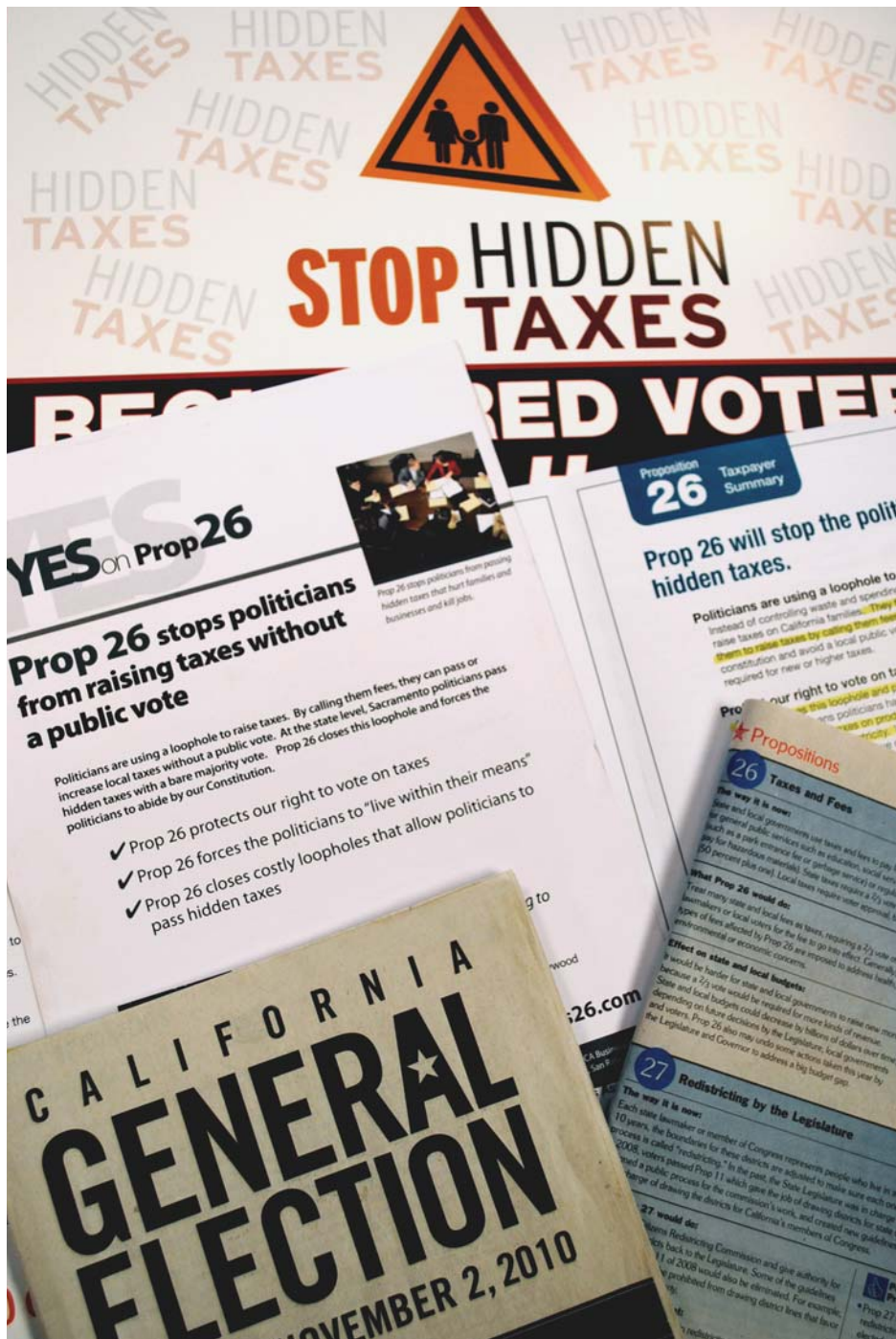


UNDERSTANDING PROPOSITION 26

A sponsor's guide to California's new tax structure.



August 15, 2011

About the California Taxpayers Association

Founded in 1926, the California Taxpayers Association is the state's largest and oldest organization representing taxpayers. Established as a non-partisan, non-profit association, CalTax has a dual mission to guard against unnecessary taxation and to promote government efficiency. CalTax conducts research and advocacy on significant tax and spending issues in the legislative, executive, and judicial branches of government. For more information on CalTax go to www.caltax.org

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Introduction

Throughout much of the 1990s and the 2000s, the California State Legislature and local governments labeled taxes as “fees” in order to avoid vote requirements for tax increases. Voter-approved laws – Proposition 13 and Proposition 218 – require state taxes to be approved by two-thirds of the Legislature and local taxes to be approved by voters (local vote requirement depends on the type

of tax). After years of frustration with legal challenges and uncertainty, the California Taxpayers Association and others sponsored Proposition 26, which was approved by voters on November 2, 2010.

The California Taxpayers Association has prepared this analysis to answer questions as state and local policymakers navigate through various policy issues associated with passage of Proposition 26.

