PAR Guide to the 2011 Constitutional Amendments

An Independent, Non-Partisan Review

Voter Checklist – October 22, 2011

YES	NO	
☐	☐	1. Funding TOPS and Sustaining Cigarette Tax Revenue
☐	☐	2. Reducing the Financial Liability of State Retirement Systems
☐	☐	3. Protecting the Patient's Compensation Fund
☐	☐	4. Managing the Budget Stabilization "Rainy Day" Fund
☐	☐	5. Updating the Census Change in a New Orleans Tax Sales Law

Voter Checklist – November 19, 2011

YES	NO	
☐	☐	1. Taxes and Fees on Transfer or Sale of Real Estate

INDEPENDENCE » INTEGRITY » RESULTS

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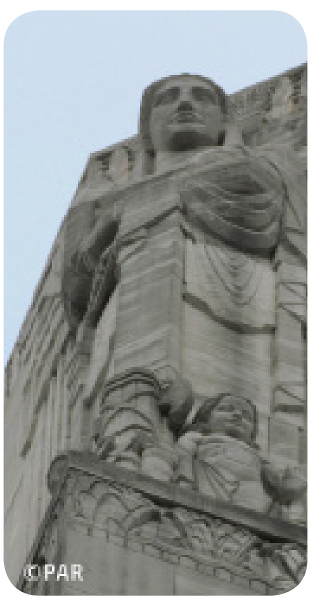
Introduction

Louisiana voters will be asked to make decisions on six proposed constitutional amendments in 2011. Five amendments will appear on the October 22 ballot and one will appear on the November 19 ballot.

The proposals on the October ballot would protect a portion of the cigarette tax and establish new rules for certain government funds, including the Taylor Opportunity Program for Students (TOPS), two state retirement systems, the Patient's Compensation Fund and the "Rainy Day" Fund. The November amendment would prevent new taxes and fees on the sale of real estate.

Legislation for these amendments occurred earlier this year. As required for passage of constitutional amendments, each bill received at least a two-thirds majority of support from both the House and Senate. The governor cannot veto proposals for constitutional amendments. To be enacted, the proposals must be approved by a majority of voters on a statewide ballot.

A constitution is supposed to be a state's fundamental law that contains the essential elements of government organization, the basic principles of governmental powers and the enumeration of citizen rights. A constitution is meant to have permanence. Statutory law, on the other hand, provides the details of government operation and is subject to frequent change by the Legislature.



Typically, constitutional amendments are proposed to authorize new programs, ensure that reforms are not easily undone by future legislation or seek protections for special interests. Unfortunately, as more detail is placed in the Constitution, more amendments may be required when conditions change or problems arise with earlier provisions.

Louisiana has a long history of frequent constitutional changes. Too often, amendments are drafted for a specific situation rather than setting a guiding principle and leaving the Legislature to fill in the details by statute. Special interests frequently demand constitutional protection for favored programs to avoid future legislative interference, resulting in numerous revenue dedications and trust fund provisions. The concept of the Constitution as a relatively permanent statement of basic law fades with the adoption of many amendments.

In order for voters to develop informed opinions about each amendment, they must evaluate each one carefully and make a decision based on its merits. One important consideration should always be whether the proposed language belongs in the Constitution.

—October 22 Ballot—

1. Funding TOPS & Sustaining Cigarette Tax Revenue

YOU DECIDE

A VOTE FOR WOULD

(1) dedicate a new funding source for TOPS by redirecting annual tobacco settlement proceeds from the Millennium Trust to the college scholarship fund and

(2) place a portion of the cigarette tax permanently in the Constitution.

A VOTE AGAINST WOULD

(1) leave unchanged the type of financing sources available for TOPS and

(2) allow a current 4-cent per pack cigarette tax to expire.

CURRENT SITUATION

An educational scholarship program and a state trust fund are integrated into Constitutional Amendment No. 1 in an effort to change how the tuition-assistance program is funded. A tobacco tax is included in the amendment. A review of each component will help explain the impact of the proposals.

THE TOPS PROGRAM

The Taylor Opportunity Program for Students (TOPS) is a state-funded, merit-based college tuition program that was inspired by Louisiana businessman Patrick Taylor. TOPS provides educational scholarships for Louisiana residents who attend certain public and private Louisiana colleges and universities. Approximately one-third of all full-time students receive TOPS scholarships. The rising cost of tuition at Louisiana schools has increased the cost of TOPS; costs are projected to be $154 million for the 2011-12 academic year. TOPS is funded primarily through the state general fund. TOPS also receives significant funding from the annual investment earnings of the Millennium Trust. Monies from the Millennium Trust paid $16.1 million (11 percent) of TOPS total costs of $145 million in 2010-11.

THE MILLENNIUM TRUST

The state's Millennium Trust was established in 1999 to hold settlement proceeds collected from litigation between Louisiana and several tobacco companies. Louisiana took a portion of the money in a lump sum to help fund the Millennium Trust. As for the rest of the settlement, the state receives approximately $58 million per year. Seventy-five percent of those settlement proceeds ($40-45 million per year) are deposited into the Millennium Trust annually, building the base or "corpus" of the Trust.

The corpus of the Trust is invested in order to earn interest and create other investment income. Currently, annual investment earnings of the Trust are allocated evenly among TOPS and two other funds:

Health Excellence Fund - Provides funding for children's health care through LA CHIP, school-based health clinics and early childhood prevention programs.

