

MEMORANDUM

**DATE:** February 28, 2018

**TO:** Steve Quon, Manager, Utility Users Tax  
Fran Mancia, Vice President of Government Relations  
Brenda Narayan, Director of Government Relations  
MuniServices, an Avenu company

**FROM:** Benjamin Fay  
Special Counsel

**RE:** Proposed Initiative: Tax Fairness, Transparency and Accountability Act of 2018

**Background**

The California Business Roundtable is sponsoring a statewide ballot initiative that it calls the “Tax Fairness, Transparency and Accountability Act of 2018” (hereafter “the TFTA”). It claims that it is needed to plug loopholes that the courts and governments have found in previous taxpayer initiatives, such as Proposition 13 (1978), Proposition 62 (1986), Proposition 218 (1996), and Proposition 26 (2010). It is expected to qualify for the ballot.

**Question Presented**

What effect would the TFTA have on existing utility users taxes?

**Short Answer**

If it passes, the TFTA will have very little effect, if any, on taxes that were already in place before 2018. Its main effect will be on any future taxes that a city might want to enact and any taxes enacted in 2018.

**Discussion**

The TFTA will make it more difficult to enact taxes by doing the following:

- Broadening the definition of what is a tax. Every charge or fee would be a tax, unless it is:
  - A charge or fee for a product or service that does not exceed the actual cost of providing the product or service.
  - A regulatory charge or fee that does not exceed the actual regulatory cost to the government.

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- A charge or fee for use of government property.
  - A fine or penalty imposed following due process to punish a violation of the law.
  - A fee imposed as a condition of property development.
  - A property-related fee imposed under Article XIII D of the California Constitution (Proposition 218).
  - An assessment imposed under Article XIII D of the California Constitution (Proposition 218).
- Eliminating the distinction between special and general taxes. All local taxes would have to be approved by a two-thirds vote of the electorate at a general election. A tax could no longer be submitted to the voters at a special election unless the city council unanimously declares an emergency.
  - Requiring all fees to be approved by a two-thirds vote of the city council. Newly enacted fees would be subject to a referendum if a petition signed by 5% of the voters is filed.
  - Requiring specific language in the ballot question of a proposed tax.

The TFTAAs would also make it more difficult to defend against legal challenges to fees. A city defending a fee would have the burden of establishing by “clear and convincing” evidence that the fee is not a tax and that it was enacted in compliance with the requirements of the TFTAAs.

Any local tax enacted in 2018 would be void unless it complied with the TFTAAs.

The TFTAAs applies to “[e]very levy, charge, or exaction of any kind imposed, adopted, created, or established by local law” and “local law” is defined broadly to include “any ordinance, resolution, ruling, opinion letter, or other legal authority or interpretation adopted, enacted, enforced, issued, or implemented by a local government.” This comprehensive definition does not appear to actually change the reach of Articles XIII C and XIII D of the Constitution, which have always been interpreted to apply to all local government actions that impose a tax, fee, or charge.

The TFTAAs would amend Articles XIII A, XIII C, and XIII D of the California Constitution and therefore would apply to charter cities.

None of these restrictions would have any effect on a tax enacted before 2018, and therefore it does not appear that it would have any effect on existing utility users taxes (or any other taxes for that matter). However, it would make it more difficult to enact new utility users taxes (or any other taxes) and more difficult to amend existing ones.