Proposition 26:
New Supermajority Voter Approvals for Revenues

By Michael Coleman[1]

A statewide initiative on the November ballot would create years of litigation and havoc in municipal finance. Proposition 26 would recategorize a broad swath of state and local fees as taxes, setting up supermajority voter approval hurdles for what are now regulatory and impact fees that can be adopted by simple majorities of the State Legislature, city councils, and boards of supervisors.

Proposition 26 would:

- Recategorize many local government fees and charges as taxes, subjecting them to the approval requirements of special taxes including two-thirds supermajority voter approval. With certain limited exceptions, a tax would include any charge that provides benefits or privileges to those not charged.
- Recategorize many state imposed fees and charges as taxes, subjecting them to the approval requirements as taxes including two-thirds supermajority approval of each house of the Legislature.
- Expand the supermajority approval requirement for state taxes by requiring two-thirds supermajority approval of each house of the Legislature for "**any change in state statute which results in any taxpayer paying a higher tax**."

Background

In 1997 the California Supreme Court decided *Sinclair Paint Co. v State Board of Equalization* concerning a fee on businesses that made products containing lead. The proceeds of the fee were used for programs to screen and treat children for lead poisoning and to otherwise mitigate the social and environmental consequences of lead contamination. The paint company argued that the charge was in fact a tax and as such required the approval of two-thirds approval of each chamber of the Legislature under Proposition 13. The Court disagreed, ruling that the proceeds of a fee need not benefit those charged as long as the fee bears a reasonable relationship to the burden imposed by those charged. Fees of this kind are called "regulatory fees."

Regulatory fees include fees levied on :

- Point-source emitters of air pollution to mitigate those effects.
- Oil manufacturers for public information, oil recycling, and regulatory programs.
- Businesses that treat, dispose of, or recycle hazardous waste to fund toxic site clean-up, pollution prevention, preparation of waster source reduction plans, and certification of new environmental technologies.

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- Alcohol vendors to fund police services and public education on the adverse consequences of alcohol consumption.
- Tobacco products to fund health programs.
- Vehicle registrations for regional transportation programs.
- Heavy trucks to mitigate damage to streets and highways caused by truck traffic and spills.
- Public utilities to mitigate potential damage caused by trenching, including the diminished durability of roads.

The Measure

Charges that Provide Benefits Other Than to the Fee Payers are Taxes. Proposition 26 would recategorize as taxes many regulatory fees that benefit the public broadly rather than providing a direct and distinct benefit to the business owner or other fee payor. Among these are regulatory fees and assessments to address the health, environmental and other social effects of business activities. Because these charges are used for specific programs, as taxes they would be special taxes requiring supermajority approval.

Approval Requirements: State and Local Fees and Taxes ***Proposition 26 would recategorize as taxes many types of charges currently considered fees***		
	Fee	Tax
State	Majority of each house of the Legislature and Governor's approval.	For measures increasing state revenues,* two-thirds of each house of the Legislature and Governor's approval or initiative constitutional amendment approved by simple majority of voters.
City	Majority of the city council.	Two-thirds voter approval for a special tax (earmarked), majority voter approval for a general tax.
**Proposition 26 would also change this standard to require 2/3 vote for any law that will increase the taxes of any taxpayer, regardless of the overall effect of the law on state revenues.*		

Proposition 26 excludes from its new definition of "tax," fees imposed:

- for a benefit of privilege conveyed (like a professional license or a land use approval)
- for a service or product (like a recreation class fee)
- to cover stated costs of regulation
- entrance fees for state or local property
- fines imposed by a court or a local government
- development impact fees imposed by local government
- property related fees and assessments governed by Proposition 218

