

# FINANCIAL IMPACT ESTIMATING CONFERENCE

## **COMPLETE INITIATIVE FINANCIAL INFORMATION STATEMENT: VOTER CONTROL OF GAMBLING IN FLORIDA (15-22)**

### **SUMMARY OF INITIATIVE FINANCIAL INFORMATION STATEMENT**

The proposed amendment would prohibit certain activities defined as “casino gambling” unless they are authorized by a constitutional amendment approved by voters through the citizens’ initiative petition process. The proposed amendment is not expected to affect the authority of the state to enter into compacts addressing gambling on tribal lands pursuant to the Federal Indian Gaming Regulatory Act.

- The amendment’s impact on state and local government revenues, if any, cannot be determined at this time because there are a number of uncertainties regarding the effect of the amendment on currently authorized gambling activities which have not been authorized pursuant to a citizens’ initiative. The primary uncertainty is whether the amendment’s effects will be prospective only or also retrospective. In this context, the term “prospective” means that the casino gambling activities that have been authorized prior to the effective date of the amendment will not be affected. The term “retrospective” means that casino gambling activities authorized at the time the amendment is adopted will have to cease unless they have been authorized pursuant to a citizens’ initiative.
- Further uncertainties exist regarding the extent to which currently authorized casino gambling activities may be affected by the amendment. Ongoing litigation and administrative hearings complicate the determination of what types of casino gambling activities would be “currently authorized” as of the effective date of the amendment.
- There is no revenue impact if the amendment is deemed to be only prospective in its application. The revenue impact, if any, would come from a retrospective application of the amendment which de-authorizes certain gambling operations or games that are currently subject to taxes or fees. To the extent this occurs, behavioral changes that lead to the shifting of one type of gambling activity for another taxable activity would mitigate the loss.
- The amendment does not directly require or prohibit an expenditure by state or local government, but there may be an indirect effect from its implementation. If the amendment is determined to have only a prospective application, it will have no impact on anticipated government costs. However, if it is determined that the amendment de-authorizes certain gambling operations or games that are currently allowed, costs of regulating casino gambling activities may be reduced, and the loss of tax revenues may cause some appropriations reductions.

### **FINANCIAL IMPACT STATEMENT**

The amendment’s impact on state and local government revenues and costs, if any, cannot be determined at this time because of its unknown effect on gambling operations that have not been approved by voters through a constitutional amendment proposed by a citizens’ initiative petition process.

## **SUBSTANTIVE ANALYSIS**

### **A. Proposed Amendment**

#### **Ballot Title:**

Voter Control of Gambling in Florida

#### **Ballot Summary:**

This amendment ensures that Florida voters shall have the exclusive right to decide whether to authorize casino gambling by requiring that in order for casino gambling to be authorized under Florida law, it must be approved by Florida voters pursuant to Article XI, Section 3 of the Florida Constitution. Affects articles X and XI. Defines casino gambling and clarifies that this amendment does not conflict with federal law regarding state/tribal compacts.

#### **Proposed Amendment to the Florida Constitution:**

The amendment proposes to add new Section 29 to Article X as follows:

Voter Control of Gambling in Florida.

(a) This amendment ensures that Florida voters shall have the exclusive right to decide whether to authorize casino gambling in the State of Florida. This amendment requires a vote by citizens' initiative pursuant to Article XI, section 3, in order for casino gambling to be authorized under Florida law. This section amends this Article; and also affects Article XI, by making citizens' initiatives the exclusive method of authorizing casino gambling.

(b) As used in this section, "casino gambling" means any of the types of games typically found in casinos and that are within the definition of Class III gaming in the Federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"), and in 25 C.F.R. §502.4, upon adoption of this amendment, and any that are added to such definition of Class III gaming in the future. This includes, but is not limited to, any house banking game, including but not limited to card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games); any player-banked game that simulates a house banking game, such as California blackjack; casino games such as roulette, craps, and keno; any slot machines as defined in 15 U.S.C.1171 (a)(1); and any other game not authorized by Article X, section 15, whether or not defined as a slot machine, in which outcomes are determined by random number generator or are similarly assigned randomly, such as instant or historical racing. As used herein, "casino gambling" includes any electronic gambling devices, simulated gambling devices, video lottery devices, internet sweepstakes devices, and any other form of electronic or electromechanical facsimiles of any game of chance, slot machine, or casino-style game, regardless of how such devices are defined under IGRA. As used herein, "casino gambling" does not include pari-mutuel wagering on horse racing, dog racing, or jai alai exhibitions. For purposes of this section, "gambling" and "gaming" are synonymous.