Education Excellence Fund - Provides funding to prepare at-risk children for school and assist children who fail to achieve acceptable scores on tests required to advance to succeeding grades.

CIGARETTE TAX RATES

Cigarette tax rates currently are established in statute, not the Constitution. Cigarettes are taxed at an overall rate of 36 cents per each 20-cigarette pack. A portion of the cigarette tax – 4 cents per pack – is set to expire on June 30, 2012. That portion of the tax generates approximately $12 million per year.

WORTH KNOWING:

Louisiana has no constitutional mandate to ensure that each student who qualifies for a TOPS scholarship will in fact get the award. It is up to the Legislature and the governor during the appropriations process each year to decide whether to fully fund TOPS. If the Legislature fails to do so, existing law provides a procedure (based on merit and financial need) to eliminate otherwise-qualified applicants from the pool of scholarship recipients to make up for the lack of funding. TOPS applicants are given warning of this possibility. One of the reasons lawmakers have fully funded TOPS is that they do not want the state to appear as though it has broken a pledge to those students who did what they were told was necessary to qualify for a TOPS award.

PROPOSED CHANGES

THE TOPS PROGRAM

This amendment and companion legislation would redirect annual tobacco settlement payments ($40-45 million per fiscal year) that currently are deposited into the Millennium Trust and place them directly into the TOPS fund, beginning with proceeds received after April 1, 2011. This change would provide a new dedicated revenue stream for TOPS. The proposal allows TOPS to receive two payments – totaling about $80 million – from the tobacco settlement during the current fiscal year and single payments in subsequent fiscal years. The scholarship program will continue to receive its annual allocation of investment earnings from the Millennium Trust. TOPS would continue to receive funding from the state general fund as directed by the Legislature. The significant net effect of the amendment is that it would lessen the amount of money needed from the state's general fund to fully finance TOPS.

THE MILLENNIUM TRUST

The Trust no longer would receive annual tobacco settlement proceeds; hence the amount of its corpus would be capped at its 2011 fiscal year balance of $1.38 billion. Investment earnings of the Millennium Trust would continue to be divided evenly between the TOPS Fund, the Health Excellence Fund and the Education Excellence Fund each fiscal year. However, the investment earnings going forward will be based on the frozen amount rather than on an expanding corpus boosted each year by infusions of tobacco settlement money. This means the future investment earnings will not be as much as they could have been. The foregone earnings would be about $2.9 million in fiscal year 2013 and would increase thereafter about $1.3 million per year.

CIGARETTE TAX RATES

The amendment would establish a certain portion of the cigarette tax - 4 cents per pack - in the Constitution instead of in statute only. This particular tax is scheduled to expire next year but under this amendment would become permanent. The amendment would protect the 4-cent tax by ensuring that the Legislature cannot change it unless a subsequent constitutional amendment is enacted. The amendment will have no impact on other state tobacco taxes; a separate 32-cent per-pack tax will remain in force whether the amendment passes or not. The Legislature still could raise or lower tobacco taxes in the future by means of a statute and the 4-cent portion protected by the Constitution would be left intact. Current law says the 4-cent portion of the state cigarette tax goes to the state general fund and may also be spent on tobacco and alcohol regulation. Companion legislation passed in the 2011 regular legislative session would allocate this 4-cent portion of the state cigarette tax to the Health Excellence Fund.

WORTH KNOWING:

The 4-cent cigarette tax has produced declining revenue streams in recent years. The tax generated $14.2 million in fiscal year 2007 and it has decreased annually, reaching $12.1 million in fiscal year 2011. The Legislative Fiscal Office has estimated the tax will continue to bring in about $12 million annually for the next few years, but if the decline in cigarette purchases continues, that estimate may be too optimistic.

COMMENT

The inclusion of a cigarette tax in this amendment came about after some enterprising moves by lawmakers during the 2011 regular session. The legislation – to redirect the tobacco settlement payments from the Millennium Trust to TOPS – was championed by the governor and supported strongly in the Legislature. As that proposal moved forward through the process, the Legislature in a completely separate initiative passed a statute to renew the 4-cent cigarette tax that is due to expire next year. The governor, opposing the renewal as a tax increase, vetoed the bill and the House of Representatives failed to muster an override. In the last days of the session, the House resurrected the 4-cent cigarette tax renewal by attaching it to the TOPS bill. Lawmakers gave the tax a connection to the legislation by dedicating the revenue to the Health Excellence Fund. Because the bill was for a Constitutional amendment rather than a regular statute, the governor could not veto the legislation. This maneuver ensured that the issue would go to the people for a statewide vote.

The Health Excellence Fund:

$479.7 million – Amount currently in fund

$15 million – Expended in Fiscal Year 2011

The Education Excellence Fund:

$482.7 million – Amount currently in fund

$15 million – Expended in Fiscal Year 2011

So it turned out that Amendment No. 1 is actually a combination of two separate legislative initiatives that found their way onto the same ballot item for the Oct. 22 election. They will not be voted upon separately. A majority vote for Amendment No. 1 would enact both the new funding plan for TOPS and the renewal of the cigarette tax; a vote of less than a majority would cancel both proposals.

