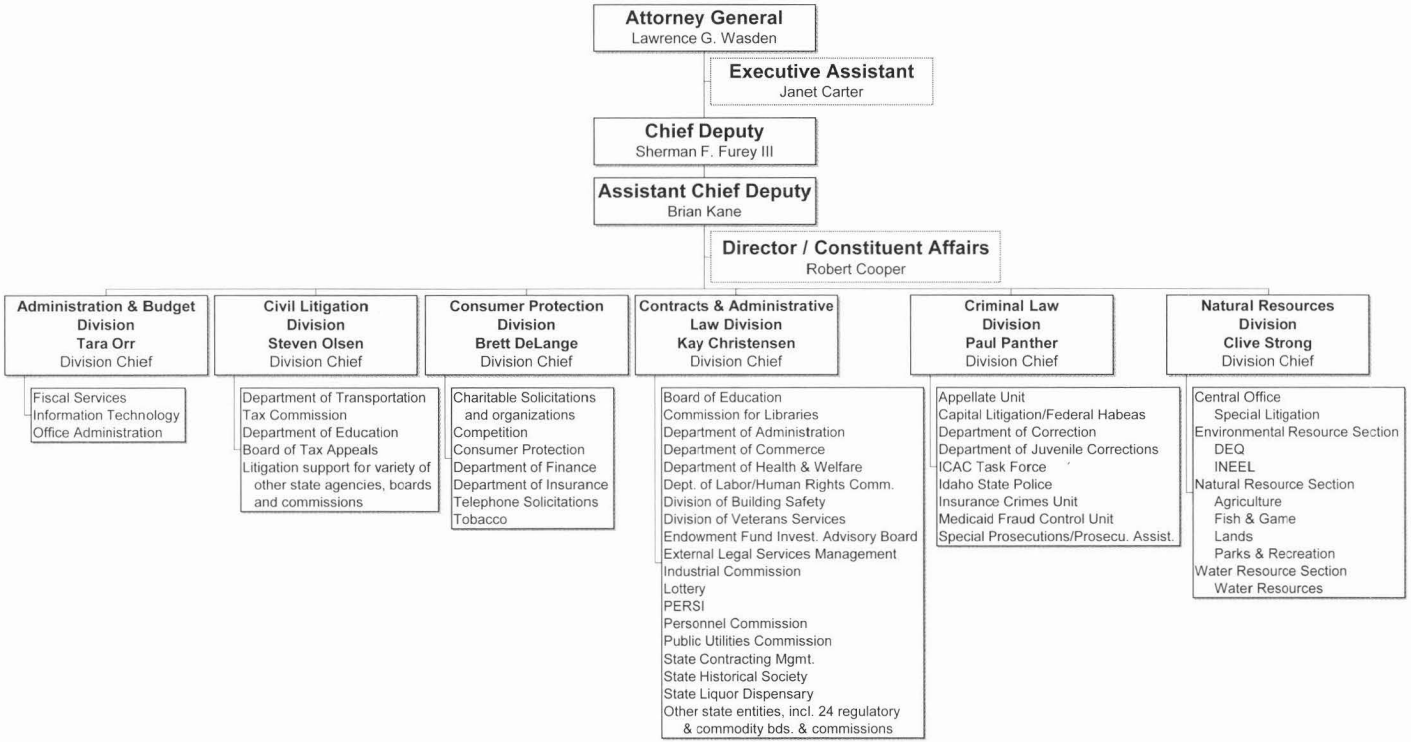
Office of the Idaho Attorney General
Organizational Chart - 2013



ATTORNEY GENERAL'S CERTIFICATES OF REVIEW FOR THE YEAR 2013

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

February 20, 2013

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

Re: Certificate of Review
Proposed Initiative Related to Legalization of Medical Use of Marijuana

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on January 22, 2013. 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." Due to the available resources and limited time for performing the reviews, we did not communicate directly with the petitioner as part of the review process. 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 TITLE

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. Summary of the Initiative

The initiative, which is self-titled the "Idaho Medical Marijuana Act" (hereafter "Act"), declares that persons engaged in the use, possession, man-

ufacture, sale, and/or distribution of marijuana to persons suffering from debilitating medical conditions, as authorized by the procedures established in the Act, are protected from arrest, prosecution, property forfeiture, and criminal and other penalties under Idaho law. A summary of the Act's provisions, tentatively denominated as Idaho Code § 39-9100, *et seq.*, begins with its purpose, which is:

> THEREFORE the purpose of this chapter is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use marijuana to alleviate suffering from debilitating medical conditions, as well as their physicians, primary caregivers, and those who are authorized to produce marijuana for medical purposes and to facilitate the availability of marijuana in Idaho for legal medical use.

Prop. I.C. § 39-9102.[1]

In general, the Act authorizes the Idaho Department of Health and Welfare ("Department") to establish a comprehensive registration system for instituting and maintaining the production and dispensing of marijuana for use by persons diagnosed with a debilitating medical condition. Prop. I.C. § 39-9106. The Act directs the Department to approve or deny applications for "registry identification cards" presented by "qualifying patients," their "designated caregivers," and "agents" of "medical marijuana organizations." Prop. I.C. §§ 39-9103(3), 39-9103(16), 39-9108 to 39-9113. The Department is required to issue "registration certificates" to qualifying "medical marijuana organizations," defined as "medical marijuana production facilities," "medical marijuana dispensaries," and "safety compliance facilities." Prop. I.C. §§ 39-9103(10), 39-9103(15), 39-9107, 39-9113, 39-9115. The Act permits, without state civil or criminal sanctions, marijuana to be produced by medical marijuana production facilities throughout the state (and qualified patients and/or designated caregivers whose registry identification cards allow them to "cultivate" marijuana), tested for potency and contaminants at safety compliance facilities, and transported to medical marijuana dispensaries for sale to qualifying patients and/or their designated caregivers.

The Act provides that: (1) qualifying patients ("patients") may possess up to 2½ ounces of marijuana, and, if a patient's registry identification card states that the patient "is exempt from criminal penalties for cultivating

marijuana," the patient may also possess up to 12 marijuana plants in an enclosed locked facility, etc., and any marijuana produced from those plants, and (2) designated caregivers ("caregivers") to assist up to 5 patients' medical use of marijuana, and to independently possess, for each patient assisted, the same amounts of marijuana described above, but not exceeding a total of 30 marijuana plants (assuming the caregiver's registry identification card bears a "cultivator" exemption). Prop. I.C. § 39-9103(2).

In order to become a patient, a person must have a "practitioner" (defined as a person authorized to prescribe drugs pursuant to the Medical Practice Act (I.C. § 18-5400, *et seq.*)) provide a written certification that, in the practitioner's professional opinion, the patient "is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient's debilitating medical condition or symptoms associated with the debilitating condition." Prop. I.C. §§ 39-9103(13), 39-9103(21). The certification must specify the patient's debilitating medical condition and may only be signed (and dated) in the course of a "practitioner-patient relationship after the practitioner has completed a full assessment of the qualifying patient's medical history and current medical condition." *Id.* Minors are also entitled to be issued registry identification cards as patients under certain criteria. Prop. I.C. § 39-9110(2).

A "debilitating medical condition" means not only the conditions listed (such as cancer, glaucoma, HIV, AIDS, "agitation of Alzheimer's disease," post-traumatic stress syndrome, etc.), but also any treatment of those conditions "that produces cachexia or wasting syndrome, severe and chronic pain, severe nausea, seizures, including those characteristic of epilepsy, or severe and persistent muscle spasms, including those characteristic of multiple sclerosis," any terminal illness with life expectancy of less than 12 months, or "[a]ny other medical condition or its treatment added by the department pursuant to section 39-9104." Prop. I.C. § 39-9103(4). The Act provides two methods in which to add new debilitating medical conditions or treatments to the list: (1) the public may petition the Department, and (2) "upon receipt by the department of a petition signed by at least fifty (50) practitioners requesting the debilitating medical condition or treatment be added." Prop. I.C. § 39-9104.

"Agents" are defined as principal officers, board members, employees, or volunteers of a medical marijuana organization who are at least 21

years old and who have "not been convicted of a felony offense." Prop. I.C. § 39-9103(1). A "felony offense" means a felony which is either a "violent crime" or a violation of a state or federal controlled substance law. Prop. I.C. § 39-9103(8). Caregivers, in contrast, do not have the "felony offense" restriction, but are required to be at least 21 years old and "agree to assist no more than five (5) qualifying patients at the same time." Prop. I.C. § 39-9103(6).

Patients may apply for registry identification cards for themselves and their caregivers by submitting a written certification issued by a practitioner within the last 90 days, application and fee, and a "designation as to who will be allowed to cultivate marijuana plants for the qualifying patient's medical use if a medical marijuana dispensary is not operating within fifteen (15) miles of the qualifying patient's home and the address where the marijuana plants will be cultivated." Prop. I.C. § 39-9109(1).[2] The Department is obligated to verify the information in an application (or renewal request) for a registry identification card, and approve or deny the application within ten days after receiving it, and must issue a card within five more days thereafter. Prop. I.C. § 39-9110(1). If a registry identification card "does not state that the cardholder is authorized to cultivate marijuana plants, the department must give written notice to the registered qualifying patient . . . of the names and addresses of all registered medical marijuana dispensaries." Prop. I.C. § 39-9110(3). The registry identification cards must include a "random twenty (20) digit alphanumeric identification number that is unique to the cardholder," and a "clear indication of whether the cardholder has been authorized by this chapter to cultivate marijuana plants for the qualifying patient's medical use." Prop. I.C. § 39-9111(1)(d)(g). The Department may deny an application or renewal request for a registry identification card for failing to meet the requirements of the Act, and must provide written notice of its reasons for doing so. Prop. I.C. § 39-9112. Registry identification cards expire after one year, and may be renewed for a fee. Prop. I.C. § 39-9113.

Medical marijuana organizations must have operating documents that include procedures for the oversight of the organization and accurate record-keeping, and are required to implement security measures to deter theft of marijuana and unauthorized entrance into areas containing marijuana. Prop. I.C. § 39-9115. Medical marijuana production facilities must restrict marijuana cultivation, harvesting, etc., within an enclosed, locked facility only accessible to registered agents. Prop. I.C. § 39-9115(3). Medical marijuana

production facilities and dispensaries "may acquire usable marijuana or marijuana plants from a registered qualifying patient or registered designated caregiver only if the . . . patient or . . . caregiver receives no compensation for the marijuana." Prop. I.C. § 39-9115(4).

The Department is required to "establish and maintain a verification system for use by law enforcement personnel and registered medical marijuana organization agents to verify registry identification cards." Prop. I.C. § 39-9118. Patients are required to notify the Department within ten days of any change in name, address, designated caregiver, and their preference regarding who may cultivate marijuana for them, and, upon receipt of such notice, the Department has ten days to issue a new registry identification card. Prop. I.C. § 39-9119(1)(4). If the patient changes the caregiver, the Department must notify the former caregiver that "his duties and rights . . . for the qualifying patient expire fifteen (15) days after the department sends notification." Prop. I.C. § 39-9119(6).

The Department is required to keep all records and information received pursuant to the Act confidential, and any dispensing of information by medical marijuana organizations or the Department must identify cardholders and such organizations by their registry identification numbers and not by name or other identifying information. Prop. I.C. § 39-9121(1), (2). Department employees may notify state or local law enforcement about suspected fraud or criminal violations if the employee who suspects the fraud or criminality "has conferred with his supervisor and both agree the circumstances warrant reporting." Prop. I.C. § 39-9121(6)(a)(b). Department employees may notify the board of medical examiners "if they have reason to believe that a practitioner provided a written certification without completing a full assessment of the qualifying patient's medical history and current medical condition, or if the department has reason to believe the practitioner violated the standard of care, or for other suspected violations of this chapter." Prop. I.C. § 39-9121(6)(c).

Prop. I.C. § 39-9122 creates a rebuttable presumption that patients and caregivers are deemed to be lawfully engaged in the medical use of marijuana if their conduct complies with the Act. However, the provision does not specify the types of cases (criminal, civil, or administrative) to which the presumption applies. Next – and most significantly – it provides that patients, caregivers, and practitioners are not subject to arrest, prosecution, or penalty

in any manner, or denial of any right or privilege, including any civil penalty or disciplinary action by a court or occupational or professional licensing board or bureau for conduct authorized by the Act. Practitioners are protected from sanctions for conduct "based solely on providing written certifications" (with the required diagnosis), but may be subject to sanction by a professional licensing board for "failing to properly evaluate a patient's medical condition or otherwise violating the standard of care for evaluating medical conditions." Prop. I.C. § 39-9122(4). No person is subject to criminal or civil sanctions for selling marijuana paraphernalia to a cardholder or medical marijuana organization, being in the presence of "the medical use of marijuana," or assisting a patient as authorized by the Act. Prop. I.C. § 39-9122(5).