(c) Nothing herein shall be deemed to limit the right of the Legislature to exercise its authority through general law to restrict, regulate, or tax any gaming or gambling activities. In addition, nothing herein shall be construed to limit the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act for the conduct of casino gambling on tribal lands, or to affect any existing gambling on tribal lands pursuant to compacts executed by the state and Native American tribes pursuant to IGRA.

(d) This section is effective upon approval by the voters, is self-executing, and no Legislative implementation is required.

(e) If any part of this section is held invalid for any reason, the remaining portion or portions shall be severed from the invalid portion and given the fullest possible force and effect.

## **B. Effective Date**

By its own terms, the proposed amendment becomes effective upon approval by the voters. The election will be held November 6, 2018.

## **C. Substantive Effect of Proposed Amendment**

The proposed amendment would prohibit certain activities defined as “casino gambling” unless authorized by a constitutional amendment approved by voters through the citizens’ initiative petition process. The proposed amendment is not expected to affect the authority of the state to enter into compacts addressing gambling on tribal lands pursuant to the Federal Indian Gaming Regulatory Act.

## **D. Background**

### *Sponsor of the Proposed Amendment*

Voters in Charge is the organization sponsoring the proposed amendment.

### *Division of Pari-Mutuel Wagering*

Pari-mutuel wagering is regulated by the Division of Pari-Mutuel Wagering (division) in the Department of Business and Professional Regulation (DBPR). The division has regulatory oversight of permitted and licensed pari-mutuel wagering facilities, cardrooms at pari-mutuel facilities located throughout the state, and slot machines at pari-mutuel facilities located in Miami-Dade and Broward counties.<sup>1</sup>

### *Slot Machines*

Slot machines are currently authorized at 8 pari-mutuel facilities located in Miami-Dade and Broward counties. Taxes are imposed at a rate of 35% on slot machine net win revenues. All slot machine tax revenues are deposited to the Educational Enhancement Trust Fund (EETF). Each facility must also pay an annual license fee of \$2.0 million to cover the division’s expenses. Any unappropriated funds in excess of those necessary for incurred obligations and subsequent year cash flow needs are transferred to the General Revenue Fund.<sup>2</sup> In addition, slot machine licensees must pay an annual regulatory fee of \$250,000 to the division to fund the compulsive or addictive gambling prevention program. The following table provides estimated slot machine tax revenues by facility and in total by fiscal year.

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<sup>1</sup> Senate Bill Analysis for SB7072, February 2016.

<sup>2</sup> Section 550.135(3), F.S.

**Slot Machine Tax Revenues, Fiscal Years 2014-15 through 2020-21**

	Gulf Stream	Mardi Gras	Pompano	Magic City		Miami		Hialeah	Dania	Total
				Flagler	Calder	Jai-Alai				
2014-15	17.2	16.8	50.6	28.0	25.8	19.9	22.4	1.3	182.2	
2015-16	16.4	16.0	53.2	29.8	25.6	21.4	23.8	4.8	191.0	
2016-17	14.1	13.2	53.8	30.2	24.2	21.6	24.4	13.9	195.4	
2017-18	14.3	13.3	55.3	30.6	24.5	21.8	24.8	14.1	198.7	
2018-19	14.4	13.5	56.4	30.9	24.9	22.0	25.2	14.3	201.5	
2019-20	14.6	13.6	57.5	31.3	25.2	22.2	25.6	14.5	204.4	
2020-21	14.7	13.7	58.6	31.6	25.6	22.4	25.9	14.7	207.2	

Source: Slot Machine Tax Revenues December 2015 Revenue Estimating Conference. Fiscal Year 2014-15 actual revenues; Fiscal Year 2015-16 through 2020-21 estimated revenues.

Pari-mutuel facilities that operate slot machine gaming are governed by ch. 551, F.S. Eligible facilities are defined to include:

1. Any licensed pari-mutuel facility located in Miami-Dade County or Broward County existing at the time of adoption of s. 23, Art. X of the State Constitution that has conducted live racing or games during calendar years 2002 and 2003 and has been approved by a majority of voters in a countywide referendum to have slot machines at such facility in the respective county;
2. Any licensed pari-mutuel facility located within a county as defined in s. 125.011, F.S., provided such facility has conducted live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter; or
3. Any licensed pari-mutuel facility in any other county in which a majority of voters have approved slot machines at such facilities in a countywide referendum held pursuant to a statutory or constitutional authorization after the effective date of this section in the respective county, provided such facility has conducted a full schedule of live racing for 2 consecutive calendar years immediately preceding its application for a slot machine license, pays the required license fee, and meets the other requirements of this chapter.

