



RICHARD P. IEYOUB  
ATTORNEY GENERAL

**State of Louisiana**  
DEPARTMENT OF JUSTICE  
CIVIL DIVISION  
BATON ROUGE  
70804-9005

One American Place  
301 Main Street, Suite 600  
P.O. Box 94005  
TEL.: (225) 342-7013  
FAX: (225) 342-2090

**MAY 01 2003**

**OPINION NUMBER 03-0185**

Mr. James H. Napper, Jr.  
General Counsel and  
Assistant Attorney General  
Treasurer of the State of Louisiana  
Post Office Box 44154  
Baton Rouge, LA 70804

**90-A-1 PUBLIC FUNDS AND CONTRACTS**  
**Art. VII, §10.8; Art. VII, §10.9; R.S. 39:98.1, et**  
**seq.**

Discussion of Millenium Trust - investments and  
appropriations.

Dear Mr. Napper:

You requested the opinion of this office concerning several issues which have arisen in connection with the Millennium Trust (the "Trust") and the Louisiana Fund (the "Fund") established in the State Treasury pursuant to Article VII, Sections 10.8 and 10.9, respectively, of the Louisiana Constitution, effective July 1, 2000. Act No. 1295 of the 1999 Regular Session enacted enabling legislation with respect to the establishment of the Trust and of the Fund, R.S. 39:98.1, et seq., with the same effective date as the constitutional amendment.

As you noted, these constitutional and statutory provisions provide for the deposit and credit of certain portions of the Tobacco Settlement Revenues received by the State, after the effective date thereof, to the Trust and to the Fund, and for appropriations from certain portions of the investment earnings of the Trust and from the Fund.

Act No. 1145 of the 2001 Regular Session enacted La. R.S. 39:99.1, et seq., and authorized, among other things, the sale and securitization by the State of up to sixty percent of the Tobacco Settlement Revenues received as a result of the Master Settlement Agreement, declared that net proceeds of any such sale and securitization shall constitute monies received as a result of the Master Settlement Agreement subject to the provisions of Louisiana Constitution Article VII, Sec. 10.8 and Sec. 10.9, and otherwise further provided for the deposit and credit of any such net proceeds. Pursuant to this authorization, a sale and securitization of sixty percent of the State's Tobacco Settlement Revenues was effected on November 7, 2001, during the State's fiscal year commencing on July 1, 2001.

I.

Your first set of questions pertains to La. Const. Art. VII, Sec. 10.8(C)(1) which restricts appropriations each year by the Legislature from the three funds created within the Trust as follows in pertinent part:

**"Appropriations from the Health Excellence Fund, Education Excellence Fund, and TOPS Fund shall be limited to an annual amount not to exceed the estimated aggregate annual earnings from interest, dividends, and realized capital gains on investment of the trust as recognized by the Revenue Estimating Conference. Amounts determined to be available for appropriation shall be those aggregate investment earnings which are in excess of an inflation factor as determined by the Revenue Estimating Conference. The amount of realized capital gains on investment which may be included in the aggregate earnings available for appropriation in any year shall not exceed the aggregate of earnings from interest and dividends for that year." (Emphasis added)**

This provision limits appropriations to an annual amount not to exceed the *estimated* aggregate annual earnings from interest, dividends and *realized* capital gains on investment of the Trust, which are in excess of an inflation factor as determined by the Revenue Estimating Conference (the "Conference").

As you noted, the above quoted provision indicates that each year there may be investment earnings of the Trust (the inflation factor amount) that are not available for appropriation, and additional investment earnings (an amount in excess of the amount estimated and appropriated, and an amount of realized capital gains in excess of the cap established in the provision) that may potentially be achieved that likewise are not available for appropriation. Your questions are:

**With respect to the annual inflation factor amount of earnings, do these automatically become part of the Trust principal, as they are earned or realized, and therefore not available for future appropriation? If not, how should they to be treated and accounted for, and when are they available for appropriation?**

