

# ROLLING THE DICE: THE IMPACT OF HEA 1350 ON CASINO TAX REVENUES AND DISTRIBUTIONS IN INDIANA

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## INTRODUCTION

At a time when cities and counties around Indiana struggle with budgetary problems and falling tax revenues, riverboat gaming taxes have kept many local communities afloat.<sup>1</sup> For example, after years of credit downgrades, falling operating funds, and general fund deficits, gaming tax revenues helped keep the city of Hammond out of bankruptcy.<sup>2</sup> Greensburg, Indiana, used \$10 million in gambling funds to attract Honda to Decatur County in an effort to create more than 2,400 jobs in southeastern Indiana.<sup>3</sup> Evansville uses the approximately \$12 million in gaming revenue it receives each year to pay for police, fire, and essential government services—money that helps meet “a budget need that [Evansville] wouldn’t be able to meet otherwise.”<sup>4</sup> Michelle Mercer, an at-large member of the Evansville City Council, stated that the city is “not using [gaming revenue] for fluff projects . . . . We’re using it for pretty much essentials.”<sup>5</sup> But now, due to the passage of House Enrolled Act 1350-2017 (“HEA 1350”), potential reductions in riverboat casino tax revenues and distributions could dry up local city and county coffers—money that kept these local units’ heads above water.<sup>6</sup>

Indiana casinos are no longer making as much money as they did a decade ago: admissions are down 40% and tax revenues from the state’s thirteen casinos and racinos have fallen 30% since 2007.<sup>7</sup> After years of escalating out-of-state competition and decreased casino admissions, the Indiana General Assembly responded to casino representatives’ pleas to ease their tax burdens.<sup>8</sup> On May 2,

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1. Laura N. Coordes & Thom Reilly, *Predictors of Municipal Bankruptcies and State Intervention Programs: An Exploratory Study*, 105 KY. L.J. 493, 548-49 (2017); see also Randy Frye, *Let’s Not Gamble on Beneficial Funds*, HERALD-TRIB. (Mar. 15, 2017), [http://www.batesvilleheraldtribune.com/opinion/let-s-not-gamble-on-beneficial-funds/article\\_d05f9da4-9929-5d2e-b162-cc3022c0391e.html](http://www.batesvilleheraldtribune.com/opinion/let-s-not-gamble-on-beneficial-funds/article_d05f9da4-9929-5d2e-b162-cc3022c0391e.html) [<https://perma.cc/DY3Y-RZQM>].

2. Coordes & Reilly, *supra* note 1, at 548-49.

3. Frye, *supra* note 1.

4. Hayleigh Colombo, *Reeling Casinos Seek Breaks from Statehouse*, INDIANAPOLIS BUS. J. (Mar. 25, 2017), <https://www.ibj.com/articles/63090-reeling-casinos-seek-breaks-from-statehouse> [<https://perma.cc/PU3E-K2VG>].

5. *Id.*

6. See generally Pub. L. No. 268-2017, 2017 Ind. Acts 3769.

7. Colombo, *supra* note 4.

8. *Id.*

2017, Governor Holcomb signed HEA 1350 into law, which amended the gaming tax laws in many ways, three of which will be explained and analyzed in this Note.<sup>9</sup> First, HEA 1350 amended Indiana Code section 4-33-12-1 by replacing the \$3 per-person Riverboat Admissions Tax (“Admissions Tax”) with a Supplemental Wagering Tax, capped at 3.5%, on a casino’s adjusted gross receipts.<sup>10</sup> Second, HEA 1350 amended Indiana Code section 6-3-1-3.5, which now phases out the requirement that casinos must add Riverboat Wagering Tax (“RWT”) deductions taken on federal tax returns to their state tax base.<sup>11</sup> Finally, HEA 1350 amended the disbursement rules for hold-harmless and revenue sharing distributions in Indiana Code section 4-33-13-5 by creating an adjustable disbursement floor governed by a formula.<sup>12</sup>

Although Indiana legislators designed HEA 1350 to help increase casino competitiveness and provide incentives to Indiana casino operators to continue re-investing in their properties, these gaming tax amendments come at a cost. According to legislative fiscal analysts, replacing the Admission Tax with a Supplemental Wagering Tax could decrease tax revenue streams to local cities and counties by up to \$3.6 million a year, and the phase-out of the addback tax requirement is estimated to gradually reduce tax revenues deposited in the State General Fund by up to \$2.3 million in fiscal year (“FY”)<sup>13</sup> 2020 and up to \$18 million annually beginning in FY 2027.<sup>14</sup> In addition, HEA 1350’s impact on local municipalities also could be draconian because they could lose millions in casino tax distributions—tax money that currently pays for schools, roads, emergency services, and other essential government services.<sup>15</sup> State Representative Randy Frye<sup>16</sup> voted against HEA 1350, stating that “we aren’t just

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9. *Id.*

10. See Pub. L. No. 268-2017, § 25, 2017 Ind. Acts 3769, 3784-85 (codified as IND. CODE § 4-33-12-1 (2018)).

11. See Pub. L. No. 268-2017, § 40, 2017 Ind. Acts 3769, 3812-23 (codified as IND. CODE § 6-3-1-3.5 (2018)).

12. See Pub. L. No. 268-2017, § 35, 2017 Ind. Acts 3769, 3799-07 (codified as IND. CODE § 4-33-13-5 (2018)). The hold-harmless distribution, otherwise known as the Admissions Tax supplemental distribution, is a statutorily mandated payment disbursed to every state and local unit that receives Admissions Tax revenue. The revenue sharing distribution is another statutorily mandated payment disbursed to every non-casino city and county. IND. CODE § 4-33-13-5 (2018).

13. Fiscal years start on July 1 of the previous calendar year and end on June 30 of the stated calendar year. For example, FY 2020 starts on July 1, 2019, and ends June 30, 2020.

14. IND. LEGIS. SERVS. AGENCY, FISCAL IMPACT STATEMENT FOR HB 1350, 120th Gen. Assemb., 1st Reg. Sess. 4 (Apr. 28, 2017), <https://iga.in.gov/legislative/2017/bills/house/1350#document-628ae7d5> [<https://perma.cc/2P7N-C6CF>] [hereinafter FISCAL IMPACT STATEMENT].

15. Brandon Smith, *Bill Would Significantly Change Indiana’s Gaming Taxes*, WFYI (Feb. 1, 2017), <https://www.wfyi.org/news/articles/bill-would-significant-change-indianas-gaming-taxes> [<https://perma.cc/V7TG-4F8G>].

16. Rep. Randy Frye currently serves as the state representative for District 67, which includes Ohio and Switzerland counties, as well as portions of Ripley, Decatur, Jennings, Jefferson, and Dearborn counties in southeastern Indiana. Rep. Frye is the Chairman of the Veterans Affairs

thinking about the impact here, financially to the State of Indiana. We're thinking about the impact financially to those small communities, some of which have bonds against their riverboat money."<sup>17</sup> Other state legislators believe, however, that local communities should start "sharing the pain" of casino troubles.<sup>18</sup> "We're in essence partners with [the gaming] industry whether we like it or not," former State Senator Luke Kenley<sup>19</sup> stated, adding that "if the revenues are going to go down, the locals need to share in the reduction of revenues."<sup>20</sup>

This Note argues that HEA 1350's unintended consequences—millions of dollars in state and local tax revenue losses—could overshadow the law's well-intended policies of providing incentives for increased economic development and competitiveness. This Note further recommends specific changes to the law that should lessen the potential negative impact of HEA 1350 on local municipalities around the state. Part I of this Note explains the fiscal impact of several sections of HEA 1350, including the repeal and replacement of the Admission Tax, the phase-out of the addback tax requirement, and the change to the hold-harmless and revenue sharing distribution provisions. Part II of this Note analyzes the costs and benefits to Indiana casino operators and the state and local municipalities affected by the tax law amendments, concluding that costs to the state and the local municipalities are far greater than the benefits to casino operators and economic development initiatives. Finally, Part III makes three recommendations for specific changes to these gaming laws that would reduce the potential negative impact on the fiscal health of affected local municipalities while providing better, targeted tax incentives for Indiana's casinos.