Even with the passage of this amendment, TOPS still would have to rely on the state's general fund for most of its money, but not as heavily. That change would make more general fund dollars available to other programs, an especially significant factor in a climate of tight budgets.

The financial winners in this amendment are TOPS, the general fund and advocates of cigarette taxes. The losers are the Millennium Trust, the Education Excellence Fund, smokers and tobacco tax opponents. Somewhere in-between is the Health Excellence Fund, which eventually will lose a few million dollars a year in marginal Millennium Trust earnings but likely will gain substantially more from the cigarette tax revenue in the early years of the new plan.

PRO AND CON

Proponents stress the importance of maintaining Louisiana's TOPS program and remind voters of the growing costs associated with doing so. Proponents argue that supporting TOPS through designated settlement dollars makes more sense than using scarce state general funds. The Millennium Trust already has built a massive corpus with substantial annual investment earnings, and so the financial benefits of stuffing additional money into the trust are marginal. The amendment also sustains and adds further protection for a cigarette tax, which has the value of discouraging smoking while generating significant revenue for the state. Louisiana already has one of the lowest tobacco taxes in the country, so vendors in the state will not be at a competitive disadvantage if the tax is renewed. Statewide surveys show that tobacco taxes are supported by a large majority of Louisiana citizens.

An argument against the amendment is that it would stall the earnings power of the Millennium Trust by capping the fund. It also helps TOPS at the expense of the Education Excellence Fund in particular. Some critics of TOPS say the program's costs should be curtailed and this amendment will postpone or discourage that discussion. Opponents of the cigarette tax say the renewal is an unnecessary tax increase and certainly should not be enshrined in the state Constitution. As for the health benefits, critics say the tax is so small that it probably does not deter smoking anyway.

LEGAL CITATION

Act 423 (Sen. Alario) of the 2011 Regular Session, amending Article VII, Sections 10.8(A) and (C), and adding Article VII, Section 4.1. Companion legislation is Act 386 (Sen. Alario).

—October 22 Ballot—

2. Reducing the Financial Liability of State Retirement Systems

YOU DECIDE

A VOTE FOR WOULD

require the Legislature to designate certain percentages of the state's nonrecurring revenue to reduce the long-term financial shortfall of the state employee (LASERS) and teacher (TRSL) retirement systems.

A VOTE AGAINST WOULD

still allow the Legislature to appropriate nonrecurring revenue to retiring the unfunded accrued liability of public retirement systems but would not require such.

CURRENT SITUATION

Louisiana has four "state" retirement systems: the Louisiana State Employees' Retirement System (LASERS), the Teachers' Retirement System of Louisiana (TRSL), the Louisiana School Employees' Retirement System (LSERS) and the Louisiana State Police Retirement System (STPOL). Those systems offer defined benefit plans for their members that promise a certain retirement compensation based on salary and years of service. This amendment affects LASERS and TRSL.

Legislative approval is required for changes to benefit provisions of any public retirement system that is subject to legislative authority. When the Legislature provides new retirement benefits or increases existing ones, a higher level of contribution is required. Contributions for each system come from the state's general fund, certain agency budgets and current enrolled employees. The plans also make money from investment earnings. Prior to 1988, the state failed to ensure that contributions kept pace with benefits, resulting in an "unfunded accrued liability" (UAL). The UAL is an estimate of how much money a retirement fund needs, in addition to its current assets, to pay for all future benefits. It is a measure of a fund's current shortfall if hypothetically all its long-term obligations had to be paid immediately.

Statutory law provides for the payments toward a large batch of unfunded accrued liabilities that had accumulated as of 1988. The pain of paying that UAL is spread over 40 years, with escalating payments as time goes on. For LASERS and TRSL, about $9.45 billion is still owed on that batch of pre-1988 unfunded accrued liability. To meet that obligation for both those plans, annual payments will be over $700 million in 2011 and are estimated to rise to roughly $1.3 billion by 2028. (State retirement systems have acquired additional unfunded liabilities since 1988 because of actuarial losses, market losses, interest on debt and cost-of-living adjustments.)

The state has various sources of revenue it can tap to pay these and other expenses. State finances are supported by recurring and nonrecurring revenues. Income taxes, sales taxes and casino gambling taxes are all examples of recurring revenue; the exact amount of revenue they generate may fluctuate year to year, but they are collected regularly. Recurring revenues can be spent on almost any budget program.

End-of-year budget surpluses, tax amnesty programs and some other types of windfall cash are examples of nonrecurring revenue, since these are events that cannot regularly be counted upon to generate money for the state. A panel called the Revenue Estimating Conference designates which financial windfalls should be considered nonrecurring revenue.

The Constitution provides that each year, 25 percent of any nonrecurring revenue must be deposited into the Budget Stabilization Fund unless that fund has reached its cap. (The cap in Fiscal Year 2011 was $801.4 million.) The remaining 75 percent of nonrecurring revenue can be used only for specific purposes, including highway construction, capital outlay projects, retiring bonds, funding wetlands conservation and retiring the UAL of public retirement systems. The Legislature's use of nonrecurring money is limited to those targeted areas but not in any particular priority

PROPOSED CHANGE

This amendment would require that a certain percentage of state revenue designated as nonrecurring be used to pay down the pre-1988 batch of unfunded accrued liability for two state retirement systems: the Louisiana State Employees' Retirement System and the Teachers' Retirement System of Louisiana.