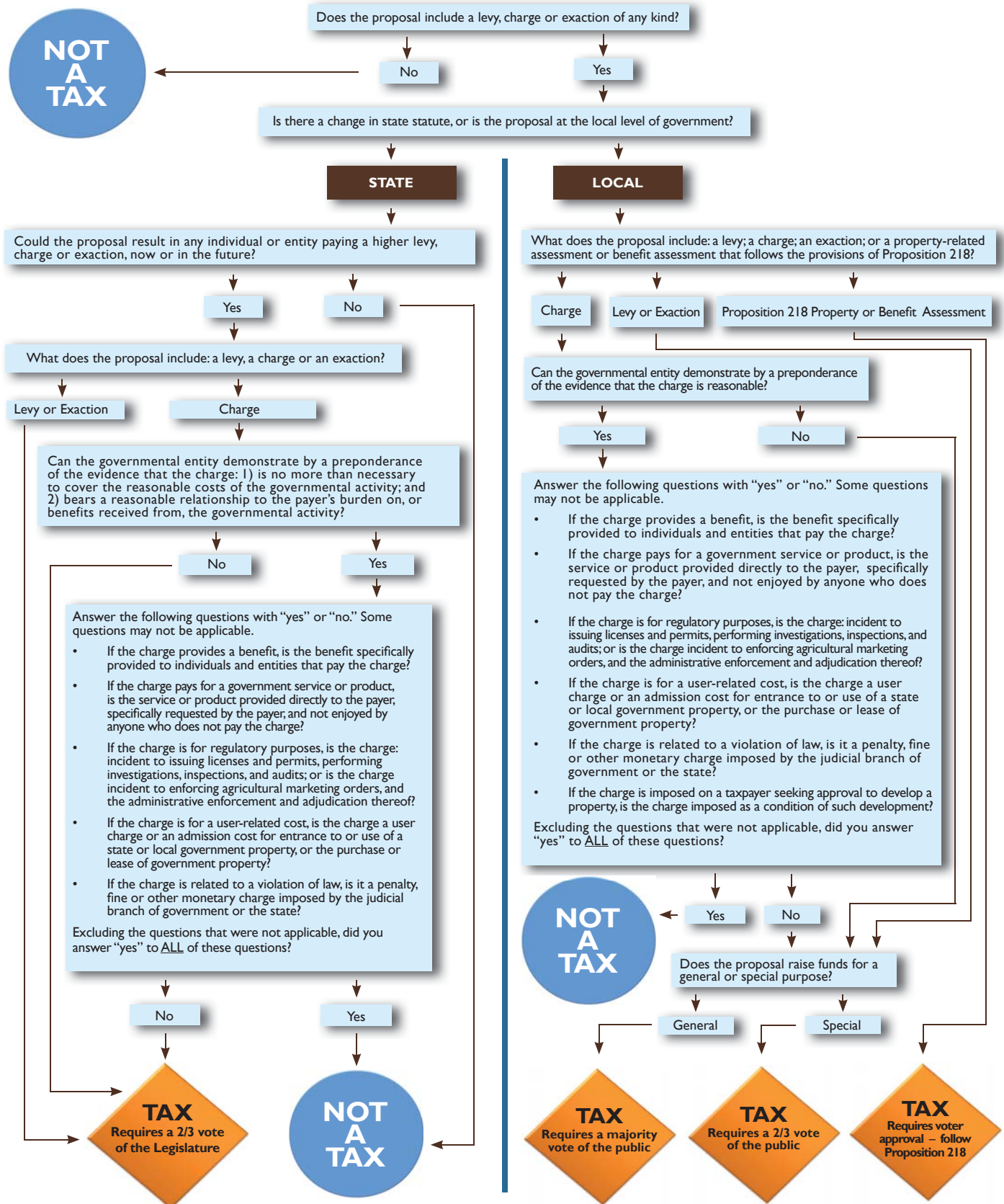
Issues to Consider Before Imposing a Tax

Before imposing any charge, state and local governments should consider if such a charge is warranted, if additional revenue is necessary, and if a charge is the most equitable revenue source. If a charge is deemed necessary, then state and local policymakers can prove that a charge is not a tax by answering the following questions:

- 1. Does the Charge Meet One of the Exceptions Provided by Proposition 26?**
- 2. Does the Charge Specifically Benefit Those Who Pay the Charge?** Government activity funded by a charge should benefit only the individuals and entities that pay the charge. Governmental activity benefiting entire communities or populations, and charges that exclude or exempt certain segments of the population, are not evenly distributed. Therefore, such charges require a two-thirds vote of the Legislature and/or approval of voters at the local level.
- 3. Is the Charge Reasonable?** State and local governments must be able to demonstrate through a preponderance of the evidence that a charge is reasonable. A charge is reasonable if it does not exceed the necessary cost of the governmental activity and if the cost allocated to the payer bears a fair or reasonable relationship to the payer’s burden and/or benefits.

If policymakers answer “no” to any of the questions above, the charge is a tax. Proposition 26 does not prohibit state or local governments from increasing taxes – it merely ensures that a tax is deliberated with diligence, and that a significant segment of society agrees that a tax is necessary to support quality governmental services. For more information on how to determine if a charge is a tax, see the flowchart on page 6.

The Tax Test: A Roadmap to Understanding Proposition 26



Major Provisions of Proposition 26

California voters approved Proposition 26 to refine the definition of “tax” and ensure that elected officials could not circumvent the vote requirements for tax increases simply by calling them something else. Below are the major provisions of Proposition 26.

- **Amends Application of Vote Threshold.** Proposition 26 changes Proposition 13’s two-thirds legislative vote requirement for taxes to include “any change in state statute which results in any taxpayer paying a higher tax.”
- **Broadens Definition of “Tax” to Include Certain Charges.** Proposition 26 broadens the definition of a tax to include any “levy, charge or exaction of any kind”¹ paid by taxpayers, except the following:

State and Local Exceptions

1. Charges for a Specific Benefit or Privilege. A charge imposed for a specific benefit or privilege that specifically improves the payer’s well-being or provides assistance to the payer. Such charges should benefit the payer only, and must not exceed the reasonable costs to the government of providing the benefit or privilege. Individuals and entities that pay for a specific benefit or privilege are funding a government program through their payment.