Seven pari-mutuel facilities obtained eligibility through constitutional approval - the first clause above. An additional pari-mutuel facility, Hialeah Park, was ineligible as it had not operated live racing or games during 2002 and 2003. It obtained eligibility through the second clause. No facilities have obtained eligibility through the third clause; however, it has been subject to competing interpretations. Stakeholders and counties have argued that the phrase "after the effective date of this section" applies to "a countywide referendum held" - so any county could authorize slot machines relying on their general authority to hold referenda. Based on this interpretation, Brevard, Gadsden, Lee, Palm Beach, Hamilton and Washington counties, have approved slot machines at pari-mutuel facilities by referendum. The Attorney General rejected this interpretation, arguing that the phrase "after the effective date of this section" modified the phrase "a statutory or constitutional authorization" so counties could not rely on their general authority to hold referenda, instead needing a specific authorization to hold a referendum on the question of slot machines.<sup>3</sup>

There is currently ongoing litigation regarding the authorization of slot machines outside of Miami-Dade and Broward counties.<sup>4</sup> Specifically, Gretna Racing, LLC contends that it is authorized to operate slot machines in Gadsden County because voters approved slot machine gaming in a countywide referendum in 2012. The Florida Supreme Court is set to hear oral arguments for this case on June 7, 2016. The decision in this case

<sup>3</sup> House Bill Analysis for HB1233, April 2015. Also see 2012-01 Fla. Op. Att’y Gen. (2012).

<sup>4</sup> *Gretna Racing, LLC, v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering*, 178 So. 3d 15 (Fla. 1<sup>st</sup> DCA 2015), *on appeal* (Fla. SC15-1929 filed October 20, 2015).

will have implications for the future of gaming in Florida and whether or not non-tribal slot machine gaming could expand beyond the two counties where it is authorized today. In addition to Gadsden County, the five other counties in Florida that have also approved slot machines pursuant to countywide referenda would be affected by the court decision.

In presentations to the conference, Voters in Charge stated that the intent of the proposed amendment is to clarify the original intent of the Constitution. Therefore, they believe that there would be no impact to slot machine activity at the seven pari-mutuel facilities in Miami-Dade and Broward counties that were approved pursuant to the 2004 citizens' initiative. However, the sponsor reported that there would be an impact to the slots facility in Hialeah because it was authorized by statute and not by citizens' initiative.

In addition, according to the sponsor's testimony, the proposed amendment would prohibit non-tribal casino gambling at any location in the state, unless approved by citizens' initiative pursuant to Article XI, Section 3 of the Florida Constitution.

### *Cardrooms, Designated Player Games, and Player-Banked Games*

Section 849.086, F.S., authorizes cardrooms at licensed pari-mutuel facilities and defines authorized games as poker and dominoes. In order for a cardroom license to be renewed the applicant must have requested, as part of its pari-mutuel annual license application, to conduct at least 90 percent of the total number of live performances conducted by such permitholder during either the state fiscal year in which its initial cardroom license was issued or the state fiscal year immediately prior thereto if the permitholder ran at least a full schedule of live racing or games in the prior year.

After rulemaking proceedings in 2013 and 2014, DBPR adopted amended administrative rules regarding cardrooms. Rule 61D-11.001(17), F.A.C., defines the term "designated player" to mean the player identified by the button as the player in the dealer position. Rule 61D-11.002(5), F.A.C., addresses rules for designated player games:

Card games that utilize a designated player that covers other players' wagers shall be governed by the cardroom operator's house rules. The house rules shall:

- (a) establish uniform requirements to be a designated player;
- (b) ensure that the dealer button rotates around the card table in a clockwise fashion on a hand by hand basis to provide each player desiring to be the designated player an equal opportunity to participate as the designated player; and
- (c) not require the designated player to cover all potential wagers.

After the 2014 rule was adopted, designated player games wherein the designated player acted as the bank (player-banked games) were offered by cardroom operators. According to DBPR, designated player games do not include player-banked games. Although the department has provided notice that player-banked games are not authorized, some cardrooms may still be offering the games.

In 2015, DBPR pursued additional rulemaking "to address issues discovered in the implementation and practical application of cardroom rules adopted on July 21, 2014." The proposed rule amendments delete Rules 61D-11.001(17) and 61D-11.002(5), quoted above.

Several pari-mutuel facilities challenged the proposed rule amendments and are currently scheduled for final hearing before the Division of Administrative Hearings (DOAH).<sup>5</sup> Additionally, DBPR filed administrative complaints against several facilities for conducting unauthorized gaming. These complaints are also currently being challenged.<sup>6</sup>

### *Classes of Gaming*

The Federal Indian Gaming Regulatory Act (IGRA) defines Class I, Class II, and Class III Gaming as follows:

- Class I Gaming – social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.
- Class II Gaming – the game of chance commonly known as bingo, whether or not it is electronic; and card games that are explicitly authorized by the laws of the State, or are not explicitly prohibited by the laws of the State and are played at any location in the State. Class II Gaming does NOT include any banking card games, including baccarat, chemin de fer, or blackjack, or electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
- Class III Gaming – all forms of gaming that are not Class I or Class II gaming.