### I. THE FISCAL IMPACT OF HEA 1350

Although HEA 1350 amended many of Indiana's gaming laws—everything from advance deposit wagering on horse racing to flexible scheduling for riverboats—this Note focuses on three specific amendments related to Indiana's riverboat casinos and casino taxes: (1) the replacement of the Admission Tax with a Supplemental Wagering Tax, (2) the eight-year phase-out of the addback tax requirement, and (3) the potential reduction in hold-harmless and revenue sharing distributions.<sup>21</sup>

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and Public Safety Committee in the Indiana House of Representatives and has been a State Rep. since 2010. *Randy Frye*, IND. HOUSE OF REPRESENTATIVES REPUBLICAN CAUCUS, <https://www.indianahouserepublicans.com/members/general/andy-frye/?back=members> [<https://perma.cc/SGK8-AFMK>] (follow "Biography" tab) (last visited Jan. 31, 2018).

17. Smith, *supra* note 15.

18. Colombo, *supra* note 4.

19. State Senator Luke Kenley represented Senate District 20—which includes portions of Hamilton County—from 1992 to 2017. State Senator Kenley chaired the Senate Committee on Appropriations from 2009 until his retirement in 2017. *Kenley to Retire from Indiana Senate*, IND. SENATE REPUBLICANS, <https://www.indianasenaterepublicans.com/kenley-to-retire-from-indiana-senate> [<https://perma.cc/YG34-UGHU>] (last visited Jan. 31, 2018).

20. Colombo, *supra* note 4.

21. See generally Pub. L. No. 268-2017, 2017 Ind. Acts 3769.

*A. Replacement of the Admission Tax with a Supplemental Wagering Tax*

Before the passage of HEA 1350, Indiana Code section 4-33-12 stated that the person or organization that held an owner's license for riverboat gambling operations had to collect a \$3 Admission Tax for every person who entered their riverboat casino whether or not the patron gambled.<sup>22</sup> The law also stated that the Admission Tax monies must be deposited in the State General Fund and distributed quarterly to various local entities based on their geographic proximity to a riverboat casino.<sup>23</sup> For instance, the State would distribute \$1 of the \$3 Admissions Tax to the "home dock" city where the riverboat casino was docked, \$1 to the county where the boat was docked, and up to \$0.10 to that county's convention and visitor bureau or promotion fund.<sup>24</sup> In addition, the State distributed some of the remainder to various state units, such as the Division of Mental Health and Addiction, the State Fair Commission, and the Indiana Economic Development Corporation.<sup>25</sup> Indeed, in FY 2016, the State distributed over \$45 million in Admission Tax revenues to "home dock" cities, counties, and visitors' bureaus, as well as \$19 million to the state units for a combined total of over \$64 million in Admission Tax revenue distributions.<sup>26</sup>

HEA 1350 repealed the Admission Tax and replaced it with a Supplemental Wagering Tax beginning in FY 2018.<sup>27</sup> The new Supplemental Wagering Tax will not be calculated based on the riverboat's per capita admissions, but on each casino's adjusted gross receipts.<sup>28</sup> The Supplemental Wagering Tax rate will be capped at 4% for FY 2019 and 3.5% for fiscal years thereafter.<sup>29</sup> In addition, HEA 1350 imposed a different Supplemental Wagering Tax rate of 3% for riverboats that moved inland by December 31, 2017, effective on the day operations

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22. IND. LEGIS. SERVS. AGENCY, INDIANA HANDBOOK OF TAXES, REVENUES, AND APPROPRIATIONS 34 (2016), <https://iga.in.gov/static-documents/5/e/a/8/5ea899a1/2016%20Tax%20Handbook%20Website%20.pdf> [<https://perma.cc/3GEX-GJRT>] [hereinafter TAXES, REVENUES, AND APPROPRIATIONS].

23. IND. STATE BUDGET AGENCY, DISTRIBUTION OF LOTTERY AND GAMING REVENUES AND THE BUILD INDIANA FUND – FISCAL YEAR 2016, at 29 (2017), [https://www.in.gov/sba/files/LGS\\_Distribution\\_Report\\_2016\\_Revised\\_03-08-17.pdf](https://www.in.gov/sba/files/LGS_Distribution_Report_2016_Revised_03-08-17.pdf) [<https://perma.cc/4Z7X-TMMJ>].

24. *Id.*

25. *Id.*

26. *Id.* at 5.

27. FISCAL IMPACT STATEMENT, *supra* note 14, at 3.

28. IND. CODE § 4-33-12-1.5 (2018) (The amount of Supplemental Wagering Tax "imposed for a particular day is determined by multiplying the riverboat's adjusted gross receipts for that day by the quotient of: (1) the total riverboat admissions tax that the riverboat's licensed owner paid beginning July 1, 2016, and ending June 30, 2017; divided by (2) the riverboat's adjusted gross receipts beginning July 1, 2016, and ending June 30, 2017." The quotient used to determine the Supplemental Wagering Tax liability, when as expressed as a percentage, may not exceed "[f]our percent (4%) before July 1, 2019" and "[t]hree and five-tenths percent (3.5%) after June 30, 2019.").

29. *Id.*

commenced at the inland casino.<sup>30</sup> Instead of delineating specific dollar distributions like the Admissions Tax, the proceeds of the new Supplemental Wagering Tax will be distributed to state and local units using percentages equal to the former distribution ratios.<sup>31</sup> For instance, instead of the local “home dock” city receiving \$1 for every \$3 in Admission Tax revenue, the “home dock” city will receive 33 1/3% of every dollar brought in by the Supplemental Wagering Tax.<sup>32</sup>

Legislative analysts have warned that replacing the Admission Tax with the Supplemental Wagering Tax will hurt both state and local units.<sup>33</sup> They forecast that revenue generated by the Supplemental Wagering Tax will be lower than the Admission Tax by about \$2.3 million in FY 2019 and \$3.6 million annually thereafter.<sup>34</sup> A large part of this decrease is a direct result of the cap on the Supplemental Wagering Tax rate at 3.5% of the casino’s adjusted gross receipts.<sup>35</sup> Thus, if revenue collected under the Supplemental Wagering Tax is less than the amount the Admissions Tax would have garnered, total distributions to the various “home dock” cities and counties, and the state agencies that received Admissions Tax distributions, will fall.<sup>36</sup>

#### *B. Phase-out of the Riverboat Wagering Tax Addback*

To calculate Indiana taxable income, taxpayers must add back “any deduction or deductions allowed or allowable pursuant to . . . the Internal Revenue Code for taxes based on or measured by income and levied at the state level by any state of the United States.”<sup>37</sup> In 2004, Judge Thomas G. Fisher of the Indiana Tax Court held that although the RWT was labeled an excise tax, it had to be added back into the riverboat operator’s Indiana income tax base because the RWT is measured by income.<sup>38</sup> Accordingly, every Indiana casino had to pay tax on several years of RWTs they had previously deducted.<sup>39</sup> HEA 1350, however, explicitly exempts the RWT from the addback requirement by gradually phasing it out over an eight-year period.<sup>40</sup> Specifically, HEA 1350 decreases the amount to be added back by 12.5% annually beginning in the 2019 tax year until it is

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30. FISCAL IMPACT STATEMENT, *supra* note 14, at 3.

31. IND. CODE § 4-33-12-6(b)(1)(A)-(B) (2018).

32. *Id.*

33. FISCAL IMPACT STATEMENT, *supra* note 14, at 4, 6.

34. *Id.* at 4.

35. *Id.* at 3.

36. *Id.* at 3, 6.

37. *Aztar Ind. Gaming Corp. v. Ind. Dep’t of State Revenue*, 806 N.E.2d 381, 382 (Ind. T.C. 2004) (citing IND. CODE § 6-3-1-3.5(b)(3) (2018)).

38. *Id.* at 386.

39. *Id.*

40. See Pub. L. No. 268-2017, § 40, 2017 Ind. Acts 3769, 3818-19 (codified as IND. CODE § 6-3-1-3.5 (2018)) (“[A]fter December 31, 2025, a taxpayer is not required to add back under [Indiana Code § 6-3-1-3.5] any amount of a deduction allowed on the taxpayer’s federal income tax return for wagering taxes.”).

fully phased out in 2026.<sup>41</sup>

This benefit to riverboat casinos nonetheless comes at a cost to the State's General Fund.<sup>42</sup> Legislative analysts estimate that the General Fund will gradually lose up to \$2.3 million in FY 2020 and up to \$18 million in FY 2027.<sup>43</sup> Furthermore, the phase-out of the RWT addback is estimated to gradually lower local income tax revenues each year by up to \$1 million in FY 2020 and up to \$8 million in FY 2027.<sup>44</sup>

### *C. Changes to the Hold-Harmless and Revenue Sharing Disbursements*

HEA 1350 also amended the hold-harmless distribution—also known as the Admissions Tax supplemental distribution—and revenue sharing distribution outlined in Indiana Code section 4-33-13-5.<sup>45</sup> Although both distributions operate similarly, they are disbursed differently and benefit different local units.<sup>46</sup> Accordingly, this Note explains the fiscal impact of the hold-harmless and revenue sharing distributions separately.