The State Constitution must be interpreted by the same rules as are other laws and, therefore, must be read to accord equal dignity to all its provisions, giving effect to the intent of both the framers and the people who adopted it, thereby avoiding absurd and impractical results. It is a general principle of judicial interpretation that, unlike the federal constitution, a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature. In its exercise of the entire legislative power of the state, the legislature may enact any legislation that the state constitution does not prohibit. *Board of Directors of the Louisiana Recovery District v. All Taxpayers, et al.*, 529 So.2d 384 (La. 1988)

It is the opinion of this office that Article VII, Section 10.8 does not address investment earnings which constitutionally are not available for appropriation (the inflation factor

amount; or, an amount of realized capital gains in excess of the cap) and thus there is no authorization for these earnings to be appropriated. Accordingly, the only permissible use of these earnings is to include them as part of the principal of the Trust. The principal of the Trust is not available for appropriation.<sup>1</sup>

**With respect to any annual amount of earnings that may be achieved in excess of the amount appropriated in a fiscal year, do these become part of the Trust principal, as they are earned or realized or at the end of the fiscal year, and therefore not available for future appropriation? If not, how should they be treated and accounted for, and when are they available for appropriation? If they are available for appropriation in a subsequent fiscal year, is their availability for appropriation subject to any other restrictions or limits?**

Appropriations from the Education Excellence Fund are limited to *estimated* (i) aggregate annual earnings from interest and dividends, and (ii) realized capital gains. A capital gain is the amount by which an asset's selling price exceeds its initial purchase price. A realized capital gain means that the investment has been sold at a profit. Accordingly, actual earnings from interest and dividends and realized capital gains which are in excess of the estimate are not addressed by the Constitution and thus are not available for appropriation and instead become part of the principal of the Trust.

**With respect to any annual amount of earnings, consisting of realized capital gains in excess of the cap established in the constitutional and statutory provisions, that may be achieved in any fiscal year, do these become part of the Trust principal, as they are realized or at the end of the fiscal year, and therefore not available for future appropriation? If not, how should they be treated and accounted for, and when are they available for appropriation? If they are available for appropriation in a subsequent fiscal year, is their availability for appropriation subject to the realized capital gains cap limit for that year or to any other restrictions or limits?**

As stated in answer to your first question, it is the opinion of this office that realized capital gains in excess of the cap become part of the Trust principal, as they are realized, and are not available for future appropriation. This conclusion renders the remainder of your questions moot.

II.

Louisiana Constitution Article VII, Sec. 10.8(A)(1)(d) and (C)(3), and La. R.S. 39:98.1(A)(4)

---

<sup>1</sup>La.Const. Art. VII, Sec. 10.8(C)(1).

and R.S. 39:98.3(C), provide for certain annual appropriations from the Education Excellence Fund to the Superintendent of Education for distribution to public and private school systems in the State and to certain State schools set out and named therein. Subparagraph (C)(3)(i) of the Constitutional provision provides:

**"The treasurer shall maintain within the state treasury a record of the amounts appropriated and credited for each entity through appropriations authorized in this Subparagraph and which remain in the state treasury. Notwithstanding any other provisions of this constitution to the contrary, such amounts, and investments earning attributable to such amounts, shall remain to the credit of each recipient entity at the close of each fiscal year." (Emphasis added)**

La. R.S. 39:98.3.C.(9) contains an identical provision.

These provisions indicate that certain of these appropriated funds may, after appropriation and until, and if, distributed and spent, remain in the Treasury through the end of a fiscal year or years to the credit of the "recipient entity".

**At what point in this procedure do these appropriated funds become the property of the respective recipient entities and no longer "state funds" or a part of the Trust and the Education Excellence Fund? Is this point in the procedure the same for the public and private school systems as well as the named State schools?**

Generally, funds within the state treasury are state owned funds. There are some limited exceptions, including certain insurance premiums which are dedicated to statewide retirement systems, *Firefighters Retirement System, et al. v. Landrieu*, 572 So.2d 1172 (La.App. 1st Cir. 1990); taxes paid under protest which are kept in an escrow account pending resolution of the dispute, R.S. 47:1576; and, inheritance taxes to which the State has an inchoate right until the passage of a specified period of time, Op.Atty.Gen. 85-9.

