



STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL

LAWRENCE G. WASDEN

September 24, 2019

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

Re: Certificate of Review
Proposed Initiative Relating to Increasing the Individual Income Tax

Dear Secretary of State Denney:

An initiative petition was filed with your office on August 30, 2019. Pursuant to Idaho Code section 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 or reject them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative. The opinions expressed in this review are limited to those potentially affecting the legality of the initiative.

BALLOT TITLES

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

I. Summary of the Proposed Initiative

The proposed initiative presents amendments to code sections found in Idaho Code, title 63 (hereinafter "Tax Code") and proposes a new section to be added to Idaho Code, title 33 (hereinafter "Education Code"). The amendments to the Tax Code would increase the individual income tax rate on amounts earned in excess of \$250,000 a year and increase the tax rate on the income earned by corporations. The proposed new section of the Education Code, along with a further amendment to the Tax Code, creates and appropriates money to a new "quality education fund." The money for this fund is to come from tax revenue the state receives as a result of the increased tax rates. Each section of the initiative will be described in turn.

A. Section One of the Initiative Proposes an Amendment to Idaho's Individual Income Tax Rate.

Section one of the initiative proposes an amendment to Idaho Code section 63-3024, the section of Idaho Code which defines the individual income tax rates. As it currently exists, the code section lists seven tax brackets ranging from "Less than \$1,000" to "\$7,500 and over." Idaho Code § 63-3024(a). For each of these seven brackets, there is an associated tax rate ranging from 1.125% to 6.925%. *Id.*

The initiative proposes two modifications to the tax brackets: first modifying the seventh tax bracket (the "\$7,500 and over" bracket) and second adding an eighth tax bracket. The modification to the seventh tax bracket changes it from "\$7,500 and over" to "\$7,500 but less than \$250,000." The proposal does not change the tax rate (6.925%) for the seventh bracket. The proposed eighth tax bracket would be for taxable income "\$250,000 and over." The initiative would set the tax rate on taxable income in this bracket at 9.925%.

Section one also contains an amendment to Idaho Code section 63-3024(a) for adjusting this new eighth bracket for inflation. This adjustment mirrors the language already in statute for adjusting the other seven brackets for inflation; however, it differs in what base year is used for the adjustment. Where the other seven brackets are adjusted using a base year of 1998, the initiative specifies that the base year for the eighth bracket is 2022.

B. Section Two of the Initiative Proposes an Amendment to Idaho's Corporate Income Tax Rate.

The second section of the initiative seeks to increase Idaho's corporate income tax rate. Presently Idaho Code section 63-3025(1) establishes a tax rate on corporate income of 6.925%. The initiative proposes amending this rate to 8%.

C. Section Three of the Initiative Proposes an Amendment to How Income Tax Revenue is Distributed and Appropriates Tax Revenue to the Quality Education Fund.

The third section of the initiative proposes an amendment to Idaho Code section 63-3067(2). This code section states how tax revenue received by the state is to be distributed by the Idaho State Tax Commission. As it presently stands, all money—except for revenue received from the withholding of lottery winnings—“received by the state . . . shall be deposited . . . and become part of the general account [fund] under the custody of the state treasurer.” Idaho Code § 63-3067. Revenue received from the withholding of lottery winnings is to be distributed such that half is deposited in the “public school income fund” and the other half is use for “county juvenile probation services.”

Section three proposes to amend this section by adding a second exception for distributing received revenue. The amendment proposes that the additional revenue received as a result of increasing the individual income tax rate and corporate income tax rate should not be distributed to the general account but should be distributed to a new fund: the Quality Education Fund.

D. Section Four of the Initiative Proposes the Creation of a New “Quality Education Fund.”

The fourth section of the initiative proposes that a brand new section be added to the Education Code. This section, titled “Quality Education Fund—Rulemaking-Definitions,” proposes the creation of a new continuously appropriated fund that is to be “expended by” the State Board of Education. Money for this fund is to come from “legislative transfers or appropriations, from the sales tax account, from the state income tax and from any other governmental or private sources.”

The purpose of the fund is to allow the state to “invest in betterment of public schools in Idaho.” It proposes to achieve this goal by allowing the State Board of Education to use the money in the Quality Education Fund to:

- Reduce class sizes;
- Prevent class size increases;
- Provide current and adequate classroom materials, such as textbooks and supplies;
- Provide career technical education;
- Provide full day kindergarten;
- Provide art programs;
- Provide music programs;
- Provide drama programs; and
- Provide special education services.