1. *The Hold-Harmless Distribution.*—In 2002, the Indiana Legislature passed Indiana House Bill 1001A, creating a supplemental “hold-harmless” distribution system.<sup>47</sup> The hold-harmless distribution would ensure that eligible state and local units did not receive less Admissions Tax revenue in future years than they received in FY 2002—the established “base year revenue.”<sup>48</sup> Therefore, if the Admission Tax revenues ever fell below the base year revenue, the State Treasurer would distribute money from the General Fund in an amount equal to any shortfall from the base year revenue in the preceding fiscal year.<sup>49</sup>

In 2014, Indiana lawmakers responded to annually increasing hold-harmless distributions by capping and guaranteeing the annual hold-harmless distributions at exactly \$48 million.<sup>50</sup> Accordingly, in FY 2016, the Treasurer of the State distributed over \$42 million of the \$48 million guaranteed hold-harmless distributions to the local cities and counties with a riverboat casino,<sup>51</sup> while nearly

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41. FISCAL IMPACT STATEMENT, *supra* note 14, at 5.

42. *Id.* at 3.

43. *Id.* at 5.

44. *Id.* at 7.

45. See § 35, 2017 Ind. Acts at 3812; *see also* IND. GAMING COMM'N, 2017 ANNUAL REPORT TO GOVERNOR ERIC HOLCOMB 6 (2017), <http://www.in.gov/igc/files/FY2017-Annual.pdf> [<https://perma.cc/L5KC-U4HQ>].

46. IND. GAMING COMM'N, *supra* note 45, at 6.

47. See Pub. L. No. 192-2002 (ss), § 23, 2002 Ind. Acts 2727, 2738-45 (codified as IND. CODE § 4-33-12-6 (2018)).

48. *Id.* at 2745 (“For state fiscal years beginning after June 30, 2002 . . . [i]f the treasurer of state determines that the total amount of money distributed to an entity under this section during a state fiscal year is less than the entity's base year revenue, the treasurer of state shall make a supplemental distribution to the entity under IC 4-33-13-5(f).”).

49. See *id.* at 2738.

50. TAXES, REVENUES, AND APPROPRIATIONS, *supra* note 22, at 34.

51. IND. STATE BUDGET AGENCY, *supra* note 23, at 5.

\$6 million was distributed to the Indiana Division of Mental Health and the State Fair Commission.<sup>52</sup>

HEA 1350 amended the hold-harmless distribution by modifying the \$48 million cap-and-guarantee beginning July 1, 2021.<sup>53</sup> It provided a formula that would force distributees to have skin in the game by lowering hold-harmless distributions in the event that statewide riverboat adjusted gross receipts declined below the new FY 2020 base year revenue.<sup>54</sup> Nonetheless, starting in FY 2022, if the total adjusted gross receipts received from gaming during the preceding state fiscal year is equal to or greater than the total adjusted gross receipts received from gaming during FY 2020, the hold-harmless funds are still capped at \$48 million.<sup>55</sup> However, if the total adjusted gross receipts received from gaming during the preceding state fiscal year is less than the total adjusted gross receipts received from gaming in FY 2020, the hold-harmless funds are reduced by the ratio of the previous year's adjusted gross receipts and FY 2020's adjusted gross receipts.<sup>56</sup> For example, if total adjusted gross receipts in 2025 are 10% more than the total adjusted gross receipts in FY 2020, the hold-harmless payment cap for FY 2026 will be capped at \$48 million. But if total adjusted gross receipts in 2025 are 10% less than the total adjusted gross receipts in FY 2020, the hold-harmless distribution for FY 2026 will be reduced to \$43.2 million—a \$4.8 million decrease in payments to state agencies and the local municipalities that house riverboat casinos.<sup>57</sup>

2. *The Revenue Sharing Distribution.*—Revenue sharing distributions are similar to hold-harmless distributions except that they are disbursed to every Indiana city and county without a riverboat casino, rather than to those that have a riverboat casino within their boundaries.<sup>58</sup> Revenue sharing distributions are just one part of the complex RWT distribution regime outlined in Indiana Code section 4-33-13.<sup>59</sup> RWT revenues are deposited into the State Gaming Fund, a

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52. *Id.*

53. See Pub. L. No. 268-2017, § 35, 2017 Ind. Acts 3769, 3805-06 (codified as IND. CODE § 4-33-13-5 (2018)).

54. See *id.*

55. See *id.* (“After June 30, 2021, if the total adjusted gross receipts received by licensees from gambling games . . . during the preceding state fiscal year is equal to or greater than the total adjusted gross receipts received . . . during the state fiscal year ending June 30, 2020, the maximum [hold-harmless distribution] is forty-eight million dollars.”).

56. See *id.* at 3806 (“After June 30, 2021, if the total adjusted gross receipts received by licensees from gambling games . . . during the preceding state fiscal year is less than the total adjusted gross receipts received . . . during the state fiscal year ending June 30, 2020, the maximum [hold-harmless distribution] is equal to the result of: (A) forty-eight million dollars . . . ; multiplied by (B) the result of: (i) the total adjusted gross receipts received . . . during the preceding state fiscal year; divided by (ii) the total adjusted gross receipts received . . . during the state fiscal year ending June 30, 2020.”).

57. See *id.*

58. IND. GAMING COMM’N, *supra* note 45, at 6.

59. See generally IND. CODE § 4-33-13-4 (2018); IND. CODE § 4-33-13-5 (2018).

separate fund specifically created to hold RWT revenues.<sup>60</sup> Distributions from the State Gaming Fund are first made to the Indiana Gaming Commission to reimburse the Commission for its riverboat gaming administrative expenses.<sup>61</sup> Then, from the remaining funds in the State Gaming Fund, \$33 million is set aside each fiscal year for local revenue sharing.<sup>62</sup> Revenue sharing money is distributed on a per capita basis to cities, towns, and counties in Indiana that do not contain a riverboat casino.<sup>63</sup>

HEA 1350 amended the revenue sharing disbursement by adjusting the \$33 million amount set aside from the RWT.<sup>64</sup> Similar to the changes to the hold-harmless distributions, HEA 1350 provided a formula that would lower the revenue sharing distribution in the event of an overall decline in statewide riverboat adjusted gross receipts.<sup>65</sup> For instance, starting in FY 2022, if the total adjusted gross receipts for the preceding year exceeds or meets the total adjusted gross receipts from FY 2020, the revenue sharing distribution will remain at \$33 million.<sup>66</sup> Nonetheless, if the total adjusted gross receipts for the preceding year is less than the total adjusted gross receipts from FY 2020, the revenue sharing payments will be reduced by the ratio of the previous year's adjusted gross receipts and FY 2020's adjusted gross receipts.<sup>67</sup> In the same way that the hold-harmless distribution would fall by 10% if the preceding year's adjusted gross receipts were 10% less than the FY 2020's adjusted gross receipts, the revenue sharing distribution would also fall by 10%, causing a \$3.3 million drop in distributions to non-riverboat counties.<sup>68</sup>

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60. TAXES, REVENUES, AND APPROPRIATIONS, *supra* note 22, at 38; *see also* IND. CODE § 4-33-13-3 (2018).

61. TAXES, REVENUES, AND APPROPRIATIONS, *supra* note 22, at 3.

62. *Id.*

63. *Id.*

64. IND. GAMING COMM'N, *supra* note 45, at 6.

65. *Id.*

66. *See* Pub. L. No. 268-2017, § 35, 2017 Ind. Acts 3769, 3799 (codified as IND. CODE § 4-33-13-5 (2018)) ("After June 30, 2021, if the total adjusted gross receipts received by licensees from gambling games . . . during the preceding state fiscal year is equal to or greater than the total adjusted gross receipts received . . . during the state fiscal year ending June 30, 2020, the first thirty-three million dollars (\$33,000,000) of tax revenues collected under this chapter shall be set aside for revenue sharing . . .").

67. *See id.* ("After June 30, 2021, if the total adjusted gross receipts received by licenses from gambling games . . . during the preceding state fiscal year is less than the total adjusted gross receipts received . . . during the state [fiscal] year ending June 30, 2020, an amount equal to the first thirty-three million dollars (\$33,000,000) of tax revenues collected under this chapter multiplied by the result of: (i) the total adjusted gross receipts received . . . during the preceding state fiscal year; divided by (ii) the total adjusted gross receipts received . . . during the state fiscal year ending June 30, 2020; shall be set aside for revenue sharing under subsection (e).").