The 2010 Indian Gaming Compact defines Class II and Class III Games consistent with IGRA and further provides that “Covered Games” include the following Class III gaming activity: slot machines, banked card games, raffles and drawings, and any new game authorized by Florida law for any purpose. The 2010 Compact provides that the Tribe is authorized to operate covered games with exclusivity, with the exception of the slot machines authorized to operate at pari-mutuel facilities in Miami-Dade and Broward County.

The proposed amendment “ensures that Florida voters shall have the exclusive right to decide whether to authorize casino gambling” in Florida and defines “casino gambling”, in part, as any type of game typically found in casinos within the IGRA definition of Class III Gaming. The amendment specifies that casino gambling includes, but is not limited to, any house banking game; any player-banked game; casino games such as roulette, craps, and keno; slot machines; instant racing machines; and historical racing machines. These portions of the definition appear to be consistent with Class III Gaming as contemplated in IGRA and the 2010 Indian Gaming Compact. However, the amendment further specifies that “casino gambling” also includes any electronic bingo devices, simulated gambling devices, video lottery devices, internet sweepstakes devices, and any other form of electronic game of chance, slot machine, or casino-style game, regardless of how such devices are defined under IGRA. Voters in Charge reported that the intent of the proposed amendment is to prohibit Class III Games and any games that imitate Class III Games that have not been authorized pursuant to a citizens’ initiative.

### *Indian Gaming Compact*

The 2010 Indian Gaming Compact provides substantial exclusivity of certain Class III gaming to the Seminole Tribe while also requiring revenue sharing with the state. The Tribe was required to make a minimum guaranteed payment for each of the first five years of the Compact unless 12 percent of Net Win produced a larger amount, in which case a true-up payment was also required. Fiscal Year 2014-15 was the last year of

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<sup>5</sup> The rule challenges involve the following DOAH cases, which have been consolidated: 15-007010RP through 15-007016RP, and 15-007022RP. There was another petition that was originally part of the consolidated group, case number 15-007055RP; however, it was voluntarily dismissed. The hearing on the remaining cases is scheduled for July 2016.

<sup>6</sup> The eleven complaints have been consolidated into two groups: case numbers 16-001504 through 16-001509 have been consolidated with case number 16-001839, and is set for hearing in late May and early June 2016; and case numbers 16-001008 through 16-001011 have been consolidated and are currently being held in abeyance.

the minimum guarantee payment period. True-up payments were generated in fiscal years 2012-13, 2013-14, and 2014-15, which means that revenue sharing exceeded the minimum guarantee. The 2010 Compact has a term of 20 years and will expire in its entirety in 2030. However, authorization for banked card games expired July 31, 2015. The Compact states that if the banked card games provision expires, the Tribe will cease revenue share payments for all gaming activity in Broward County. From the expiration date, the Tribe had a 90-day grace period in which to terminate operation of banked card games; however, the Tribe has continued to operate those games. While the Tribe is still remitting revenue sharing associated with the banked card games, those dollars are not included in the state's official forecast.<sup>7</sup> The current forecast for Indian Gaming Revenues is provided in the table below.

**Indian Gaming Revenues, Fiscal Years 2014-15 through 2020-21**

	<u>Receipts</u>	Local <u>Distribution</u>	General <u>Revenue</u>
2014-15	255.6	7.1	248.5
2015-16	215.4	7.7	207.7
2016-17	126.2	6.3	119.9
2017-18	124.4	3.7	120.7
2018-19	126.4	3.7	122.6
2019-20	128.3	3.8	124.5
2020-21	130.3	3.9	126.5

Source: Indian Gaming Revenues, December 2015 Revenue Estimating Conference

Note: FY15-16 includes revenues from banked card games during the 90-day grace period.

A proposed 2015 Compact was signed by the Governor on December 7, 2015, but was not ratified by the Legislature during the 2016 Regular Session. The proposed 2015 Compact would have reinstated the authority to operate banked card games at the 5 facilities that are currently operating banked card games and extended the authorization to two other facilities for the entire term of the new compact which would have ended in 2036. The proposed 2015 Compact also would have allowed all seven of the Tribe's facilities to operate live table games such as craps and roulette.