- Examples: Restricted neighborhood parking permits, demonstration or protest permits, franchise fees (right to dig up a road or pay for the cost of a right of way).

2. Charges for a Specific Government Service or Product. A charge imposed for a specific government service that benefits the payer due to government labor. A product provided directly to the payer is something specifically requested by the payer, and not enjoyed by anyone who does not pay the charge. Such charges must not exceed the reasonable costs to the government of providing the service or product.

- Example: Document service fees (photocopying).

3. True Regulatory Charges. Charges imposed for reasonable regulatory costs are charges that fund the administrative cost related to issuing licenses and permits, performing investigations, inspections, audits, and enforcing agricultural orders. A regulatory charge does not include the Vehicle License Fee – a tax that is based on a vehicle’s assessed value – any changes to which still require a two-thirds vote of the Legislature. Such charges may be incident to registering a vehicle, however.

- Examples: Inspection fees, certain mitigation fees, permits for regulated businesses (such as taxicabs, massage businesses, card rooms, etc.).

4. User Charges. A charge imposed for entrance to or use of state or local government property, or for the purchase, rental, or lease of such property.

- Examples: Equipment rental fees, park/recreation fees and admission charges (high school football games, public museums, etc.).

5. Fines and Penalties. A fine or penalty imposed by the judicial branch of government, the State of California, or any local government in California, for violation of law.

- Examples: Late-payment fees and parking/speeding tickets.

Additional Exceptions Pertaining Only to Local Governments

6. Developer Charges. A charge imposed as a condition of property development. These charges may be imposed only on those seeking approval to develop property.

- Example: Builder fees.

7. Benefit Assessments and Property-Related Charges. An assessment, property-related charge, or parcel tax imposed on a property owner. Local governments must follow the provisions of Article XIID of the California Constitution (Proposition 218).

Retroactivity on Noncompliant State Taxes.

Changes in state statute that result in any taxpayer paying a higher tax, adopted without a two-thirds vote between January 1 and November 3, 2010, are “void” on November 3, 2011, unless re-enacted by a two-thirds vote of the Legislature and signed by the governor. Proposition 26 does not include a similar retroactive provision for local tax increases.

Government Bears Burden of Proof. State and local government must prove “by a preponderance of the evidence” that the levy, charge, or other exaction is not a tax, that the amount is no more than is reasonably necessary to cover the costs of the governmental activity, and that the manner in which those costs are allocated to a payer bears a fair or reasonable relationship to the payer’s burdens on, or benefits received from, the governmental activity.

Background

Prior to passage of Proposition 26, the California Constitution imposed a two-thirds vote requirement for the Legislature to impose a new tax or increase a tax for the purpose of raising revenue.² At the local level, the constitution requires two-thirds voter approval for special taxes, such as a parcel tax, and majority voter approval for general taxes, such as a sales tax that generates revenue for a city’s general fund.³

Despite the constitutional requirements, the Legislature and local governments found other ways to raise revenue. Once Proposition 13 passed in 1978, local governments turned to property-related assessments and “fees” to raise revenue to make up for reduced property tax revenues. Local governments were able to raise revenue by forming assessment districts, which formerly had been used for regional improvement projects.

In 1991, the Legislature approved a tax-like “fee” on manufacturers who produced lead-based products. The term “tax-like fee” is used by Capitol observers to describe “fees” that share more characteristics of a tax than a “fee.”

In 1997, the California Supreme Court further opened the door for the Legislature and local

governments to circumvent constitutional vote thresholds for taxes. In *Sinclair Paint v. State Board of Equalization*, the Supreme Court held that a fee imposed to mitigate a burden created by the fee payer was a valid regulatory fee and not a tax subject to the two-thirds vote requirement of Proposition 13.⁴

About the same time, the Howard Jarvis Taxpayers Association filed an initiative to restore Proposition 13’s protections for property owners. The initiative, Proposition 218, required local governments to submit to voters any proposal that imposes a tax, property-related assessment or property-related fee. Proposition 218 was approved by voters in November 1996. Despite Proposition 218’s passage, problems at the state level associated with tax-like “fees” remained.

Specific Impacts of Proposition 26

What Is a Tax?

Proposition 26 defines a “tax” as any levy, any exaction and certain charges imposed in a state statute or by a local government that result in a taxpayer paying a higher tax. Exactions, levies, and charges mean the following:

- **Exaction.** A monetary demand by the government from an individual or entity, with no benefit to the payer. An exaction is more forceful than a tax levy or a charge.
- **Levy.** A levy includes a new tax or tax increase – including but not limited to the personal income, corporate, sales and use, or excise tax – as defined by the *Sinclair Paint* decision.
- **Charge.** A monetary demand by the government from an individual or entity for a service, an intangible benefit, or a good or product provided to the payer of the charge. A charge will not necessarily be compulsory, since not all individuals or entities desire or need a particular service, benefit or good/

product. While a charge does not always have a consistent label, most are labeled as either a “fee” or a “charge.”

When Is a Tax “Imposed”?

A higher tax can be “imposed” under the following conditions:

- A new tax is created;
- An existing tax is amended;
- Taxing authority is set up, established or granted to a new or existing governmental entity; or
- State or local tax structures are changed.

The act of imposing a tax at the state level is a decision made by the Legislature through a new statute or statutory change. At the local level, a tax is imposed by a county board of supervisors, city council, or special district board or commission.

