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

March 14, 2016

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

RE: Certificate of Review
Proposed Initiative Amending the Idaho Sunshine Law to Limit Campaign Contributions by Persons Doing Public Business, to Amend Statutes Related to Bribery, and to Add a New Statute for Post-Employment Restrictions on Public Officials

Dear Secretary of State Denney:

An initiative petition was filed with your office on February 16, 2016. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and prepared the following advisory comments. Given the strict statutory timeframe within which this office must review the petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." The petitioners are free to "accept them in whole or in part." The opinions expressed in this review are only those that may affect the legality of the initiative. This office offers no opinion with regard to 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.

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

MATTER OF FORM

The Proposed Initiative was submitted by a former member of the Idaho Legislature. Unsurprisingly, it is in proper legislative format for showing amendments to statute by striking out deleted words and underlining added words, with the exception of Section 8. It is not necessary to underline Section 8's newly proposed Idaho Code section because it is not amending an existing section of the Idaho Code. The Proposed Initiative's capitalization conventions may differ from those used by Legislative Services Office, but in the end that is of little consequence.

SUMMARY OF INITIATIVE AND MATTERS OF SUBSTANTIVE IMPORT

The Proposed Initiative does the following:

Section 1 amends Idaho Code § 67-6002, the definitional section of the Sunshine Law, to add two new definitions — "Person doing public business" and "Principal of a person doing public business" — that contain specific reference to a statutory definition of "Contractor" in the Department of Administration's statutes for procurement or purchasing.

Section 2 amends Idaho Code § 67-6610A of the Sunshine Law to reduce the cap on campaign contributions to a candidate for State Legislature from $1,000 to $500 and the cap on campaign contributions to a candidate for statewide office from $5,000 to $2,000 and to prohibit persons doing public business from contributing to candidates or political committees.

Section 3 amends Idaho Code § 67-6612 of the Sunshine Law to require that Sunshine Law reports filed by political treasurers for candidates and political committees must list the full name and address of the employer and the occupation of each person who contributed more than $50 to the candidate or political treasurer.

Section 4 amends Idaho Code § 67-6623 of the Sunshine Law to require Sunshine Law reports to be submitted in electronic, machine-readable form, to require the Secretary of State to provide necessary software for such filings upon request, and to require the Secretary of State to post such reports within 24 hours of receipt.

Section 5 amends Idaho Code § 67-6625 of the Sunshine Law:

(a) to increase the maximum fine for various violations of the Sunshine Law for individuals from $250 to $2,500 or up to twice the amount of the contribution or expenditure involved, and for persons other than individuals from $2,500 to $10,000 or twice the amount of the contribution or expenditure involved;

(b) to add a new provision for fines for willful or knowing violations of the Sunshine Law for individuals up to a maximum of $5,000 or three times the

amount of the contribution or expenditure involved, and for persons other than individuals of up to $20,000 or three times the amount of the contribution or expenditure involved; and

(c) to add a subsection (c) to make knowing or willful violation of certain Sunshine Law requirements regarding receiving, giving or reporting of contributions or expenditures aggregating $25,000 or more in a calendar year a felony.

Section 6 amends Idaho Code § 18-1351, the definitional section of the Bribery and Corrupt Practices Act, to add definitions of "Gift" and "Lobbyist."

Section 7 amends Idaho Code § 18-1356 of the Bribery and Corrupt Practices Act to prohibit any lobbyist from giving to and any legislator or employee of the Legislature soliciting, accepting or agreeing to accept from any one lobbyist any gifts aggregating more than $50 in value in a calendar year and makes other changes.

Section 8 enacts a new Idaho Code § 74-407 to be added to the Ethics in Government Act that makes it a felony for any public official of the state to receive compensation for lobbying within a year after leaving office.

This office has no comments on Section 1, which adds two straightforward definitions to the Sunshine Law; Section 4, which requires electronic Sunshine Law reporting to the Secretary of State; or to Section 6, which adds two straightforward definitions to the Bribery and Corrupt Practices Act. This office comments upon the remaining sections as follows.

Section 2

Section 2 reduces the maximum campaign contribution limit by an individual, corporation, political committee, or other recognized entity to a legislative candidate or to the candidate's committee for a primary election and for a general election from $1,000 to $500. It likewise reduces contribution limits for candidates for statewide office from $5,000 to $2,500. It prohibits all contributions from a person doing public business or the principal of a person doing public business or who did public business in the preceding two years. Section 1's amendments defined those doing public business as those with a contract that could exceed $250,000 in payments to the contractor.