68. *See id.*



## II. THE COST OF INCREASED CASINO PROFITABILITY AND COMPETITIVENESS

### *A. Boosting Casino Profitability: Encouraging State Economic Development and Better Competitiveness*

The casino industry in Indiana has struggled, largely due to increased competition from casinos in neighboring states.<sup>69</sup> Yearly admissions have declined by 5.3% in FY 2017, and although RWT and Admission Taxes totaled over \$596 million in FY 2017, total taxes still decreased about \$7.7 million from FY 2016 totals.<sup>70</sup> Indeed, Indiana's casinos have seen a large drop in admissions over the past 20 years.<sup>71</sup> For example, yearly admissions at Tropicana Evansville dropped from 2.5 million in FY 2002 to roughly 1.2 million in FY 2017.<sup>72</sup> Similarly, yearly admissions to the Hollywood Casino in Lawrenceburg dropped from 7.5 million in FY 2002 to under 1.5 million in FY 2017.<sup>73</sup> Penn National Gaming, the company that operates the Hollywood Casino in Lawrenceburg, opened four casinos in Ohio and numerous Video Lottery Terminals in Illinois from 2012 to 2015, which directly compete for customers with every casino in Indiana.<sup>74</sup> As a result, revenues from the Hollywood Casino, which formerly made up 18% of Indiana's gross gaming revenue in 2008, fell to only 8% of Indiana's gross gaming revenue in 2015.<sup>75</sup>

Casino operators have applauded Indiana lawmakers for passing HEA 1350 to lessen casinos' tax burdens, allowing casino operations to be more profitable.<sup>76</sup> Mark Schuffert, Ameristar's Senior Vice President and General Manager, praised the repeal and replacement of the Admission Tax and explained that not having to charge the per-capita tax would allow better integration of gaming and nongaming operations and move gaming "away from the traditional gaming boat model" that left restaurants and other amenities behind when they sailed.<sup>77</sup> Dan Nita, Horseshoe Hammond Casino's Senior Vice President and General Manager, agreed and stated that not having to charge the Admissions Tax would allow the casino to attract larger groups to its meeting spaces and its Venue theater because it will no longer have to pay \$3 for each nongambling visitor.<sup>78</sup> Furthermore,

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69. IND. GAMING COMM'N, *supra* note 45, at 5.

70. *Id.*

71. *Id.* at 22-33.

72. *Id.* at 25.

73. *Id.* at 26.

74. Randhir Jha, *Indiana Gaming Laws: A Balancing Act*, INDIANA LEGIS. SERVS. AGENCY (2015), available at [https://www.taxadmin.org/assets/docs/Meetings/15rev\\_esr/jha.pdf](https://www.taxadmin.org/assets/docs/Meetings/15rev_esr/jha.pdf) [<https://perma.cc/YL4P-F3ED>].

75. *Id.*

76. Andrew Steele, *Casinos Produce Strong June with Tax Changes on Horizon*, NWL.COM (July 10, 2017), [http://www.nwitimes.com/business/local/casinos-produce-strong-june-with-tax-changes-on-horizon/article\\_accf2428-ccba-56c8-b422-081f22127ee96.html](http://www.nwitimes.com/business/local/casinos-produce-strong-june-with-tax-changes-on-horizon/article_accf2428-ccba-56c8-b422-081f22127ee96.html) [<https://perma.cc/634W-T8WY>].

77. *Id.*

78. *Id.*

casino operators heralded the phase-out of the RWT addback requirement. Troy Stremming, a spokesman for Pinnacle Entertainment—the parent company of Ameristar Casino in East Chicago—believed the addback requirement unfairly imposed “taxes on gaming revenue twice.”<sup>79</sup> Stremming predicted that Ameristar Casino would see “some cost savings” from the addback requirement’s demise that it “could use [] for marketing or property improvements.”<sup>80</sup> Stremming also lauded the new Supplemental Wagering Tax because “the processes associated with counting guests [for the Admissions Tax] ha[d] been cumbersome.”<sup>81</sup>

Despite a year of ups and downs in Indiana’s gaming industry, one casino in particular ended 2017 with soaring revenues and high admissions.<sup>82</sup> Tropicana Casino and Resort in Evansville experienced a big jump in business with the opening of its new \$50 million on-shore facility in 2017.<sup>83</sup> Tropicana Evansville responded to greater competition from neighboring states by becoming the first riverboat casino in Indiana to take advantage of a law passed in 2015 that allowed riverboat casinos to move to an inland location.<sup>84</sup> Specifically, after the passage of HEA 1540 in 2015, casinos were no longer legally limited to the confines of a riverboat, and companies that wished to move their gambling operations to an inland location could do so.<sup>85</sup>

Tropicana Evansville’s new facility—a spacious single floor casino with high ceilings and lavish fixtures—opened alongside two new restaurants and a nightclub.<sup>86</sup> Evansville and Tropicana officials promoted the new facility as a multi-faceted entertainment venue: visitors can play the slots and gamble on table games and can also enjoy the casino’s new full-service restaurants and dance

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79. Karen Caffarini, *Casinos See Jackpot with New Casino Tax Law*, CHI. TRIB. (May 11, 2017, 1:05 PM), <http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-casino-new-law-st-0512-20170511-story.html> [<https://perma.cc/THN4-8CGK>].

80. *Id.*

81. *Id.*

82. *Evansville Casino Sees Big Boost with Move to On-Shore Site*, WTHR (Dec. 30, 2017, 1:03 PM), <https://www.wthr.com/article/evansville-casino-sees-big-boost-with-move-to-on-shore-site> [<https://perma.cc/E96S-6DAN>] [hereinafter *Evansville Casino*].

83. *Id.*

84. *Id.*

85. See Pub. L. No. 255-2015, § 11, 2015 Ind. Acts 4222, 4228-29 (codified as IND. CODE § 4-33-6-24 (2018)) (“A licensed owner may relocate the licensed owner’s gaming operation from a docked riverboat to an inland casino if the following conditions are met: (1) [T]he casino is located on property that the licensed owner owned or leased and used in the conduct of the licensed owner’s gaming operations on February 1, 2015. (2) The casino is located on property adjacent to the dock site of the licensed owner’s riverboat. (3) The casino complies with all applicable building codes and any safety requirements imposed by the commission. (4) The commission approves the relocation of the licensed owner’s gaming operation.”).

86. John Martin, *New \$50 Million Tropicana Evansville Casino Comes Ashore*, COURIER & PRESS (Oct. 20, 2017, 12:57 PM), <https://www.courierpress.com/story/news/2017/10/20/new-50-million-tropicana-evansville-casino-comes-ashore/777002001/> [<https://perma.cc/8J82-DHUQ>].

club.<sup>87</sup> Indiana Lieutenant Governor Suzanne Crouch, who was the Vanderburgh County Auditor when Indiana's first casino opened in Evansville in 1995, was impressed by the new Tropicana Evansville casino.<sup>88</sup> "[I]t speaks [favorably] to the commitment and the investment Tropicana has made in Evansville, and to the public-private partnerships that have been established under [Evansville] Mayor Lloyd Winnecke," Crouch added.<sup>89</sup> Tony Rodio, President and CEO of Tropicana Entertainment, said that the new inland casino exceeded his expectations.<sup>90</sup> "The beauty of this compared to what we were delivering before on the boat is, you can come here and not put a penny in a slot machine and still have a wonderful night, whether it's dinner or entertainment in the lounge or just people-watching," Rodio said, adding, "I think it's a great experience."<sup>91</sup>

State reports show that, after moving to its inland location, Tropicana Evansville experienced a 36% jump in gross revenue in November 2017—a jump of about \$3.1 million—compared to November 2016.<sup>92</sup> Total taxes generated from Tropicana Evansville experienced concomitant increases, jumping from \$2.02 million in November 2016 to \$2.91 million in November 2017.<sup>93</sup> The increase in gaming revenue and taxes comes after the new inland casino opened in October 2017, replacing the riverboat that Tropicana Evansville had occupied since its 1995 opening on the Ohio River.<sup>94</sup>

Indeed, HEA 1350's tax incentives for relocating on land directly benefitted Tropicana Evansville.<sup>95</sup> Before HEA 1350, Tropicana Evansville paid \$3 to the state in Admissions Taxes every time a person entered the riverboat casino, even when the patron did not gamble.<sup>96</sup> According to John Chaszar, general manager of Tropicana Evansville, "people frequently [went] back and forth between their hotel rooms and the casino, meaning the venues [were] often taxed multiple times for the same person's admission in one night."<sup>97</sup> But under HEA 1350, any riverboat casino that moved to land before December 31, 2017, would not have to pay the Admissions Tax and would receive a favorable, but temporary, 3% Supplemental Wagering Tax rate on the day operations began on the inland casino.<sup>98</sup> Although HEA 1350 provided this generous tax break to casinos,

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87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Evansville Casino*, *supra* note 82.