All state levies, exactions, and charges require approval of two-thirds of the Legislature, unless they satisfy one of the exceptions. Locally imposed levies,

certain charges and exactions that will be used for specific purposes are subject to two-thirds approval by the local electorate. However, general purpose levies, certain general purpose charges, and general purpose exactions can be approved by a majority vote of the public.

What “Results” in a Taxpayer Paying a Higher Tax?

New charges sometimes arise from state statutes that authorize a regulatory agency or local government to establish a charge for services, products or other benefits. Proposition 26 states that any new law or revision to an existing law that “results in any taxpayer paying a higher tax” must be approved by a two-thirds vote of the Legislature. The word “results” is key to understanding whether legislation requires a two-thirds vote.

As defined by Merriam-Webster’s Dictionary, “result” means something that happens “because of something else that happened or was done before; to be caused by something else.”⁵

The immediate legislative action of passing a

Example: Legislative Authorization to Impose a Tax

In a hypothetical situation, a bill is enacted that authorizes Alpine County to impose a new \$18 “fee” on marriage licenses to fund programs providing assistance to victims of domestic violence. The “fee” is administered by the county and may be increased by the Board of Supervisors for inflation. Since not every individual who obtains a marriage license from Alpine County will be subject to domestic violence, not all individuals benefit from the charge they pay to the county. Thus, it is not a true regulatory charge or a charge imposed for a specific government service benefiting the payer.

The legislation to authorize the local government to impose the new “fee” requires a two-thirds vote, for two reasons:

1. The benefit of the program is not specifically conferred upon the individuals who pay the “fee.”
2. When the Legislature authorizes Alpine County to impose the “fee,” the authorization is the first step in the process that results in a taxpayer paying a higher tax.

state statute that authorizes a regulatory agency or a local government to impose a charge does not directly require a taxpayer to pay a higher tax. However, the term “results” is much broader and should reflect both *de facto* and *de jure* implications.

The legal term *de jure* essentially explains what the law says, while *de facto* explains the effect of the law when it is in practice. The word “results” is inclusive of both the *de jure* impact and *de facto* impact of a change in state statute or proposal at the local level of government.

When the Legislature authorizes another governmental entity (either at the state or local level) to impose a new charge or to increase a charge, the legislative authorization is the first crucial step in a chain of events necessary for a new charge to be imposed. Without authorization from the Legislature, no charge would be possible, and no taxpayer would pay a higher tax. Thus, while the legislative authorization is not a *de jure* tax increase, it does result in a *de facto* tax increase.

Also, Section C of the intent language of Proposition 26 states that taxes in California have continued to escalate and that there are a “myriad of state and local business taxes,” and that “Californians are taxed at one of the highest levels of any state in the nation.”

Purposive theorists, such as Supreme Court Justice Stephen Breyer and former Supreme Court Justice Warren Burger, argue that a measure’s purpose and intent are of primary importance to interpreting the text. With Proposition 26, the intent language indicates that Proposition 26 is intended to limit higher taxes and charges imposed at the state and local level. The intent language also indicates that Proposition 26 is meant to limit additional non-uniformity between a myriad of state and local tax rates. If, by a majority vote, the Legislature could authorize local governments to impose a charge or extend a charge beyond their existing authority, the purpose and intent of Proposition 26 would be ignored.

As a sponsor of Proposition 26, CalTax believes that authorizing local government or a regulatory agency to impose a charge is an element that results

in a taxpayer paying a higher tax. Any change in state statute that directly or indirectly results in any taxpayer paying a higher tax must be approved by a two-thirds vote of the Legislature.

For more information, see the example on page 9.

The Burden of Proof: Government Must Prove That a Charge Is Not a Tax

Under Proposition 26, state and local governments must prove “by a preponderance of the evidence” that a charge that meets one of the specific exceptions is not a tax.

It is in the best interest of all taxpayers if state and local governments can prove that a charge is not a tax before the charge is imposed. Demonstrating that a charge is not a tax will help governmental entities avoid costly litigation if a taxpayer questions the validity of a charge. Further, it is important for society to have confidence and trust in government and the finance mechanisms policymakers choose to fund needed programs and services.

State and local policymakers have a number of resources that can help substantiate that a proposed charge is reasonable. For example, at the state level, legislative committee consultants, the Office of Administrative Law, the Legislative Analyst’s Office,

Board of Equalization, Employment Development Department, Franchise Tax Board, and the Department of Finance all have the capabilities to determine if charges are reasonable for their intended purposes, and if legislation has immediate and long-term fiscal implications that would “result in a taxpayer paying a higher

tax.” Analyses of the fiscal impact of legislation or local measures must be comprehensive; anything short of this fails to ensure that a charge is not a tax.

Does a Majority-Vote Tax Adopted in 2010 Become “Void” Under Proposition 26?

Taxpayers may challenge any state law adopted by a majority vote of the Legislature beginning January 1, 2010, if they believe they are now paying a higher tax

“...authorizing local government or a regulatory agency to impose a charge is an element that results in a taxpayer paying a higher tax.”

as a result of the law's enactment.

One provision of Proposition 26 states that “any tax adopted” between January 1, 2010 and November 2, 2010 by a majority vote of the Legislature shall be “void” if it is not in compliance with Proposition 26 by November 2, 2011. When a law becomes “void,” it may remain on the books (and be enforced by administrative agencies), but it will not hold any legal weight if challenged in a court of law.

In analyzing the meaning of “void” in relation to legislation passed in 2010, the Franchise Tax Board determined that an appellate court decision – or legislation – is necessary to repeal a law. The state constitution states in Article III §3.5 that administrative agencies of the state have no power to declare a state statute unenforceable or unconstitutional, “unless an appellate court has made a determination that such statute is unconstitutional.”

So, if any taxpayer challenges a law on the grounds that it failed to comply with Proposition 26, the court will determine if it will be repealed. However, taxpayers can expect an agency's legal department to put up a fight, and to uphold a “void” law until an appellate court issues a determination – as required by the constitution.

Once a court deems a law “void,” the court also will determine what sections of the law will remain in effect, if any.

Pre-Existing Tax-Like “Fees”

Proposition 26 applies retroactively to state taxes levied after January 1, 2010. Previously enacted charges that fail to meet one of the exceptions provided by Proposition 26 all remain intact under Proposition 26, since they were in existence, and in full effect, prior to January 1, 2010. However, if such a charge is expanded, the provisions of Proposition 26 apply. For an example of how Proposition 26 would affect existing tax-like “fees,” see the sidebar to the right.

Proposition 25 and Budget-Related Taxes

Proposition 25, also approved by voters on November 2, 2010, reduced the vote threshold for passage of a state budget to a majority vote, but

retained the threshold for tax increases at a two-thirds vote. During the course of the campaign, there were concerns that taxes implemented as part of the state budget, including new taxes, tax increases/extensions or tax initiatives placed before voters, could be enacted by only a majority vote of the Legislature. These taxpayer concerns were removed after legal proceedings.

The California Chamber of Commerce challenged the ballot title and summary during the election campaign of Proposition 25 in *Allan Zaremberg v. Debra Bowen*.⁶ The ballot title read:

CHANGES LEGISLATIVE VOTE
REQUIREMENT TO PASS BUDGET
AND BUDGET-RELATED LEGISLATION
FROM TWO-THIRDS TO A SIMPLE

Example: Pre-Existing Tax-Like “Fees” Will Remain in Effect

The Childhood Lead Poisoning Prevention Act of 1991⁷ imposed a “fee” on manufacturers and others who were said to be contributing to environmental contamination.

AB 2038, authored by Assemblyman Lloyd Connelly and signed by Governor Pete Wilson in 1991, directed the Department of Health Services to develop a regulatory program to mitigate the effects of lead poisoning in the environment, and its impact on children. The department later developed educational outreach programs and began providing lead screening for children who may have had exposure to lead, as part of its regulatory program. The bill also established the “Childhood Lead Poisoning Prevention Fund” and directed the State Board of Equalization to collect and administer the “fees.”

Proposition 26 will not affect the “fees” deposited into the fund, since the “fees” were adopted before approval of Proposition 26.

UNDERSTANDING PROPOSITION 26

MAJORITY. RETAINS TWO-THIRDS VOTE REQUIREMENT FOR TAXES. INITIATIVE CONSTITUTIONAL AMENDMENT.

Opponents of Proposition 25 claimed that the phrase “Retains Two-Thirds Vote Requirement for Taxes” was “false, misleading, and inconsistent” with state election laws, and noted that “no substantive provision of Proposition 25 makes any reference to the preservation of the two-thirds vote requirement to raise taxes.”⁸ The courts denied the challenge and wrote: “We find nothing in the substantive provisions of Proposition 25 that would allow the Legislature to circumvent the existing constitutional requirement of a two-thirds vote to raise taxes.”⁹ The courts concluded that Proposition 25 would not affect the vote threshold for taxes.

Also during the 2010 election campaign, supporters of Proposition 25 ran two television commercials that told voters: “Proposition 25 protects the two-thirds vote to raise taxes.” In one of the commercials, titled “Reform That Works,” the announcer told viewers: “Proposition 25 doesn’t raise taxes; it holds legislators accountable for late budgets. Period.”¹⁰

While Proposition 26 was not law when voters approved Proposition 25, it is unlikely that the same day voters approved a higher vote threshold for tax-like “fees,” they also would reduce the vote threshold for “fees” and taxes included in the budget. Despite Proposition 25’s change to the vote threshold needed to pass a budget, it is clear that the two-thirds vote requirement remains for higher taxes included in the budget, whether that tax is in a trailer bill, or whether a bill places a tax increase before voters.

Proposition 26 Does Not Conflict With Proposition 25

The provisions of Proposition 26 do not conflict with those of Proposition 25. The initiatives amend different sections of the constitution and address different subjects. Proposition 25 allows a budget bill or budget-related trailer bill to be approved by a majority vote. While such bills have, on occasion, included tax increases, the Legislative Analyst’s Office, the attorney general, Proposition 25’s proponents, and the Third District Court of Appeal state that Proposition 25 retains the two-thirds vote

for taxes. No conflict exists between Proposition 25 and Proposition 26 – Proposition 25 relates to the vote requirement for the budget bill and related bills, while Proposition 26 relates to the definition of state and local taxes. Therefore, each measure should remain law, unaffected by the other’s passage.

Amending or Repealing Tax-Related Initiative Statutes

A tax increase proposed by the Legislature in a constitutional amendment can be placed before voters during a statewide election, if it is approved by a two-thirds vote of the Legislature.¹¹

However, Proposition 26 affects the vote threshold for how tax-related changes to an initiative statute may occur.

While the text of Proposition 26 refers to a “change in state statute,” initiative statutes, once approved by voters, are, by all means, a state statute. Any change to these statutes, or proposal to seek authorization from voters to change a statute, requires a two-thirds vote of the Legislature.

Here is how Proposition 26 interacts with constitutional amendments and initiative statutes:

- **Constitutional Amendments and Revisions.** To amend or revise the constitution, the Legislature must obtain a two-thirds vote (Article XVII §1).
- **Amending or Repealing an Initiative Statute.** The Legislature may amend or repeal a voter-approved initiative statute by a majority vote, if the initiative statute permits the Legislature to amend or repeal the measure. If the initiative statute does not give the Legislature authority to change the measure, the Legislature may submit an amendment to the voters, or ask voters to repeal the measure, by a majority vote (Article II §10c).
- **Amending or Repealing a Tax-Related Initiative Statute.** A two-thirds vote of the Legislature is needed to change a voter-approved initiative statute, if the change “results in a taxpayer paying a higher tax”

under Proposition 26. (For a complete discussion of what “results” in a taxpayer paying a higher tax, see page 9.)

Interest Charges Under Proposition 26

Specific interest charges can be imposed by a majority vote under Proposition 26. Interest charges must be reasonable, and state and local government should be able to prove and demonstrate reasonableness. Interest associated with various charges must be in compliance with Proposition 26.

Local Charges Under Proposition 26

Under Proposition 26, a “tax” – whether a “special tax” or a “general tax” – is defined as any levy, certain charges or an exaction “of any kind imposed by a local government.” If the charge is covered by one of Proposition 26’s exceptions, then a public vote is not needed.

Proposition 26 requires government to ensure that a charge is fairly distributed among payers so that the payment is reflective of what the payer receives. When a charge is imposed for a government activity, Proposition 26 requires all individuals and entities that benefit from the activity to pay, whereas before, some individuals and entities enjoyed the government activity for

free. If government seeks to pass a new charge, all individuals and entities must bear a fair burden of the cost, or else it is a tax.

For an example of how Proposition 26 affects local levies and charges, see the example below.

Limitations on Local Pre-Existing Tax-Like “Fees”

Unlike Proposition 26’s retroactive application to January 1, 2010, for existing state-level charges, its application to local charges applies prospectively only. Cities, counties and local districts that imposed tax-like “fees” prior to passage of Proposition 26 may continue to impose those charges. Any proposal to extend or otherwise change existing tax-like “fees” requires the charge to be subject to Proposition 26.

Local government can increase any pre-existing charge, adjust any charge for inflation purposes, and extend any charge past a sunset date – as long as Proposition 26’s requirements are met. In doing so, local government must prove “by a preponderance of the evidence” that the increase for the charge does not cover anything more than the reasonable costs of the government activity. Also, if changes are made to pre-existing charges, local government must review the charge to ensure that it falls within the exceptions of Proposition 26 and, among other things, is imposed for a specific benefit or service.

Example: An Illegal Tax Under Proposition 26

The City of Sacramento adopted a so-called “crash tax” on January 26, 2011. The city’s ordinance imposed a \$495 “fee” on non-resident motorists at-fault in a vehicle accident to fund city fire department “scene stabilization” activities, which includes cleaning up motor fuel; and \$2,275 for incidents involving a helicopter response.¹²

Sacramento’s “crash tax” was a direct violation of Proposition 26 because the “fee” was not uniform, since it applied only to non-residents. The “crash tax” additionally failed to provide motorists with the ability to opt out of receiving and paying for services they may not need.

Sacramento’s City Council repealed the “crash tax” on March 29, 2011 due to public outcry. Had the city chosen to keep the “crash tax” on the books, it would have had to place the measure before voters, and two-thirds of the voters would have had to approve the measure in order to make it a legal tax.

Proposition 26 Title and Summary

PROPOSITION 26: REQUIRES THAT CERTAIN STATE AND LOCAL FEES BE APPROVED BY TWO-THIRDS VOTE. FEES INCLUDE THOSE THAT ADDRESS ADVERSE IMPACTS ON SOCIETY OR THE ENVIRONMENT CAUSED BY THE FEE-PAYER'S BUSINESS. INITIATIVE CONSTITUTIONAL AMENDMENT.

SUMMARY

Put on the Ballot by Petition Signatures

Fiscal Impact: Depending on decisions by governing bodies and voters, decreased state and local government revenues and spending (up to billions of dollars annually). Increased transportation spending and state General Fund costs (\$1 billion annually).

WHAT YOUR VOTE MEANS

YES: A YES vote on this measure means: The definition of taxes would be broadened to include many payments currently considered to be fees or charges. As a result, more state and local proposals to increase revenues would require approval by two-thirds of each house of the Legislature or by local voters.

NO: A NO vote on this measure means: Current constitutional requirements regarding fees and taxes would not be changed.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- Decreased state and local government revenues and spending due to the higher approval requirements for new revenues. The amount of the decrease would depend on future decisions by governing bodies and voters, but over time could total up to billions of dollars annually.
- Additional state fiscal effects from repealing recent fee and tax laws: (1) increased transportation program spending and increased General Fund costs of \$1 billion annually, and (2) unknown potential decrease in state revenues.

Proposition 26 Text

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends sections of the California Constitution; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. Findings and Declarations of Purpose.

The people of the State of California find and declare that:

- (a) Since the people overwhelmingly approved Proposition 13 in 1978, the Constitution of the State of California has required that increases in state taxes be adopted by not less than two-thirds of the members elected to each house of the Legislature.
- (b) Since the enactment of Proposition 218 in 1996, the Constitution of the State of California has required that increases in local taxes be approved by the voters.
- (c) Despite these limitations, California taxes have continued to escalate. Rates for state personal income taxes, state and local sales and use taxes, and a myriad of state and local business taxes are at all-time highs. Californians are taxed at one of the highest levels of any state in the nation.
- (d) Recently, the Legislature added another \$12 billion in new taxes to be paid by drivers, shoppers, and anyone who earns an income.
- (e) This escalation in taxation does not account for the recent phenomenon whereby the Legislature and local governments have disguised new taxes as “fees” in order to extract even more revenue from California taxpayers without having to abide by these constitutional voting requirements. Fees couched as “regulatory” but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes.
- (f) In order to ensure the effectiveness of these constitutional limitations, this measure also defines a “tax” for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as “fees.”