WORTH KNOWING

In state budget terms, nonrecurring revenue is not synonymous with so-called "one-time money." Nonrecurring revenues are those that are specifically designated as such by the Revenue Estimating Conference according to guidelines set in law. Their classification limits how those monies can be spent, and they don't go directly into the state operating budget.

One-time money is a more subjective, politically charged and hard-to-define term. For example, some might say that the sale of state properties or the settlement of lawsuits in the state's favor should be considered one-time money, while others might say those type of windfalls occur so often over the years that they should not be counted as only one-time sources of revenue. Generally, fiscally conservative lawmakers have wanted to limit the amount of one-time money being used to pay for the state's ongoing operations. They point to examples of windfall money that are not officially classified as nonrecurring that they say should be treated with spending restrictions. The definition took a major turn in the 2011 regular session with the House's adoption of the Geymann rule, which requires a supermajority vote to spend certain levels of one-time money. For purposes of the Geymann rule, the designation of what counts as one-time money is made by the Legislative Fiscal Office and approved by House leaders with no specific guidelines.

The Budget Stabilization Fund would continue to receive the first 25 percent of nonrecurring revenue until the fund's cap is reached. As for the remaining amount of nonrecurring revenue, in fiscal years 2014 and 2015 the Legislature would have to appropriate at least 5 percent toward the liability of LASERS and TRSL. In fiscal year 2016, and every fiscal year thereafter, the Legislature would have to appropriate at least 10 percent of nonrecurring revenue to the UAL. These appropriations would be extra payments toward the UAL above the regularly scheduled payments. The amendment forbids those payments from being used to fund cost-of-living increases for either system.

Companion legislation passed in the 2011 regular legislative session specifies that the required payment for the retirement systems shall take precedence over other allowable uses for nonrecurring revenue.

COMMENT

Making additional payments toward a personal mortgage or loan can have profound effects on the outstanding balance owed and the amount of monthly payments necessary to retire a debt. Similarly, the state can benefit from making additional payments to retire the UAL it owes to public retirement systems. The liability accumulated as of 1988 was a large amount of debt set on an increasing payment schedule that is now rapidly ramping up. The payoff deadline is 2029.

Since 1988 Louisiana has managed to make its actuarially required payments each year, which some other states have failed to do. In addition, the state made extra payments in 2006 and 2008 toward reducing the UAL.

How much money would this amendment steer toward the retirement systems? The answer will be different each year and the amount could fluctuate widely. The most likely source of nonrecurring revenue would be a budget surplus, which the state often realizes after closing its annual financial books. In the previous five years, the state has run a budget deficit as well as giant surpluses, including one exceeding $1 billion.

PRO AND CON

Proponents of the amendment assert that using nonrecurring funds for the purpose of reducing the retirement systems' unfunded accrued liability makes good fiscal sense. These "extra payments" will help the state retire the UAL more quickly and lessen the long-term cost of keeping the retirement systems solvent. When nonrecurring revenue is collected, the Legislature must exercise some discipline in addressing the financial needs of the state's retirement liability. In most years, this amendment would force lawmakers to make a contribution to pay down the UAL. The amendment would not prevent the state from directing additional dollars to the UAL.

Opponents argue against dedicating funds because it ties the hands of the Legislature in the future for budgeting purposes. Constitutionally mandating a certain percentage of nonrecurring funds to pay the UAL means the Legislature cannot direct those funds toward other allowable expenses. The Constitution already allows the use of nonrecurring revenue toward the UAL and an amendment that creates budget restrictions is not needed. A different argument against the amendment is that it calls for mandated proportions – 5 percent and 10 percent of nonrecurring revenue – that are too small. The amendment could have the unintended consequence of convincing lawmakers to stop at that level when they should be contributing more to the UAL. In other words, the minimum could become the maximum.

LEGAL CITATION

Act 422 (Rep. Pearson and Sen. Gautreaux) of the 2011 Regular Session, amending Article VII, Section 10(D). Companion legislation is Act 357 (Rep. Pearson and Sen. Gautreaux).

—October 22 Ballot—

3. Protecting the Patient's Compensation Fund

YOU DECIDE

A VOTE FOR WOULD

protect the Patient's Compensation Fund from legislative appropriation by establishing it in the Constitution and defining it as a private custodial fund to be used only for the benefit and protection of medical malpractice claimants and qualified health care providers.

A VOTE AGAINST WOULD

retain the existing statutory definition of the Patient's Compensation Fund, which could subject the Fund to appropriation by the Legislature for other budgeting purposes.

CURRENT SITUATION

The Patient's Compensation Fund was created by statute in 1975 for the purpose of ensuring that affordable medical malpractice coverage is available to private healthcare providers while also providing a reliable source of compensation for legitimate claims of injury due to medical malpractice. The Fund is managed by the Patient's Compensation Fund Oversight Board. Its nine board members represent doctors and other healthcare providers in Louisiana who pay annual surcharges to the program. The Board was once a budget unit of the state and its surcharges were regulated by the Department of Insurance. Since 2010, the Board no longer has had to seek annual spending authority by the Legislature or rate approvals from the insurance commissioner. Currently, the fund covers about 17,000 health care providers and contains approximately $676 million.