93. John Martin, *Tropicana Evansville Revenue Soars in New Casino's First Full Month*, *COURIER & PRESS* (Dec. 27, 2017), <https://www.courierpress.com/story/news/2017/12/27/tropicana-evansville-revenue-soars-new-casinos-first-full-month/984747001/> [<https://perma.cc/QR2H-7LE4>].

94. *Evansville Casino*, *supra* note 82.

95. See Pub. L. No. 268-2017, § 25, 2017 Ind. Acts 3769, 3784-85 (codified as IND. CODE § 4-33-12-1 (2018)).

96. Colombo, *supra* note 4.

97. *Id.*

98. See § 25, 2017 Ind. Acts at 3784 ("This subsection applies to a gaming operation that has

Tropicana Evansville was the only casino to receive HEA 1350's inland tax benefit before it expired at the end of 2017.<sup>99</sup>

*B. Hidden Losses of Tax Disbursements to Local Municipalities  
Under HEA 1350*

HEA 1350's amendments to gaming taxes will lower tax revenues allocated to the State General Fund, to state agencies, and to local municipalities throughout the state.<sup>100</sup> Replacing the Admission Tax will have the detrimental effect of lowering both state and local units' revenue streams by a combined total of about \$2.3 million in FY 2019 and \$3.6 million annually thereafter.<sup>101</sup> In addition, estimates say that the eight-year phase-out of the RWT addback will gradually reduce tax revenues in the state General Fund by up to \$2.3 million in FY 2020 and \$18 million in FY 2027 and reduce local income tax revenues by up to \$1 million in FY 2020 and up to \$8 million in FY 2027.<sup>102</sup>

Although casino operators have applauded both the replacement of the Admissions Tax with the less onerous Supplemental Wagering Tax and the phase-out of the RWT addback requirement, they have not commented about the amendments to the hold-harmless and revenue sharing distributions.<sup>103</sup> Their silence reflects that the changes to the hold-harmless and revenue sharing distributions do not directly benefit casino operators, but instead directly affect the portion of the gaming taxes the casinos have already paid that are available to state agencies, riverboat communities, and non-riverboat communities.<sup>104</sup>

Rep. Randy Frye fought efforts to reduce hold-harmless distributions while the Indiana House of Representatives considered HEA 1350.<sup>105</sup> Indeed, in late February 2017, the House approved Rep. Frye's amendment to HEA 1350 that kept the \$48 million hold-harmless distribution cap-and-guarantee.<sup>106</sup> "[HEA 1350] would have resulted in millions of dollars being taken away from our communities," Rep. Frye said after his amendment passed, adding, "we have three casinos in [my district]. This would greatly impact us as these casinos fund projects and programs that continue to allow our communities to thrive and

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relocated from a docked riverboat to an inland casino by December 31, 2017, as described in Indiana Code 4-33-6-24. A supplemental wagering tax is (1) imposed and authorized under this article at a rate of three percent (3%) of adjusted gross receipts; and (2) imposed starting the day operations begin at an inland casino. This subsection expires July 1, 2018.").

99. *Evansville Casino*, *supra* note 82.

100. *See generally* FISCAL IMPACT STATEMENT, *supra* note 14.

101. *Id.* at 4.

102. *Id.* at 5, 7.

103. Caffarini, *supra* note 79.

104. *See generally* IND. GAMING COMMISSION, *supra* note 45.

105. Hannah Carlock, *Frye Protects Riverboat Communities' Gaming Revenue*, IND. HOUSE OF REPRESENTATIVES REPUBLICAN CAUCUS (Feb. 22, 2017, 1:40 PM), <https://www.indianahouserеспублиcans.com/news/press-releases/frye-protects-riverboat-communities-gaming-revenue/> [<https://perma.cc/5NEA-ZACV>].

106. *Id.*

grow.”<sup>107</sup>

As Rep. Frye stated, the hold-harmless and revenue sharing distributions fund efforts to bring businesses into communities around the state and pay for essential government services.<sup>108</sup> For instance, Greensburg, Indiana, used \$10 million of their Admissions Tax and hold-harmless monies to attract Honda to the county, creating more than 2,400 jobs in southeastern Indiana.<sup>109</sup> Further, casino communities also use money from hold-harmless distributions to support police, fire, and EMS; pay for paving and repairing local roads and bridges; aid schools and businesses; and improve deteriorating water and sewer systems.<sup>110</sup> In addition, some small communities took out bonds to support community projects that are repaid with riverboat money.<sup>111</sup> Indeed, Evansville City Council member Michelle Mercer explained that the approximately \$12 million that Evansville receives each year from casino taxes is used to pay for police cars and firetrucks, improvements to the city’s roads, and bond payments for the city’s Ford Center Arena.<sup>112</sup>

Rising Sun, Indiana, greatly benefits from casino taxes and hold-harmless distributions.<sup>113</sup> Local governments have used tax money from the Rising Star Casino Resort to hire police officers in Rising Sun, purchase bulletproof vests for the Ripley County Sheriff’s Department, and install new sewer equipment in the city of Aurora.<sup>114</sup> But in recent years, local taxes garnered from the Rising Star Casino Resort have fallen to \$3.65 million in 2016—just 62% of the local tax revenue generated in 2013.<sup>115</sup> And although the small town dealt with potential budgetary problems, Full House Resorts invested \$6 million in the Rising Star casino in an effort to boost its falling customer base.<sup>116</sup> “We believe our investments in the property will grow our revenues over time,” said Alex Stolyar, senior vice president of Full House Resorts, adding “however, we do not expect our revenues to ever return to the levels they were at prior to the introduction of gaming to Central Indiana and Ohio.”<sup>117</sup> Furthermore, Rising Sun Mayor Brent Bascom has emphasized the importance of the tax money and the relationship with the community’s casino.<sup>118</sup> “We’re talking about planning a massive infusion

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107. *Id.*

108. Frye, *supra* note 1.

109. *Id.*

110. *Id.*

111. Smith, *supra* note 15.

112. Colombo, *supra* note 4.

113. Kaitlin L. Lange, *What Indiana’s First Tribal Casino – the Four Winds in South Bend – Means for the State*, INDIANAPOLIS STAR (Aug. 26, 2017), <https://www.indystar.com/story/news/politics/2017/08/26/what-indianas-first-tribal-casino-four-winds-south-bend-means-state/577688001/> [https://perma.cc/WZ3T-LJBY].

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

of economics in a smaller demographic, more rural, more income-challenged area,” stated Mayor Bascom, adding, “it’s been a great relationship for our community.”<sup>119</sup> But without hold-harmless guarantees, Mayor Bascom’s “rural, more income-challenged area” may take more hits than it can handle.<sup>120</sup>

Michigan City, Indiana, also benefits from casino taxes and hold-harmless distributions.<sup>121</sup> In 2017, it received \$10.8 million in casino distributions that it used to build a multi-million dollar police station, service the police and fire fleet, and meet the technological needs of the city’s school system.<sup>122</sup> Starting in 2018, though, Michigan City officials say they will have to make adjustments to make up for mounting casino competition and tax revenue uncertainty.<sup>123</sup> Michigan City Mayor Ron Meer said that “it’s important to make sure that Blue Chip [Casino, Hotel & Spa] does thrive because their success does reflect on our community.”<sup>124</sup> Indeed, Mayor Meer’s statement may have a deeper meaning: the Blue Chip Casino’s success not only reflects on Michigan City, but the casino’s tax dollars also help keep the city running.<sup>125</sup>

Rep. Frye’s amendment retaining the hold-harmless cap and guarantee did not survive in the bill as enacted even after a “fight down to the wire,” resulting in future reductions in hold-harmless and revenue sharing payments starting FY 2022.<sup>126</sup> As Rep. Frye stated, “the impact on small communities [around Indiana could be] enormous.”<sup>127</sup> Even though certain parts of HEA 1350 may help casinos by reducing casino tax burdens and making casino operations more efficient, the possible losses to state agencies and local municipalities around the state outweighs the benefits to Indiana’s casinos.<sup>128</sup> Accordingly, with the health of small casino communities on the line, Indiana lawmakers must make changes to Indiana’s gaming tax laws to offset potentially devastating losses.