It is the opinion of this office that State funds which are appropriated from the State treasury remain State funds until the monies are physically withdrawn from the State treasury. A legislative appropriation is only required to withdraw State funds from the State treasury. *Firefighters Retirement System, et al. v. Landrieu*, supra. An appropriation is an authorization by the legislature to expend from public funds a sum of money, for the purpose designated. R.S. 39:2(3). As stated in *Henry v. Edwards*, 346 So.2d 153 (La.1977), and quoted with approval in *Louisiana Public Facilities Authority v. Foster*, 2001-0009 (La. 9/18/01) 795 So.2d 288:

**"[I]nherent in the power of appropriation is the power to specify how the money shall be spent. Therefore, in addition to distinct "items" of**

appropriation, the legislature may include in an appropriation bill qualifications, conditions, limitations or restrictions on the expenditure of funds ...”

Generally, an entity to whom an appropriation is made obtains an inchoate or incomplete interest in the appropriated monies in the state treasury. It is not until the qualifications, conditions, limitations or restrictions on the expenditure of funds are met, that the money can be withdrawn from the state treasury and expended. Ownership vests in the entity to which the appropriation was made upon the withdrawal or expenditure of the funds, not upon the effective date of the appropriation.

With regards to the Education Excellence Fund, the Constitution makes a distinction between “appropriations”, “allocations” and “distributions”. It is our understanding that an appropriation is an authorization to expend, while an allocation is a direction as to how the appropriation is to be spent, while a distribution is the actual withdrawal or expenditure. In this instance, the appropriations are not made directly to the recipient school and school systems<sup>2</sup>, but rather the appropriations are made to the superintendent of education. The recipient school or school systems must prepare and submit to the State Department of Education a prioritized plan for expenditure of funds it expects to receive in the coming year. Distribution of the funds may occur only after the plan has received both legislative and departmental approval as provided by law.<sup>3</sup>

It is the opinion of this office that the appropriated funds become the property of the respective recipient entities and are no longer “state funds” when they are withdrawn from the State treasury upon distribution by the State superintendent of education after approval of the plan by the department and the legislature. Until that time, the schools and school systems only have an inchoate or incomplete interest in the appropriated monies in the state treasury. It is not until the qualifications, conditions, limitations or restrictions on the expenditure of funds are met, namely, the preparation and submission of the plan by the recipient entity and the legislative and departmental approvals, that ownership transfers. While ownership has not transferred, the monies appropriated for the schools and the school systems cannot be diverted for any other purpose nor to any other entity. The allocations to the various recipient entities must occur as described in the Constitution. Even though the schools and the school systems do not have full ownership of the funds

---

<sup>2</sup>An exception to appropriations from the Education Excellence Fund being made to the State superintendent of education for allocation to recipient schools and school systems is found in Subsubparagraph (C)(3)(b) wherein the Constitution directs that appropriations be made to the Louisiana School for the Deaf, the Louisiana School for the Visually Impaired, the Louisiana Special Education Center in Alexandria, the Louisiana School for Math, Science and the Arts, the New Orleans Center for Creative Arts and the Louis Armstrong High School for the Arts, after such schools are operational.

<sup>3</sup>La.Const. Art. VII, Sec. 10.8(C)(3)(g).

available for appropriation from the Education Excellence Fund while those monies are in the state treasury, the disposition of the funds must follow the allocations set forth in the Constitution and the funds should be held as though in trust for the recipient entities. We believe that even though ownership has not transferred, it would be appropriate to treat the funds in a custodial capacity as though owned by the recipient entities. We suggest that it would not be appropriate to use these monies for cash flow borrowings.

Also, the monies appropriated for the schools and school systems remaining in the state treasury earn interest attributable to such amounts and remain to the credit of each recipient entity as provided in La.Const. Art. VII, Sec. 10.8(C)(3)(i).