Section 2's limits on campaign contributions are likely to be constitutional, but may be in a gray area in which recent case law has not addressed the exact contributions limits. Unlike independent expenditures, which cannot be limited, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 130 S. Ct. 876, 175 L.Ed.2d 753 (2010), contributions to a candidate can be limited in order to prevent the actuality of or appearance of corruption, 558 U.S. at 345-346, citing Buckley v. Valeo, 424 U.S. 1, 23-25, 96 S. Ct. 612, 636-38, 46 L.Ed.2d 659 (1976). The issue left open by *Buckley* is how low a campaign contribution limit may go before it is unconstitutionally low. The United States Supreme Court has not

directly addressed that question and one is left to fill in the gaps by analyzing decisions of the lower courts. This is how several lower courts have drawn the line:

In Foster v. Dilger, 2010 WL 3620238 (E.D.Ky. 2010), the Federal District Court of Kentucky entered a preliminary injunction against enforcing a statute that limited contributions to candidates for school board election to $100. In Frank v. City of Akron, 290 F.3d 813, 817 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160, 123 S. Ct 968, 154 L.Ed.2d 894 (2003), the Sixth Circuit upheld a $300 contribution limit to candidates for citywide office and $100 to candidates running for city office, but not citywide. In Citizens for Responsible Gov't State Political Action Comm. v. Buckley, 60 F.Supp.2d 1066, 1086-1087 (D. Colo. 1999), *reversed in part on other grounds*, 236 F.3d 1174 (10th Cir. 2000), the Federal District Court of Colorado struck down $500 limits on contributions to candidates for statewide office and $100 limits on contributions for candidates for state legislature. In Florida Right to Life, Inc. v. Mortham, 1998 WL 1735137 (M.D.Fla. 1998), the Federal District Court of Florida upheld $500 limits to candidates (which on its face seemed to apply to candidates for legislative and statewide office) for the primary election and $500 for the general election. Given these and other decisions, none of which were reviewed by the United States Supreme Court, Section 2's limits are probably constitutional, but they are nevertheless in a gray zone of some uncertainty as inflation erodes the value of limits that were once held to be constitutional.

Section 2's complete ban on contributions by people doing public business requires a separate analysis. The District of Columbia Court of Appeals recently upheld against First Amendment challenges federal law prohibitions against U.S. Government contractors contributing to candidates for federal office. Wagner v. Fed. Election Comm'n, 793 F.3d 1, 22-26 (D.C. Cir. 2015), *cert. denied* — U.S. —, 136 S. Ct. 895 (2016). The Ninth Circuit recently upheld a similar prohibition under Hawai'ian law. Yamada v. Snipes, 786 F.3d 1182, 1205-1207 (9th Cir. 2015). These decisions do not address the eight definitions of "principals" of persons doing public business found in Section 1,[1] so they do not stand for the proposition that there is case law upholding the prohibition of each of these categories of "principal" contributing to a candidate, but they would almost certainly stand for the

---

[1] Section 1's amendment to Idaho Code § 67-6002 defines eight categories of principals of a person doing public business that persons take corporate or other form other than an individual:

(1) any individual who is a corporate officer or member of the board of directors;
(2) any person who has an ownership interest of five percent or more;
(3) any person with a voting interest of five percent or more;
(4) any individual who is an employee with managerial or discretionary responsibilities with respect to the receipt of [or] expenditure of State funds;
(5) any lobbyist employed by such corporation, firm, partnership or limited liability company;
(6) any employee or contractor of such lobbyist engaged in lobbying on behalf of or for the benefit of the same employer;
(7) the spouse or child of an individual described in any of the preceding subparagraphs of this paragraph; and
(8) a political committee established, maintained or controlled by any person or individual described in any other subparagraph of this paragraph.

Subsection (4) quoted above may contain an error in form indicated by the bracketed substitution of "or" for "of."

proposition that the prohibition could be applied to some of these statutorily defined principals. It may take individual case determinations to decide which of the eight definitions of "principal or a person doing public business" may be constitutionally prohibited from donating to a candidate. For example, a court might conclude that the adult son or daughter of an individual who works ten hours a week in the office of a lobbyist for the person doing public business, but whose mother or father lobbies exclusively on issues unrelated to public business during those ten hours a week, while literally falling within the scope of subsections (6)'s and (7)'s reach, is too far attenuated from the person doing public business that the First Amendment would prohibit applying this section to that person.

Section 3

Section 3 requires reporting the occupation of each campaign contributor who gives $50 or more and the contributor's employer's full name. Family PAC v. McKenna, 685 F.3d 800, 803, 805-811 (9th Cir. 2012), upheld a Washington statute that required "a political committee to report the name and address of each person contributing more than $25 to the committee" and "the occupation and employer of each person contributing more than $100 to the committee." Frank, 290 F.3d at 818-819, upheld a $25 reporting requirement for contributors to municipal campaigns and $50 requirement for reporting contributors' principal employer. Minn. State Ethical Practices Bd. v. Nat'l Rifle Ass'n of Am., 761 F.2d 509, 512 (8th Cir. 1985), upheld employer reporting requirements for those contributing $50 or more for a legislative race and $100 or more for a statewide race. Thus, Section 3's reporting requirements are probably constitutional, although there are no recent reported decisions on whether $50 is too low to trigger an employer reporting obligation.