### III. RECOMMENDATIONS LOOKING FORWARD

#### *A. Modify the Hold-Harmless and Revenue Sharing Disbursement Laws*

The calculation of the hold-harmless distributions under HEA 1350 will result in casino communities losing millions of dollars in the event that total adjusted gross receipts fall below the new FY 2020 base year revenue.<sup>129</sup> Indiana

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See id.*

126. Wanda English Burnett, *Fourth Port Dream Becomes a Reality*, VERSAILLES REPUBLICAN (June 8, 2017), <http://www.ripleynews.com/2017/2017-6-8-vrhome.html> [<https://perma.cc/K3YC-GVRV>].

127. Smith, *supra* note 15.

128. Steele, *supra* note 76.

129. *See* Pub. L. No. 268-2017, § 35, 2017 Ind. Acts 3769, 3799-07 (codified as IND. CODE

lawmakers should act to cushion casino communities against this potential loss of revenue that many have used to pay for essential government services. Specifically, Indiana lawmakers should repeal the laws regarding the revenue sharing disbursements and shift its \$33 million revenue sharing dollars to the hold-harmless distributions in order to provide a stable source of revenue to casino communities. Furthermore, Indiana lawmakers should amend the law to allow the hold-harmless distribution to increase above the statutory cap if adjusted gross receipts ever rise above the FY 2020 base year revenue.

1. *Repeal Revenue Sharing and Shift to Hold-Harmless Distributions.*—In 2002, Indiana lawmakers enacted the hold-harmless and revenue sharing distributions to benefit casino and non-casino communities.<sup>130</sup> Specifically, since its inception, the State Treasurer has made hold-harmless distributions to casino cities and counties, and revenue sharing distributions to cities and counties without casinos.<sup>131</sup> Prior to HEA 1350, hold-harmless distributions provided a tax revenue guarantee for casino communities that already felt the pain of falling Admissions Tax revenues.<sup>132</sup> But after HEA 1350, disbursements to casino communities could decrease by millions of dollars if adjusted gross receipts ever fall below FY 2020's base year revenue level.<sup>133</sup> To combat potential decreases in hold-harmless distributions, Indiana lawmakers should repeal the \$33 million revenue sharing distribution and shift the \$33 million over to the hold-harmless distribution.

The repeal and shift of revenue sharing dollars would benefit casino communities in multiple ways. First, the repeal and shift would provide greater revenue stability for casino communities, especially since Indiana casino revenues have fallen precipitously over the past decade.<sup>134</sup> Local municipalities that use casino tax dollars to pay for essential government services could lose millions of dollars and may not be able to sustainably run their communities if hold-harmless distributions fall.<sup>135</sup> By shifting the \$33 million from the revenue sharing distribution to the hold-harmless distribution, casino communities could use the increased disbursements to invest in their community's development, attract more private investment, create more jobs, and become less reliant on

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§ 4-33-13-5 (2018)).

130. Jim Landers, *The Two-Sided Coin: Casino Gaming and Casino Tax Revenue in Indiana*, IND. BUS. REV. (2009), [www.ibrc.indiana.edu/ibr/2009/spring/article1.html](http://www.ibrc.indiana.edu/ibr/2009/spring/article1.html) [<https://perma.cc/BWZ9-L64A>].

131. See Pub. L. No. 192-2002 (ss), § 23, 2002 Ind. Acts 2727, 2738-45 (codified as IND. CODE § 4-33-12-6 (2018)) ("For state fiscal years beginning after June 30, 2002 . . . [i]f the treasurer of state determines that the total amount of money distributed to an entity under this section during a state fiscal year is less than the entity's base year revenue, the treasurer of state shall make a supplemental distribution to the entity under IC 4-33-13-5(f)."); see also IND. GAMING COMM'N, *supra* note 45.

132. See TAXES, REVENUES, AND APPROPRIATIONS, *supra* note 22, at 34.

133. See § 35, 2017 Ind. Acts at 3799.

134. Colombo, *supra* note 4.

135. See Steele, *supra* note 76; see also Colombo, *supra* note 4.

casino taxes.<sup>136</sup>

Second, repealing and shifting the revenue sharing distribution better accomplishes the legislature's intent to support the symbiotic relationship between a casino and its community, local economic development, and stability.<sup>137</sup> Indiana lawmakers have stated that they want casinos to become more competitive against out-of-state casinos, but cuts to hold-harmless distributions hurt the local communities that house and support the casinos.<sup>138</sup> As local governments prepare for the loss of future tax revenue, lawmakers should inject more money into casino communities to ensure that the cities and counties that house casinos can stay afloat.<sup>139</sup>

Finally, the repeal and shift will not irrationally deprive non-casino communities of revenue sharing dollars since non-casino communities are not in the same position as casino communities to boost casino business.<sup>140</sup> In fact, some casino communities already use riverboat tax revenues to support non-casino communities.<sup>141</sup> Although every non-casino community receives a share of the \$33 million revenue sharing distribution, non-casino cities and counties have no skin in the game.<sup>142</sup> Instead, the \$33 million in revenue sharing distributions should help ensure that casino communities like Hammond, Evansville, and Michigan City can keep their cities—and their casinos—running.<sup>143</sup>

Some lawmakers have argued that casino communities should “feel the pain” of falling casino revenues, but the pain may be too intense for those local government units that have become dependent on the stable tax disbursements that pay for their essential government services.<sup>144</sup> The current formula in HEA 1350, which allows for decreased hold-harmless distributions, has put pressure on casino communities to encourage business and increase casino revenues in any way they can.<sup>145</sup> By getting rid of the revenue sharing disbursement and boosting the hold-harmless disbursement to \$81 million, casino communities will have additional money to invest in economic development and put themselves in a position to become less reliant on casino taxes.<sup>146</sup>

2. *Eliminate the Hold-Harmless Distribution Cap.*—HEA 1350 requires hold-harmless distributions to be lowered in the event adjusted gross receipts fall below the FY 2020 base year revenue, but it does not share any upside with

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136. See Frye, *supra* note 1; see also Colombo, *supra* note 4.

137. Colombo, *supra* note 4.

138. *Id.*

139. See *id.*

140. Frye, *supra* note 1.

141. See Frye, *supra* note 1; see also Lange, *supra* note 113.

142. See IND. GAMING COMM'N, *supra* note 45, at 6.

143. See Lange, *supra* note 113; see also Coordes & Reilly, *supra* note 1, at 548-49.

144. Colombo, *supra* note 4.

145. See Pub. L. No. 268-2017, § 35, 2017 Ind. Acts 3769, 3799-07 (codified as IND. CODE § 4-33-13-5 (2018)).

146. Colombo, *supra* note 4.



casino communities when tax revenues exceed the new base year revenue.<sup>147</sup> In fact, under changes made by HEA 1350, hold-harmless disbursements can never exceed \$48 million, even if adjusted gross receipts rose above the new FY 2020 base year revenue.<sup>148</sup> To increase the fairness of the hold-harmless distributions, the General Assembly should remove the distribution cap. Removal of the hold-harmless distribution cap not only would inject fairness into the disbursement system, but might also spur casino communities to coordinate their efforts with the casinos to reap economic success.<sup>149</sup> Accordingly, Indiana lawmakers should add a “carrot” to HEA 1350’s “stick.”

Fairness suggests that casino communities—cities and counties that will pay the price of gaming tax revenue decreases—should reap the benefits when adjusted gross receipts rise above FY 2020 levels.<sup>150</sup> Casino communities also have a vested interest in the success of casinos and should not be disincentivized by the hold-harmless distribution cap: if lawmakers remove the cap and adjusted gross receipts rise above FY 2020 levels, casino communities could use the extra hold-harmless money to pay for projects and programs that promote municipal health and growth.<sup>151</sup> Furthermore, if the law allowed for increased hold-harmless distributions when adjusted gross receipts rise above the FY 2020 base year revenue, local governments could protect their coffers from depletion by placing the unplanned, increased revenue in an emergency fund.<sup>152</sup>

#### *B. Encourage Investment and Increase Profitability Through Targeted Tax Benefits*

Although modifying the hold-harmless and revenue sharing distributions will provide direct financial benefits to casino communities, Indiana lawmakers should also enact targeted tax provisions to directly encourage casinos to invest in amenities and other property upgrades—investments that would boost casino profitability. Specifically, the General Assembly should re-enact the short-term tax incentive given to casinos to move from a riverboat to an inland location. In addition, Indiana lawmakers should remove the limitation on “free play” deductions to encourage casinos to increase marketing efforts and business investment.