In addition to these specifically enumerated actions, the State Board of Education is also given the open-ended instruction of “including, attracting and retaining highly qualified teachers.” The State Board of Education is to achieve this goal by taking actions “including but not limited to . . . providing competitive salaries, offering continuing education opportunities, and providing support for new educators.” The money in the fund expressly may not be used to “pay superintendents’, principals’ or other administrators’ salaries or other compensation.”

The money in the Quality Education Fund is to be distributed in a manner similar to the distribution of money held in the School District Building Account. See Idaho Code § 33-905(2). The money in the Quality Education Fund is to be distributed from the fund to school districts and public charter schools “not later than August 31.” The money is distributed to each school district and public charter school in proportion to their average daily attendance of the district (or charter school) as compared to the total average daily state-wide attendance. The distribution section also contains a special provision for schools of the deaf and the blind. For the purpose of distribution, such schools are treated as if each were a separate school district.

The Quality Education Fund is intended as a supplement to—and not a replacement of—the typical “K-12 public school support.” The money in the fund is meant to “augment” the “state’s general account appropriation.”

Finally, the State Board of Education is tasked with “promulgat[ing] rules to implement the provisions of this section.”

E. Section Five of the Initiative is a Severability Clause.

The fifth section of the initiative states that the provisions of the initiative are “severable . . . if any provision of [the] initiative . . . is . . . invalid.”

F. Section Six of the Initiative States the Effective Date.

The sixth section of the initiative states that the initiative’s effective date is January 1, 2021.

II. Substantive Analysis

A. There is a Risk that the Initiative Violates the Single-Subject Rule of the Idaho Constitution.

Because the initiative seeks to both raise income tax rates and create a new fund to promote education in Idaho, there is a risk that the initiative violates the single-subject rule set forth in article III, section 16 of Idaho Constitution. That section states:

Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title.

Idaho Const. art. III, § 16. The Idaho Court of Appeals, in interpreting this provision, has found that a bill (or initiative) may make several changes to law so long as each of the changes relate back to the same “general subject.” In particular, so long as all of the portions of the initiative “fall[] within [the] subject” and “are germane to” and “not incongruous with” the subject, then the initiative does not violate the single-subject rule. Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223, 1224 (Ct. App. 1985).

For the present initiative, there is nothing particularly incongruous about an income tax rate increase and a new fund for promoting education being put forth in the same initiative. However, these two policies are also not obviously germane to one another. The proposed initiative does connect the two policy changes by specifying that any additional revenue received from the income tax rate increases be used for the promotion of education in Idaho. However, there is a risk that this connection is not substantial enough for the initiative to survive if it is challenged in court on the single-subject rule. See, e.g., Idaho Watersheds Project v. State Bd. of Land Comm’rs, 133 Idaho 55, 60, 982 P.2d 358, 363 (1999) (Finding that a constitutional amendment that made two adjustments related to school endowment land violated a similar single-subject rule controlling constitutional amendments).

B. The Initiative Deviates from the Present Statutory Definitions of the Tax Brackets.

The initiative deviates in two ways from how the legislature has previously defined the tax brackets. First, the rate column for the seventh tax bracket (“\$7,500 but less than \$250,000”), defines the rate as 6.925% of “the amount over \$7,500 but less than \$250,000.” This phrase in the rate column—in particular the portion that reads “but less than \$250,000”—does not appear in any of the other brackets in the statute. Instead, the other tax brackets have some variation of the following phrase: the rate applies to “the amount over \$5,000.” Putting the phrase “but less than \$250,000” into the rate column does not appear to substantively change the provision, but it is inconsistent with the statutory language for the other brackets.

Second, in the rate column for the proposed eighth bracket (“\$250,000 and over”), the initiative has failed to include the base amount of tax due from taxpayers with income of over \$250,000. Idaho’s tax rate is progressive, this meaning that the first \$999 earned by every taxpayer is taxed according to the first tax bracket’s (“Less than \$1,000”) rate of 1.125%, the second \$1,000 is taxed according to the second tax bracket’s (“\$1,000 but

less than \$2,000”) rate of 3.125%, the third \$1,000 earned is taxed according to the third tax bracket’s (\$3,000 but less than \$4,000) rate of 4.625%, and so forth. All of the other brackets include a base amount of tax in the starting point reflecting this progressive tax adjustment and the inclusion of this figure is critical for accurately determining tax due. An individual associated with Reclaim Idaho, an organization interested in the drafting of this initiative, has indicated that the exclusion of the base tax was an oversight.

