



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

May 26, 2021

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

Re: Certificate of Review
Proposed Initiative Relating to the Quality Education Act

Dear Secretary of State Denney:

An initiative petition was filed with your office on April 29, 2021. 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 replace the recently adopted changes to Idaho Code section 63-3024 with amendments to the prior version of Idaho Code section 63-3024, ultimately resulting in an increase on the individual income tax rate on amounts earned in excess of \$250,000 a year and in an increase on 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 States the Initiative's Title.

Section one of the initiative states that the initiative shall be referred to as "The Quality Education Act."

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

Section two of the initiative proposes an amendment to Idaho Code section 63-3024, the section of Idaho Code which defines individual income tax rates. However, the 2021 Legislature, through House Bill 380, updated Idaho Code section 63-3024. The newly adopted legislation reduces the number of brackets from seven to five and makes changes to the dollar threshold and the tax percentage associated with each respective bracket. The amendments proposed in the initiative refer to and amend the brackets from the prior version of Idaho Code section 63-3024.

Section two also contains an amendment to Idaho Code section 63-3024(a) for adjusting the "new" eighth bracket for inflation. This adjustment mirrors the language already in statute for adjusting the other 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 2024.

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

The third section of the initiative seeks to increase Idaho's corporate income tax

rate. This section of code was also amended with House Bill 380 this year with a retroactive date of January 1, 2021. Under the newly amended law, Idaho Code section 63-3025(1) establishes a tax rate on corporate income of 6.5%. The initiative proposes amending this rate to 8%.

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

The fourth 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 a 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 used for “county juvenile probation services.” Idaho Code § 63-3067(1).

Section four 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.

E. Section Five of the Initiative Proposes the Creation of a New “Quality Education Fund.”

The fifth 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, the state franchise 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;
- Provide support for English language learners;
- Provide enhanced instruction in civics, American history, and government; 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” and “attracting and retaining counselors and school psychologists[.]” 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.”

F. Section Six of the Initiative is a Severability Clause.

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

G. Section Seven of the Initiative States the Effective Date.

The seventh section of the initiative states that the initiative’s effective date is

January 1, 2023.

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.” Cheney v. Smith, 108 Idaho 209, 210, 697 P.2d 1223, 1224 (Ct. App. 1985), *abrogated on other grounds by* Beco Constr. Co. v. J-U-B Eng’rs, Inc., 149 Idaho 294, 233 P.3d 1216 (2010). 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. Id.

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 Fails to Incorporate the Legislature’s Recently Adopted Changes to Idaho Code Section 63-3024.

The initiative fails to incorporate the Legislature’s most recently adopted changes to Idaho Code section 63-3024. In the 2021 legislative session, the Legislature adopted

changes to Idaho Code section 63-3024 reducing the number of tax brackets from seven to five. See House Bill 380, 66th Leg., 1st Reg. Sess., 2021 Idaho Sess. Laws Ch. 342. The new legislation also changes the income thresholds and taxing percentages associated with each bracket. These changes were adopted with a retroactive effective date of January 1, 2021. Id.

Should the initiative pass without incorporating the newly adopted language of Idaho Code section 63-3024(a), the seven tax brackets and the amendments proposed thereto referenced in the initiative would replace the more recently adopted five tax brackets and their respective income thresholds and tax percentages. See State v. Finch, 79 Idaho 275, 280, 315 P.2d 529, 530 (1957).

Additionally, in the 2021 legislative session, the Legislature created a new code provision, Idaho Code section 63-3026B. See House Bill 317, 66th Leg., 1st Reg. Sess., 2021 Idaho Sess. Laws Ch. 239. This provision allows partnerships to elect to pay as the taxpayer at the corporate rate instead of requiring taxpayers to pass tax liability on through to individuals. This new provision was made retroactive to January 1, 2021. Id.

If the initiative passes without addressing the new ability of partnerships to pay tax directly instead of passing the tax liability through, that class of taxpayers would be exempt from the distribution requirements set forth in the initiative.

C. 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.

D. 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(6)(g));
- Providing suitable classroom materials, such as textbooks and supplies (Idaho

Code § 33-512(3));

- Providing career technical education (Idaho Code §§ 33-1635, 33-1002G);
- Providing special education services (Idaho Code § 33-2001 *et. seq.*);
- Providing support to English language learners (Idaho Code § 33-1617); and
- Compensating teachers (Idaho Code §§ 33-1004A through 33-1004J).

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.

E. 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[.]" Proposed Idaho Code § 33-911(3). 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." Id.

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 2 of the initiative:

- It may be helpful to incorporate the most recent version of Idaho Code section 63-3024(a)—specifically, the new tax brackets.
- In the amendment to the paragraph following the enumeration of the tax bracket and rates, the initiative states, “the state tax commission shall provide an adjustment factor for the bracket amount by multiplying the bracket amount by the percentage (the consumer price index for the calendar year immediately preceding the calendar year to which the adjusted bracket will apply divided by the consumer price index for calendar year 2024).” It is unclear whether the term “percentage” is synonymous with the term “adjustment factor” mentioned earlier in the sentence. If they are not synonymous, it might be helpful to include a definition for “adjustment factor.” Assuming these two terms are synonymous, the proposed amendment could be changed as follows: “the state tax commission shall provide an adjustment factor for the bracket amount by multiplying the bracket amount by the adjustment factor. The adjustment factor is calculated by dividing the consumer price index for the calendar year 2024 by the consumer price index for the calendar year immediately preceding the calendar year to which the adjusted bracket will apply.”

