October 13, 1995

The Honorable Pete T. Cenarrusa
Secretary of State
HAND DELIVERED

Re: Certificate of Review;
Sales Tax Initiative—Exemption for Food, Water and Clothing

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 exempt from sales tax the purchase of water, food and clothing. "These three (3) items are necessities of life, for everyone, therefore, this tax should be exempt from the current Idaho Tax Revenue . . . ." There is no constitutional provision prohibiting the exemption of water, food and clothing from Idaho sales and use taxes; however, this initiative only exempts food, water and clothing sales and not use tax. By failing to address use tax, the petitioners risk creating an inconsistency in Idaho law and have failed, at least in part, to accomplish their stated purpose.

ISSUES RELATING TO THE IDAHO SALES TAX

The initiative proposes to amend the sales tax statute instead of creating an exemption statute. Most of the exemption statutes from the Idaho Sales and Use Tax Act are codified at Idaho Code § 63-3622 and, specifically, Idaho Code §§ 63-3622A through 63-3622KK. Idaho Code § 63-3619 imposes a tax on retail sales. The petitioners should strongly consider a change to the initiative to provide for the creation of a new exemption statute (a new Idaho Code § 63-3622LL) instead of amending Idaho Code § 63-3619.

If the initiative is not changed, the petitioners will not completely accomplish their objective of exempting food, water and clothing from the Idaho sales and use tax. The initiative as drafted exempts the purchase of food, water and clothing from sales tax, but does not exempt food, water and clothing from the use tax. Idaho Code § 63-3621 provides in relevant part:

> An excise tax is hereby imposed on the storage, use, or other consumption in this state of tangible personal property acquired on or after July 1, 1995, for storage, use, or other consumption in this state at the rate of five per cent (5%) of the value of the property, and a recent sales price shall be presumptive evidence of the value of the property.

The statute further provides that every person storing, using or otherwise consuming, in this state, tangible personal property, is liable for the tax and that liability is not extinguished until the tax has been paid to this state. The statute further provides:

> Every retailer engaged in business in this state and making sales of tangible personal property for the storage, use, or other consumption in this state, not exempted under section 63-3622, Idaho Code, shall, at the time of making the sales or, if storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the state tax commission.

Because Idaho Code § 63-3621 does not refer to any exemptions contained in Idaho Code § 63-3619, but, instead, only refers to the exemptions contained in Idaho Code § 63-3622, the use tax would still be due on food, water and clothing. This failure to exempt food, water and clothing from the use tax defeats the very purpose of the petitioners. Idaho Code § 63-3621 further requires the retailer to collect the use tax from the purchaser. Thus, despite the language of the initiative the retailer will collect a 5% tax from the purchaser. As noted above, the petitioners should add an exemption statute to Idaho Code § 63-3622, instead of amending Idaho Code § 63-3619. Alternatively, the petitioners may wish to amend Idaho Code § 63-3621 to exempt food, water and clothing from use tax. This alternative, though it would achieve an exemption, is more cumbersome than simply creating a new exemption statute.

DEFINITIONAL PROVISIONS TO THE INITIATIVE

1. Definition of Food

The proposed initiative does not define the term "food." Many states which exempt food have some specific definition for food, such as a reference to the federal statute defining food for purposes of food stamps. As drafted, the term would exempt sales of the most expensive restaurant food as well as basic groceries. Further, the initiative is unclear as to whether the petitioners intended to exempt the sale of beverages commonly sold with food such as soda pop, juice, milk, coffee and tea.

2. Definition of Clothing

Like the term "food," "clothing" is not defined. It is not clear whether the petitioners intended to exempt as "clothing" specialized sporting equipment such as uniforms, helmets, batting gloves, knee pads, lifejackets and other similar items. In addition, the term clothing would exempt the sale of items regardless of price and would include everything from tee shirts to mink coats.

3. Definition of Water

Water, when delivered to consumers at the place of consumption by means of pipes, wires, mains or similar systems, is exempted from the sales and use tax. *See* Idaho Code § 63-3622F. It appears the petitioners intend to include water delivered to consumers for consumption. However, the term "water" is not clearly defined. The petitioners' intent may be to exempt bottled water and other beverages made from water such as tea, coffee or juices which contain a substantial quantity of water. The petitioners may wish to reconsider the definition of water.

ISSUES RELATING TO IDAHO'S INCOME TAX ACT

Idaho Code § 63-3024A provides for fifteen dollars ($15.00) credit for allowable personal exemptions claimed on the state income tax return. Though not specifically defined as such, it is commonly understood the credit was created as an offset for sales taxes paid on food. The proposed initiative, by creating a sales tax exemption, may, to such extent, duplicate the income tax credit. If duplication of the income tax credit is not intended, the petitioners may wish to include a provision repealing Idaho Code § 63-3024A.

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 Idaho 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 greatly complicated. Experience indicates it is better to have the effective date at the beginning of a calendar quarter.

CONCLUSION

The initiative does not accomplish what the petitioners intended. In order to accomplish the obvious purpose, the initiative needs to be redrafted and resubmitted as a new exemption to the Idaho sales and use tax. Alternatively, the petitioners could propose an initiative modifying the use tax statute as well as the sales tax statute.

In addition, the definitions of food, water and clothing should be clarified. The petitioners are advised to consider making those statutory revisions in order to make the proposed initiative compatible with the Idaho sales and use tax scheme.

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

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