The Act makes medical marijuana organizations and their agents immune from criminal and civil sanctions, and searches or inspections, if their conduct complies with the Act. Prop. I.C. § 39-9122(6) to (8). Further, the mere possession of, or application for, a registry identification card "may not constitute probable cause or reasonable suspicion, nor may it be used to support the search of the person or property of the person possessing or applying for the registry identification card." Prop. I.C. § 39-9122(10). Based upon the discussion that follows regarding the relationship between the Act and federal law, such a provision would have no impact upon a probable cause determination made in compliance with the Fourth Amendment of the United States Constitution. Prop. I.C. § 39-9122(11) states that no school, landlord, or employer may be penalized or denied any benefit under state law for enrolling, leasing to, or employing a cardholder or (leasing to) a medical marijuana organization. However, the Act "does not prevent the imposition of any civil, criminal, or other penalties" for possession or engaging in the medical use of marijuana on a school bus, preschool, primary, or secondary school grounds or in any correctional facility, nor does it allow smoking marijuana on any other form of public transportation or in any public place. Prop. I.C. § 39-9105.

The Department is given the task of making extensive rules, pursuant to the Idaho Administrative Procedure Act ("IDAPA") for implementing the Act's measures, including rules for: the form and content of applications and renewals, a system to "numerically score competing medical marijuana dispensary applicants," the prevention of theft of marijuana and security at facilities, oversight, recordkeeping, safety, dispensing of medical marijuana "by use of an automated machine," and safe and accurate packaging and labeling

of medical marijuana. Prop. I.C. § 39-9106. Notably, the provision requires that, in establishing application and renewal fees for registry identification cards and registration certificates, "[t]he total amount of all fees must generate revenues sufficient to implement and administer this chapter, except fee revenue may be offset or supplemented by private donations." Prop. I.C. § 39-9106(1)(g)(i). The same self-funding requirement is repeated in Prop. I.C. § 39-9106(1)(g)(iii). A "medical marijuana fund" is established by what is misnumbered (as the second) Prop. I.C. § 39-9127, but should be Prop. I.C. § 39-9128. The fund consists of "fees collected, civil penalties imposed, and private donations," and is to be administered by the Department.

Under the heading "Affirmative defense," the Act provides that patients, visiting patients, and caregivers "may assert the medical purpose for using marijuana as a defense to any prosecution of an offense involving marijuana intended for a qualifying patient's or visiting qualifying patient's medical use, and this defense must be presumed valid if," several criteria are met. Prop. I.C. § 39-9123(1). If evidence shows that the listed criteria are met, the defense "must be presumed valid." *Id.* Further, Prop. I.C. § 39-9123(2) allows a person to assert the "medical use" affirmative defense "in a motion to dismiss, and the charges must be dismissed following an evidentiary hearing if the person shows the elements listed in subsection (1)." Prop. I.C. § 39-9123 clearly creates a conclusive presumption, which is not only disfavored in law, but is also completely inconsistent with the way affirmative defenses operate – *i.e.*, by requiring the defense to present prima facie evidence at trial to support an affirmative defense before a jury instruction on the affirmative defense is deemed warranted. Moreover, the provision gives defendants the unprecedented opportunity of having an affirmative defense be the basis not only of acquittal at trial, but dismissal prior to trial. Finally, if the patient or caregiver succeeds in demonstrating a medical purpose for the patient's use of marijuana, there can be no disciplinary action by a court or occupational or professional licensing board, etc. Prop. I.C. § 39-9123(3).

Under the heading "Discrimination Prohibited," the Act makes it illegal for schools, landlords, nursing facilities, intermediate care facilities, hospice houses, hospitals, etc., to penalize a person solely for his status as a cardholder, unless to do so would violate federal law or cause the entity to lose a monetary or licensing benefit under federal law. Prop. I.C. § 39-9124(1). The provision also states that "[n]o person may be denied custody of or visitation or parenting time with a minor, and there is no presumption of neglect

or child endangerment for conduct allowed under this chapter, unless the person's behavior creates an unreasonable danger to the safety of the minor as established by clear and convincing evidence." Prop. I.C. § 39-9124(5). The presumption created by the "clear and convincing evidence" standard will make it much more difficult to prove that a parent or custodian's marijuana use is harmful to a child in civil proceedings.

The Act has measures for revoking registry identification cards and registration certificates for violations of its provisions, including notice and confidentiality requirements. Prop. I.C. §§ 39-9126, 39-9127. Under Prop. I.C. § 39-9127(7), it is a "class A misdemeanor" for an employee or official of the Department to breach the confidentiality of information. However, Idaho Code does not make any provision for "class A" misdemeanors. Subsection (8) of Prop. I.C. § 39-9127 reads, "[a] person who intentionally makes a false statement to a law enforcement official about any fact or circumstance related to the medical use of marijuana to avoid arrest or prosecution is guilty of an infraction . . . ." It is very questionable whether the phrase "any fact or circumstance relating to the medical use of marijuana" would withstand a "void for vagueness" constitutional challenge in court. The Act contains a "Severability" clause which states that if any of its provisions are "declared invalid for any reason, such declaration shall not affect the validity of the remaining portions of this act." The Act, Section 2.

If the Department fails to adopt rules to implement the Act within 120 days of the Act's enactment, any citizen may commence a mandamus action to compel compliance. [Corrected number] Prop. I.C. § 39-9129(1) to (2). If the Department fails to issue or deny an application or renewal for a registry identification card within 45 days after submission of such application, a copy of the application is deemed a valid registry identification card. [Corrected number] Prop. I.C. § 39-9129(3). Further, if the Department is not accepting applications or has not adopted rules for applications within 140 days after enactment of the Act, a "notarized statement" by a patient containing the information required in an application, with a written certification issued by a practitioner, etc., will be deemed a valid registry identification card. [Corrected number] Prop. I.C. § 39-9129(4). The Department must submit an annual public report to the Legislature with information set out in Prop. I.C. § 39-9120.

In sum, the Act generally decriminalizes under state law the possession of up to 2½ ounces of marijuana and (if authorized as a "cultivator") 12 marijuana plants for patients and caregivers. The Act also protects agents of medical marijuana production facilities, medical marijuana dispensaries, and safety compliance facilities from civil forfeitures and penalties under state law, and makes it illegal under state law to discriminate against all such participants in regard to education, housing, and employment. Patients certified by practitioners as having debilitating medical conditions may obtain marijuana for medicinal use from his (or his caregiver's) cultivation of marijuana (if authorized on the registry identification card), the patient's caregiver or a medical marijuana dispensary. Patients, caregivers, and agents of medical marijuana organizations must obtain registry identification cards, and medical marijuana organizations must obtain registry certificates from the Department, and continuously update relevant information. The Department is tasked with an extensive list of duties, including, *inter alia:* formulating rules and regulations to implement and maintain the Act's numerous and far-reaching measures, verifying information and timely approving applications and renewal requests submitted for registry identification cards and registration certificates, establishing and maintaining a law enforcement verification system, providing rules for security, recordkeeping, oversight, maintaining and enforcing confidentiality of records, and providing an annual report to the Idaho Legislature.

B. If Enacted, the Initiative Would Have No Legal Impact on Federal Criminal, Employment, or Housing Laws Regarding Marijuana

Idaho is free to enforce its own laws, just as the federal government is free to do the same. The United States Supreme Court has explained:

> In *Bartkus v. Illinois,* 359 U.S. 121 [1959], . . . and *Abbate v. United States,* 359 U.S. 187 [1959], . . . this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth Amendment, "subject [the defendant] for the same offence to be twice put in jeopardy":

> An offence [sic], in its legal signification, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a State or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . *That either or both may (if they see fit) punish such an offender, cannot be doubted."*

United States v. Wheeler, 435 U.S. 313, 316-17, 98 S. Ct. 1079, 1082-83, 55 L. Ed. 2d 303 (1978) (superseded by statute) (quoting Moore v. Illinois, 14 How. 13, 19-20, 14 L.Ed. 306 (1852)) (footnote omitted; emphasis added); *See* State v. Marek, 112 Idaho 860, 865, 736 P.2d 1314, 1319 (1987) ("[T]he double jeopardy clause of the fifth amendment does not prohibit separate sovereigns from pursuing separate prosecutions since separate sovereigns do not prosecute for the 'same offense.'"). Under the concept of "separate sovereigns," the State of Idaho is free to create its own criminal laws and exceptions pertaining to the use of marijuana. However, the State of Idaho cannot limit the federal government, as a separate sovereign, from prosecuting marijuana-related conduct under its own laws.

In United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 486, 121 S. Ct. 1711, 1715, 149 L. Ed. 2d 722 (2001), the United States Supreme Court described a set of circumstances that appear similar to the system proposed in the initiative:

> In November 1996, California voters enacted an initiative measure entitled the Compassionate Use Act of 1996. Attempting "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," Cal. Health & Safety Code Ann. § 11362.5 (West Supp. 2001), the statute creates an exception to California laws prohibiting the possession and cultivation of marijuana. These prohibitions no longer apply to a patient or his primary caregiver who possesses or cultivates marijuana for the patient's medical purposes upon the recommendation or approval of a physician. *Ibid.* In the wake of this voter initiative, several groups organized "medical cannabis dispensaries" to meet the needs of qualified patients. [Citation omitted.]

> Respondent Oakland Cannabis Buyers' Cooperative is one of these groups.

A federal district court denied the Cooperative's motion to modify an injunction that was predicated on the Cooperative's continued violation of the federal Controlled Substance Act's "prohibitions on distributing, manufacturing, and possessing with the intent to distribute or manufacture a controlled substance." *Id.* at 487. On appeal, the Ninth Circuit determined "medical necessity is a legally cognizable defense to violations of the Controlled Substances Act." *Id.* at 489. However, the United States Supreme Court reversed the Ninth Circuit and held:

> It is clear from the text of the [Controlled Substances] Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs "have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people," § 801(1), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, we reject the Cooperative's argument.
>
> . . . .
>
> For these reasons, we hold that medical necessity is not a defense to manufacturing and distributing marijuana. The Court of Appeals erred when it held that medical necessity is a "legally cognizable defense." 190 F.3d. at 1114. It further erred when it instructed the District Court on remand to consider "the criteria for a medical necessity exemption, and, should it modify the injunction, to set forth those criteria in the modification order." *Id.* at 1115.

Id. at 493-95.

The Oakland Cannabis Buyers' Cooperative decision makes clear that prosecutions under the federal Controlled Substances Act are not subject to a "medical necessity defense," even though state law precludes prosecut-

ing persons authorized to use marijuana for medical purposes, as well as those who manufacture and distribute marijuana for such use. Therefore, passage of the initiative would not affect the ability of the federal government to prosecute marijuana-related crimes under federal laws.

In sum, Idaho is free to pass and enforce its own laws creating or negating criminal liability relative to marijuana. But, as the United States Supreme Court's Oakland Cannabis Buyers' Cooperative decision demonstrates, even if the initiative is enacted, persons exempted from state law criminal liability under its provisions would still be subject to criminal liability under federal law.

The same holds true in regard to federal regulations pertaining to housing and employment. In Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643, 2008 WL 598310 at 1) (unpublished) (9th Cir. 2008), contrary to the plaintiff's contention that, because he was authorized under state law to use marijuana for medical purposes, he was illegally denied housing. The Ninth Circuit explained:

> The district court properly rejected the Plaintiffs' attempt to assert the medical necessity defense. See *Raich v. Gonzales*, 500 F.3d 850, 861 (9th Cir.2007) (stating that the defense may be considered only when the medical marijuana user has been charged and faces criminal prosecution). The Fair Housing Act, Americans with Disabilities Act, and Rehabilitation Act all expressly exclude illegal drug use, and AHA did not have a duty to reasonably accommodate Assenberg's medical marijuana use. See 42 U.S.C. §§ 3602(h), 12210(a); 29 U.S.C. § 705(20)(C)(i).
>
> AHA did not violate the Department of Housing and Urban Development's ("HUD") policy by automatically terminating the Plaintiffs' lease based on Assenberg's drug use without considering factors HUD listed in its September 24, 1999 memo. . . .
>
> Because the Plaintiffs' eviction is substantiated by Assenberg's illegal drug use, we need not address his claim . . . whether AHA offered a reasonable accommodation.

The district court properly dismissed Assenberg's state law claims. Washington law requires only "reasonable" accommodation. [Citation omitted.] Requiring public housing authorities to violate federal law would not be reasonable.

Similarly, the Oregon Supreme Court recently held that, under Oregon's employment discrimination laws, an employer was not required to accommodate an employee's use of medical marijuana. Emerald Steel Fabricators, Inc., v. Bureau of Labor and Industries, 230 P.3d 518, 520 (Or. 2010). Therefore, the provisions of the initiative, Prop. I.C. § 39-9101, *et seq.*, cannot interfere or otherwise have an effect on federal laws, criminal or civil, which rely, in whole or part, on marijuana being illegal under the federal Controlled Substances Act.

C. Recommended Revisions or Alterations

The initiative contains many "findings" in Prop. I.C. § 39-9102 that have not been verified for the purposes of this review due to time constraints. The Office of the Attorney General takes no position on those findings. In addition to the legal and non-legal problems previously discussed, the initiative has several other aspects that merit consideration, described as follows:

1. Prop. I.C. § 39-9127 "Medical marijuana fund – Private donations" is misnumbered and should be numbered "39-9128."

2. Prop. I.C. § 39-9128 "Enforcement of this act – Mandamus" is misnumbered and should be numbered "39-9129."

3. Prop. I.C. § 39-9103(4)(a) reads in part, "agitation of Alzheimer's disease," which would be more correctly phrased "agitation of Alzheimer's patients."