Under Louisiana's Medical Malpractice Act, persons who are injured by physicians, dentists, hospital staff, nursing homes or other health care providers may sue those providers for damages in a court of law once the claim has been reviewed by a medical review panel. The court can award medical costs resulting from an injury as well as damages for general issues such as pain and suffering or economic loss. Awards for medical expenses are not limited but awards for other types of damages, such as pain and suffering, are capped at $500,000, plus interest and certain costs.

The Patient's Compensation Fund offers malpractice coverage for "qualified health care providers." A qualified provider must have malpractice liability insurance or be adequately self-insured to cover the first $100,000 in liability *and* they must pay an annual surcharge to the Patient's Compensation Fund for coverage of any additional liability. The surcharges collected from providers become assets of the fund and exist to pay the claims of injured persons when they arise.

Currently, the Patient's Compensation Fund is not considered to be an insurance company. As such, it is not required to pay assessments to the Louisiana Insurance Guaranty Association (LIGA), which guarantees claims on behalf of insurance companies that become insolvent. The Fund is sustained by self-generated revenue instead of tax dollars and the Legislature is not required to appropriate money to assist the Fund. So far, the Legislature has not used the fund's dollars to plug holes that arise elsewhere in the state budget.

PROPOSED CHANGE

This amendment would make clear *in the Constitution* that monies deposited into the Patient's Compensation Fund are not public dollars and are not available for appropriation by the Legislature. The amendment would protect the Fund as self-generated, private monies to be used only for the benefit and protection of medical malpractice claimants and qualified health care providers. Additionally the amendment would clarify that the Fund is exempt from participation in guaranty funds such as LIGA.

The amendment would make clear that the Legislature is not required to appropriate monies for the Fund. If the state wanted to appropriate money to the Fund it could still do so. Companion legislation passed in the 2011 regular legislative session would replicate the proposed amendment language in statute.

This amendment would not change how malpractice suits are handled or the way assets of the Fund are utilized currently.

COMMENT

Six other states have funds similar to Louisiana's Patient's Compensation Fund. The Wisconsin legislature removed $200 million from that state's patient compensation fund in 2007 to help balance the state general budget; the Wisconsin Supreme Court has ordered that it be repaid.

Although the Louisiana Legislature has never dipped into the Patient's Compensation Fund to pay for other state programs, proponents of the amendment are concerned this could happen in the future. The Legislature and the governor during tight budget cycles have established a track record of sweeping money to general appropriations from various special-purpose funds. Even when funds are protected by statute they might be tapped by an appropriations bill. Recent Louisiana legal decisions and attorney general opinions have suggested that money paid by health care providers into the Patient's Compensation Fund could be swept into the state's general fund and thus appropriated by the Legislature to other parts of the state budget.

Advocates of this type of fund say that medical professionals are more inclined to practice in states with an affordable mechanism for paying damages and that medical malpractice claimants have greater confidence that their damages will be paid if they are injured. Critics of Louisiana's overall malpractice claims system say that the court awards are capped too low and that compensation funds restrict the free market for private insurance carriers. The proposed amendment does not address these debates about the state's medical malpractice law; a Louisiana trial lawyers group that is critical of the malpractice liability cap supports this amendment.

PRO AND CON

Proponents of the amendment argue that the dollars in the Patient's Compensation Fund are paid by private health care providers and should remain dedicated to their private, originally intended purpose—the protection of medical malpractice claimants. If the Fund is established only in statute and is not defined as a private fund within the Constitution, the Legislature could change the statutory language at any time and use the dollars in the Fund for other budget purposes. Such an act by the Legislature would shake confidence in the health care provider community and potentially raise the cost of medical malpractice coverage in Louisiana. The amendment also would assure participating health care providers that they will not be hit with an additional assessment to provide guaranty coverage of the Fund. As a protection for the public, the amendment ensures that the state is not responsible for payment of any of the fund's legal obligations.

An argument against this proposal is that the current Fund already is covered in the statutes and this amendment would add another special section to our cluttered constitution. The Legislature has not even threatened to raid the fund to balance the general budget; by proposing this amendment the Legislature is fixing something that it hasn't yet broken. Many other funds established by the state for special interest groups also would like protection under the Constitution, which could become more clogged with exceptions and minutia. The amendment would give the Fund a constitutional exemption from participating in a guaranty fund such as LIGA whereas that exemption could be protected adequately by statute. Also, inserting appropriations restrictions into the Constitution limits the Legislature's flexibility. Although the proposal prohibits legislative withdrawals from the Fund, it allows lawmakers to deposit money into the Fund, creating a private entity with an option for a public bailout in the event of financial distress.

LEGAL CITATION

Act 421 (Rep. Hazel) of the 2011 Regular Session, adding Article XII, Section 16. Companion legislation is Act 263 (Rep. Hazel).

WORTH KNOWING:

Although the proposed constitutional amendment allows the Patient's Compensation Fund to refrain from obtaining guaranty coverage, it does not directly address the debate of whether the Fund is sufficiently financed. Proponents of the Fund say it contains more than $670 million, enough to cover several years of operation without even counting revenue from future surcharges. In the most recent fiscal year the Fund took in $171 million and paid out $116 million in claims and administrative expenses. The previous year it collected $186 million and paid out $135 million.