Section 5

Section 5 increases the maximum penalty for Sunshine Law reporting requirements tenfold or more and allows "treble damages" as measured by the amount of the unreported contribution or expenditure. This section implicates the Eighth Amendment (excessive fines) as well as the First Amendment. In Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n, 983 F.Supp.2d 1, 8, 18-20 (D.D.C. 2013), *aff'd* 795 F.3d 151 (D.C. Cir. 2015), the District Court for the District of Columbia affirmed against Eighth Amendment and First Amendment challenges to administrative penalties of $4,400 for a tardy election sensitive report with $75,000–$99,999.99 of activity, $3,300 for another tardy election sensitive report with $50,000–$74,999.99 of activity, and $990 for a third tardy non-election sensitive report with $25,000–$49,999.99 of activity. "Denial of Combat Veteran's claims requires no explanation beyond what the district court provided." Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n, 795 F.3d 151, 159 (D.C. Cir. 2015). Thus, some level of fines or penalties may be constitutionally imposed for failing to report or untimely reporting of campaign contributions or expenditures.

I did not find case law regarding the facial constitutionality of maximum fines of $2,500 for individuals' violations, $10,000 for others' violations, $5,000 for individuals' knowing violations, and $20,000 for others' knowing violations, or "treble damages" for all of

these categories as measured by "the amount of contribution or expenditure involved in such violation." I suspect that Idaho courts would hold that a fine in these ranges would be unconstitutional as applied to relatively small unreported contributions or expenditures and could find "treble damages" also to be unconstitutional as applied or per se. However, the possibility of a successful as-applied challenge to imposition of the maximum fines for a relatively minor reporting violation does not make the statute unconstitutional per se; on the contrary, given the case law cited in the previous paragraph, this section should withstand a facial constitutional challenge. On the other hand, imposition of the maximum fine for tardy reporting of a $50 contribution would likely be an excessive fine.

Section 7

This section does not amend the Sunshine Law; it amends the Bribery and Corruption Chapter of the Criminal Code. It prohibits lobbyists from giving and legislators and employees of the Legislature from accepting gifts of more than $50 in aggregate value from any one lobbyist in any one calendar year. Section 6 in turn defines "gifts" to include "any item, good or service having monetary value including without limitation any loan, hospitality, discount, forbearance, services, training, transportation, food and beverage, [or] lodging and meals."

There is abundant case regarding reporting of gifts to public officials, but much less concerning criminalizing gifts to public officials, perhaps because laws on the former are more widespread than laws on the latter. In Scaccia v. State Ethics Comm'n, 727 N.E.2d 824 (Mass. 2000), the Supreme Judicial Court of Massachusetts reviewed the imposition of an administrative fine for a legislator accused, among other things, of accepting and not reporting gifts from lobbyists exceeding the Massachusetts statute's $100 maximum. Scaccia affirmed the findings and civil fine under the gift statute, noting that the legislator involved had invoked his Fifth Amendment right not to testify in the administrative proceeding. From this I glean that there does not seem to be case law prohibiting a legislator from accepting gifts from lobbyists above a certain amount; otherwise, the Court or a party would have found that case law. I could not find any such case law either. I therefore conclude that it is very likely that Section 7's prohibition on a legislator's or legislative employee from accepting gifts from a lobbyist exceeding $50 in a calendar year is constitutional, even if there are criminal sanctions rather than civil.

Section 8

As for the constitutionality of prohibiting former public officials from lobbying for compensation for a year after leaving office, there is abundant case law that this prohibition is generally constitutional. Statutes like this proposed new section are often known as "revolving door" statutes because they seek to prevent public officials from immediately "cashing in" on their knowledge and influence as a public official by going through the "revolving door" from regulator to regulated without a "cooling off" period in between.

In Brinkman v. Budish, 692 F.Supp.2d 855, 862-863, 864 (S.D. Ohio 2010), the Federal District Court for Ohio recognized, in its post-Citizens United analysis, that preventing corruption or the appearance of corruption served a compelling state interest and justified Ohio's one-year, anti-revolving door prohibition against lobbying for compensation after leaving the Ohio Legislature ("Defendants have established compelling interests justifying O.R.C. § 102.03(A)(4) as applied to compensated lobbying"), although the Court invalidated a ban on uncompensated lobbying under the First Amendment. In Ortiz v. Taxation & Revenue Dep't, Motor Vehicle Div., 954 P.2d 109, 111-114 (N.M. Ct. App. 1998), the New Mexico Court of Appeals upheld New Mexico's revolving door statute and cited cases from Florida, Louisiana, New York, and Rhode Island that had upheld similar measures. *But see* Shaulis v. Pennsylvania State Ethics Com'n, 833 A.2d 123, 130-132 (Pa. 2003) (revolving door statute was unconstitutional to the extent that it infringed on Pennsylvania Supreme Court's authority to regulate practice of law).[2]

CERTIFICATION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import. The recommendations set forth above have been communicated to the Petitioner via a copy of this Certification of Review, deposited in the U.S. Mail to Holli Woodings, 1148 Santa Maria Dr., Boise, Idaho 83712.

Sincerely,

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Michael S. Gilmore
Deputy Attorney General

[2] If the proposed revolving door statute were held not to apply to Idaho attorneys in the practice of law, the attorneys would still be subject to the Idaho Rules of Professional Conduct, which include Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees.