



January 6, 2010

Hon. Edmund G. Brown Jr.
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Krystal Paris
Initiative Coordinator

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed the proposed constitutional initiative relating to state and local approval requirements for taxes, fees, and penalties (A.G. File No. 09-0093).

BACKGROUND

Taxes

State Taxes. The State Constitution requires a two-thirds vote of each house of the Legislature for measures that result in increases in revenues from imposing new state taxes or changing existing state taxes. This has been interpreted to allow measures that do not result in a net increase in state taxes to be adopted by majority vote. For example, a measure that results in higher taxes for some taxpayers but an equal (or larger) reduction in taxes levied on other taxpayers would not result in an aggregate increase in taxes. Under current practice, this type of measure could be passed by a majority vote.

Local Taxes. Local governments may impose or increase taxes (other than ad valorem property taxes) subject to the approval of their local voters. If the local government proposes to use the tax proceeds for general purposes (a “general tax”), the tax requires approval by a majority of local voters. If the tax proceeds are earmarked for a specific purpose (a “special tax”), the voter approval threshold is two-thirds. In some cases, local governments place nonbinding “companion measures” on the same ballot with proposed general tax increases. These advisory measures express voter intent regarding the expenditure of funds raised by general taxes. The Constitution currently does not specify the vote requirement for the Legislature to pass a law that has the result of increasing local tax revenues.

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Fees, Assessments, Fines, and Other Charges

Current law generally gives state and local governments significant discretion in establishing fees, assessments, fines, penalties, and other charges. Governments may impose these charges for many reasons, including to offset their costs to provide specific services and benefits (“user fees”), regulate a particular activity (“regulatory fees”), penalize certain behaviors (“penalties”), and finance property or business improvements (“assessments”).

In some cases—such as many user fees, admission fees, and assessments—the charge is closely linked to the cost of providing a particular service to an individual beneficiary. In other cases—particularly regulatory fees (including environmental mitigation)—the charge may be based on the costs of government oversight of a group or industry, or on the social or environmental costs associated with particular activities. Figure 1 provides some examples of state and local fees imposed for broad regulatory purposes.

Figure 1

Examples of Regulatory Fees

Fees on Paint Manufacturers

The state imposes a regulatory fee on paint companies and other businesses which make (or previously made) products containing lead. The state uses this money to screen children at risk for lead poisoning, follow up on their treatment, and identify sources of lead contamination responsible for the poisoning.

Fees on Alcohol Retailers

Several California cities impose a fee on most alcohol retailers and use the funds for code and law enforcement and merchant education to reduce public nuisance problems associated with alcohol (such as violations of alcohol laws, violence, loitering, drug dealing, public drinking, and graffiti).

Oil Recycling Fee

The state imposes a regulatory fee on oil manufacturers and uses the funds for a public information and education program, grants to local used oil collection programs, payment of recycling incentives, research, demonstration projects, and inspections and enforcement at used oil recycling facilities.

Imposing Fees, Assessments, and Charges. The state generally may impose fees, assessments, and charges by a majority vote of the Legislature, provided these charges do not exceed government’s related costs. (State charges in excess of costs are considered “taxes” and are subject to the Constitution’s approval requirements for taxes.)

With three exceptions, local governments generally have similar authority to impose fees, assessments, and charges. Specifically, state law requires local governments to obtain the approval of business owners before imposing assessments to finance improvements in business districts. In addition, the Constitution requires local governments to

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receive approval from property owners or voters before imposing (1) property owner assessments or (2) fees as an incident of property ownership (“property-related fees”), other than fees for water, sewer, and refuse collection services.

State and Local Requirements Regarding Fines and Penalties. State and local governments have significant discretion to set fines and penalties for violations of state laws and local ordinances and to discourage certain behavior. The Constitution generally does not restrict how state and local governments spend the funds raised from fines and penalties. State and local governments may impose most fines and penalties with a majority vote of the governing body.

PROPOSAL

This measure amends the Constitution to broaden the definitions of a state tax and local special tax, thereby requiring more revenue measures to be approved by a two-thirds vote of the Legislature or local voters.

Definition of Taxes. The measure broadens the definition of a state tax or a local special tax to include a wide range of charges that government currently may impose by a majority vote of its governing entity. Specifically, the measure provides that all state and local charges are taxes, *except*:

- User charges, based on government’s reasonable costs, for specific services or benefits that government provides directly and exclusively to the fee payer.
- Regulatory charges limited to a government’s reasonable administrative costs for issuing licenses and permits and undertaking investigations, inspections, audits, enforcement, and adjudication.
- Charges for the use of or entrance to state or local government property.
- Fines and penalties imposed by government “as a result of a violation of a law.”
- Local charges imposed as a condition of property development, property owner assessments, and property-related fees.

The measure also specifies that any change in a state statute that results in *any* taxpayer paying a higher tax requires a two-thirds vote of the Legislature. (This would include statutes that reallocate tax burdens without yielding a net increase in revenues and those affecting only local taxes.)

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The measure's changes would have the effect of increasing the number of revenue measures classified as taxes and subject to (1) the two-thirds vote requirement of the Legislature in the case of a state measure, or (2) a vote of the governing body and approval by two-thirds of the local electorate in the case of a local levy.

Effective Date for State Provisions. This measure specifies that any state tax enacted after January 1, 2010 that is inconsistent with this initiative's provisions would become inoperative 12 months after the effective date of this initiative unless the tax is reenacted into law in compliance with this initiative's requirements.

Burden of Proof. In any legal challenge, the measure specifies that government bears the burden of proving that the charge is not a tax and that the amount raised is consistent with the measure's provisions.

FISCAL EFFECTS

By expanding the scope of what is considered a tax, the measure would make it more difficult for state and local governments to enact a broad range of measures that generate revenues. The extent of this change is not clear, but it would appear to include many state and local environmental regulatory fees, such as the fees summarized in Figure 1. Future increases or changes to these charges would be subject to the approval requirement for taxes.

The measure also would increase the vote requirement for some state tax legislation that the Legislature currently may enact by majority vote. For example, some tax bills are revenue neutral in aggregate, but result in offsetting state tax increases and decreases on different taxpayers. In addition, some state legislation increases *local* tax revenues, but not state revenues. This measure would require that these bills be adopted by two-thirds of the Legislature.

The overall revenue impact of these changes would depend on future actions of the Legislature, local governing boards, and local voters. To the extent that these increased voting requirements resulted in a failure to pass charges that would have been approved under a majority vote, the measure would result in lower revenues and spending than would have occurred otherwise. Given the potential scope of levies that would be subject to the higher approval thresholds, the effect of the measure's provisions probably would be major.

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Summary

The measure would have the following impacts on state and local governments:

- Potentially major decrease in state and local revenues and spending, depending upon future actions of the Legislature, local governing bodies, and local voters.

Sincerely,

Mac Taylor
Legislative Analyst

Ana J. Matosantos
Director of Finance