The proposed 2015 Compact also established a Guarantee Payment Period that is defined as the seven-year period beginning July 1, 2017, and ending June 30, 2024. During the Guarantee Payment Period, the Tribe would make payments as specified ranging from \$325 million in the first year to \$550 million in the last year, for a total of \$3 billion. At the end of the seven-year period, a true-up payment would be required if the amount due using the revenue share rates and brackets outlined in the 2015 Compact would have generated more than \$3 billion. The proposed 2015 Compact also established an Initial Payment Period defined as the period beginning on the effective date of the Compact and ending June 30, 2017. During the Initial Payment Period, revenue share rates and brackets that are the same as the ones in the 2010 Compact would be used to determine payments to the state.

The proposed 2015 Compact also outlined exceptions to the exclusivity provided to the Tribe that would not have negative impacts on revenue sharing, such as: one additional slot machine facility in both Miami-Dade and Palm Beach counties, blackjack at slots facilities in Miami-Dade and Broward counties under certain circumstances, a reduction in the tax rate for pari-mutuels to as low as 25% of slot machine revenue, and decoupling slots from other pari-mutuel activities such as greyhound racing, horse racing, and jai alai.

<sup>7</sup> The authority of the Tribe to operate banked card games is currently being litigated. *Seminole Tribe v. State*, No. 4:15cv516-RH/CAS (N.D. Fla. May 13, 2016).

According to the sponsor, the proposed amendment is not intended to conflict with the 2010 Compact and therefore would not have an impact on revenue sharing payments. The proposed amendment permits the negotiation of gaming compacts pursuant to IGRA to allow Class III Gaming in Tribal facilities.

#### *Department of Lottery*

In November 1986, voters approved an amendment to the Florida Constitution (Article X, Section 15) providing for a state-operated lottery. Chapter 24, F.S., implements the state operated lottery. The Department of Lottery was created during the 1987 Regular Legislative Session, and the state lottery officially began selling tickets on January 12, 1988. The Lottery operates both instant ticket games (scratch-off) and terminal games and is required to determine prize percentages that maximize education funding. After prizes and administrative expenses are paid from total collections, the remainder is deposited into the Educational Enhancement Trust Fund (EETF).<sup>8</sup>

Based on the plain language of the proposed amendment and according to the sponsor, the proposed amendment will not affect any game the state can operate lawfully under Article X, Section 15.

#### *Department of Agriculture and Consumer Services*

The Division of Consumer Services within the Department of Agriculture and Consumer Services (DACS) is the state's clearinghouse for consumer complaints, information, and protection. DACS regulates game promotions and sweepstakes in Florida. A game promotion or sweepstakes is a marketing technique designed to induce consumers to purchase a product or service. The prizes in legitimate game promotions in Florida must be awarded solely by chance, and contestants must not be required to pay a fee or make a purchase to enter or increase their odds of winning. DACS registers legitimate game promotions, and provides assistance to consumers harmed by fraudulent game promotions. According to DACS, the proposed amendment would not have a fiscal impact on these types of games.

### **E. Financial Impact of Proposed Amendment**

Section 100.371(5)(a), F.S., requires that the Financial Impact Estimating Conference "...complete an analysis and financial impact statement to be placed on the ballot of the estimated increase or decrease in any revenues or costs to state or local governments resulting from the proposed initiative."

As part of determining the fiscal impact of this proposed amendment, the Conference held five public meetings:

- Public Workshop on April 27, 2016
- Principals' Workshop on May 4, 2016
- Formal Conference on May 12, 2016
- Formal Conference on May 17, 2016
- Formal Conference on May 18, 2016

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<sup>8</sup> 2016 Tax Handbook

*Requested Information from State Entities and Other Organizations*

<b>Presenter</b>	<b>Date</b>	<b>Summary of Information</b>
Department of Business and Professional Regulation (DBPR)	May 4 <sup>th</sup>	The department has taken the position that player-banked games are prohibited by statute. The department is uncertain of the effect the proposed amendment might have on the operation of slot machines at Hialeah.
Department of Lottery (DOL)	May 3 <sup>rd</sup>	The department does not think the proposed amendment will have any impact on its current operations or any of its planned operations.*
Department of Agriculture and Consumer Services (DACCS)	May 3 <sup>rd</sup>	The proposed amendment does not appear to directly impact the department's regulation of game promotions.*
Voters in Charge	April 27 <sup>th</sup> and May 4 <sup>th</sup>	The sponsor indicated that there would be no impact to live racing; jai-alai; cardrooms; or slot machines at the seven pari-mutuel facilities in Miami-Dade and Broward counties that were approved pursuant to the 2004 citizens' initiative. The sponsor believes that the proposed amendment would effectively de-authorize slot machines at Hialeah, but that there would not be an overall loss in state revenue as a result because the money spent on slot machine gaming at Hialeah would be spent either on other gaming or some other taxable item or activity in the state.