Existing law requires the Board to maintain assets of at least 30 percent of the Fund's outstanding liabilities; the current fund level far exceeds that requirement. If all potential claims suddenly came due at once, the Fund would need about $770 million to cover the obligations. But most claims take years to resolve in the courts and so payments toward those obligations will be spread out over a long period.

Critics are concerned about the financial safeguards. Recently, the level of legally required assets in the Fund was lowered substantially. The Legislature this year gave the Board more leeway to put the funds into riskier investments. The Board, whose members represent the health-care providers paying premiums into the Fund, has recently acquired the authority to set rates without approval from the insurance commissioner. The Board began lowering rates last year soon after the insurance commissioner lost oversight powers. The Fund has never had a back-up guarantor policy in case of insolvency, unlike for example the fund overseen by the Louisiana Workers Compensation Corporation. If the Fund were to have insufficient money, the claimants could suffer the brunt of the consequences. The law says claims in that situation would be paid on a reduced, pro-rata basis according to what the Fund could afford and until such time as funds are replenished.

State contributions to the Fund are allowed but are not required or anticipated. In the event the state were to bail out the Fund or place public dollars into it for whatever reason, the current and proposed law is unclear about whether such an appropriation would be accompanied by a cooperative endeavor agreement, which is a standard requirement in Louisiana for public financing of private institutions.

4. Managing the Budget Stabilization "Rainy Day" Fund

YOU DECIDE

A VOTE FOR WOULD

provide that if money is withdrawn from the Budget Stabilization Fund, the state must begin to replenish the Fund during the second fiscal year after the money was withdrawn, paying back the withdrawn amount in thirds each year until fully repaid or until the Fund reaches its statutory cap.

A VOTE AGAINST WOULD

leave the state to deal with its current statute, which prohibits money taken from the Budget Stabilization Fund from being replenished in the same fiscal year that it was withdrawn or the following fiscal year. However, this law is being challenged in court as unconstitutional and could be overturned.

CURRENT SITUATION

The Budget Stabilization Fund, also known unofficially as the Rainy Day Fund, was created in 1991 to help stabilize the state budget over time. When the state receives a large budget surplus or other windfall, some of that revenue is directed into the Fund to prevent the money from being spent on ongoing operations and inflating the state operating budget. The Fund also serves as a sort of savings account for the state; in certain downturns some of the Fund money can be spent on state operations.

Generally, the Fund is supported by three potential revenue sources: (1) money in the state general fund that exceeds the expenditure limit for the fiscal year; (2) one-fourth of any nonrecurring revenue as designated by the Revenue Estimating Conference; and (3) mineral revenues received by the state that exceed a base threshold of $850 million. Money deposited into the Budget Stabilization Fund is invested by the state treasurer. Earnings realized from investment remain in the Fund.

There is a constitutional cap on the Fund—no deposit can be made to the Fund if the balance of the Fund would exceed 4 percent of total state revenue for the previous fiscal year. The maximum fund balance last fiscal year was $801.4 million. Additionally there are restrictions as to when monies in the Budget Stabilization Fund may be used. Money in the Fund may not be appropriated unless:

The official forecast of recurring revenue for the *upcoming fiscal year* is less than the official forecast of recurring revenue for the current fiscal year; or

$646.3 million
Current balance of the Budget Stabilization Fund

$801.4 million
The limit the Fund could have grown as of last fiscal year

$284.6 million
Withdrawn from the Fund in Fiscal Year 2010
$86.2 million was taken mid-year (repaid with amnesty money); $198.4 million was taken late in fiscal year

$153.9 million
Withdrawn from the Fund in Fiscal Year 2006

$86.4 million
Withdrawn from the Fund in Fiscal Year 2003

a deficit is projected for the *current fiscal year* due to a decrease in the official forecast of recurring money.

Near the end of fiscal year 2010, forecasted revenue dropped radically. The Legislature in response withdrew money from the Budget Stabilization Fund to support general fund appropriations. Because mineral revenues that year were well above the $850 million threshold, the law provided that mineral revenues had to be automatically deposited into the Budget Stabilization Fund to compensate for the recent withdrawal. However, those mineral revenues already had been obligated to support 2010 general fund appropriations. This created a circular problem: if monies were taken from the Fund to help plug a hole in the budget, the state would have to replenish the Fund immediately from the budget that had just been stabilized.

The Legislature already had attempted to solve the problem by enacting a statutory fix in 2009. That law provides that no deposit should be made *to* the Budget Stabilization Fund in the same fiscal year as a withdrawal is made *from* the Fund. Deposits to replenish the Fund do not have to be made until the state's revenue forecast increases to the level of revenue reached in 2008, a peak year for Louisiana. Critics of that legislative move responded by filing a lawsuit that challenged its constitutionality. That suit currently is on hold.

PROPOSED CHANGE

This amendment attempts to strike a balance between the "circular hole in the budget" scenario and current statutory language, which some believe to be too loose in terms of when money taken from the Fund should be paid back. The amendment would prohibit the automatic flow of mineral revenue into the Budget Stabilization Fund during the fiscal year that the Fund was used and the following fiscal year. The amendment provides that mineral revenue would resume flowing into the Fund thereafter. Deposits into the Fund would be limited to one-third of the last withdrawal amount, until the withdrawal is replenished or until the Fund balance reaches its cap.