C. The Initiative Deviates from How Other Tax Revenue Is Distributed by Basing its Distribution on “Taxable Income.”

The initiative’s proposed amendment to Idaho Code’s income tax distribution section, section 63-3067, states that “an amount equal to three percent (3%) of taxable income” will be distributed to the Quality Education Fund. The use of the phrase “taxable income” to make this distribution diverges from the other methods of distributing income tax described in Idaho Code section 63-3067. Specifically, the other methods for distributing income tax revenue rely on the amount of tax revenue the state has collected as the base for distribution. The initiative diverges from this scheme because the base it has selected, “taxable income,” is not the same as the amount of income tax revenue the state has collected. Instead, “taxable income” is only an amount reported on a taxpayer’s tax return as a part of the process of determining tax liability—it does not reflect the amount of tax paid by a taxpayer to the State of Idaho.

The phrase “taxable income” is defined as “federal taxable income as determined under the Internal Revenue Code.” Idaho Code § 63-3011B. Multiplying a tax rate against this figure would not yield the amount of tax a taxpayer actually pays to the state. Two categories of adjustments must be made to determine how much tax a taxpayer must pay. First, after that amount of taxable income is ascertained, a taxpayer is permitted to make state-specific adjustments to their “taxable income” to reach a figure known as “Idaho taxable income.” Idaho Code § 63-3011C. Second, after Idaho taxable income is determined and the appropriate tax rates are applied, a taxpayer may be entitled to credits that will directly reduce their tax liability. See Idaho Code § 63-3029P. Both types of adjustment will lead to a substantially different amount of income tax owed than had the taxpayer multiplied the tax rates against his or her taxable income. In short, the phrase taxable income cannot stand in as measure for income tax revenue collected.

Similarly, for the distribution of corporate income tax, the initiative proposes using “taxable corporate or franchise income” as the base for determining how much corporate income tax revenue is to be distributed to the Quality Education Fund. This phrase is not a defined phrase in the Tax Code, however, its use produces the same problem as the use of the phrase “taxable income.” The phrase taxable income cannot be used as a corollary for income tax revenue collected.

It appears that the intent of the initiative is to only distribute the increase of tax revenue attributable to the proposed rate increases. The initiative states “that the amounts collected” as a result of the rate increase “shall be remitted to the quality education fund.” To accomplish this goal more directly, the initiative should not use taxable income as the base for determining how much of the income tax revenue should be distributed.

D. The Initiative Does Not Match the Structure of Idaho Code Section 63-3067.

In its current form, the structure of Idaho Code section 63-3067 follows this pattern: (1) the exception to the general distribution of income tax revenue and (2) the general distribution of the remaining portion of income tax revenue. In its proposed amendment to Idaho Code section 63-3067, the initiative proposes to add a further exception to the general distribution of income tax revenue. In doing so it proposes changing the structure of Idaho Code section 63-3067 to (1) an exception to the general distribution, (2) the general distribution of the remaining portion, and (3) another exception to the general distribution. The initiative would better match the current statutory structure if it were to list its proposed exception to the general distribution of income tax revenue immediately following the first exception to the distribution of the revenue.

E. The Initiative Overlaps with Other Education Statutes.

Some of what the initiative seeks to accomplish overlaps with statutes that already exist. Specifically, Idaho Code has provisions addressing the following:

- Managing class size, Idaho Code § 33-1004(g);
- Providing suitable classroom materials, such as textbooks and supplies, Idaho Code § 33-512(3);
- Providing career technical education, Idaho Code § 33-1635 and § 33-1002G;
- Providing special education services, Idaho Code § 33-2001, *et. seq.*; and
- Compensating teachers, Idaho Code §§ 33-1004A – 1004J.

Apart from stating that the Quality Education Fund is intended to be a supplementary source of funding for the state’s education system, the initiative does not address these overlapping provisions. It is unknown how an additional source of revenue will affect the application of these overlapping provisions.