*1. Encourage Inland Casino Development.*—Although legislators crafted HEA 1350 to attract more casino business and spur investment in the state, a temporary tax incentive for moving a riverboat casino inland prematurely expired.<sup>153</sup> Specifically, the special tax treatment given to casinos that moved to an inland location expired just seven months after HEA 1350 became law, and

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147. See § 35, 2017 Ind. Acts at 3799.

148. *Id.*

149. See generally Colombo, *supra* note 4.

150. See § 35, 2017 Ind. Acts at 3799. See generally Burnett, *supra* note 126.

151. See generally Frye, *supra* note 1.

152. See generally *id.*

153. Colombo, *supra* note 4.

Tropicana Evansville was the only casino in the state that benefited from it.<sup>154</sup> The tax incentive provided to casinos that moved to an inland location included favorable Supplemental Wagering Tax rates and an exemption from having to pay Admissions Taxes.<sup>155</sup> Nonetheless, by providing a favorable 3% Supplemental Wagering Tax rate without a time limitation, the General Assembly would directly encourage new economic development.<sup>156</sup> Indeed, Tropicana Evansville's grand opening demonstrates the big benefits that both casino operators and casino communities can enjoy.<sup>157</sup> For instance, casino revenue and taxes from Tropicana Evansville grew substantially in the first few months after relocation to an inland location, and the casino provided the community with two new restaurants, a nightclub, and a new entertainment experience for people interested in having a good time.<sup>158</sup>

Lynn Strickland, Tropicana Evansville's Revenue Manager, said she remembered the crowds and the excitement when the first riverboat opened in Evansville, noting that crowds at the new inland casino were just as excited.<sup>159</sup> "People [were] lining up out front all morning," Strickland said, adding "in a way, [Tropicana Evansville's opening was] even more exciting because [of] the glitz and glam. We had it on the boat, but it [does not] compare to this."<sup>160</sup> Moreover, Tony Rodio of Tropicana Entertainment explained that as more casinos open around the country, there is a growing emphasis on adding non-gaming amenities to appeal to a broader number of customers.<sup>161</sup> "Gaming has really proliferated across the country," Rodio said, and "it's critical to diversify the experience and offer more than just slot machines and table games."<sup>162</sup> If legislators amended the law to provide a favorable Supplemental Wagering Tax for all casinos that moved to an inland location, Indiana could directly encourage investment like that experienced in Evansville.

2. *Increase the Free Play Deduction Cap.*—Indiana law provides a tax incentive to promote casino marketing by allowing casinos to deduct the value of free play game vouchers from taxable revenue.<sup>163</sup> Free play vouchers are, in effect, free money a casino gives away to attract new business from potential customers that can only be used at the casino.<sup>164</sup> For example, if someone

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154. See Pub. L. No. 268-2017, § 25, 2017 Ind. Acts 3769, 3784-85 (codified as IND. CODE § 4-33-12-1 (2018)); See also *Evansville Casino*, *supra* note 82.

155. See *Evansville Casino*, *supra* note 82; see also § 25, 2017 Ind. Acts at 3784-85.

156. See § 25, 2017 Ind. Acts at 3784-85.

157. See Martin, *supra* note 86.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Zack Osowski, *Legislators Want to Further Study Casinos' Free Play Promotions*, IND. ECON. DIG. (Nov. 3, 2014), <http://indianaeconomicdigest.com/main.asp?SectionID=31&subsectionID=135&articleID=76996> [https://perma.cc/BRD6-JA72].

164. *Id.*

received a \$25 free play voucher from Horseshoe Hammond Casino, the recipient could only use the voucher for gambling at that casino.<sup>165</sup> But if the customer won anything, he or she could cash out those winnings, and the casino would not require repayment of the voucher amount.<sup>166</sup>

Casino owners agree that free play promotions get customers in the door, who then tend to stay and spend more money in the casino.<sup>167</sup> Conservative estimates found that casinos make about \$3 for every \$1 they give away on free play, which amounts to a 300% return on investment.<sup>168</sup> Indiana taxes casinos on the value of free play vouchers over \$7 million at a single property, but states like Ohio, Pennsylvania, and Nevada do not tax free play values at all.<sup>169</sup>

Free play vouchers expand the tax base by generating incremental wagering activity and gaming trips.<sup>170</sup> More trips equal more wins, and free play voucher promotions help create loyal customers who, in turn, visit the casino more often.<sup>171</sup> But policy restrictions related to the deductibility of free play promotions could diminish the ability of Indiana casino operators to compete with casinos in other states.<sup>172</sup> Indiana has discouraged free play promotions by prohibiting over \$7 million in free play deductions, causing Indiana casino operators to suffer a competitive disadvantage relative to casinos in neighboring states that do not tax free play voucher values.<sup>173</sup> Since Indiana's casinos have restrictions on free play promotion deductions, they risk losing customers to out-of-state casinos that can use greater marketing promotions and increased free play activity.<sup>174</sup> In fact, Indiana casino operators, especially those near the Ohio border, acknowledge that this has put them at a competitive disadvantage.<sup>175</sup> An interim study committee that studied the fiscal impact of providing casinos with free play voucher tax deductions found that these deductions would lower the tax revenue paid to state and local entities.<sup>176</sup> Nonetheless, providing a tax deduction would encourage

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165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. See Anthony F. Lucas & Katherine Spilde, *The Free-Play Tax Deduction Debate: How Academic Research Can Help*, 21 UNLV GAMING RES. & REV. J. 25, 28 (2017) (Free play vouchers are not treated as revenue in Ohio, value of free-play vouchers are not treated as revenue in Pennsylvania, value of free-play not included in gross revenue calculations in Massachusetts, and value of free-play not treated as revenue in Nevada); see also Pub. L. No. 255-2015, § 19, 2015 Ind. Acts 4222, 4250 (codified as IND. CODE § 4-33-13-7 (2018)) (increased the free play deduction from \$5 million to \$7 million).

170. Lucas & Spilde, *supra* note 169, at 29-30.

171. *Id.*

172. See *id.* at 28.

173. See Osowski, *supra* note 163; see also Lucas & Spilde, *supra* note 169, at 28.

174. See Lucas & Spilde, *supra* note 169, at 30-31.

175. Osowski, *supra* note 163.

176. *Id.*

greater use of free play promotions.<sup>177</sup> In addition, customers brought in by free play vouchers stand to spend money at the buffet or restaurant, stay the night at the casino hotel, and enjoy the other non-gaming amenities available to them.<sup>178</sup>

In 2015, the Indiana General Assembly increased the amount of free play deductions casinos can deduct from \$5 million to \$7 million.<sup>179</sup> To further incentivize marketing tactics and revenue growth, though, Indiana lawmakers should increase the free play deduction cap to \$10 million or more. An increase of the free play deduction cap provides incentives for casinos to give out more free play vouchers, increasing the amount of money they receive from new customers.<sup>180</sup> Encouraging greater use of this proven marketing method is appropriately targeted to fulfill one of the legislature's purposes in passing HEA 1350: to increase economic development.<sup>181</sup> Accordingly, casinos should be able to deduct more to boost revenues in this increasingly competitive market.

*C. Form a Legislative Committee to Study the Impact of Tribal Gaming in Indiana*

Finally, the Indiana General Assembly should form a legislative study committee to research the impact of Indiana's first tribal casino. Although the Indiana General Assembly paved the way for tribal gaming regulation and administrative guidelines in 2015, Indiana lawmakers could have done more by researching the impact of tribal casinos on Indiana's private casinos.<sup>182</sup> Before lawmakers passed HEA 1350, several reports stated that tribal casinos would not have to pay state taxes and would shift customers away from Indiana's private casinos.<sup>183</sup> But even though HEA 1350 amended many gaming laws, Indiana lawmakers missed an important opportunity to include provisions to research and minimize any detriments created by the impact of tribal gaming in Indiana.<sup>184</sup>

In January 2018, the Pokagon band of Potawatomi ("Pokagon tribe") opened the Four Winds South Bend, its first casino in Indiana.<sup>185</sup> Before opening up Four Winds South Bend, the Pokagon tribe had already built a large casino and two

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177. *See id.*

178. *See generally* Martin, *supra* note 86.

179. *See* Pub. L. No. 255-2015, § 19, 2015 Ind. Acts 4222, 4250 (codified as IND. CODE § 4-33-13-7 (2018)).

180. *See* Osowski, *supra* note 163.

181. *Id.*

182. *See generally* Pub. L. No. 255-2015, § 1, 2015 Ind. Acts 4222, 4222-24 (codified as IND. CODE §§ 4-29-1 to -3 (2018)).