COMMENT

The proposed amendment and the 2009 statute have similar goals. Both attempt to address the Legislature's dilemma of being forced to use general fund dollars to replenish the Budget Stabilization Fund immediately after withdrawing stabilization fund dollars to boost the general fund. The key difference is in the repayment schedule. The proposed amendment would set a more specific schedule for replenishing the Budget Stabilization Fund with mineral revenue.

One of the main purposes of this amendment is to address the court dispute over whether the current statutory "fix" is constitutional. It would provide a new constitutional framework for replenishment of the Fund that would override existing statutory law.

WORTH KNOWING:

Official forecasts show a pattern of growing annual state revenue each year for the next several years. Under this scenario, there does not appear to be a time in the near future when the Budget Stabilization Fund could be tapped. However, with the national economy shaky and the potential for mid-year revenue estimate declines, the official forecasters could in the future change their outlook and put the state in a posture to tap the Fund once again.

PRO AND CON

Proponents of this amendment argue that it would force the Legislature to replenish withdrawals made from the Budget Stabilization Fund in a timely manner, which will be more fiscally responsible than current law. The amendment also will structure repayments to the Fund so that the Legislature can spread out the expense and better plan for future budgets. The amendment would negate the debate of whether the 2009 statutory fix was constitutional.

Opponents contend that allowing the Legislature two years to begin paying back withdrawals from the Budget Stabilization Fund is not good practice. They assert that withdrawals taken from the Fund should be repaid sooner so that legislators do not routinely raid the Fund for issues that are not true emergencies. Critics say one of the purposes of the Fund was to help reduce the state's dependency on inconsistent mineral revenues, and this amendment is contrary to that goal.

LEGAL CITATION

Act 424 (Sen. Chaisson) of the 2011 Regular Session, adding Article VII, Section 10.3(C). Companion legislation is Act 383 (Sen. Chaisson). Related legislation is Act 357 (Rep. Pearson).

5. Updating the Census Change in a New Orleans Tax Sales Law

YOU DECIDE

A VOTE FOR WOULD

identify the City of New Orleans by name rather than by reference to its outdated 2000 Census population in a section of the Constitution regarding auctions of tax-delinquent properties.

A VOTE AGAINST WOULD

leave the outdated Census population reference in the Constitution with the result that New Orleans would not maintain an existing exemption from the minimum bid requirements for property tax sales.

CURRENT SITUATION

Hundreds of laws in Louisiana have referred to specific parishes and municipalities by their population numbers rather than by name. Laws are sometimes written this way to avoid restrictions and notices required of legislation dealing with specifically named localities. A number of these references have been made for the City of New Orleans or Orleans Parish. For example, prior to the 2010 Census New Orleans was sometimes referred to in state law as a "municipality with a population of more than 450,000 persons as of the most recent decennial census." That figure worked fine so long as the city maintained its population above that level and no other municipality reached that threshold. The 2000 Census showed New Orleans with a population of 484,674 and its closest competitor as Baton Rouge with 227,818.

After declines due in part to Hurricane Katrina, New Orleans' population in the 2010 Census was determined to be 343,829. That meant that references in law to "the most recent decennial census" had become outdated. During the 2011 special session for redistricting, the Legislature updated those sections of Louisiana law that identified parishes and cities by outdated population figures. The statutory references were cleaned up with new legislation.

The Legislature also sought to update a population reference in a section of the Constitution that covers so-called property tax sales. If a property owner fails to pay local property taxes, a parish or city in Louisiana can offer the property for sale and use the revenue to pay off the tax bill. Minimum bids are required. The Constitution provides that if property in a particular-sized city (New Orleans) fails to sell for the minimum required bid in the tax sale, then the government may offer the property at a subsequent sale with no minimum required bid. The Constitution does not identify that city by name, instead referring to it as "a municipality with a population of more than 450,000 persons as of the most recent decennial census."

WORTH KNOWING:

Although New Orleans' population declined by 29 percent in the past decade, the city is still the largest municipality in Louisiana. The city of Baton Rouge is second, followed by Shreveport. Orleans Parish, which is the same area as the City of New Orleans, is the third largest populated parish behind East Baton Rouge and Jefferson.

PROPOSED CHANGE

This amendment would identify the City of New Orleans by name and remove the Constitution's indirect reference to a municipality with a population of more than 450,000. The change would not impact New Orleans' tax sale law.

COMMENT

For this amendment to pass, it must receive a majority vote both statewide and in New Orleans. If the amendment does not pass, then New Orleans would no longer be identified under this Constitutional provision, which was intended to give the city an exemption from the minimum bid requirement for tax sales if a property fails to sell the first time around. The population reference in the current Constitution does not apply to any Louisiana city under the 2010 Census.

PRO AND CON

Proponents say the amendment is a standard updating of the law that simply reflects changes in the decennial census. It does not tamper with property tax sale law and would give New Orleans no more or less leeway with its tax sales than it had previously.

An argument against the amendment is that New Orleans should not be entitled to an exemption from the minimum bid requirements and that the Constitutional language should not be updated to apply to the city.

LEGAL CITATION

Act 43 (Rep. Leger) of the 2011 First Special Session, amending Article VII, Section 25(A)(2) of the Constitution.

1. Taxes and Fees on Sale or Transfer of Real Estate

YOU DECIDE

A VOTE FOR WOULD

prohibit the levy of new taxes or fees upon the sale or transfer of immovable property after November 30, 2011.