\*E-mails dated May 3, 2016 on file with the Office of Economic and Demographic Research (EDR).

Neither the League of Cities nor the Association of Counties provided comments regarding the proposed amendment.

***Revenues***

The proposed amendment's impact on state and local government revenues, if any, cannot be determined at this time because there are a number of uncertainties regarding the effect of the amendment on currently authorized<sup>9</sup> gambling activities which have not been authorized pursuant to a citizens' initiative. The primary uncertainty is whether the proposed amendment's effects will be prospective<sup>10</sup> only or also retrospective<sup>11</sup>. Further uncertainties exist regarding the extent to which other currently authorized casino gambling activities may be affected by the proposed amendment. These issues are discussed below.

<sup>9</sup> This discussion is limited to those casino gambling activities that are currently authorized. However, the proposed amendment will not be before the voters until November, 2018. Therefore, other authorized gambling activities not known today may also be affected by the proposed amendment.

<sup>10</sup> In this context, prospective means it will not affect those casino gambling activities that have been previously authorized.

<sup>11</sup> In this context, retrospective means casino gambling activities that are authorized at the time the amendment is adopted will have to cease, unless they have been previously authorized pursuant to a citizens' initiative petition.

## Prospective v. Retrospective

The FIEC has concluded that it cannot determine whether the proposed amendment will have a prospective or retrospective effect because its effect on “casino gambling” authorized in Florida prior to November 2018 by means other than citizens’ initiative is not clear.

When determining the effect of a new constitutional provision on existing statutes where the intent is unclear, courts resort to rules of statutory construction and consider several legal principles. Among these are:

- Amendments to the constitution generally are prospective in operation, and if neither the provision, nor the ballot statement, manifest any intent that an amendment is to be applied retroactively, it will be given prospective effect only. See *State v. Lavazzoli*, 434 So. 2d 321, 323 (Fla. 1983). This rule applies with particular force to those instances where retrospective operation of the law would impair or destroy existing rights. *Trustees of Tufts College v. Triple R. Ranch, Inc.*, 275 So.2d 521 (Fla.1973).
- In considering the effect of constitutional amendments upon existing statutes, the rule is that the statute will continue in effect unless it is completely inconsistent with the plain terms of the Constitution. *In re Advisory Opinion to the Governor*, 132 So. 2d 163, 169 (Fla. 1961). A statute in force when a constitutional amendment is adopted ordinarily is not affected by it unless the new constitution or the new amendment is clearly and irreconcilably in conflict with the statute. In such case, the statute may be regarded as repealed by the constitutional provision by implication. *Am. Jur. 2d, Constitutional Law § 50*.
- Implied repeals of statutes by later constitutional provisions are not favored. To effect a repeal by implication, the inconsistency between existing legislation and a new constitutional provision must be irreconcilable, that is, the inconsistency must be obvious, clear, and strong. Such a statute cannot be upheld if it is opposed to the plain terms of the new constitution if the statute is inconsistent with the full operation of its provisions. Otherwise, the statute will be deemed to be still in force and effect. In making the determination whether there is a conflict between a preexisting statute and a new constitutional provision so that the statute is repealed by implication, a court will presume in favor of the constitutionality of the statute until the contrary clearly appears and will, if possible, construe a statute so as to render it valid. The repeal must be plain and unambiguous. *Am. Jur. 2d, Constitutional Law § 51*.

The first sentence of subsection (a) of the proposed amendment reads: “[t]his amendment ensures that Florida voters **shall have** the exclusive right to decide whether **to authorize** casino gambling in the State of Florida.” (emphasis supplied) It does not say: “[t]his amendment ensures that only casino gambling that has been authorized by the voters is allowed in Florida.” The use of the phrases “shall have” and “to authorize” could be read to be prospective only, allowing a court to decide that the adoption of the proposed constitutional amendment does not conflict with, or upset, the current statutory scheme. These phrases are also present in the Ballot Summary.

The second sentence of subsection (a), reads: “[t]his amendment requires a vote by citizens’ initiative pursuant to Article XI, Section 3, in order for casino gambling **to be authorized** under Florida law.” (emphasis supplied) One particular phrase appears to be crucial: “to be authorized.” The phrase is not defined. One plausible interpretation is that in order “to be authorized” means in order for such authority to exist under Florida law, it “requires a vote by citizens’ initiative...” A court could simply read that sentence and decide that in order to be authorized under Florida law, casino gambling must be approved by citizens’ initiative and to the extent that a statute provided otherwise, a conflict exists that cannot be reconciled. However, a reasonable person could

also read that sentence together with the first sentence and conclude that there is insufficient clarity regarding an intent to create a conflict with existing statutory provisions and therefore find that such a conflict does not legally exist.