F. The Initiative's Provision that the Quality Education Fund Supplement and Not Replace General Account Appropriations May Be Ineffective.

The initiative appears intended to stop the legislature from offsetting any increase in education spending due to the Quality Education Fund with a reduction in general account appropriations; however, this provision may be ineffective. The initiative seeks an overall increase in education spending in Idaho. To this end, it states that the Quality Education Fund is to "augment and not replace K-12 public school support." It continues by stating that money from the Quality Education Fund is to be provided in addition to the state's general account appropriation "and not in place of any part of that appropriation."

The difficulty with this provision is in determining whether the money from the Quality Education Fund takes the place of any part of an appropriation. Appropriations are made by the legislature on a year-to-year basis based on detailed reports, budget requests, and statutory frameworks. See Idaho Code § 33-1001, *et. seq.* Each year, the appropriation is a separate act of the legislature and not necessarily related to the appropriation made the year before. It is difficult to compare year-to-year appropriation amounts and it may be difficult to determine whether any year-to-year decrease in an appropriation is caused by the Quality Education Fund.

Additionally, the plain language of the initiative may make the supplementary provision difficult to enforce. Because this provision does not call for any year-to-year comparison of appropriated amounts, it is possible that the requirements of the provision are satisfied so long as the legislature appropriates any amount of revenue from the general account in addition to the Quality Education Fund.

III. Recommended Revisions, Alterations, Suggestions, and Miscellaneous Issues

In addition to the comments already made in this certificate of review, the following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 1:

1. In the amendment to the paragraph following the enumeration of the tax bracket and rates, the initiative states, "For the top bracket contained in subsection (a) of this section." The phrase "top bracket" is ambiguous as it could refer to the "\$250,000 and over" bracket or to the bracket at the top of the list of brackets. Perhaps refer to it as the "\$250,000 and over" bracket or some other designation that is more specific.

2. In that same paragraph as described in ¶ 1, the initiative uses the phrase "for the amount" and "the amount" to refer to what the other portions of the statute call the "bracket amounts." To be consistent, and to avoid ambiguity, perhaps change the initiative's phrasing to "bracket amount."

The following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 3:

1. In the amendment to subsection (2) of Idaho Code section 63-3067, the initiative uses the word “remitted.” This word is not otherwise used to describe the distribution of income tax revenue. To be consistent with the rest of the statute, perhaps use the word “distributed.”

2. In the same paragraph as described in ¶ 1, the initiative uses the phrase “corporations and franchises.” The use of the word “franchise” in this phrase is redundant and only serves to introduce confusion. It appears that the initiative uses this word to tie its distribution language to the franchise tax found in Idaho Code § 63-3025A. However, as that tax only applies to corporations, it is not necessary for the initiative to separately refer to “franchises.”

3. In the same paragraph as described in ¶ 1, the initiative starts its second and third sentences of its proposed amendment with a prepositional phrases; it should punctuate those phrases with commas. “From each single person or married persons filing separately an amount equal to three percent . . .” should be, “From each single person or married persons filing separately, an amount equal to three percent . . .” “For corporations and franchises an amount equal to 1.075% . . .” should be, “For corporations and franchises, an amount equal to 1.075% . . .”

4. In the same paragraph as described in ¶ 1, the initiative fails to consistently write out the distribution percentages. The initiative first uses the phrase, “an amount equal to three percent (3%),” but later uses the phrase “an amount equal to 1.075%.” In this later instance, perhaps write out “an amount equal to one and seventy-five one-thousandths percent (1.075%).”

5. Additionally, in the same sentence described in ¶ 4, the initiative joins two independent clauses together with an “and;” the initiative should either divide the two independent clauses into two separate sentences or punctuate this sentence with a comma. “From each single person or married persons filing separately an amount equal to three percent (3%) of the taxable income in excess of \$250,000 and for married persons filing jointly an amount equal to three (3%) of the taxable income in excess of \$500,000” should be, “From each single person or married persons filing separately, an amount equal to three percent (3%) of the taxable income in excess of two hundred fifty thousand dollars (\$250,000). For married persons filing jointly an amount equal to three (3%) of the taxable income in excess of five hundred thousand dollars (\$500,000).”