A VOTE AGAINST WOULD

leave the Constitution silent on the issue, meaning that the Legislature could pass statutes to create new real estate transfer taxes in the future.

CURRENT SITUATION

Certain fees and costs are to be expected when transferring or selling real estate, also known as immovable property. Commonly, buyers and sellers will pay closing costs that include fees for private services such as attorneys and title research, as well as fees paid to a government agency or clerk of court for record keeping or other transaction assistance.

Some states and localities charge a special conveyance tax or fee on a real estate transfer for the purpose of supplementing their general revenue or for purposes unrelated to the government expense of recording or administering the transaction. This conveyance tax or fee generally is called a real estate transfer tax, or RETT. In most states where RETTs are permitted, they are calculated as a percentage of property value or loan amount. They might be charged to a seller, buyer or both.

Louisiana does not have a statewide RETT and its Constitution is silent on real estate transfer taxes. However, the Constitution allows the Legislature, by a two-thirds vote of both chambers, to pass statutes creating new statewide taxes. The Constitution also lets the Legislature pass laws permitting local governments to levy taxes.

Among local governments in Louisiana, only the City of New Orleans levies such a tax or fee on the transfer of immovable property. New Orleans charges a flat $325 “documentary transaction tax” on all property transfers. In 2010, this tax generated approximately $3.6 million in revenue and is expected to generate $4.4 million in 2011.

PROPOSED CHANGE

This amendment would prohibit the levy of *new* taxes or fees by the state or local governments upon the sale or transfer of immovable property after November 30, 2011. It would not repeal taxes or fees currently levied; New

Orleans could continue to charge its transaction tax. Further, the amendment will not affect ad valorem taxes on property or general legal and real estate fees associated with transferring or selling property, such as attorney's fees, clerk of court fees and other common closing costs.

COMMENT

Under the current Constitution, the Legislature may pass statutes letting local governments take action to levy a real estate transfer tax. That action would require a two-thirds vote of both houses of the legislature. The legislature might also require a local voter referendum.

But what if local governments want to act on their own to create a RETT without waiting for the Legislature? For a parish or municipality without a home rule charter, the governing authority on its own would not be able to levy a RETT under current law. Among local governments with a home rule charter, the waters have been tested for creating a property transfer tax. Livingston Parish, which operates under a home rule charter, tried one in 2004. The parish council approved a real estate conveyance tax of $300 per transaction. The next year the state attorney general issued an opinion that the Livingston tax was unconstitutional because the Legislature had not delegated the new taxing authority to the parish. The parish dropped the tax.

Many observers share the view of the attorney general. Still, attorney general opinions are not binding and do not hold the weight of a court of law. The proposed amendment would place a clear constitutional barrier to the state or local governments establishing RETTS in the future; not even with a statute could the Legislature allow a parish to charge such a tax.

The attorney general opinion viewed the Livingston Parish charge as a tax rather than a fee. The difference can be significant. Broadly described, a tax generates general revenue whereas a fee is charged to defray the specific cost of a government service or administrative expense. Under current law a local government might be able to create a fee to support a specific, related program, such as an environmental impact fee. Under the proposed constitutional amendment, new fees would be prohibited, including "documentary transaction taxes or fees." But the amendment makes an exception for fees that cover the costs of recording and maintaining documents, records of transfers, annual parcel fees and "impact fees for development of property."

WORTH KNOWING:

Louisiana is one of 13 states that do not charge a real estate transfer tax. Arizona, Missouri and Montana prohibit RETTs in their state constitutions. Other states without a RETT are Idaho, Indiana, Mississippi, New Mexico, North Dakota, Oregon, Texas, Utah and Wyoming.

Of the states that charge a property transfer tax, 28 of them enacted their taxes between 1950 and 1970. Fourteen states have increased their transfer taxes at least once since original enactment. Few states have enacted property transfer taxes in recent years. A legislative attempt to create a property transfer tax in Louisiana failed in 2000.

New Orleans' home rule charter and transfer tax pre-date the state's 1974 Constitution. The city's authority to maintain that tax is not being contested and would not be affected by the proposed Constitutional amendment.

PRO AND CON

Proponents of RETT restrictions contend that taxes and fees on real estate transactions inhibit sales and make property purchases less affordable. Higher taxes would weaken an already troubled housing market and hamper economic recovery. Additionally, supporters argue that because property taxes and fees fluctuate with the housing market, they are not a solid foundation on which to build government budgets. The proposed amendment would prohibit RETTs while protecting those fees necessary to compensate parish and court offices for the job of record keeping and administering property transfers. Proponents assert that the elimination of RETTs is a growing trend across the nation.

Some opponents argue that the amendment will prevent transfer taxes if they are needed in the future to generate revenue. Parishes, municipalities and other forms of local government may need RETTs to prop up budgets in lean years. The amendment further increases local authorities' dependence on state government. Also, there are other ways to lower real estate closing costs without adversely affecting local government revenue, such as lowering real estate commissions or attorney fees. Additionally, critics might argue that the Constitutional amendment is overkill because already a two-thirds vote is needed in the Legislature to pass a new state tax by statute. So the proposed amendment just further clogs the Constitution with unnecessary provisions.

LEGAL CITATION

Act 425 (Rep. Nowlin) of the 2011 Regular Session, adding Article VII, Section 2.3.

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