4. Prop. I.C. § 39-9103(19) reads in part, "means a secure, phone," which should omit the comma after the word "secure."

5. Under Prop. I.C. § 39-9103(1), medical marijuana organization agents cannot have been convicted of a felony offense (as defined), but there is no such requirement for caregivers, which may be intentional or an oversight.

6. Prop. I.C. § 39-9103(4)(a) defines "debilitating medical condition" as including a list of conditions "or the treatment of these conditions." However, Prop. I.C. § 39-9103(4)(b) more accurately explains that "debilitating medical condition" means "a chronic or debilitating disease or medical condition *or its treatment that produces cachexia or wasting syndrome, severe and chronic pain, (etc.).*" It is recommended that the phrase "or the treatment of these conditions" be excised from Prop. I.C. § 39-9103(4)(a).

7. In Prop. I.C. § 39-9103(4)(c), there is no indication of who decides whether a patient has a terminal illness "with life expectancy of less than twelve (12) months" in order to qualify as having a debilitating medical condition. It is recommended that the provision state who is given that responsibility.

8. The provision that allows a new debilitating medical condition or treatment to be added to such list if 50 or more practitioners sign a petition making a request does not have any public hearing, notice, or public comment provisions. These omissions may violate due process and/or equal protection constitutional requirements. *See* Prop. I.C. § 39-9104(2); cf. Prop. I.C. § 39-9106(1)(a). It is recommended that the provision be modified to allow for public hearing, notice, and public comment.

9. Prop. I.C. § 39-9107(e) appears to allow only one medical marijuana dispensary in counties of over 20,000, which is inconsistent with Prop. I.C. § 39-9107(4), which allows the Department to "register additional medical marijuana organizations at its discretion."

10. The registration requirements of patients, caregivers, and agents do not require the applicants to include their social security numbers – only their names and dates of birth. This less than certain method of identification could present identification issues at hearings or trials of cardholders for non-compliance with the Act, or violations of criminal law. *See* Prop. I.C. §§ 39-9108(2), 39-9109(1). It is recommended that social security numbers or other identifying numbers such as driver's licenses or other state-issued identification of persons applying (and proposed caregivers) for registry identification cards be required in the applications for such cards.

11. There is no criteria for a registry identification card to have the "cultivator" authorization on it. *See* Prop. I.C. §§ 39-9103(2)(a)(ii) and (b)(ii), 39-9109(1)(c)(v), 39-9110(3). If it is intended that the Department

create rules for such qualifications, it is recommended that such responsibility be included in the "Rulemaking" provisions of Prop. I.C. § 39-9106.

12. The provision authorizing the Department to conduct a "background check" of any "prospective medical marijuana organization agent" does not indicate whether those checks are for criminal history under the N.C.I.C. system or some other format, and does not explain who qualifies as a "prospective" medical marijuana organization agent. *See* Prop. I.C. § 39-9110(4). It is recommended that such details be provided in the proposed provision.

13. The Department is not required to prepare or present any financial information regarding the implementation and/or maintenance of the Act's provisions in its annual report to the Idaho Legislature. *See* Prop. I.C. § 39-9120. If an oversight, it is recommended that additional criteria concerning finances be included in the provision.

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 Lindsey Rinehart, 2912 W. Malad, Boise, Idaho 83705.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

JOHN C. McKINNEY
Deputy Attorney General

[1] References to "proposed" I.C. § 39-9100, *et seq.*, will read, "Prop. I.C. § 39-9100," etc.

[2] The Act also allows "visiting qualifying patients" from other states to possess medical marijuana while in Idaho. Prop. I.C. § 39-9103(20).

May 1, 2013

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

Re: Certificate of Review
Proposed Initiative to Increase the Minimum Wage Rate

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on April 15, 2013. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory time-frame 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 limited to those potentially affecting the legality of the initiative. This office offers no opinion with regard to the 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 the filing of the proposed initiative, this office prepares 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

The purpose of the proposed initiative is to amend Idaho Code § 44-1502 to increase Idaho's minimum wage rate by fixed amounts for calendar

years 2015, 2016 and for two consecutive calendar years in 2017 through 2018. If adopted, the initial minimum wage rate would be the same as the current Idaho and federal minimum wage rate of $7.25 per hour. The minimum wage would increase to $9.80 per hour through the end of calendar year 2018. After 2018, and for subsequent calendar years, the proposed initiative would require the Director of the Department of Labor to make annual increases to the minimum wage rate based on the rate of inflation according to the consumer price index for urban wage earners and clerical workers or CPI-W[1] . The proposal would also increase the amount of direct wages an employer must pay to tipped employees from $3.35 an hour through the end of calendar year 2014, up to $5.90 an hour for calendar year 2017 and beyond. For the employment of youth, the proposal lowers the age limit employees can receive an initial 90-day training wage of $4.25 per hour to employees under 18 years of age.

The federal Fair Labor Standards Act of 1938[2] (FLSA) also has minimum wage requirements that include special minimum wage rates for tipped employees and youth employment. For FLSA covered, non-exempt employers, the current federal minimum wage rate is $7.25 per hour (29 U.S.C. § 206), the amount of direct wages an employer must pay to tipped employees is at least $2.13 per hour (29 U.S.C. § 203(m))[3] , and the age an employee can receive an initial 90-day training wage of $4.25 per hour is limited to employees under 20 years of age (29 U.S.C. § 206(g)).

Although the proposed initiative sets higher minimum wage rates and stricter standards for applying the youth minimum wage than the FLSA, the FLSA does not preempt state law. This is because the FLSA contains a savings clause specifically authorizing states to set stricter standards: "No provision of this [Act] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this [Act]." 29 U.S.C. § 218. As a result, states are free to adopt and enforce minimum wage rates that are higher than the minimum wage rates established under federal law. Currently, 19 states have minimum wage rates that are higher than the FLSA.[4]

Regarding the calculation of the adjusted minimum wage rate, the proposed initiative imposes several specific requirements on the Department of Labor. Some of these requirements are clear and straightforward: the calculation is to be made on September 30 of each year to take effect the fol-

lowing January 1; it is to be calculated to the nearest cent; and, the rate of inflation used to make the calculation is determined from the percentage change in the CPI-W over the 12 months prior to September 1 of that year. However, three requirements in the proposed initiative are ambiguous when read together. Proposed Idaho Code § 44-1502(1)(e) directs the Department (1) to use the CPI-W to calculate the adjusted minimum wage rate in Idaho; (2) to maintain employee purchasing power; and, (3) increase the minimum wage rate by the rate of inflation. The requirement to use the CPI-W implies that the minimum wage rate is to follow the CPI-W as it increases or decreases each year. However, the statute directs that the minimum wage rate is to be adjusted by increasing it by the rate of inflation, without any corresponding reference to a decrease in the minimum wage should deflation occur. Further, the explicit objective to be met by adjusting the minimum wage rate is to maintain employee purchasing power, not to increase it or decrease it over time. These three requirements—use the CPI-W, maintain employee purchasing power, and increase the minimum wage rate by the rate of inflation—are in tension with one another, and that tension is not resolved by the plain language of the proposed initiative.

To avoid this ambiguity, it is recommended that language be added to clarify how the minimum wage calculation is to be made. If the proponents of the initiative intend for there to be a direct mathematical relationship between the CPI-W and the minimum wage rate, then the language of the proposed initiative should be changed to indicate that the adjusted minimum wage rate is to rise and fall depending on changes in the CPI-W. However, if the intent of the proposed initiative is to withhold authority from the Department to reduce the minimum wage rate even when the CPI-W declines, then the language of the proposed initiative should be changed to indicate that in the event the CPI-W declines, the minimum wage rate is to remain unchanged and not increase until the actual value of the CPI-W has returned to the level it had reached before it declined.

Giving specific mathematical instructions as to how the minimum wage rate is to be adjusted using the CPI-W will avoid problems administering the proposed initiative should it be adopted.

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 Anne Nesse, 854 North Victorian Drive, Coeur d'Alene, Idaho 83814.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CRAIG BLEDSOE
Deputy Attorney General

[1] "CPI-W" is the abbreviation for the federal consumer price index for urban wage earners and clerical workers, representing expenditures by urban households that derive more than half their income from clerical or hourly wage occupations. *See U.S. Dep't of Labor, Program Highlights, BLS Fact Sheet 94-1(Revised): Guide to Available CPI Data,* available at http://www.bls.gov/cpi/cpifact8.pdf.

[2] Fair Labor Standards Act of 1938 (FLSA), Pub. L. No. 75-718, 52 Stat. 1060, codified as amended at 29 U.S.C. § 201, *et seq.*

[3] *See also U.S. Department of Labor Wage and Hour Fact Sheet No. 15*, available online at http://www.dol.gov/whd/regs/compliance/whdfs15.pdf.

[4] *See U.S. Department of Labor, Wage and Hour Division, Minimum Wage Laws in the States* (Jan. 2013), available online at http://www.dol.gov/whd/minwage/america.htm.

September 24, 2013

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

Re: Certificate of Review
Proposed Initiative Amending the Idaho Sales Tax Statutes

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on August 26, 2013. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory time-frame within which this office must review the petition, our review can only isolate the 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 nor the potential revenue impact to the state budget.

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.

MATTERS OF SUBSTANTIVE IMPORT

One overarching complication of this review is that Petitioners used a prior version of the statutes when constructing the proposed initiative ("initiative"). Thus, it does not include many recent amendments made to the relevant statutes by the 2011, 2012, and 2013 legislative sessions. Petitioners

will need to revise the initiative to include the most recent version of the relevant statutes.

The proposed amendment in Section 1 to Idaho Code § 63-602L will not affect Idaho sales tax because that code section relates to personal property tax. This code section exempts from property taxation certain intangible personal property. Personal property tax is a distinct tax that is applied separately from Idaho's sales tax. Petitioners may want to omit this amendment in order to limit the effect of the initiative to Idaho sales tax only, if that is the intent of the initiative.

Section 2 proposes a new section to Idaho Code pertaining to Computer Software and Digital Goods. This amendment pulls "computer software" out of the tangible personal property definition in Idaho Code § 63-3616 and creates a new taxable item outside tangible personal property. Section 2 defines "computer software" to include information stored in electronic media. The initiative also defines "digital goods" separately from computer software. Historically, digital goods have been interpreted to fall under the definition of computer software as "information stored in an electronic medium." Bifurcating these definitions could create internal inconsistencies. Petitioners may wish to review these definitions to make digital goods a subset of computer software if that is their intent. However, the initiative makes both items taxable, which may make the issue immaterial. The drafters should also note that this area of taxation presents difficulty in defining these terms in this rapidly changing industry. This will also be a problem in the proposed sourcing sections as well.

The proposed amendment in Section 4 will shift the tax obligation from the contractor to the purchaser since real property contracts would be taxable under the proposed changes to Idaho Code § 63-3612(2)(k). It is possible the proposed initiative may tax the sale of new homes and not tax the sale of existing homes. If a builder builds a home that he intends to sell upon completion, he may be able to purchase the materials and the subcontract services for resale. Under the language of the proposed initiative, the sale of the newly constructed home may be categorized as a retail sale. The sale of an existing home would not be a retail sale.

The proposed changes to Idaho Code § 63-3613, subsection (a)(6), includes contracts for applying, installing, cleaning, altering, improving, dec-

orating, treating, storing, or repairing tangible personal property or real property. Recall that Idaho Code §§ 63-3622A and 63-3622O prohibit the imposition of taxes on retail sales to governmental entities. By including contracts described in subsection (a)(6) as retail sales, the initiative will completely exempt those contracts performed for governmental entities from taxation whereas under present law, materials used on government contracts are taxable. Contractors working at the Idaho National Laboratory (INL), Mountain Home Air Force Base, and contractors building or repairing highways or other roads are just a few examples of contracts that would completely escape taxation under the proposed initiative.

Petitioners should also revise the proposed changes to Idaho Code § 63-3613, subsection (f), which is incomplete.

Section 8 of the initiative, which creates a new section, Idaho Code § 63-3614A, limits the imposition of tax on services to certain activities engaged in for consideration. The new statute will not tax services performed for an "employer" by an "employee." The initiative does not contain a specific definition for either term, both of which are the subject matter of countless lawsuits. For instance, the classification of a worker as an employee or as an independent contractor is often problematic. The activities of an independent contractor may mirror that of an employee. Under a strict interpretation of the initiative, the activities of the independent contractor would be taxable while the activities of the employee would not be taxable, even though the services performed are identical. Petitioners may wish to clarify these terms and address their intent with regard to worker classification in order to avoid confusion.

Additionally, Section 8 does not include services provided by certain licensed medical professionals. It would appear that the drafters seek to exempt medical-related services. However, by exempting the service providers rather than the service provided, the exemption could extend to <u>any</u> service provided by a licensed medical professional. For instance, a registered nurse could operate a day care out of her home. Those services provided by the nurse would be exempt under the proposed Idaho Code § 63-3614A. On the other hand, a day care operated by a non-licensed medical professional (such as a teacher or a full-time child care provider without a medical designation) would be fully taxable. Additionally, the list of service providers excludes some health care professionals and includes other health care pro-

fessionals. Physical therapists are included, but occupational and speech therapists are not. This could be an impediment to passage by those excluded from the exemption and should be more broadly worded to include all health care professionals "licensed" by certain state boards.