6. Once more, in the same sentence described in ¶ 4, the initiative incorrectly makes the word “person” plural in the phrase “married persons filing separately.” As the sentence is about “each” person, there is no need to say “married persons.”

7. In the same paragraph as described in ¶ 1, the three sentences that the initiative proposes to add are not wholly consistent with one another. The first sentence states that the intent is to distribute the excess amounts collected as a result of increasing the individual and corporate income tax rates to the Quality Education Fund. The second and third sentences however set forth formulas for distributing revenue that are not tied to the amount of revenue collected. Rather, these formulas are tied to the amount of taxable income taxpayers have reported. The drafters of the initiative may wish to reformulate its proposed method of distribution to better align the distribution formulas with the intent of the initiative.

8. In the same paragraph as described in ¶ 1, the initiative concludes the first sentence of its amendment with the phrase “as follows,” punctuating that phrase with a period. As used in Idaho statute, the phrase “as follows” is nearly always followed by a colon and not a period. Often the phrase is used before subsections. The drafters of the initiative may wish to reconsider its use of the phrase “as follows” or modify the initiative to match the statutory norm.

9. In subsection three (3) of the Idaho Code § 63-3067, there appears to be a scrivener’s error. The initiative does not appear to intend to make any modifications to this subsection, however, the language in the initiative does not match the language of the statute. Idaho Code § 63-3067(3) states:

Any unencumbered balance remaining in the state refund account on June 30 of each and every year in excess of the sum of one million five hundred thousand dollars (\$1,500,000) shall be transferred to the general fund and the state controller is hereby authorized and directed on such dates to make such transfers unless the board of examiners, which is hereby authorized to do so, changes the date of transfer or sum to be transferred.

While the initiative states:

Any unencumbered balance remaining in the state refund account on June 30 of each and every year in excess of the sum of one million five hundred thousand dollars (\$1,500,000) shall be transferred to the general fund and the state controller is hereby authorized and directed on such dates to make such transfers unless the board of examiners, *which is hereby authorized and directed on such dates to make such transfers unless the board of examiners*, which is hereby authorized to so, changes the date of transfer or sum to be transferred.

(Emphasis added.) The initiative has added the language indicated in italics. This added language appears to be just a mistake in copying the language of the statute.

The following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 4:

1. In subsection one (1) of proposed Idaho Code section 33-911, the second sentence of the proposed section needs an Oxford comma to improve clarity. The sentence presently states, "The fund shall consist of moneys made available through legislative transfers or appropriations, from the sales tax account, from the state income tax and from any other governmental or private sources." The sentence should state, "The fund shall consist of moneys made available through legislative transfers or appropriations, from the sales tax account, from the state income tax, and from any other governmental or private sources."

2. The second half of the same paragraph as described in ¶ 1 contains a complicated list of what the State Board of Education may fund with money from the Quality Education Fund. This list lacks conjunctive terms and does not use semi-colons consistently. The list states: "Reducing class sizes and preventing class size increases; attracting and retaining highly qualified teachers and support staff, including but not limited to, providing competitive salaries, offering continuing education opportunities, and providing support for new educators; providing current and adequate classroom materials, such as textbooks and supplies for students; providing career technical education, providing full day kindergarten, providing art, music and drama programs, providing special education services." The list should state, "Reducing class sizes and preventing class size increases; attracting and retaining highly qualified teachers and support staff, including but not limited to, providing competitive salaries, offering continuing education opportunities, and providing support for new educators; providing current and adequate classroom materials, such as textbooks and supplies for students; providing career technical education; providing full day kindergarten; providing art, music and drama programs; and providing special education services."

3. In subsection two (2) of proposed Idaho Code section 33-911, a phrase in the first sentence is missing the article "the." The phrase states, "moneys in the fund pursuant to distribution provided in subsection (1)" This phrase should be, "moneys in the fund pursuant to the distribution provided in subsection (1)"

4. In the same paragraph referred to in ¶ 2, the final sentence lacks an Oxford comma. That sentence presently states, "Moneys from the fund shall not be used to pay superintendents', principals' or other administrators' salaries or other compensation." The sentence should be, "Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation."

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 Reclaim Idaho c/o Jeremy Gugino, 701 E. Jefferson St., Boise, Idaho 83712.

Sincerely,



LAWRENCE G. WASDEN
Attorney General

Analysis by:

Nathan Nielson
Deputy Attorney General