183. *See* Andrew Steele, *Plans for South Bend Casino Move Forward*, NWI.COM (Aug. 1, 2016), [http://www.nwitimes.com/business/gambling/plans-for-south-bend-casino-move-forward/article\\_27271561-1b0b-5872-80ad-7b315e17d034.html](http://www.nwitimes.com/business/gambling/plans-for-south-bend-casino-move-forward/article_27271561-1b0b-5872-80ad-7b315e17d034.html) [<https://perma.cc/T8BL-FRT6>]; *see also* Karen Caffarini, *Report: Capital Investment Key to Indiana Casino Success*, CHI. TRIB. (Dec. 16, 2016), <http://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-casino-competition-st-1218-20161216-story.html> [<https://perma.cc/2RQX-VBQV>].

184. *See generally* Pub. L. No. 268-2017, 2017 Ind. Acts 3769.

185. Lange, *supra* note 113.

other smaller satellite casinos in Michigan.<sup>186</sup> When the tribe opened its Four Winds casino in New Buffalo, Michigan, the casino immediately began to siphon customers away from the nearby Blue Chip Casino in Michigan City, Indiana.<sup>187</sup> After just one year of operations at Four Winds New Buffalo, Michigan City's Blue Chip Casino had "cut 165 employees and lost \$58 million in revenue."<sup>188</sup> And after the grand opening of Four Winds South Bend, state officials and the Indiana casino industry are bracing for an even bigger impact.<sup>189</sup> Because the tribal casino will likely drain even more business away from nearby private casinos, Indiana could potentially lose millions of dollars in casino tax revenue because tribal casinos are not subject to state taxes.<sup>190</sup> "Nobody (in Indiana) has dealt with this before," said Ed Feigenbaum, editor of the Indiana Gaming Insight newsletter, adding that "[i]t's going to be a game changer, and it's going to be particularly bad news for Blue Chip in Michigan City."<sup>191</sup>

Currently, no other Native American tribe has been able to meet the criteria to open a casino in Indiana.<sup>192</sup> To open a casino, a tribe must be federally recognized and be approved for a land grant by the federal government.<sup>193</sup> In 1994, the federal government finally recognized the Pokagon tribe after decades of tribal reaffirmation.<sup>194</sup> Tribe chairman John Warren explained the importance of his tribe opening a casino in Indiana: "It's the first time in 200 years in Indiana that [the state will] actually have Indian country . . . . And we're very proud of that."<sup>195</sup> Since Congress passed the Indian Gaming Regulatory Act in 1988,<sup>196</sup> tribal gaming has exploded to a record \$31.6 billion revenue high in 2016.<sup>197</sup> "Twenty-eight states already have tribal gaming, according to the National Indian Gaming Commission," and although the Pokagon tribe has broken new ground in a state that had never had tribal gaming, the new Four Winds South Bend casino may put Indiana's casinos "in a difficult position."<sup>198</sup>

The Indian Gaming Regulatory Act gave tribal communities the ability to open Class II gaming casinos—permitting any gaming short of live table games and certain slot machines—on their land without state approval.<sup>199</sup> Nonetheless, to be good neighbors, Indian tribes with casinos generally negotiate agreements with state and local governments by making payments in lieu of taxes

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186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. See 25 U.S.C. §§ 2701-2721.

197. Lange, *supra* note 113.

198. *Id.*

199. *Id.*

(“PILOTs”).<sup>200</sup> Currently, the Pokagon tribe has an agreement with South Bend to pay the city \$400,000 for water and sewer services, pay up to \$5 million toward community development over the next five years, and pay at least \$2 million towards the city’s budget.<sup>201</sup> “The tribe was [within] their rights to go forward with gaming with or without us,” South Bend Mayor Pete Buttigieg said, adding that “[o]ur stance has always been that we are supportive, provided that this can be set up in a way that this is a net win for the community.”<sup>202</sup> Moreover, the State could authorize the Pokagon tribe to offer live tables games in their casino in exchange for a similar state PILOT.<sup>203</sup> In Michigan, for example, the Pokagon tribe paid the state \$19.4 million and provided local government units \$6.1 million for its New Buffalo and satellite casinos in 2016.<sup>204</sup> Any increase in tribal gaming competes with the casinos that already pay taxes in Indiana, and Indiana could greatly benefit from a PILOT agreement between the State and the Pokagon tribe.<sup>205</sup> As a result, the Indiana General Assembly should form a legislative study committee to review the impact of tribal gaming in Indiana and find ways to minimize any detriments. State officials and casino operators are just beginning to navigate this uncharted territory. And although it missed an opportunity to do so in HEA 1350, the State should now study and find solutions to any problems tribal gaming may create for the state’s casinos and falling casino tax revenues.<sup>206</sup>

#### CONCLUSION

HEA 1350 amended the gaming tax landscape for Indiana casinos to fulfill the goals of reducing casinos’ tax burdens, encouraging economic growth, and easing some of the administrative burdens of running a casino.<sup>207</sup> Indiana casino operators have universally stated their support for repealing the Admission Tax, replacing it with a Supplemental Wagering Tax, and phasing out the RWT addback requirement.<sup>208</sup> But the passage of HEA 1350 decreases casino tax revenues by millions of dollars annually that previously was paid into the State

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200. See *id.*; see also Mark J. Cowan, *Nonprofits and the Sales and Use Tax*, 9 FLA. TAX REV. 1077, 1187 (2010) (arguing that organizations that benefit from government expenses should be required to pay payments in lieu of taxes (PILOTs) to the government to pay for the governmental services that it uses); Kevin Allen, *South Bend, Pokagon Band Reach Agreements Related to Casino Project*, SOUTH BEND TRIB. (Mar. 26, 2016), [https://www.southbendtribune.com/news/local/south-bend-pokagon-band-reach-agreements-related-to-casino-project/article\\_6e2f14f6-f0fc-11e5-bf0b-4bf1365a3744.html](https://www.southbendtribune.com/news/local/south-bend-pokagon-band-reach-agreements-related-to-casino-project/article_6e2f14f6-f0fc-11e5-bf0b-4bf1365a3744.html) [<https://perma.cc/3RS4-9TVA>] (outlining agreements Pokagon tribe made with South Bend to pay payments in lieu of property taxes).

201. Lange, *supra* note 113.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. Caffarini, *supra* note 79.

208. *Id.*

General Fund, to state agencies, and to local municipalities statewide.<sup>209</sup> This decrease in tax revenue could reduce local government services provided to residents of small Indiana communities that have become dependent on these dollars to pay for schools, roads, and emergency services.<sup>210</sup>

This Note argues that, although HEA 1350's tax amendments will benefit casinos, the harm to local municipalities overshadows the benefits to Indiana's casinos. This conclusion is supported by published statements of local officials and other authorities indicating that several casino communities already are scrambling to find other ways to pay for police and fire protection, water and sewage treatment, bond payments, and other essential government services.<sup>211</sup> Further, the amendments that allow a reduction to hold-harmless distributions in FY 2021 do not benefit Indiana's casinos and, therefore, seem like punishments to cities and counties with casinos.<sup>212</sup> In sum, although HEA 1350 provided tax benefits to Indiana's casinos, Indiana lawmakers failed to curtail the negative impact on casino communities when it created a formula to reduce previously guaranteed distributions.

The Indiana General Assembly should protect the tax base distributed to local casino communities by shifting the revenue sharing dollars to the hold-harmless distribution. Equally important, Indiana lawmakers should fully vest these communities in the fortunes of their casino industries not only by allowing hold-harmless distributions to fall when casino revenues are down, but also by allowing them to share in the winnings by lifting the hold-harmless distribution cap. Furthermore, Indiana lawmakers should directly encourage economic development and increase competitive success through targeted tax incentives: providing a temporary Supplemental Wagering Tax for all casinos moving to an inland location and raising the current \$7 million free play deduction cap. Finally, Indiana lawmakers should create a legislative study committee to study the impact of the Four Winds South Bend casino, Indiana's first tribal casino. These changes will reverse HEA 1350's detrimental effect on Indiana's casino counties while simultaneously boosting the Indiana casino industry's profitability and competitiveness. And that is a bet everyone can feel comfortable placing.

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209. *See generally* FISCAL IMPACT STATEMENT, *supra* note 14.

210. Frye, *supra* note 1.

211. Colombo, *supra* note 4.

212. *See* Caffarini, *supra* note 79; *see also* IND. GAMING COMM'N, *supra* note 45, at 6.