The addition of the phrase "including sales of services" in Section 11 is redundant. The amendment to Idaho Code § 63-3612 includes the sales of services in the definition of "sales." The additions in this section may not be necessary.

The inclusion of the term "or service(s)" in Section 12 and Section 13 may not achieve the result intended by the drafters and may cause unnecessary confusion. By way of example, Idaho Code § 63-3621(f) relates to inventory held for resale. It is not clear how holding inventory for resale relates to services and the imposition of Idaho's use tax. Similarly, the addition of "or services" to Idaho Code § 63-3622(c) relates to tangible personal property sold for resale. The drafters' intent in adding "or services" is not apparent in relation to the resale of tangible personal property and could benefit from additional clarification.

The proposed Idaho Code § 63-3622D does not exempt any services except those services consumed in a production process. There are many statutes that provide exemptions of tangible personal property but would not be exempt from related services. For example, the occasional sale exemption exempts the transfer of tangible personal property between related entities. The proposed initiative would impose tax on service transactions between related entities. There are other exemptions that similarly exempt transactions involving tangible personal property, but related service transactions would be taxed under the initiative. Some obvious examples include the pollution control exemption, the research and development exemption, and the logging exemption. The drafters of the initiative have the prerogative to maintain any of the exemptions for sales of tangible personal property while taxing sales of related services, but the Petitioners may wish to consider some consistency for service-related transactions.

The drafters also included sourcing provisions in Sections 18, 19, and 20. These sourcing rules seem unduly complex. Moreover, the sourcing rules may or may not be consistent with other provisions of the Idaho sales tax laws. Sourcing is defined as the point where the retail sale occurs.

Subsection (5) of proposed Idaho Code § 63-3642 states that services "performed and consumed" in Idaho will be sourced to that location in Idaho. Services "performed" in another state yet "consumed" in Idaho will be sourced to Idaho where the "consumption" occurred. Services "performed" in Idaho yet "consumed" in another state will be sourced to that other state. The terms "performed" and "consumed" appear to be terms of art that could benefit from an explicit definition. Additionally, this section affects services related to sales of computer software and digital goods. It's worth noting that the recent 2013 legislative changes also included provisions for remotely accessed software, which will need to be addressed in the sourcing rules.

Relating to more general matters, Petitioners may wish to revisit the statement of purpose and the ten exemptions (broadcast equipment, commercial aircraft, railroad rolling stock and manufacturing, driver's education automobiles, trade-in value, ski lifts and snow grooming equipment, heating materials, utility sales, precious metal bullion, and telecommunication equipment) that it seeks to eliminate. These items are explicitly exempted in other statutes, which the drafters did not repeal in the proposed initiative.

Additionally, the proposed statutes appear to raise revenue for the State of Idaho. The initiative itself does not identify the revenue impact, yet as described in the cover letter submitted concurrently with the initiative, it is estimated the initiative could raise upwards of $740 million in revenues. This raises the question of whether an initiative that raises revenue will be struck because it did not originate in the House of Representatives. Article III of the Idaho Constitution provides that all bills which raise revenue must originate in the House. There is an argument that an initiative not originating in the House, which raises revenue, will be prohibited.

By using the term "bill," the drafters of the Constitution implied that the provision only applies to legislative enactments. An initiative, as allowed for in art. III, sec. 1, is a process for the people through signatures and voting to enact legislation. The history of the federal Origination Clause is all about balance between the two legislative houses. Idaho seems to have just copied the federal practice. The Idaho Constitutional Convention in 1889 adopted this section without debate or amendment. At the federal level, the clause had two motives. First, it put the fiscal authority in the House of Representatives, which was seen as being the house closest to the people. Second, it acted as

a counterbalance to the special powers granted only to the Senate – the power to advise and consent to Presidential appointments and to ratify treaties.

Thus, the rationale for requiring revenue-raising measures in the House seems inapplicable to initiatives. If, in fact, one of the motives is to give the power to the body closest to the people, then it seems logical that the initiative process could be used to raise revenue.

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 Robert C. Huntley, P.O. Box 2188, Boise, Idaho 83701.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

CHELSEA E. KIDNEY
Deputy Attorney General

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ATTORNEY GENERAL'S SELECTED ADVISORY LETTERS FOR THE YEAR 2013

LAWRENCE G. WASDEN
ATTORNEY GENERAL
STATE OF IDAHO

January 15, 2013

The Honorable Pete Nielsen
Idaho State Representative
Statehouse
VIA HAND DELIVERY

Re: Our File No. 13-43283 — Medical Child Support Costs

Dear Representative Nielsen:

This letter is in response to your recent inquiry of this office regarding the provision of medical support by parents for their children. Specifically, you asked whether the statutes could be amended to apportion the costs of medical care. Set forth below is an overview of the statutes, which indicate that the costs of medical care can be apportioned, as well as subject to an order of the court.

Generally, states are required to include medical support in child support orders by 45 C.F.R. § 303.31. Idaho has implemented that requirement through a series of statutes that have been reviewed and approved as part of the child support state plan procedure established by the federal Office of Child Support Enforcement.

1) Idaho Code sections 32-706(1)(e) and 706(4)(e) deal with the requirement for either or both parents to provide for health insurance for the children as part of the child support order.
2) Idaho Code sections 32-1214A to 32-1214J outline the use of the National Medical Support Notice, which is used for administrative enforcement of the medical support provisions of a child support order.
3) Idaho Code section 32-1213 outlines the process by which a parent can seek a judgment or order for contribution from the other parent for payment of a specified medical expense obtained for a shared child.

Idaho's Child Support Guidelines are court rules contained in I.R.C.P. 6(c)(6). These rules appear to address the question posed to this office. The

operative provision is Section 8(d). That section allocates the responsibility for paying for medical expenses for a child (not otherwise covered by insurance) between the parents based upon the ratio of their income as used in calculating their child support obligation. **This section includes a specific provision outlining that if the out-of-pocket cost to the parent not responsible for seeking the medical treatment is in excess of $500 that consent from both parents must be obtained in writing prior to the course of treatment.**[1] In the specific instance which you have brought to this office's attention, it is likely that the support order in this case already contains an allocation of out-of-pocket medical expenses between the parents based on the Idaho Child Support Guidelines.

These guidelines, like all Idaho court rules, are formulated by judicial committee and adopted by the Idaho Supreme Court. For your review, the rule is set forth below:

> (d) **Health insurance premiums and health care expenses not covered by insurance.**
>
> (1) For each child support order, consideration should be given to provision of adequate health insurance coverage for the child. Such health insurance should normally be provided by the parent that can obtain suitable coverage through an employer at the lower cost. The actual cost paid by either parent for health insurance premiums or for health care expenses for the children not covered or paid in full by insurance, including, but not limited to, orthodontic, optical, dental, psychological and prescription medication expenses, shall be prorated between the parents in proportion to their Guidelines Income. These payments shall be in addition to basic child support and will be paid directly between the parents; however, the prorata share of the monthly insurance premium may instead be either a credit against or in addition to basic child support.
>
> (2) Any claimed health care expense for the children, whether or not covered by insurance, which would result in an actual out-of-pocket expense to the other parent of over $500 for the course of treatment, must be approved in advance, in writing, by both parents or by prior court order.

> Relief may be granted by the Court for failure to comply under extraordinary circumstances, and the Court may in its discretion apportion the incurred expense in some percentage other than that in the existing support order, and in so doing, may consider whether consent was unreasonably requested or withheld.

Without further information, it is hard to evaluate what led to the specific situation that you have inquired of. It is possible that the individual is receiving the full bill due to the fact that the child was covered under that individual's insurance policy and the balance has now been billed to the policy holder's address. Another possible scenario is that the provider is sending complete copies of the bill to both parents and will be pursuing payment jointly and severally. This is a common practice as the provider is not a party to the support order or divorce decree, and, as such, may not be aware of nor consent to the judicial distribution of that liability.

The child support guidelines referenced above specify the payment of unpaid medical expenses is to be made directly between the parties. This language has always indicated two things to the Department of Health and Welfare as the agency enforcing child support orders: 1) That the Department should not be enforcing medical reimbursement unless specifically directed by the Court to do so in a specific case; and, 2) it is anticipated that the party who sought the treatment has paid or been billed for the services and is subsequently seeking contribution toward the expenses they have incurred in providing for the child(ren).

I hope that you find this response helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

[1] There is an allowance for judicial bypass if either parent can show that the other was not reasonable or that obtaining advance consent was not possible or practicable.

February 1, 2013

Senator John H. Tippets
Representative Tom Loertscher
Representative Marcus Gibbs
State Capitol
P.O. Box 83720
Boise, ID 83720-0081

Dear Gentlemen:

Your letter of January 31, 2013, to Attorney General Lawrence Wasden was forwarded to me for response.

You ask whether repeal of personal property tax applied to businesses violates the provisions of art. VII, sec. 8 of the Idaho Constitution. That section provides that the power to tax corporations or corporate property, both real and personal, shall never be relinquished or suspended, and that corporations in the state or doing business in the state shall be subject to taxation on real and personal property owned or used by them.

The Idaho Supreme Court held in Williams v. Baldridge, 48 Idaho 618, 284 P. 203 (1930), that this section does not prohibit suspension of a particular tax on a corporation. It is, rather, designed to prevent the Legislature from bargaining away its power to tax. The Court explained:

> Provisions similar to sec. 8 of art. 7 are found in the Constitutions of most if not all of the western states. A cursory view of the history of the period during which these Constitutions were written sufficiently explains their origin. Various eastern states, in order to induce the rapid introduction of capital, particularly for railroad building, had granted franchises to corporations exempting them for long periods or perpetually from taxation.
>
> It was soon recognized that such a course was inadvisable and it was to guard against such practices that western states inserted provisions in their Constitutions similar to sec. 8 of art. 7.

> This knowledge of the background against which this section was written gives a clue to its real meaning. It was designed to prevent the bartering away by contract of the sovereign right of taxation.

48 Idaho at 629.

I suggest that Baldridge stands for the proposition that if a subsequent Legislature is free to repeal an exemption, then art. VII, sec. 8 does not prohibit the Legislature from passing the exemption.

You also ask if exemptions to the taxation of personal property are allowed, do restrictions exist on the ability to exempt the taxation of personal property. The Idaho Constitution provides that the Legislature "may allow such exemptions from taxation from time to time as shall seem necessary and just . . . ." (Idaho Const. art. VII, § 5). This power is plenary save only as it may be limited by state or federal constitutions. Achenbach v. Kincaid, 25 Idaho 768, 140 P. 529 (1914). The Legislature may, therefore, exempt personal property from taxation as it sees fit, so long as the exemption is necessary and just.

I hope this responds to your question. If you have further questions or comments, please contact me at the number below.

Sincerely,

GEORGE R. BROWN
Deputy Attorney General

February 8, 2013

The Honorable Kathleen Sims
Idaho House of Representatives
STATEHOUSE MAIL

Re: Commercial Use and Redistribution of Motor Vehicle Ownership Information Under Idaho Code § 49-203

Dear Representative Sims:

This letter responds to your February 6, 2013, request for clarification as to the Idaho Transportation Department's authority to disclose personal information about motor vehicle owners. You also ask how restrictions on the commercial use and redistribution of motor vehicle owners' personal information could be prevented.

Idaho's limitations on the disclosure of personal information of motor vehicle owners, as well as any exceptions to those limitations, mirror the Federal Driver's Privacy Protection Act. See 18 U.S.C. § 2725. Idaho Code § 49-203 requires the Department to disclose personal information about registered motor vehicle owners in certain circumstances. Subsection (2) provides, in part:

> (2) Personal information shall be disclosed, except as restricted in subsection (6) of this section, for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of nonowner records from the original owner records of motor vehicle manufacturers to carry out the purposes of the Automobile Information Disclosure Act (15 U.S.C. § 1231, et seq.), the Motor Vehicle Information and Cost Savings Act (49 U.S.C. § 32101, et seq.), the National Traffic and Motor Vehicle Safety Act of 1966, the Anti Car Theft Act of 1992, and the Clean Air Act (42 U.S.C. § 7401, et seq.), as amended.)

The Department may not disclose a person's photograph, digitized image of a photograph, digitized signature, social security number, or medical or disability information without the person's written consent. See Idaho Code § 49-203(6).

Idaho Code § 49-203(4) authorizes the Department to disclose personal information to a third party for limited uses, including the following:

> (a) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a federal, state, or local agency in carrying out its functions.
> (b) For use in matters of motor vehicle or driver safety and theft; motor vehicle emissions, motor vehicle product alterations, recalls or advisories; performance monitoring of motor vehicles, motor vehicle parts, and dealers; motor vehicle market research activities, including survey research; and removal of nonowner records from the original records of motor vehicle manufacturers.
> (c) For use in the normal course of business by a legitimate business or its agents, employees or contractors, but only:
>
> (i) To verify the accuracy of personal information submitted by the individual to the business or its agents, employees or contractors; and
>
> (ii) If such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purpose of preventing fraud by pursuing legal remedies against, or recovering on a debt or security interest against, the individual.
>
> (d) For use in connection with any civil, criminal, administrative or arbitral proceeding in any federal, state or local court or agency or before any self-regulatory body, including the services of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a federal, state or local court.
> (e) For use in research activities, and for use in producing statistical reports, so long as personal information is not published, redisclosed or used to contact individuals.

(f) For use by any insurer or insurance support organization, or by a self-insured entity, or its agents, employees or contractors, in connection with claims investigation activities, rating or underwriting.
(g) For use in providing notice to the owners of towed or impounded vehicles.
(h) For use by any licensed private investigative agency or licensed security service for any purpose permitted under the provisions of title 49, Idaho Code.
(i) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under the Commercial Motor Vehicle Safety Act of 1986 (49 U.S.C. § 31101, et seq.).
(j) For bulk distribution for surveys, marketing, or solicitations if the department has obtained the written consent of the person to whom such personal information pertains.
(k) For any other use specifically authorized under Idaho Code, if such use is related to public safety or the operation of a motor vehicle.
(l) For use in connection with the operation of private toll transportation facilities, including companies that operate parking facilities for the purpose of providing notice to the owners of vehicles who have used the facility.

A person who receives personal information from the Department may redistribute such the information to others, but only for purposes outlined in Idaho Code § 49-203(4). See Idaho Code § 49-203(7).

Before a professional organization may purchase personal information in bulk from the Department, the organization must execute a contract with the Department in which the organization agrees:

- it is purchasing the information for a purpose designated in Idaho Code § 49-203 and applicable federal laws;
- it will not use the purchased information for solicitations;
- it will not resell the purchased information to third parties without the express written consent of the Department;

- the Department retains the right to audit the organization's records for compliance; and
- the contract may be terminated if it is breached.

Neither Idaho law nor Department policy authorizes the distribution or redistribution of motor vehicle owners' personal information for advertising purposes without the person's written consent. You indicate in your letter that the Idaho Automobile Dealers Association (IADA) purchases personal information from the Department and disseminates it to Idaho dealerships. Assuming IADA only purchases this information for a purpose designated in Idaho Code § 49-203 and has executed the Department's required contract, IADA should not be the source of any owner-specific advertisements. On the other hand, if IADA purchases personal information from the Department for advertising purposes, it is violating Idaho Code § 49-203 and Department policy. Furthermore, if dealers obtain the information from IADA so they can use it for advertising purposes, the dealers are violating Idaho Code § 49-203.

Nothing prohibits the Legislature from amending Idaho Code § 49-203 to further restrict the distribution of motor vehicle owners' personal information. For example, the Legislature could eliminate the following exceptions of Idaho Code § 49-203(4) that, because of their ambiguous language, may result in the misuse of motor vehicle owners' personal information:

- (4)(b) (market/survey research activities);
- (4)(e) (statistical research activities); and
- (4)(j) (marketing/solicitations with written consent).

If I can answer additional questions or be of further assistance, please do not hesitate to call me at (208) 334-4114 or e-mail me at brett.delange@ag.idaho.gov.

Sincerely,

BRETT T. DELANGE
Division Chief
Consumer Protection Division

February 11, 2013

The Honorable Dean Mortimer
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 13-43652 — Open Meeting Minutes

Dear Senator Mortimer:

This letter is in response to your inquiry of this office regarding written minutes of meetings. Specifically, you ask whether the law requires that minutes of open meetings be provided within a set timeframe.

The Idaho Open Meeting Law requires: "All minutes shall be available to the public within a reasonable time after the meeting . . . ." Idaho Code § 67-2344. Idaho law does not define the term "reasonable" with regard to how quickly minutes must be made available to the public. Within your inquiry, you have indicated that there may be minutes eight years old that have not been approved or released to the public. It is difficult for this office to raise a plausible defense of minutes that are eight years old being released within a "reasonable" time. Generally, this office recommends that minutes of meetings be released within approximately two weeks of the meeting, although recognizes that infrequently meeting boards may take longer to prepare and release their minutes.

The Legislature could set a more firm deadline for the release of minutes within the statute. For example, the Legislature could require approval and release of its minutes no later than the second meeting following the meeting for which the minutes were taken. This would allow for preparation and approval of the minutes by the board. Or, the minutes could be required to be released and approved within one week of the meeting at which they were taken—although that deadline could require boards to meet more frequently to approve minutes. Swifter approval of minutes or more frequent meetings could require additional personnel to ensure that minutes are pre-

pared in a timely fashion. Thus, legislation requiring a specific time limit for the approval of minutes would likely have some fiscal impact.

I hope that you find this response helpful. If you would like to discuss this issue more fully, or any other, please contact me.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 4, 2013

The Honorable Jeff Siddoway
Idaho State Senator
Statehouse
VIA HAND DELIVERY

Re: Our File No. 13-43890 — Dedicated Fund Program

Dear Senator Siddoway:

This letter is in response to your inquiry regarding whether a dedicated fund program can abdicate its responsibilities if it runs out of money. No details as to what agency or what the function of the agency is have been provided, therefore, this answer will be extremely general in application.

First, dedicated fund agencies are subject to the appropriation process. Idaho Const. art. VII, § 13. See 1985 Idaho Att'y Gen. Ann. Rpt. 43. An example of such an appropriation is found in House Bill 602 from last session, which is the appropriation for the Department of Finance (http://legislature.idaho.gov/legislation/2012/H0602.pdf). According to the appropriation bill, it appears that the Department was appropriated funds out of its dedicated funds account. This appropriation limits the amount that the Department may spend out of its funds, which means that even if additional monies are in the fund, the Department must have an appropriation to spend them. In the event a dedicated fund agency failed to have sufficient funds, funds could be appropriated out of the general fund to supplement. This determination would be made by the Legislature through the process discussed in the next paragraph.

As a general matter, an agency would likely have a number of options that would include prioritization of mandatory and discretionary functions, submittal of claims to the Board of Examiners, and likely oversight from the Governor's Office as well as the Legislature in addressing a revenue shortfall. In the event additional claims are made against an agency while the Legislature is out of session, the Board of Examiners may examine that claim.

Idaho Const. art. IV, § 18. Generally, upon acceptance and approval of the claim, these items then go through the supplemental appropriation process.

Without specifics, I am uncertain as to whether an entity could simply close their doors because the funds had run out. Certain public safety agencies likely could not, while a primarily policy agency potentially could. Within many agencies, there are mandatory ("shall") responsibilities coupled with discretionary ("may") responsibilities. An agency faced with dwindling funds could curtail their discretionary responsibilities in order to ensure that their mandatory responsibilities are fulfilled. So, for example, if a dedicated fund agency failed to have necessary funds appropriated to it, it would likely need to engage in a series of cost savings analyses to determine whether it could "make do," or some other measure was necessary. Furloughs, layoffs, and/or shifting of priorities could all occur.

In sum, absent clear legislative intent or direction from the Governor, it is uncertain whether an agency could simply "abdicate its duties." We would hope that such a dire situation could be avoided through the processes and alternatives discussed above.

I hope that you find this response helpful.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

March 18, 2013

Stephanie J. Bonney
Moore, Smith, Buxton & Turcke, Chtd.
950 W. Bannock St., Ste. 520
Boise, ID 83702

Dear Ms. Bonney:

Your letter of January 30, 2013, to Brian Kane requesting an attorney general opinion was forwarded to me for response.

In your letter, you ask whether a board of county commissioners has the legal authority to borrow funds for its general fund from dedicated non-general funds of the county, and if so, under what circumstances. On February 19, 2013, after we discussed the case by telephone, you sent me an e-mail that further limited the scope of your question to whether the county could borrow amounts for its general fund from its (1) road and bridge fund, and (2) solid waste fund.

Based on our previous communications, I assume that the term "borrow," for the purposes of this question, describes the administrative transfer of amounts from the identified funds into the general fund to meet the county's immediate budgetary needs. Counties in Idaho have no power to borrow money, except in situations expressly provided in statute. Few of these statutory provisions exist. Some examples are: Title 63, chapter 31, Idaho Code, allows for short-term bonding in anticipation of the receipt of tax revenues by the county during the current year; some sections of title 31, Idaho Code, provide that counties may utilize bonding to raise amounts to fund specific activities, but only after a public election on the matter (see Idaho Code §§ 31-1002 and 31-1903); and art. VIII, sec. 3 of the Idaho Constitution allows for bonding, subject to public election, for various public works. Also, under Idaho Code § 31-1507, warrants for emergency expenditures pursuant to Idaho Code § 31-1608 may be paid via short-term borrowing from other county funds, subject to market interest rates. Idaho Code § 31-1507 does not indicate, however, whether borrowing from dedicated funds, in which money is protected from transfer by their governing statutes, is allowed. County treasurers are specifically prohibited from loaning county or state funds or

allowing anyone to use those funds, except as provided by law. Idaho Code § 31-2119. Insofar as my assumption that the question is about administrative transfers and not borrowing subject to certain terms is correct, I will answer the question of whether or not a county board can transfer funds from its road and bridge and solid waste funds to its general fund.

Idaho Code § 31-1508 prohibits county boards from transferring money from one fund to another "except in cases expressly provided and permitted by law . . . ." There are a few methods applicable to any county fund expressly provided and permitted by law to transfer money from dedicated county funds. Idaho Code § 31-1508 excepts from the stated prohibition any money set apart in a separate fund that becomes "inoperative for the purpose for which said fund was created." Should that event occur, a transfer is allowed from the fund "to such fund as the board of county commissioners may deem best." Counties can perform interfund borrowing pursuant to Idaho Code § 31-1507 as described above. Counties are also allowed to invest amounts from funds that are surplus or idle for the time being pursuant to Idaho Code § 57-127.

Road and Bridge Funds

County road and bridge funds are identified by Idaho Code § 40-604(8) and levies for county highway systems are governed by Idaho Code § 40-801. Counties also receive funds from the state's highway distribution account pursuant to Idaho Code § 40-709.

County road and bridge funds are subject to certain exceptions from Idaho Code § 31-1508. One exception is found in Idaho Code § 63-806 when it says:

> (2) All property taxes levied in any year for the county current expense fund, county road fund and county bridge fund and collected on or after the first day of January in the succeeding year and any property tax levied for any purpose and which is no longer needed for such purpose when collected must be paid into the county treasury and apportioned to the county warrant redemption fund, except as otherwise provided by law. All money in the county treasury on the first day of October to the credit of the county current expense fund,

> county road fund, county bridge fund or any other fund which is no longer needed must be transferred to the county warrant redemption fund upon the books of the county auditor and county treasurer by resolution of the county commissioners entered upon the records of the proceedings.

So if a warrant redemption fund exists, unneeded funds from the county road and bridge fund must be transferred to it in a manner compliant with the timing and administrative requirements in Idaho Code § 63-806. Unneeded funds are those above the amount required to pay for current expenses, and the board of county commissioners is responsible to determine that amount. Laclede Highway Dist. v. Bonner County, 33 Idaho 476, 196 P. 196 (1921). The exception in section 63-806 also applies to funds distributed to counties from the state's highway distribution account. In re Boise County, 465 B.R. 156 (D. Idaho 2011). Idaho Code § 40-709(7) restricts highway funds from being "used for any purposes other than those provided in [section 40-709], except as specifically otherwise provided." The court in In re Boise County concluded that Idaho Code § 63-806(2) "appears to fall within" the "except as specifically otherwise provided" language in Idaho Code § 40-709(7) to allow unneeded state sourced amounts in county road and bridge funds to be shifted to warrant redemption funds.

Should a statutory exception not apply, county road and bridge funds fall under the general prohibition on interfund transfers found in Idaho Code § 31-1508.

Solid Waste Fund

Title 31, chapter 44, Idaho Code, governs solid waste disposal sites. Idaho Code § 31-4404 allows counties to levy property taxes for solid waste funds. No separate code section within chapter 44 specifically allows or denies the transfer of funds from a county solid waste fund to other county funds, therefore, Idaho Code § 31-1508 controls any such transfer. When applied to solid waste funds, Idaho Code § 63-806(2) falls under Idaho Code § 31-1508's exception to the general rule that counties cannot transfer amounts between funds because it says:

> . . . . All money in the county treasury on the first day of October to the credit of the county current expense fund, county road fund, county bridge fund *or any other fund which is no longer needed* must be transferred to the county warrant redemption fund.

(Emphasis added.) Therefore, pursuant to section 63-806(2), amounts no longer needed in county solid waste funds on October 1 can be transferred to county warrant redemption funds in the same manner as unneeded amounts in county road and bridge funds.

Should a statutory exception not apply, county solid waste funds fall under the general prohibition on interfund transfers found in Idaho Code § 31-1508.

CONCLUSION

Counties only have the powers specified in statutes, or powers "necessarily implied from those expressed." Idaho Code § 31-601. The general power to transfer amounts between county funds is not specified in statute and that general power is not implied from any other powers or responsibilities counties hold. Absent a situation to which a specific statutory exclusion applies, amounts in county road and bridge funds and county solid waste funds fall under the prohibition against interfund transfers found in Idaho Code § 31-1508.

