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

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, manufacture, 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:

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> 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.),

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

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

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, and 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":
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> 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.
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> . . . .
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> 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 prosecuting 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. . . .
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> 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 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