A court trying to determine the effect of the proposed amendment on existing statutes would be faced with parsing these sentences and determining the meaning of words individually and together. Trying to anticipate what a court will decide here is fraught with uncertainty. In the end, the effect of the adoption of the proposed amendment on the operation of slot machines and other casino gambling not authorized by citizens' initiative will depend upon the actions, or inactions, of multiple parties, including the Legislature<sup>12</sup>, the Department of Business and Professional Regulation, parties with standing to challenge such actions or inactions, and ultimately the courts.

Depending on these outcomes, the amendment may or may not have a financial impact.

#### 1. Prospective – No financial impact

If the amendment is ultimately determined to be prospective only, there will be no financial impact on state and local governments. Gambling activities authorized prior to the amendment's adoption and their associated revenues will continue as if the amendment had not been adopted.

#### 2. Retrospective – Financial impact cannot be determined

If the amendment is ultimately determined to be retrospective, the amendment will have an impact on state and local government revenues. However, a probable financial impact cannot be determined because whether certain casino gambling activities are currently authorized is not clear.

The FIEC has identified four activities that may be affected if the proposed amendment has a retrospective effect. These are discussed below. There will be varying degrees of substitution associated with the losses identified for each of the activities. For example, research shows that the vast majority of the net win generated by casinos (the amount typically retained by the casino after prizes and certain promotional activities are paid) comes from a limited number of frequent players.<sup>13,14</sup> The most recent literature indicates that as much as 90% of the net win is generated by just 10% of the players; this is referred to as "revenue concentration." Given this research, it is probable that de-authorizing certain gambling operations or games will result in substantial shifting of dollars previously spent on that activity to another game or gambling operation that acts as a viable substitute--both in type and proximity. To the extent this substitution occurs, there would be no revenue loss to the state. To the extent that current players shift away from spending on gambling, there may be revenue losses. Since many of these players would then make other taxable purchases with their entertainment dollars, the ultimate loss would reflect only the incremental difference between the tax rates (e.g., the applicable tax rate on gambling versus the tax on sales).

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<sup>12</sup> Legislative construction of a constitutional provision is entitled to great weight (see *Amos v. Moseley*, 74 Fla. 555, 77 So. 619 (1917)) and a contemporaneous construction of the Constitution by the Legislature is strongly presumed to be correct. *Am. Bankers Ins. Co. v. Chiles*, 675 So. 2d 922, 923 (Fla. 1996) The Legislature may or may not amend or adopt statutes implementing the constitutional amendment. If it does, and if a court finds the constitutional language susceptible to two different meanings, the meaning adopted by the Legislature is conclusive. See *Vinales v. State*, 394 So. 2d 993 (Fla. 1981).

<sup>13</sup> J.W. Welte et al., *The Relationship of Ecological and Geographic Factors to Gambling Behavior and Pathology*, 20 J. Gambling Studies 405 (2004).

<sup>14</sup> Richard A. LaBrie et al., *Inside the Virtual Casino: A Prospective Longitudinal Study of Actual Internet Casino Gambling*, 18 Eur. J. Public Health 410 (2008).

a. Hialeah Park Slots Facility. As discussed in section “D. Background” of this document, the authorization for the Hialeah Park slots facility was granted by law and not pursuant to a citizens’ initiative petition. Therefore, if the Hialeah Park slots facilities cannot continue to operate, state revenues are expected to be reduced by an indeterminate amount due to the loss of slot machine tax revenues, \$2.0 million from the loss of the annual license fee and the \$250,000 compulsive gambling fee currently paid by Hialeah Park.

b. Player-Banked Card Games. As discussed in section “D. Background,” the status of player-banked card games at cardrooms is the subject of administrative hearings before the DOAH. Player-banked games are specifically included in the proposed amendment as casino gambling that would be prohibited unless authorized pursuant to a citizens’ initiative petition. The state has received revenues from the operation of these games at licensed cardrooms.

DBPR’s interpretation of s. 849.086, F.S., is that the statute does not authorize player-banked games. Cardroom operators argue that these types of games are authorized by the statute.

If player-banked card games are ultimately determined to be allowed under s. 849.086, F.S., the state will lose an indeterminate amount of revenue if the proposed amendment is adopted. If player-banked card games are ultimately determined to not be allowed under s. 849.086, F.S., there will be no fiscal impact if the proposed amendment is adopted.

c. Electronic Table Games. Electronic Table Games are games played on a computer screen that simulate casino-style table games like blackjack, roulette, craps, and baccarat. Some forms of these games are considered slot machines in Florida and are authorized for play at facilities that have slots licenses.