I hope this responds to your question. If you have further questions or comments, please contact me at the number below.

Sincerely,

GEORGE R. BROWN
Deputy Attorney General

April 18, 2013

The Honorable Stephen Hartgen
Idaho State Representative
1681 Wildflower Lane
Twin Falls, ID 83301

Re: Our File No. 13-44330 — District Boards of Health

Dear Representative Hartgen:

You recently asked several questions related to the authority and powers of the District Boards of Health (hereinafter "District Board") over the management and direction of their respective district. More specifically, you inquired whether the District Board had the power to monitor, discipline, sanction, and remove an appointed Director of the health district. This analysis provides a general overview of the authority of the District Board, and cannot be used as a basis for specific action by a District Board. Prior to taking any of the actions contemplated within this analysis, this office strongly encourages a District Board to consult directly with its attorney to fully understand the legal ramifications of any action.

The District Board is "vested with the authority, control, and supervision of the district health department, and with such powers as required to perform the duties as are set forth in this act and shall be responsible for supervision of all district health programs." Idaho Code § 39-410.

The district health director (hereinafter "Director") is appointed by the District Board. In other words, the Director serves at the pleasure of the District Board. He or she has general powers and duties "inherent in the position or delegated to him or imposed upon him by law or rule, regulation, or ordinance." Idaho Code § 39-413. However, the administration and enforcement of the district health standards lie with the District Board. See Idaho Code § 39-414(1). With respect to personnel working for the district health department under the Director, the law expressly provides the District Board with approval authority over the Director as follows:

> The director shall have and exercise the following powers and duties . . . :
>
> * * *
>
> (4) **With the approval of the district board to:**
> (a) Prescribe the positions and the qualifications of all personnel under the district health director on a nonpartisan merit basis in accordance with the objective standards approved by the district board.
> (b) Fix the rate of pay and appoint, promote, demote, and separate such employees and to perform such other personnel actions as are needed from time to time in conformance with the requirements of chapter 53, title 67, Idaho Code.
> (c) Create such units and sections as are or may be necessary for the proper and efficient functioning of the duties herein imposed.

Idaho Code § 39-413 (emphasis added).

Read together, the District Board has the duty to supervise all district health programs and the Director is obligated to gain the approval of the District Board on standards to be used to determine the number and qualifications of the district's staff, and although the rate of pay and other personnel policies must conform with the laws and rules governing the state personnel system, the District Board still has oversight responsibilities. The policies and standards for the district must be approved by the District Board.

You also asked about the process or procedure for the District Board to address issues with the Director. It is within the power and authority of the District Board to establish how it will measure the performance of the Director and how often it will review the Director's performance.

As for whether the District Board can conduct its oversight function of the Director in a closed meeting or executive session, the rule of thumb is that an executive session cannot be utilized to consider general personnel matters, however, an executive session can be held to consider those specifically enumerated personnel matters found in Idaho Code § 67-2345(1)(a) and

(b); that is, "to consider hiring a public officer, employee, staff member or agent" or to "consider the evaluation, dismissal or disciplining of, or to hear complaints or charges brought against, a public officer, employee, staff member or individual agent, or public school student."

As provided above, this analysis is a general overview of the authority of the District Board, and should not be used as the basis for specific action by a District Board. Prior to taking any action contemplated by this analysis, this office strongly encourages a District Board to consult directly with its attorney to fully understand the legal ramifications of any action.

I hope you find this analysis helpful. Please let me know if I can be of further assistance.

Sincerely,

BRIAN KANE
Assistant Chief Deputy

July 9, 2013

Hon. Bob Nonini
Idaho State Senate
P.O. Box 83720
Boise, Idaho 83720-0081

Re: City of Coeur d'Alene Ordinance No. 3466

Dear Senator Nonini:

The Attorney General has referred your June 20, 2013, letter to me for response. It asks five questions concerning Ordinance No. 3466 adopted by the City of Coeur d'Alene on June 4, 2013. In general terms, the Ordinance prohibits discrimination on the basis of sexual orientation or gender identity/expression with respect to employment, housing or public accommodations. The Ordinance applies only within the City's territorial jurisdiction. Your questions are answered in the order posed.

Question No. 1: "Has Coeur d'Alene ordinance #3466 been preempted by current state or federal law?"

Answer: No. Art. XII, sec. 2 of the Idaho Constitution provides that "[a]ny county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." *See also* Idaho Code § 50-302 ("[c]ities shall make all such ordinances, bylaws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry"). The constitutional provision, as its text indicates, empowers municipalities "to enact regulations for the furtherance of the public health, safety or morals or welfare of its residents." Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene, 126 Idaho 740, 742, 890 P.2d 326, 328 (1995) (internal quotation marks omitted); *see also* State v. Clark, 88 Idaho 365, 373, 399 P.2d 955, 959 (1965) ("[a city] has authority to make police regulations not in conflict with the general laws, co-equal with the authority of the legis-

lature to pass general police laws"). Any challenge on policy grounds to validity of a municipality's exercise of its police powers faces a substantial hurdle because "[g]enerally courts are not concerned with the wisdom of ordinances and will uphold a municipal ordinance unless it is clearly unreasonable or arbitrary." Potts Constr. Co. v. N. Kootenai Water Dist., 141 Idaho 678, 682, 116 P.3d 8, 12 (2005). It is quite unlikely that a court would invalidate the ordinance as being unreasonable or arbitrary.

Your question, therefore, properly focuses on the critical issue: preemption. The Idaho Legislature has not addressed the issue of discrimination on the basis of sexual orientation or gender identity/expression. It only proscribes at this time discrimination in employment, union membership, public accommodation, education, or real estate transactions because of race, color, religion, sex, national origin or, as to certain activities, age or disability. Idaho Code § 67-5909. Nothing in title 67, chapter 59, Idaho Code, allows the conclusion that the Legislature "intended to fully occupy or preempt a particular area"—instantly all forms of discrimination related to, *inter alia*, employment or public accommodation. Envirosafe Servs. of Idaho, Inc. v. Owyhee County, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). So, too, Congress has remained silent on the issue. In the absence of comprehensive, or pervasive, regulation directed at the particular form of discrimination prohibited under Ordinance No. 3466 by either the Legislature or Congress, no substantial grounds exist to warrant finding implied preemption. *See* Idaho Dairymen's Ass'n, Inc. v. Gooding County, 148 Idaho 653, 659, 227 P.3d 907, 913 (2010).

Question No. 2: "If Coeur d'Alene ordinance #3466 has not been preempted by current state or federal law, can legislation be crafted which would preempt the ordinance?"

Answer: Likely no. The United States Supreme Court in Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996), invalidated an amendment to the Colorado Constitution that provided:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall

> enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Id. at 624. The majority opinion reasoned that "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group" that was "so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects." *Id.* at 632. The "reasons offered" were two: (1) "respect for other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality," and (2) "conserving resources to fight discrimination against other groups." *Id.* at 635. The Court deemed the amendment's expansive scope decisive:

> [W]e cannot accept the view that Amendment 2's prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State's view, by trying to pass helpful laws of general applicability. This is so no matter how local or discrete the harm, no matter how public and widespread the injury. We find nothing special in the protections Amendment 2 withholds. These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.

Id. at 631. The amendment instead "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634; *see also id.* at 635 ("Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else").

Subsequent to Romer, the Sixth Circuit Court of Appeals concluded that the City of Cincinnati could *repeal* an ordinance prohibiting sexual orientation discrimination and, in so holding, distinguished the Supreme Court's opinion:

> A state law which prevents local voters or their representatives, against their will, from granting special rights to gays, cannot be rationally justified by cost savings and associational liberties which the majority of citizens in those communities do not want . . . . In contradistinction [to the Colorado constitutional amendment], . . . the Cincinnati Charter Amendment constituted local legislation of purely local scope. As such, the City's voters had clear, actual, and direct individual and collective interests in that measure, and in the potential cost savings and other contingent benefits which could result from that local law. Beyond contradiction, passage of the Cincinnati Charter Amendment was not facially animated solely by an impermissible naked desire of a majority of the City's residents to injure an unpopular group of citizens, rather than to legally actualize their individual and collective interests and preferences. Clearly, the Cincinnati Charter Amendment implicated at least one issue of direct, actual, and practical importance to those who voted it into law, namely whether those voters would be legally compelled by municipal ordinances to expend their own public and private resources to guarantee and enforce nondiscrimination against gays in local commercial transactions and social intercourse.

Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289, 300 (6th Cir. 1997). The court of appeals thus found Romer non-controlling because the constitutional amendment operated statewide—and thereby

deprived a municipality's citizens of the right to expend resources to prevent a particular form of discrimination—while the ordinance's electoral repeal represented, at least arguably, a legitimate determination to cease spending city funds for a particular purpose—a decision made by the city's residents themselves.

One potential route for the Legislature to consider is making the provisions of title 67, chapter 53, Idaho Code, the exclusive remedy for discrimination of the types covered there. The justification would be to ensure a uniform, *i.e.*, statewide, approach to the entire field of employment, public accommodation, education and real estate transaction-related discrimination, with the Human Rights Commission responsible for the statute's administration. This approach would allow the Legislature to define those types of prohibited discrimination and is suggested in your fourth question. I must further add, however, that such a revision likely would be challenged in federal court. Such litigation might well result in the statute's invalidation given the possibility that the legislation would be viewed as simply aimed at local sexual orientation anti-discrimination regulations like Ordinance No. 3466. All in all, therefore, Romer stands as a substantial obstacle to successful legislative preemption of the Coeur d'Alene ordinance.

Question No. 3: "Is Coeur d'Alene ordinance #3466 so vague or overly broad as to be unconstitutional under the Idaho or U.S. Constitution?"

Answer: Likely no in a facial challenge context. Courts distinguish between "facial" and "as applied" constitutional challenges. A facial challenge to a statute or, as here, an ordinance that does not regulate speech or association, is predicated on the proposition that the law "is unconstitutional in all of its applications" or lacks "a plainly legitimate sweep." Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L.Ed.2d 151 (2008) (internal quotation marks omitted). Facial challenges are disfavored because "[t]hey often rest on speculation, can lead courts unnecessarily to anticipate constitutional questions or formulate broad constitutional rules, and may prevent governmental officers from implementing laws in a manner consistent with the Constitution." John Doe No. 1 v. Reed, 561 U.S. 186, 130 S. Ct. 2811, 2838, 177 L.Ed.2d 493 (2010) (internal quotation marks omitted). As applied challenges, as the term reflects, are raised by complainants in the context of actual application to a specific set of

circumstances. Your question can be answered only in a facial context—*i.e.*, that some or all of Ordinance No. 3466's provisions are impermissibly vague in any application—because no actual application has occurred.

The Supreme Court summarized the applicable Fourteenth Amendment Due Process Clause standards for vagueness claims in City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L.Ed.2d 67 (1999):

> Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

Id. at 56 (citation omitted). Ordinance No. 3466 likely gives the requisite fair notice requirement and contains the necessary "minimum guidelines to govern law enforcement." *Id.* at 60 (internal quotation marks omitted).

First, the ordinance defines at some length its operative terms: "deny," "discrimination," "full enjoyment of," "gender expression/identity," and "housing accommodation." An ordinary reader thus is apprised with a significant measure of detail about the type of conduct at which the ordinance is targeted. There may be questions in some situations concerning whether, for example, certain "appearance, expression or behavior" is "gender-related," but any due process-predicated challenge to a prosecution on the basis of alleged discrimination in those instances appropriately would be raised in an as applied challenge. It is enough to say for present purposes that many potential applications of the ordinance exist where the "appearance, expression or behavior" would be plainly "gender-related."

Second, the definitions provide adequate "guidelines" to law enforcement personnel for facial challenge purposes. The ordinance accordingly differs from the loitering regulation invalidated in Morales because the latter not only "reach[ed] a substantial amount of innocent conduct" but also "necessarily entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat." *Id.* at 60 (internal quotation marks omitted). No such snap judgments need occur under Ordinance No. 3466; it instead funnels

alleged violations into the city prosecutor's office for consideration and potential misdemeanor proceedings.

Finally, the ordinance does not raise overbreadth concerns. The overbreadth doctrine essentially allows a litigant to assert the free speech, assembly or associational rights of non-parties because the statute "prohibits a substantial amount of protected speech" or conduct even if not the conduct of the person raising the constitutional challenge. United States v. Stevens, 553 U.S. 285, 292, 128 S. Ct. 1830, 1838, 170 L.Ed.2d 650 (2008). Instantly, Ordinance No. 3466 prohibits discrete forms of conduct—most importantly sexual orientation-related discrimination—that do not implicate the First Amendment or its counterpart in art. I, sec. 9 of the Idaho Constitution.

Question No. 4: "Would the State of Idaho benefit by having a uniform set of laws which apply to all people in the state as opposed to just people who live within the municipal areas covered by a patch-work of municipal laws?"

Answer: A question as to what is best for the State of Idaho is one of policy and more appropriately answered by the Legislature. To the extent that you may be asking whether such legislation would pass constitutional muster, the final paragraph of the answer to Question No. 2 addresses that question.

