October 13, 1995

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Sales Tax Initiative—Sales Tax Rate

Dear Mr. Cenarrusa:

An initiative petition was filed with your office on September 13, 1995. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. It must be stressed that, given the strict statutory time frame in which this office must respond and the complexity of the legal issues raised in this petition, our review can only isolate areas of concern and cannot provide in-depth analysis of each issue. Further, under the review statute, the Attorney General's recommendations are advisory only and the petitioner is free to accept or reject them in whole or in part.

BALLOT TITLE

When the initiative is filed, our office will prepare a short ballot title and a long ballot title. The ballot title should impartially and straightforwardly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares the titles, petitioner may submit proposed language in keeping with the standards for ballot titles. If petitioner submits such language, it will be considered by the Attorney General staff as it drafts the ballot titles.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative provides for an amendment to Idaho Code § 63-3619 to reduce the sales tax rate from 5% to 3%. The initiative does not propose to make any change to the rate of the complementary use tax, which raises a question of whether it can survive a Commerce Clause challenge. In addition, by failing to address the use tax petitioners appear to have failed to accomplish at least part of their apparent purpose. Also, to the extent there are Commerce Clause violations, there are NAFTA and GATT violations. The analysis below relating to the Commerce Clause applies equally to NAFTA and GATT.

ANALYSIS UNDER THE CONSTITUTION

The proposed initiative amends Idaho Code § 63-3619 to reduce the tax rate for all transactions subject to sales tax within the State of Idaho. However, the proposed initiative has not addressed the use tax rate of 5% which is controlled by Idaho Code § 63-3621. Because the initiative does not propose to amend the use tax, if it is adopted Idaho will be a jurisdiction with two varying tax rates, a 3% rate on all items subject to sales tax, and a 5% rate on all items subject to use tax. Idaho Code § 63-3621(c) provides "the provisions of this section [the use tax section] shall not apply when a retailer pays sales tax on the transaction and collects reimbursement for such tax from the customer." Thus, a 3% rate will apply to those transactions subject to Idaho sales tax under Idaho Code § 63-3619, a 5% rate will apply to those transactions subject to use tax under Idaho Code § 63-3621.

The net effect of the resulting statutory scheme is to discriminate against out-of-state sellers. In the typical situation, the sales tax applies when the sale is made by an in-state seller, and the use tax applies when the sale is made by an out-of-state seller to an Idaho resident and the goods are shipped to Idaho. Thus, the local retailer would collect a 3% tax, while the out-of-state retailer would collect a 5% tax or the purchaser would remit a 5% use tax. The United States Constitution prohibits discrimination against interstate commerce. U.S. Const. Art. I, § 8, cl. 3; Associated Industries of Missouri v. Lohman, — U.S. —, 114 S. Ct. 1815, 128 L. Ed. 2d 639 (1994). In Lohman, the Court ruled Missouri's use tax scheme violated the Commerce Clause. Missouri had a 4.225% sales tax on the sale of all goods within the state and a statewide use tax of 4.225% on goods brought into the state after being purchased elsewhere. In addition, the state allowed local governments to impose a local sales tax. Many of these jurisdictions had imposed local sales taxes ranging from .05% to 3.5%. To compensate for the higher sales tax the Missouri Legislature enacted an additional use tax of 1.5%. This additional use tax was challenged as being an impermissible burden on interstate commerce.

The Supreme Court held that to be constitutional a use tax must be a compensatory tax designed to make interstate commerce bear a burden already born by intrastate commerce. The Court stated that the end result under the compensatory tax theory is that "when the account is made up, a stranger from afar is subject to no greater burden . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." Lohman, — U.S. at —, 114 S. Ct. at 1821, *citing* Henneford v. Silus Mason Company, 300 U.S. 577, 584, 57 S. Ct. 524, 527, 81 L. Ed. 814 (1937). The Court held Missouri's use tax scheme ran afoul of the basic requirement of a compensatory tax because the burdens imposed on interstate and intrastate commerce are not equal:

> Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods

> locally. The resulting disparity is incompatible with [prior rules adopted by the Court].

Id.

Quite simply, sellers of out-of-state goods are discriminated against when they have to collect a higher tax than in-state sellers. If enacted, the initiative would result in a 3% tax on in-state sales and a 5% tax rate on purchases of goods from outside the state. Thus, the taxes are not compensatory and thus run afoul of the Commerce Clause. The petitioners of the proposed initiative can remedy the constitutional defect by simply amending Idaho Code § 63-3621 to lower the use tax rate to 3%.

ISSUES RELATING TO IDAHO'S SALES TAX STATUTES

On two prior occasions, 1984 and 1987, the Idaho Legislature has amended the rate of the sales and use taxes. In 1984, the Idaho Legislature raised the rate from 3% to 4%. *See* 1984 Sess. Laws, ch. 287. In 1987, the Idaho Legislature raised the sales and use tax from 4% to 5%. *See* 1987 Sess. Laws, ch. 31. In both instances, the legislature amended both Idaho Code § 63-3619 and § 63-3621 to make the sales and use tax complementary. If the petitioners would amend the initiative to make the sales and use tax rates consistent, the proposed initiative would comport with past legislative practice and accomplish the apparent purpose of the petitioners.

EFFECTIVE DATE

The petitioners have not proposed an effective date for the initiative. If the initiative passes, it will become law once the governor proclaims the initiative as approved by a majority of the voters. *See* Idaho Code § 34-1813. This allows no time to implement the necessary administrative mechanics for both retailers and the Idaho Tax Commission. Retailers will need time to program computers to recognize the new law, and the Tax Commission will need time to draft rules and prepare forms. If the effective date is in the middle of a reporting period, retailers' preparation of sales tax returns for that period will be extremely difficult. Experience indicates it is better to have the effective date at the beginning of a calendar quarter.

CONCLUSION

The petitioners of the proposed initiative need to keep the sales and use taxes consistent. Otherwise, the initiative could face serious constitutional problems as a violation of the United States Commerce Clause as well as a violation of both NAFTA and GATT.

I hereby certify that the enclosed measure has been reviewed for form, style and matters of substantive import and that the conclusion set forth above has been communicated to the petitioner, Mary J. Charbonough, by deposit in the U.S. Mail of a copy of this certificate of review.

Yours very truly,

ALAN G. LANCE
ATTORNEY GENERAL

Analysis by:
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