SECTION 2. Section 3 of Article XIII A of the California Constitution is amended to read:

SEC. 3. (a) ~~From and after the effective date of this article, any changes in state taxes enacted for the purpose of increasing revenues collected pursuant thereto~~ *Any change in state statute which results in any taxpayer paying a higher tax whether by increased rates or changes in methods of computation must be imposed by an Act act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be impose*

(b) *As used in this section, “tax” means any levy, charge, or exaction of any kind imposed by the State, except the following:*

- (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.*
- (2) 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 State of providing the service or product to the payor.*
- (3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.*

APPENDIX

(4) A charge imposed for entrance to or use of state property, or the purchase, rental, or lease of state property, except charges governed by Section 15 of Article XI.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or the State, as a result of a violation of law.

(c) Any tax adopted after January 1, 2010, but prior to the effective date of this act, that was not adopted in compliance with the requirements of this section is void 12 months after the effective date of this act unless the tax is reenacted by the Legislature and signed into law by the Governor in compliance with the requirements of this section.

(d) The State bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

SECTION 3. Section 1 of Article XIII C of the California Constitution is amended to read:

SECTION 1. Definitions. As used in this article:

(a) "General tax" means any tax imposed for general governmental purposes.

(b) "Local government" means any county, city, city and county, including a charter city or county, any special district, or any other local or regional governmental entity.

(c) "Special district" means an agency of the State, formed pursuant to general law or a special act, for the local performance of governmental or proprietary functions with limited geographic boundaries including, but not limited to, school districts and redevelopment agencies.

(d) "Special tax" means any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund.

(e) As used in this article, "tax" means any levy, charge, or exaction of any kind imposed by a local government, except the following:

(1) A charge imposed for a specific benefit conferred or privilege granted 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 conferring the benefit or granting the privilege.

(2) 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.

(3) A charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.

(4) A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.

(5) A fine, penalty, or other monetary charge imposed by the judicial branch of government or a local government, as a result of a violation of law.

(6) A charge imposed as a condition of property development.

(7) Assessments and property-related fees imposed in accordance with the provisions of Article XIII D.

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity

SECTION 4. Conflicting Measures.

In the event that this measure and another measure or measures relating to the legislative or local votes required to enact taxes or fees shall appear on the same statewide election ballot, the provisions of the other measure or measures shall be deemed to be in conflict with this measure. In the event that this measure shall receive a greater number of affirmative votes, the provisions of this measure shall prevail in their entirety, and the provisions of the other measure or measures relating to the legislative or local votes required to enact taxes or fees shall be null and void.

SECTION 5. Severability.

If any provision of this act or any part thereof, is for any reason held to be invalid or unconstitutional, the remaining provisions shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

Sponsors' Rationale For Supporting Proposition 26

This is the "Yes on Proposition 26" argument that appeared in the voter pamphlet for the November 2010 election.

State and local politicians are using a loophole to impose Hidden Taxes on many products and services by calling them "fees" instead of taxes. Here's how it works:

At the State Level: California's Constitution requires a two-thirds vote of the Legislature for new or increased taxes, but the politicians use a gimmick to get around this by calling their taxes "fees" so they can pass them with only a bare majority vote.

At the Local Level: Most tax increases at the local level require voter approval. Local politicians have been calling taxes "fees" so they can bypass voters and raise taxes without voter permission – taking away your right to stop these Hidden Taxes at the ballot.

PROPOSITION 26 CLOSES THIS LOOPHOLE. Proposition 26 requires politicians to meet the same vote requirements to pass these Hidden Taxes as they must to raise other taxes, protecting California taxpayers and consumers by requiring these Hidden Taxes to be passed by a two-thirds vote of the Legislature and, at the local level, by public vote.

APPENDIX

PROPOSITION 26 PROTECTS ENVIRONMENTAL AND CONSUMER REGULATIONS AND FEES.

Don't be misled by opponents of Proposition 26. California has some of the strongest environmental and consumer protection laws in the country. Proposition 26 preserves those laws and protects legitimate fees such as those to cleanup environmental or ocean damage, fund necessary consumer regulations, or punish wrongdoing, and for licenses for professional certification or driving.

DON'T LET THE POLITICIANS CIRCUMVENT OUR CONSTITUTION TO TAKE EVEN MORE MONEY FROM US. Politicians have proposed more than \$10 billion in Hidden Taxes. Here are a few examples of things they could apply Hidden Taxes to unless we stop them:

- Food
- Cell Phones
- Emergency Services
- Gas
- Electricity
- Toys
- Insurance
- Entertainment
- Water
- Beverages

PROPOSITION 26: HOLD POLITICIANS ACCOUNTABLE. “State politicians already raised taxes by \$18 billion. Now, instead of controlling spending to address the budget deficit, they're using this gimmick to increase taxes even more! It's time for voters to STOP the politicians by passing Proposition 26.” – Teresa Casazza, California Taxpayers Association.

Local politicians play tricks on voters by disguising taxes as “fees” so they don't have to ask voters for approval. They need to control spending, not use loopholes to raise taxes! It's time to hold them accountable for runaway spending and to stop Hidden Taxes at the local level.