Examples of Fees That Proponents Say Proposition 26 Will Address

- Health inspection/monitoring fees
- Public safety cost mitigation fees
- Traffic, parking, noise abatement, and air quality impact fees for education, cleanup, health or other programs of general benefit
- Water quality impact fees for education, cleanup, health or other programs of general benefit
- Solid waste, tires, canned beverages, food packaging, computer hardware and toxic waste disposal fees used for education, cleanup, recycling/reuse, health or other programs of general benefit
- Alternative energy fees and energy use surcharges
- Fees on alcohol to litigate public nuisance associated with sale or consumption
- Fees on soda, unhealthy foods, fats, or sugar to mitigate obesity and other negative health effects
- Trenching fees for diminution in durability or longevity of roads, traffic congestion mitigation, mitigate potential damage to existing infrastructure
- Environmental mitigation and eco-impairment fees including carbon consumption fees, oil severance fees, and hazardous waste fees to support programs of general public benefit
- Vehicle registration or gasoline fees for transportation programs or environmental cleanup of general benefit
- Fees on tobacco for mitigating the adverse health effects of tobacco products (including evaluation, screening, and necessary follow-up services who are deemed potential victims of tobacco related injuries) or to discourage consumption (by increasing cost of product) and/or to educate the general public on the consequences of tobacco consumption. Fees to prevent illegal consumption by minors
- Fees on wireless telecommunications to reduce the impacts of DWTs (Driving While Talking), burdens on the 911 system, potential future effects of close proximity radio frequency exposure
- Fees on "altered food" products (chemical, gene, hormone, etc.) for research, screening, testing and treatment or education.
- Fees on television and movie programming to mitigate effects of violence on youth or similar anti-social consequences linked to programming
- Fees on gambling activities to treat compulsive gambling including screening, education, and treatment
- Fees on pharmaceuticals to treat subsequently discovered health risks associated with a particular drug product, for drug education, health research, treatment, emergency care, covering the costs of the uninsured or underinsured or for immunizations for children
- Fees on 4-wheel drive and all-terrain vehicles to offset eco-damage of off-road automobile use
- Fees on pesticides and other chemicals fees to treat the adverse health effects, for chemical use or alternative product education, research, treatment, or emergency response, cleanup or care.
- Fees on property casualty insurers for firefighting, earthquake and flood, uninsured drivers and auto case court costs.

If a fee is deemed to be a tax, if imposed by the state it would require the approval of 2/3 of each house of the legislature and the governor. A locally imposed tax would be a special tax (because it would be used for a specific purpose) and would require 2/3 voter approval.

Two-thirds Vote for Any Action That Results in Any Taxpayer Paying a Higher Tax. Proposition 26 also broadens the two-thirds state legislative vote requirement for increases in any state tax. The California Constitution currently requires two-thirds approval of each house of the Legislature for laws enacted "for the purpose of increasing revenues." Proposition 26 substantially expands this supermajority vote requirement by requiring two-thirds approval of each house of the legislature for *any law* that will increase the taxes of *any taxpayer*. This rule could expand the legislative supermajority rule to include such things as state conformity with federal tax structures, revisions to depreciation schedules, changes in building codes or other laws that require the purchase of goods subject to the sales tax, and increases in the minimum wage which increase an individual's earnings and thus the taxes they owe.

Because Proposition 26 applies retroactively to any state laws passed on or after January 1, 2010, it could invalidate the gas tax swap of 2009 which reduced the sales tax on gasoline and increase the fuel excise tax on gasoline in order to provide the state with more flexibility in the use of those tax revenues. By invalidating the swap, Proposition 26 would eliminate $1 billion in state General Fund savings.

Conclusion

If Proposition 26 passes, there will be significant impacts on a variety of state and local revenues and the programs and services they fund. These include:

- Fees to mitigate the social and environmental consequences of activities will now be defined as taxes requiring two-thirds voter approval.
- Regional vehicle registration fees for transportation which under current state law (SB83 Hancock 2009) may be approved by a majority of voters will require two-thirds voter approval as special taxes.
- Franchise fees (e.g pipeline, cable television, solid waste, gas, electric, telephone, etc.) may now be defensible only to the extent they are a charge for the use of government property – and this might require the government have the power to exclude users from the property if the fee is not paid.
- The fate of the fees imposed by the California Department of Fish & Game to review documents prepared by local governments under the California Environmental Quality Act (CEQA) might not longer be permissible.
- Senior and low-income discounts or exemptions for various fees and charges might not longer be permitted. The measure requires fees for permits, privileges and services be imposed only when that permit, privilege or service is not provided to those not charged.
- Advance planning and rule making activities of regulatory agencies funded by regulatory fees may no longer be legal.

- Municipal gas and electric utilities will have a cost-of-service limit on fees that their for-profit competitors do not have. Proposition 218 exempted local government fees for gas and electric service from its requirements. Proposition 26 does not include any similar exemption and it therefore appears that such fees will now have to fall within the exemption from the definition of tax for "[a] charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product."
- Many aspects of the measure are unclear and even its proponents are confused or disagree about its effects and application. If it passes there will certainly be many years of uncertainty and litigation.

State and local governments are frequently tasked with mitigating the effects on the public of the social, environmental and economic impacts created by individuals and businesses. By reclassifying certain fees as taxes, Proposition 26 would also limit the ability of state and local governments to place the costs of programs and services on the individuals and businesses responsible for those adverse impacts. Instead, the cost burden would shift to taxpayers as a whole, unless voters, by a two-thirds supermajority, approve of special taxes on those individuals or businesses.

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