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

- In the amendment to subsection (2) of Idaho Code section 63-3067, the initiative includes several clauses. While the sentence may not be grammatically incorrect, it could be revised for greater clarity as follows: “[F]rom each single individual or married individual filing separately reporting Idaho taxable income” to “[F]rom each single individual or married individual filing separately and reporting Idaho taxable income” or “[F]rom each single individual or married individual filing separately, reporting Idaho taxable income.”
- In the same paragraph, the amendment uses the phrase “individuals treated as filing a joint return under section 63-3024(b).” Idaho Code section 63-3024(b) currently states:

In case a joint return is filed by husband and wife pursuant to the provisions of section 63-3031, Idaho Code, the tax imposed by this section shall be twice the tax which would be imposed on one-half (1/2) of the aggregate Idaho taxable income. For the purposes of this section, a return of a *surviving spouse*, as defined in section 2(a) of the Internal Revenue Code, and a *head of household*, as defined

in section 2(b) of the Internal Revenue Code, *shall be treated as a joint return* and the tax imposed shall be twice the tax which would be imposed on one-half (1/2) of the Idaho taxable income.

(Emphasis added.) It is assumed the intent of the amendment is to include married individuals filing jointly (“joint return ... filed by husband and wife”) as well as the “surviving spouse” and “head of household” mentioned in the second sentence of Idaho Code section 63-3024(b). If this assumption is correct, the language in the amendment should be changed from “individuals treated as filing a joint return under section 63-3024(b)” to “individuals filing a joint return or individuals treated as filing a joint return under section 63-3024(b).”

- In the same paragraph, the initiative uses the term “as follows:” after which follows the three proposed distribution practices separated by colons. For clarity and ease of reading, the drafters may consider separating the three proposed distribution practices with semicolons, separate lettered paragraphs, or both. For example:

(a) From each single individual or married individual filing separately reporting Idaho taxable income that equals or exceeds the highest tax bracket starting figure, including any inflation adjustment provided in section 63-3024 (a), Idaho Code, thirty-six percent (36%) of the section 63-3024, Idaho Code, income tax (net of allowed tax credits and excluding recapture tax) in excess of the tax adjustment base amount;

(b) From individuals treated as filing a joint return under section 63-3024(b), Idaho Code, reporting Idaho taxable income that equals or exceeds two (2) times the highest tax bracket starting figure, including any inflation adjustment provided in section 63-3024(a), Idaho Code, thirty-six percent (36%) of the section 63-3024, Idaho Code, income tax (net of allowed tax credits and excluding recapture tax) in excess of two (2) times the tax adjustment base amount; and

(c) From corporations, other than S corporations, reporting Idaho taxable income, thirteen percent (13%) of the section 63-3025 or 63-3025A, Idaho Code, income or franchise tax (net of allowed tax credits and excluding recapture tax).

- The phrase “tax adjustment base amount” is awkwardly defined. Specifically, the defined phrase is used in the definition of the phrase: “For purposes of determining the distribution to the education fund, the ‘tax adjustment base amount’ means the tax adjustment base amount for the highest tax bracket contained in section 63-3024(a), Idaho Code.” Perhaps use a definition that avoids using the defined term in the definition. The following definition may

capture the intent: "For purposes of determining the distribution to the education fund, the 'tax adjustment base amount' means the cumulative tax amount of all proceedings brackets described in the highest tax bracket of section 63-3024(a), Idaho Code."

- The initiative does not take into account the recently passed Idaho Code section 63-3026B. Tailoring the language of the initiative to include this provision may not be too difficult as the intent of section 63-3026B is to tax partnerships that elect to be treated as the taxpayer as if they were corporations. The following phrase could be adjusted to accommodate this legislative change: "and from corporations, other than S corporations, reporting Idaho taxable income, thirteen percent (13%)" to "and from any entity that has made the election to be an affected business entity under 63-3026B, Idaho Code, or corporations, other than S corporations that have not made the election to be an affected business entity under 63-3026B, reporting Idaho taxable income, thirteen percent (13%)."

The following are recommended revisions, alterations, suggestions, and miscellaneous issues for Section 5 of the initiative:

- In proposed Idaho Code section 33-911(1), the final sentence lacks an Oxford comma. That sentence presently states, "providing enhanced instruction in civics, American history and government[.]" The sentence should be, "providing enhanced instruction in civics, American history, and government."
- In proposed Idaho Code section 33-911(2), the final sentence contains language that could be ambiguous. That sentence presently states, "Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation." The phrase "or other compensation" creates two possible interpretations to this sentence. This sentence could be interpreted that moneys from the fund shall not be used to pay either the salaries or other compensation of superintendents, principals, or other administrators. It is assumed this is the intended interpretation since proposed Idaho Code section 33-911(1) specifically allows the fund to be used for compensatory purposes. However, this sentence could also be interpreted that moneys from the fund shall not be used to pay either (1) superintendents', principals', or other administrators' salaries, or (2) other compensation. In this interpretation, the phrase "or other compensation" stands alone and does not modify the phrase "superintendents', principals', or other administrators' salaries." In other words, the term "other compensation" would paint a broad stroke and would inhibit the fund from being used to compensate anyone. Again, this interpretation contradicts the language in proposed Idaho Code section 33-911(1). This ambiguity can be remedied by changing the last

sentence from "Moneys from the fund shall not be used to pay superintendents', principals', or other administrators' salaries or other compensation" to "Moneys from the fund shall not be used to pay the salaries of, or otherwise compensate, superintendents, principals, and other administrators."

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 Ashley Prince, Reclaim Idaho, 1424 S. Loveland St., Boise, ID 83705.

Sincerely,



LAWRENCE G. WUSDEN
Attorney General

Analysis by:

Adam Warr
Deputy Attorney General