YES ON PROPOSITION 26: PROTECT CALIFORNIA FAMILIES. California families and small businesses can't afford new and higher Hidden Taxes that will kill jobs and hurt families. When government increases Hidden Taxes, consumers and taxpayers pay increased costs on everyday items.

“The best way out of this recession is to grow the economy and create jobs, not increase taxes. Proposition 26 will send a message to politicians that it's time to clean up wasteful spending in Sacramento.” – John Kabateck, National Federation of Independent Business/California.

VOTE YES ON PROPOSITION 26 TO STOP HIDDEN TAXES – www.No25Yes26.com

Signed:

TERESA CASAZZA, President, California Taxpayers Association

ALLAN ZAREMBERG, President, California Chamber of Commerce

JOEL FOX, President, Small Business Action Committee

Key Terms and Definitions

Burden of Proof. A term defining which entity has the duty to prove or disprove a disputed fact. In the case of Proposition 26, this means that if a taxpayer challenges the validity of a charge under Proposition 26, the government entity responsible for imposing the charge has the burden of proving that the charge is not a tax.

Charge. A monetary demand by the government from an individual or entity for a service, an intangible benefit, or a good or product provided to the payer of the charge. A charge will not necessarily be compulsory, since not all individuals or entities desire or need a particular service, benefit or good/product. While a charge does not always have a consistent label, most are labeled as either a “fee” or a “charge.”

De Facto. A term used to characterize what occurs in practice as a result of past action. *De facto* is often used in contrast with *de jure*.

De Jure. A term used to describe what occurs due to what is specifically mandated by law. *De jure* is often used in contrast with *de facto*.

Exaction. A monetary demand by the government from an individual or entity, with no benefit to the payer. An exaction is more forceful than a tax levy or a charge.

Fee. See the definition of a charge.

General Tax. Any tax imposed for general governmental purposes.

Impose. The act of imposing a tax is a decision made by the Legislature through a new statute or statutory change, or by a local governmental body, such as a county board of supervisors, city council, or special district board or commission. The act of “imposing” a tax includes: creating a new tax; amending an existing tax; setting up, establishing, or granting authority to a new or existing governmental entity; or changing existing state or local tax structures.

Levy. A levy includes a tax increase or new tax – including but not limited to the personal income, corporate, sales and use, or excise tax – as defined by the *Sinclair Paint* decision.

Local Government. Any city; county; city and county, including a charter city or county; special district; or any other local or regional governmental entity.

Tax. As defined by Proposition 26, any levy, any exaction, and certain charges that do not meet any of the exceptions listed in the initiative.

Preponderance of the Evidence. An evidentiary standard of proof required in a legal action to convince the court that a particular argument is true. Preponderance of the evidence is the lowest level of proof that is generally met if the argument is more likely true than not true. This is the standard form of proof required in most civil cases.

Proposition 13. A ballot measure approved by California voters in 1978 that mandates “any changes in

State taxes enacted for the purpose of increasing revenues ... whether by increased rates or changes in methods of computation” must be approved by a two-thirds vote of the Legislature.

Proposition 218. A ballot measure approved in 1996 that requires that all local taxes must be approved by voters. Proposition 218 reiterated that special taxes must be approved by a two-thirds vote, while general taxes may be approved by a majority vote.

Result. Something that happens due to something else that happened or was done before. Proposition 26 states that any new law or revision to an existing law that “results in any taxpayer paying a higher tax” must be approved by a two-thirds vote of the Legislature. For purposes of Proposition 26, a state statute that authorizes a local government or a regulatory agency to impose a charge is an element that results in a taxpayer paying a higher tax. Legislation that directly or indirectly results in any taxpayer paying a higher tax must be approved by a two-thirds vote of the Legislature.

Special Tax. Any tax imposed for specific purposes, including a tax imposed for specific purposes that is placed into a general fund. For example, a sales tax with revenue dedicated to fund library services.

State Statute. For purposes of Proposition 26, a state statute includes any legislative bill chaptered into law that became effective on or after January 1, 2010.

Endnotes

1. Article XIII A, Section 3; Article XIII C, Section 1 of the California Constitution
2. Article XIII A, Section 3 of the California Constitution
3. Article XIII A, Section 4; Article XIII C, Section 1; and Article XIII D, Section 2 of the California Constitution
4. *Sinclair Paint Company v. State Board of Equalization*, 15 Cal. 4th 866 (1997)
5. Merriam-Webster’s Dictionary, Accessed on April 5, 2011 at <http://www.learnersdictionary.com/search/result>
6. Allan Zarembeg, President and Chief Executive Officer of California Chamber of Commerce and Committee Chair of Stop Hidden Taxes - No on 25/Yes on 26 Petitioner, v. Debra Bowen, Secretary of State of California, Superior Court of California, County of Sacramento (2010)
7. AB 2038 (Statutes of 1991, Chapter 799)
8. Allan Zarembeg, President and Chief Executive Officer of California Chamber of Commerce and Committee Chair of Stop Hidden Taxes - No on 25/Yes on 26 Petitioner, v. Debra Bowen, Secretary of State of California, Superior Court of California, County of Sacramento (2010)
9. *Yes on 25, Citizens for An On-Time Budget v. The Superior Court of Sacramento County*, Third Dist. Court of Appeal (2010)
10. *Yes on 25 – Citizens for an On-Time Budget. “Reform That Works.”* Video released September 2010
11. Article XVII, Section 1 of the California Constitution
12. Sacramento City Code Chapter 8.128, Title 8