Question No. 5: "Does incarceration without the right to a jury trial in the Coeur d'Alene ordinance constitute a violation of constitutional law?"

Answer: Yes, if Ordinance No. 3466 so provided. But Ordinance No. 3466 does not permit incarceration without a jury trial. The penalty provision (Coeur d'Alene Municipal Code § 9.56.060) specifies that a violation constitutes a misdemeanor which, under Coeur d'Alene Municipal Code § 1.28, is subject to a fine not to exceed $1,000 and/or imprisonment not to exceed 180 days. The right to a jury trial exists under art. I, sec. 7 of the Idaho Constitution. This right would be exercised were the misdemeanor prosecution to go to trial. State v. Bennion, 112 Idaho 32, 44, 730 P.2d 952, 964 (1986). The ordinance precludes a jury trial only if the misdemeanor charge is reduced to an infraction with a maximum possible fine of $100, as to which prosecution no jury trial is constitutionally or statutorily required (Coeur

d'Alene Mun. Code § 9.56.060.B). *See* Bennion, 112 Idaho at 45, 730 P.2d at 965 ("[t]he sanction imposed, a fine not exceeding $100, does not rise to the level of a punitive, criminal sanction").

I hope that this response adequately addresses your inquiry. Please contact me for any clarification or with further questions.

Sincerely,

CLAY R. SMITH
Deputy Attorney General

July 23, 2013

Gary Spackman, Director
Idaho Department of Water Resources
P.O. Box 83720
Boise, ID 83720-0098

Re: Watermaster and Regular Assistant Compensation

Dear Director Spackman:

This letter responds to your inquiry concerning the meaning and application of Idaho Code § 42-605(3) as amended by 2013 Idaho Laws Chapter 327. The subsection, as effective on July 1, 2013, provides:

> (3) At the meeting of the water users of a district there shall be elected a watermaster for such water district, who may be authorized to employ such other regular assistants as the water users shall deem necessary, and who, upon appointment by the director of the department of water resources, shall be responsible for distribution of water within said water district. Notwithstanding any personnel classification assigned to the watermaster and assistants pursuant to the provisions of chapter 53, title 67, Idaho Code, the water users shall, prior to the election of such watermaster and approval of the employment of assistants, fix the compensation to be paid them during the time actually engaged in the performance of their duties.

The amendment separated the subsection into two sentences and added the clause "[n]otwithstanding any personnel classification assigned to the watermaster and assistants pursuant to the provisions of chapter 53, title 67, Idaho Code" to the beginning of the second sentence.

You ask three questions:

> Does Idaho Code § 42-605, as amended by S1155, authorize a water district, at its annual meeting, to set the salaries of an

> elected watermaster and his assistants, who have been designated as classified state employees, without regard and independent of the Idaho Compensation Plan contained [sic] Idaho Code § 67-5309B?
>
> If the answer to the above question is yes, can a watermaster and his assistants who are state employees and whose salaries are independently determined by the water district rather than by the Idaho Compensation Plan continue participating in all the benefits and protections afforded to state employees under the state employment system?
>
> If the answer to the above question is no, what benefits and protections are unavailable to the state employee who is a watermaster or watermaster's assistant?

We conclude that the unambiguous text of subsection (3) controls and that the answers to the first two questions are "yes" with respect to those individuals who are Department employees and devote a portion of their work hours to watermaster or watermaster assistant duties and that, therefore, the third need not be addressed. We also answer your questions with regard to watermasters and watermaster assistants who serve solely in those capacities and whom the Department of Water Resources ("Department") does not employ. As to those individuals, the answer to the first question is "yes" and to the second "no." They are entitled to no "benefits and protections" under the Idaho Personnel System Act.

I. Statutory and Factual Background

Section 42-604, Idaho Code, authorizes the Department's Director to divide the state into water districts for "each public stream and tributaries[] or independent source of water supply" and, in some circumstances, to create more than one district for a public stream, tributary or independent source of water supply. The Director also "may create, revise the boundaries of, or abolish a water district or combine two (2) or more districts . . . if such action is required in order to properly administer uses of the water resource." *See also* In re Idaho Dep't of Water Resources Amended Final Order Creating Water Dist. No. 170, 148 Idaho 200, 212, 220 P.3d 318, 330 (2009) (Director

implicitly authorized to establish sub-districts within water district). Once created, a water district is "an instrumentality of the state of Idaho for the purpose of performing the essential governmental function of distribution of water among appropriators under the laws of the state of Idaho." Idaho Code § 42-604.

Section 42-605, Idaho Code, specifies various procedural requirements for the conduct of the annual water district meeting, which include under subsection (3) the election of a watermaster, determination of whether employment of "regular assistants"—i.e., assistant watermasters—is warranted, and "fix[ing] the compensation to be paid to them during the time actually engaged in the performance of their duties." *See also* Idaho Code § 42-609 (watermaster's authority to employ assistants other than those authorized at the annual district meeting "in case of emergency"). Once elected, the watermaster must be appointed by the Director and, upon appointment, the watermaster's sole "dut[y]" for the district is overseeing the distribution of water within its boundaries in accordance with Idaho Code § 42-607. Idaho Code § 42-605(10); *see also id.* § 42-608(2) and (3) (parameters for watermaster's commencing and ceasing performance of duties); *id.* § 42-615 (watermaster responsible for preparing proposed district budget). The watermaster's term of appointment ends at the next annual meeting or until a successor is elected. *Id.* § 42-608(1). In connection with performance of that principal duty, a district's water users may authorize the watermaster to acquire or dispose of property, equipment and facilities "as necessary for the proper distribution of water" and to maintain custody over the acquired assets. *Id.* § 42-605(12).

Section 42-605 contains other provisions related to the watermaster position. They include subscribing to an oath to perform faithfully the watermaster office's duties and filing the subscribed oath with the Department. Idaho Code § 42-605(10). The watermaster then becomes covered by the surety bond acquired by the Administrator of the Division of Insurance, Department of Administration, pursuant to Idaho Code § 59-803. *Id.* § 42-605(10). Watermasters may be removed from their position by the Director after complaint by a district water right holder or user and a hearing "whenever such watermaster fails to perform the watermaster's duty." *Id.* § 42-605(9). The Director also may appoint a successor watermaster for the unexpired term of a watermaster when the latter is removed from office for cause, "resigns, dies or is physically unable to perform his duties." *Id.* § 42-605(9)

and (10). As these provisions reflect, individuals performing watermaster duties, as well as the persons assisting them, are state employees notwithstanding their election by a water district's water users and the district's authority to fix their compensation for periods during which those duties are carried out. *See* Marty v. State, 117 Idaho 133, 140, 786 P.2d 524, 531 (1989) (water district, district chairman and watermaster are entitled to sovereign immunity under Idaho Code § 42-1717 as agents of Department).

Water districts adopt their budgets at the annual meeting. Idaho Code § 42-612. The budgets must cover "the estimated expenses of delivering the water of the district for the ensuing year" including the "compensation of the watermaster and the watermaster's assistants." *Id.* § 42-612(1). They must "show the aggregate amount to be collected from all the water users in the district, and the amount to be paid by each ditch, canal company, irrigation district or other water user." *Id.* § 42-612(3). Under the presumptive method, county assessors collect the assessed amounts through notices sent by county auditors to the affected water users, with all remitted amounts deposited in a special fund. *Id.* § 42-613; *see also id.* § 42-617 (districts authorized to set alternative payment dates and to prohibit distribution of water to non-compliant users). Districts, however, may authorize watermasters "to collect his compensation and that of his assistants, and other expenses of delivering the water of said district to the users thereof, directly from the water users, canal companies, and irrigation districts." *Id.* § 42-618. They also may appoint a water district treasurer or, where the budget is no greater than $7,500, designate the watermaster to collect the assessments if a board of county commissioners concludes that payment to the county treasurer is an undue burden. *Id.* § 42-619.

Approximately 120 water districts and sub-districts exist in Idaho. *See* http://www.idwr.idaho.gov/WaterManagement/WaterDistricts/PDF/WD_DESCRIPTIONS.pdf (last visited Jul. 4, 2013) (identifying districts and sub-districts). Most, but not all, have individuals performing watermaster and watermaster assistant duties. *See* http://www.idwr.idaho.gov/ExternalReports/wdcontactsrpt.pdf (last visited Jul. 4, 2013) (identifying watermasters). Our understanding is that currently, with the exception of 14 individuals, the districts are solely responsible for the watermasters' and their assistants' compensation. The water districts pay a portion of compensation for the 14 exceptions based upon an allocation of time devoted to district, or watermas-

ter, duties and time devoted to non-district, or departmental, tasks. The exceptions occupy classifications published by the Division of Human Resources (*see* https://labor.idaho.gov/dhr/ats/statejobs/ClassificationData.aspx) (last visited Jul. 4, 2013)) and the attendant compensation schedule (*see* http://dhr.idaho.gov/PDF%20documents/Compensation/FY2013payschedule.pdf (last visited Jul. 4, 2013)) to implement Idaho Code § 67-5309B. These individuals were compensated in accordance with the compensation level and that the Department has been reimbursed by the affected water district for the period of time devoted to performing watermaster or watermaster assistant duties. One of these individuals—the watermaster for Water District 01—provides services to the district through a signed memorandum of understanding that allocates two-thirds of his time to watermaster duties and is terminable at will.

II. Application of Idaho Code § 42-605(3)

The statutory construction principles governing resolution of your questions are settled. "The interpretation of a statute 'must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.'" Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). Absent any ambiguity, "'this Court does not construe [the statute], but simply follows the law as written.'" *Id.* Neither a court nor the Attorney General has authority to depart from a law's otherwise plain terms because to do so would invade the Legislature's prerogative to establish public policy. *See, e.g.*, Herndon v. West, 87 Idaho 335, 339, 393 P.2d 35, 37 (1964) ("We must follow the law as written. If it is socially or economically unsound, the power to correct it is legislative, not judicial."). To the extent that two or more statutes may apply to the same subject matter, they "must be construed together to give effect to legislative intent." Johnson v. McPhee, 147 Idaho 455, 461, 210 P.3d 563, 569 (2009). In determining such intent, "the specific statute will control over the more general statute." First Fed. Sav. Bank v. Riedesel Eng'g, Inc., 154 Idaho 626, 632, 301 P.3d 632, 638 (2012).

Section 42-605(3) is unambiguous. It authorizes water districts to elect watermasters at their annual meetings and to invest discretion in the watermaster as to the selection and employment of assistants. It further authorizes—indeed requires—the districts to fix the "compensation" to be

paid these individuals for "the time actually engaged in the performance of their duties." The 2013 amendment adding the clause "[n]otwithstanding any personnel classification assigned to the watermaster and assistants pursuant to the provisions of chapter 53, title 67, Idaho Code" is consistent with the unamended provision and served chiefly to reinforce the statute's plain meaning in this regard.

The answer to your first question is therefore "yes." That answer comes with two qualifications. The first is that water districts' compensation fixing power is limited to the affected individuals' employment as "watermasters" or "regular assistants"—a limitation reflected not only in the detailed statutory treatment of the "watermaster" duties, which establish the position as unique and not subject to modification by districts, the Director or the Administrator of the Division of Human Resources, but also in subsection (3)'s concluding phrase "during the time actually engaged in the performance of their duties." The second is that the Director has the discretion to condition providing Department employees to a district for watermaster or watermaster assistant purposes on payment of compensation equal to that assigned to the particular employee under the § 67-5309B salary schedule. The water district has the corresponding discretion to decline that condition and to employ a watermaster and to authorize selection of regular assistants for district employment at whatever compensation level it chooses. As to the signed memorandum of understanding between the Department and Water District 01, a declination would require the memorandum's termination. It additionally warrants noting that the provision of Department employees to perform watermaster or watermaster assistant duties must be accompanied by an agreement consistent with the requirements of Idaho Code §§ 67-2326 to 67-2333.

As discussed above, a large number of water districts have watermasters and, presumably, assistant watermasters whose compensation they determine and entirely pay. There are exceptions to this general practice with respect to the watermaster in one district and assistant watermasters in six districts who are employed by the Department but whose compensation is contributed in part by the district. The exceptions perform duties for both the Department and the contributing district. Compensation for the departmental functions falls outside the scope of the districts' compensation fixing authority in subsection (3). The individuals, therefore, must be, and have been,

assigned position classifications in accordance with the Division of Human Resources' list with reference to their departmental responsibilities and are paid consistently with the Division's compensation schedule for the time apportioned to the performance of those responsibilities.

The answer to your second question is "yes" to the extent that it refers to the individuals employed by the Department. The Legislature's express reference to the position classification and related compensation provision in Idaho Code § 67-5309B has relevance only to those individuals who possess "classified employee" status under the Personnel System Act. Here, those individuals consist of the 14 employed by the Department employment but who also perform watermaster or assistant watermaster duties. *See* Idaho Code § 67-5302(5) (definition of "classified officer or employee" as "any person appointed to or holding a position in a department"); *id.* § 67-5302(9) (definition of "department" as "any department, agency, institution or office of the state of Idaho").

The analysis above answers your third question. Those individuals employed by the Department are classified employees under the Personnel System Act and, as such, enjoy its benefits and protections. Although perhaps unnecessary, it may be helpful to explain why the same conclusion is not true for watermasters and watermaster assistants employed by a water district.