In order to give effect to the provision of the Constitution which mandates that investment earnings on the Trust are to be credited to the three Subfunds<sup>4</sup> as well as the Constitutional provision which mandates that investment earnings on Education Excellence Fund appropriations remaining in the State treasury remain to the credit of each recipient entity, we suggest that upon appropriation to the superintendent of education, the monies should remain in the state treasury yet be removed from the Trust. It is our understanding that your office upon appropriation has moved the funds out of the Trust and into an administrative account. We believe that this is an appropriate course of conduct.

As to whether this is the same for the named State schools, we suggest that the monies appropriated to the named State schools (as listed in footnote 3) remain State funds even when the monies are removed from the Trust upon appropriation to the named State schools. No distinction is made in the Constitution between the seven named schools and the other schools and school systems.

La.Const. Art. III, Sec. 16 provides that appropriations shall not be made for longer than one year. The language of La.Const. Art. VII, Sec. 10.8(C)(3)(i) contains an exception to that provision in that it provides that notwithstanding any other provisions of the constitution to the contrary, appropriations from the Education Excellence Fund, and investment earnings attributable to such amounts, remain to the credit of each recipient entity at the close of each fiscal year. It is the opinion of this office that appropriations from the Education Excellence Fund do not lapse at the end of the fiscal year as do all other appropriations.

**At the point in the procedure when these appropriated funds become the property of the respective recipient entities, should the Treasury separate and segregate these funds from the Trust and the Education Excellence Fund for custody, management and investment purposes?**

---

<sup>4</sup>The Education Excellence Fund, the Health Excellence Fund and the TOPS Fund.

**If so, should the funds of the public and private school systems entities be separated and segregated from those of the named State schools entities for custody, management and investment purposes? If the funds should be separated and segregated into a pool or pools, what management and investment guidelines are applicable to the pool or pools for Treasury's management and investment of them while remaining in the Treasury?**

As it is the opinion of this office that the appropriated funds do not become the property of the respective recipient entities until actual disbursement, but they do not remain part of the Trust upon appropriation, it would be appropriate to separate and segregate the funds from the Trust and the Education Excellence Fund for custody, management and investment purposes. Between the various recipient entities, the funds should be shown on the accounts of the treasury separately. We do not see any provision, constitutional or statutory, need for the funds of the seven named schools to be separated and segregated from the other recipient entities for investment purposes.

As to the management and investment guidelines applicable to the appropriated funds, since the funds are no longer in the Trust, the investment authority contained in La.Const. Art. VII, Sec. 10.8(B) no longer applies and your office should follow the general laws which pertain to the investment and collateralization of monies in the state treasury, see in particular, R.S. 49:321, et seq. Your office should act as a custodian to the recipient entities with regards to these funds.

**With respect to such funds appropriated and distributed to the respective public and private school systems entities that may remain in the Treasury beyond the fiscal year in which appropriated, do these funds, and the investment earnings thereon, require an appropriation to be withdrawn from the Treasury by the entities in a subsequent fiscal year? If not, what procedures and authorization should be used for such withdrawals from the Treasury in subsequent fiscal years?**

As we answered in response to a previous question, it is the opinion of this office that subsequent appropriations are not necessary even if the funds remain in the state treasury to the credit of a school or school system. The funds are subject to constitutional conditions and requirements which may involve a lengthy period of time in order for compliance and approval to occur. When the superintendent of education advises that a plan has been approved, the procedures and authorization for withdrawal of the funds should be in accordance with your traditional business practices except that the appropriation may have occurred in a previous fiscal year.

**With respect to such funds appropriated and distributed to the**

**respective State schools entities that may remain in the Treasury beyond the fiscal year in which appropriated, do these funds, and the investment earnings thereon, require an appropriation to be withdrawn from the Treasury by the entities in a subsequent fiscal year? If not, what procedures and authorization should be used for such withdrawals from the Treasury in subsequent fiscal years?**

Subsubparagraph (C)(3)(i) does not make a distinction between the recipient entities, as it states: "such amounts ... shall remain to the credit of **each recipient entity** at the close of each fiscal year". (Emphasis added). Accordingly, it is the opinion of this office that the seven named State schools should not be treated differently than any other recipient entity.

### III.

Your third set of questions pertain to La. R.S. 39:99.12.B(3), enacted by Act No. 1145 of the 2001 Regular Session of the Louisiana Legislature, which provides:

**"In the event a sale or sales authorized in Subsection A of this Section is made during the state fiscal year commencing on July 1, 2001, the state treasurer, in consultation with the commissioner of administration, shall provide for the deposit into the Louisiana Fund an amount of the net proceeds of any such sale or sales that together with other deposits will ensure that fifty million dollars is deposited into the Louisiana Fund in that state fiscal year. The remainder of such proceeds after deposit into the Louisiana Fund, any residuals received in such state fiscal year and the net proceeds of any sale or sales occurring after that state fiscal year shall be deposited in the Millennium Trust."** (Emphasis added)

A sale and securitization of sixty percent of the Tobacco Settlement Revenues of the State under the Master Settlement Agreement occurred on November 7, 2001, during the fiscal year commencing on July 1, 2001.

**Do these provisions restrict the total amount of monies deposited to and credited to the Fund, from all sources, the regular Tobacco Settlement Revenue payments received in January and April under the Master Settlement Agreement and the net proceeds received from the sale and securitization in November, to \$50,000,000 this fiscal year? Or, do these provisions limit only the amount to be deposited and credited to the Fund from the net proceeds of the sale and securitization to \$50,000,000, such that the Fund would receive that amount plus the constitutional percentage amounts from the regular Tobacco Settlement Revenue payments in January and April of this fiscal year?**

It is the opinion of this office that the above quoted language does not limit the amount to be deposited into the Louisiana Fund to \$50 million but mandates that at least \$50 million **be deposited** into the Louisiana Fund that fiscal year. We emphasize that \$50 million was to be deposited into the Louisiana Fund because the Fund had a beginning fund balance of approximately \$13 million. However, R.S. 39:99.12.B(3) requires a \$50 million deposit during the fiscal year and not a \$50 million balance so that the beginning fund balance should not be included in the determination of the amount to be deposited during the fiscal year. It is our understanding, based upon conversations with your office, that at the date of delivery of the bonds, the only deposits into the Louisiana Fund for the fiscal year were investment earnings of several hundred thousand dollars. At the time of the sale, there was an estimate as to the tobacco settlement proceeds to be received by the State during the fiscal year, but there are outside factors which can affect the receipt of such funds. In order to ensure compliance with R.S. 39:99.12(B)(3), your office deposited \$50,000,000 from the bond proceeds into the Louisiana Fund. We think your actions in this regard were appropriate.

**If the total amount of monies to be deposited and credited to the Fund from all sources is limited to \$50,000,000 this fiscal year, is the proper procedure for the Treasurer and Commissioner to follow to wait until the regular January and April payments of Tobacco Settlement Revenues are received and the constitutional deposits and credits to the Fund are determined and made, and then adjust the amount of the net proceeds from the sale and securitization such that it along with the regular payments amount total \$50,000,000, leaving the rest of the net proceed for deposit and credit into the Trust? If not, what are the proper procedures and timing thereof to accomplish this statutorily mandated adjustment?**

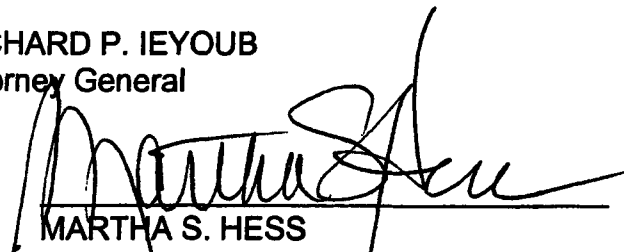
Because the answer to your previous question was that more than \$50,000,000 could be deposited into the Louisiana Fund, we believe your remaining questions are now moot.

Trusting this adequately responds to your request, we remain

Yours very truly,

RICHARD P. IEYOUB  
Attorney General

BY:

  
MARTHA S. HESS  
Assistant Attorney General

RPI/MSH