First, the fact that water districts function as a state "instrumentality" does not warrant an opposite conclusion. They carry out their statutory purpose as a distinct juridical entity, not as a sub-division of the Department notwithstanding the Director's extensive role in their creation and operation. Representative of their independent status is the districts' self-funding of their activities and the related water user assessment process in which neither the Department nor any other state agency plays a role. Water districts thus are not "departments" under the Personnel System Act in title 67, chapter 53, Idaho Code; *i.e.*, they do not constitute an Executive Branch "department" or "agency" (*see* Idaho Code § 67-2402), an "institution," or an "office" of the State. *Second*, the districts are subject to specific directives with regard to the employment of watermasters and watermaster assistants that are incompatible with those positions' incorporation into the state personnel system. So, for example, watermasters are elected, not appointed through merit selection as contemplated under Idaho Code § 67-5301; serve for a limited term; have

their compensation determined outside the state compensation plan's constraints; and are subject to termination under a unique statutory process and not Idaho Code §§ 67-5315 to 67-5318. Watermaster assistants similarly have their compensation set by the districts; are subject to appointment at the watermaster's discretion; have an employment term no longer than the period covered by the annual meeting's authorization; and are subject to termination at will by the watermaster. The absence of any classification for "watermaster" or "watermaster assistant" promulgated under § 67-5309B additionally evidences the Personnel System Act's non-applicability because the Division of Human Resources' Administrator presumably would have developed an appropriate classification for watermasters and watermaster assistants if they were deemed subject to the Act.

I hope that this letter adequately responds to your inquiry. Please contact me with any further questions concerning this matter.

Sincerely,

CLAY R. SMITH
Deputy Attorney General

October 25, 2013

The Honorable Jason Monks
Idaho House of Representatives
1002 W. Washington Dr.
Meridian, ID 83642
VIA E-MAIL AND U.S. MAIL

Re: The Idaho Unfair Sales Act

Dear Representative Monks:

The Attorney General has asked that I respond to your letter seeking the following clarifications on the Idaho Unfair Sales Act, Idaho Code § 48-401, *et seq.* (the "Act"):

1. Does the Unfair Sales Act apply to special promotions and sales such as Black Friday or clearance sales?

2. What is the extent of the Unfair Sales Act's application to rebates?

3. Does the Unfair Sales Act create the possibility for a merchant to face large financial fines for violations of the Act?

Prior to addressing your questions above, a brief overview of the Act is appropriate. The Act makes illegal the advertising, offer to sell, or retail sale of any merchandise below a statutory definition of cost[1] in the State of Idaho. Idaho Code § 48-404. Rebates found to violate the "spirit and intent" of the Act also violate the Act. Idaho Code § 48-413. Each violation of the Act is a misdemeanor criminal offense punishable by a $500 fine or six months imprisonment, or both. Idaho Code § 48-405. The state or private parties may seek civil remedies of injunction and actual damages for violations of the Act. Idaho Code § 48-406. The governor, or a state department designated by the governor, is responsible for the supervision and administration of the Act. Idaho Code § 48-408.[2] With that background, I will proceed to respond to your inquiries.

A. Does the Unfair Sales Act Apply to Special Promotions and Sales Such as Black Friday or Clearance Sales?

Your first question requests clarification on whether the Act's prohibition on selling merchandise below cost includes special promotions and sales such as Black Friday or clearance sales. The answer is yes, clearance sales and seasonal sales such as Black Friday sales promotions are subject to the Act, but such sales are not, in and of themselves, *per se* violations of the Act.

The Act applies generally to all advertisements, offers to sell, and sales of merchandise in retail sales, wholesales, and direct sales within Idaho. The Act covers and applies to the sale of merchandise below cost subject to the definitions and conditions set forth therein. Accordingly, special promotions and sales, including Black Friday sales, are subject to the prohibition against below costs sales established by the Act. Such special promotions are not, however, necessarily violations of the Act.

The Act sets forth specific criteria that must be satisfied in order for a sale to violate the Act, and exempts numerous other sales that would otherwise violate the Act. Determination of whether an individual advertisement, offer, or sale violates the Act, therefore, requires an application of the particular facts of that case to elements set forth in the Act. Because such a determination is fact specific, it is not possible to state that Black Friday sales or similar promotions categorically violate the Act. One must consider each of the elements set forth in the Act and whether each element has been satisfied before a conclusion that a specific sale is unlawful can be reached. The Act states:

> [A]ny advertising, offer to sell or sale of any merchandise,[3] either by retailers or wholesalers, at less than cost as defined in this act, with the intent, or effect, of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, and is unfair competition and contrary to public policy and the policy of this act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreason-

> ably restrain trade, or to tend to create a monopoly in any line of commerce.

Idaho Code § 48-404.

Breaking the statutory provision above into its essential elements, the advertisement, offer, or sale of merchandise by a retailer or wholesaler[4] violates the Act only if all of elements 1-3 are satisfied:

1. The advertisement, offer, or sale is below "cost," as that term is statutorily defined;

2. The advertisement, offer, or sale is designed to induce purchase of other merchandise or unfairly divert trade from competitors; and

3. The advertisement, offer, or sale results in (a) a tendency to deceive purchasers; (b) substantially lower competition; (c) an unreasonable restraint of trade; or (d) a tendency to create a monopoly.[5]

Even if the above elements are met, Idaho Code section 48-407 of the Act exempts numerous types of sales.[6] Notably, the Act exempts a sale "where an endeavor is made in good faith to meet the prices of a competitor . . . selling substantially the same article or product in the same locality or trade area in the ordinary channels of trade." Thus, a retailer or wholesaler will have an absolute defense if the retailer or wholesaler can establish that the otherwise below cost sale was a good faith response to a competitor's pricing. If a sale meets the above-listed elements and does not qualify for an exemption listed in section 48-407, then the sale is illegal pursuant to the Act.

B. What Is the Extent of the Unfair Sales Act's Application to Rebates?

Your letter also requests clarification regarding the seeming inconsistent language of Idaho Code § 48-413.[7] The initial portion of section 48-413 extends the prohibition of below cost sales created by the Act to special rebates which violate the "spirit and intent" of the Act. Yet, as your letter

notes, the second portion of section 48-413 could be interpreted as prohibiting retailers, wholesalers, and direct sellers from giving or receiving any rebates. Based on established principles of statutory construction, however, section 48-413 only applies to those rebates, which violate the intent of the Act, which is to eliminate certain below cost sales of merchandise.

It is our view that section 48-413 is limited to rebates intended to evade the Act's prohibition of below cost sales; it is not applicable to rebates in general. In construing the meaning of a statute, the paramount rule is to give effect to the Legislature's intent and purpose. Curtis v. Firth, 123 Idaho 598, 615, 850 P.2d 749, 766 (1993). A statute must be construed as a whole, not in a way that makes surplusage of included provisions. Bradbury v. Idaho Judicial Council, 149 Idaho 107, 116, 233 P.3d 38, 47 (2009). Construing section 48-413 to make all rebates illegal reaches beyond the Legislature's purpose and design of the Act expressed in Idaho Code section 48-401: to make illegal, under certain circumstances, the act of selling merchandise below cost to attract patronage. Further, interpreting section 48-413 to apply to all rebates would render the first portion of section 48-413 surplusage, and does not construe the Act as a whole.

Construing the Act as a whole, as well as Idaho Code section 48-413 itself, the preferable interpretation is to read section 48-413 as prohibiting only those special rebates, collateral contracts, or other arrangements that have the effect of violating the spirit and intent of the Act. A rebate that does not create this summative effect would not appear to violate section 48-413.

C. Does the Unfair Sales Act Create the Possibility for a Merchant to Face a Large Financial Fine for Violations of the Act?

Your letter also seeks clarification regarding the application of the $500 fine for each single violation of the Act set forth in Idaho Code section 48-405. Your letter poses a hypothetical in which a merchant distributed 100,000 circulars containing ten items offered below cost, asking whether a fine of $500 million could result.[8] Section 48-405 makes it a misdemeanor offense to violate the Act, punishable by a fine not to exceed $500, or imprisonment not to exceed six months or both. The court has discretion to determine the actual fine and imprisonment within those parameters. The Act does not authorize private parties to enforce section 48-405.[9] Enforcement of this section is reserved to the governor or the governor's appointed representative.

A fine in the amount posed by the hypothetical is mathematically possible, depending on what a court interprets to be a single violation. However, it is highly improbable a court would actually order such a fine. To begin, a very large fine would in many cases be disproportionate to the underlying violation. Moreover, such a large fine goes beyond the purpose of the Act. The Act is intended to prevent certain below cost sales, not to bankrupt the offending merchant.[10] Thus, while such a large fine is hypothetically possible, it is unlikely a prosecutor would seek, or that a court would order, such a large fine.

In conclusion, the Act is a statute of general applicability to all retail, wholesale, and direct sales that fall within the definitions provided in the Act. The Act makes it illegal to advertise, offer, or sell any such merchandise below cost, as defined by the statute. Accordingly, the Act does apply to special promotions and sales, including Black Friday sales. However, the applicability of the Act does not mean such sales automatically violate the Act. The statutory elements set forth above must be established for there to be a violation of the Act. Even if the elements are established, the Act exempts numerous sales from liability. Rebates conceived to dodge the spirit and intent of the Act violate the Act, but not rebates in general. While there is a theoretical possibility of a multi-million dollar fine for a violation of the Act, the actual imposition of such a fine is improbable.

Thank you for contacting the Attorney General's Office. If you have any further questions or concerns that you would like to discuss, please do not hesitate to contact me.

Very truly yours,

OSCAR S. KLAAS
Deputy Attorney General
Consumer Protection Division

[1] The statutory definition of "cost" depends on the type of seller. "Cost to the retailer" is the lower of the actual, bona fide cost of the merchandise to the retailer or the lowest prevailing replacement cost; less all trade discounts (other than cash discounts); plus a "cost of doing business" markup (6% of the cost of the merchandise to the seller) and freight costs (actual) and cartage costs (0.75% of merchandise cost). Idaho Code § 48-403(a)(1) to (3). "Cost to the wholesaler" is calculated in the same manner as "cost to the retailer," but the "cost of doing business" markup is 2% of the cost to the seller plus cartage and freight costs. Idaho Code § 48-403(b)(1) to (3). "Cost to the direct seller" is calculated in the same

manner, but permits a cartage cost of 1.5% and a "cost of doing business" markup of 8% based on cost to the seller plus freight. Idaho Code §48-403(b)(aa)(1) to (3).

[2] Effective January 1, 1979, the Legislature repealed the tax funding the supervision and administration of the Act.

[3] The Act does not define "merchandise." The commonly understood meaning of the term is "goods or commodities that may be bought or sold." Webster's II New College Dictionary 685 (1995).

[4] Section 48-403 of the Act defines numerous terms, including "retailer," "wholesaler," "direct seller."

[5] An Ada County District Court case decided in the late 1960s, State Ex. Rel. Stearns v. Rosauers, Alberstons, et al., added a requirement that the plaintiff must also prove the sale had an actual injurious effect on competitors. This case is not an appellate decision and is of limited precedential value.

[6] Section 48-407 provides:

> Exempted sales. The provisions of this act shall not apply to sales at retail or sales at wholesale.
>
> (a) where perishable merchandise must be sold promptly in order to forestall loss;
>
> (b) where merchandise is imperfect or damaged or is being discontinued and is advertised, marked or sold as such;
>
> (c) where merchandise is sold upon the final liquidation of any business;
>
> (d) Where an endeavor is made in good faith to meet the prices of a competitor as herein defined selling substantially the same article or product in the same locality or trade area in the ordinary channels of trade.
>
> (e) where merchandise is sold on contract to departments of the government or governmental agencies;
>
> (f) where merchandise is sold by any officer acting under the order or direction of any court;
>
> (g) where in closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such article or product if advertised, marked and sold as such. Provided, however, that any retailer or wholesaler claiming the benefits of any of the exceptions hereinabove provided, shall have the burden of proof of facts entitling such retailer or wholesaler to any of the benefits of such exceptions.

[7] Section 48-413 provides:

> The inhibition of this chapter against selling merchandise at less than cost and unfair competition contrary to public policy shall embrace any scheme of special rebates, collateral contracts or any device of any nature by and among wholesalers, retailers and direct sellers whereby such rebates or agreements are, in substance or fact, effected in violation of the spirit and intent of this chapter. It is hereby declared to be unlawful, unfair competition, and an act or acts within the purview of section 48-406, Idaho Code, for any wholesaler, retailer or direct seller to give or receive special rebates or be a party to any such agreements or devices.

[8] $500 million = ($500 fine) * (100,000 circulars) * (ten below cost items).

[9] This is unlike section 48-406, which allows any person to seek an injunction and actual damages.

[10] Review of the injunctive provisions of the Act, Idaho Code § 48-406(1) to (5), supports this position. The injunctions authorized by section 48-406 are limited to ceasing the sale of merchandise in violation of the Act and deterring future violations. There is no authority to enjoin a merchant from conducting business in the future, such as those contained in the Idaho Consumer Protection Act, Idaho Code § 48-607(6).

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