Since slot machines were authorized in seven pari-mutuel facilities pursuant to a citizens’ initiative, it would appear that electronic table games that are considered slot machines would also be authorized in those seven facilities and not be affected by the proposed amendment.

However, the proposed amendment contains the following language: “As used herein, ‘casino gambling’ includes any electronic gambling devices, simulated gambling devices, video lottery devices, internet sweepstakes devices, and any other form of electronic or electromechanical facsimiles of any game of chance, slot machine, or casino-style game, regardless of how such devices are defined under IGRA.” This language appears to make a distinction between slot machines and casino-style games. If this distinction is recognized and electronic casino-style games are determined to be something different from slot machines, the proposed amendment will have an indeterminate fiscal impact due to the loss of revenues from electronic table games, since these games have not been authorized pursuant to a citizens’ initiative.

d. Gretna Racing and Other Potential Slots Facilities. As discussed in section “D. Background,” the decision in *Gretna Racing, LLC*, is currently on appeal before the Florida Supreme Court.

If the Court rules that Gretna Racing, LLC is not entitled to a slots license, the proposed amendment will not have a fiscal impact. However, if the Court rules that Gretna Racing, LLC is entitled to a slots license, the proposed amendment will have a fiscal impact due to the loss of revenues from slot machine taxes (assuming that slots are operated at the facility before November, 2018), since these slots machines would not have been authorized by a citizens’ initiative. In addition to Gretna Racing, LLC there are other pari-mutuel facilities that could be similarly affected.

## *Effect on Indian Gaming Compacts*

The proposed amendment is expected to affect neither the 2010 Indian Gaming Compact nor any other compact that may be entered into and ratified in the future, including the 2015 Compact signed by the Governor but not ratified by the Legislature. In particular, the continuing authority of the state to enter into compacts is readily apparent in the amendment language. Also preserved is the authority of the state to allow casino gambling on tribal lands that may be otherwise prohibited by the proposed amendment outside of tribal lands.

The amendment, in part, provides:

“Nothing herein shall be construed to limit the ability of the state or Native American tribes to negotiate gaming compacts pursuant to the Federal Indian Gaming Regulatory Act for the conduct of casino gambling on tribal lands, or to affect any existing gambling on tribal lands pursuant to compacts executed by the state and Native American tribes pursuant to IGRA.”

The Federal Indian Gaming Regulatory Act (IGRA) and related case law allow states to grant authority to conduct types of class III gaming on tribal lands beyond those types otherwise allowed on non-tribal lands.<sup>15</sup> For example, the Florida Legislature made an exception to a general statutory prohibition against gambling by specifically authorizing the Seminole Tribe to conduct certain banked card games for purposes of the IGRA and the 2010 Indian Gaming Compact.<sup>16</sup> Since the proposed amendment is explicit that its provisions will not limit negotiation of gaming compacts pursuant to IGRA, the amendment is not expected to constrain the state in determining the types of class III gaming that may be conducted on tribal lands pursuant to a compact.

### **Costs**

The amendment does not directly require or prohibit an expenditure by state or local government, but there may be an indirect effect from its implementation. If the amendment is determined to have only a prospective application, it will have no impact on anticipated government costs. However, if it is determined that the amendment de-authorizes certain gambling operations or games that are currently allowed, costs of regulating casino gambling activities may be reduced, and the loss of tax revenues may cause some appropriations reductions.

First, there may be regulatory cost reductions to the state budget. Since regulatory costs are currently funded by the associated license fees, the budgetary reduction would have little to no practical effect on other government expenditures since the removal of regulatory costs that are no longer necessary would occur in tandem with the loss of the fees.

Second, to the extent that any tax revenues from slot machine activity are lost (see the discussion above), funds currently available for state education expenditures may be reduced by a minimal amount. It is unknown whether a future Legislature would shift funds from other purposes to replace this loss. In either of these cases, the total budget would be smaller than it would have been in the amendment's absence.

Third, any revenue loss from player-banked games would affect the state's general revenue and trust funds as well as local government distributions. This would have a small impact on expenditures.

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<sup>15</sup> See 25 U.S.C. § 2710(d)(1). See also *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 720 (9th Cir. 2003); *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 489, 687 S.E.2d 690, 696 (2009).

<sup>16</sup> See Chapter 849, Florida Statutes, for general gambling prohibitions. See ss. 285.710(13) and (14), Florida Statutes, for class III gaming authority for the 2010 Indian Gaming Compact.

### ***Effect on Future Legislatures***

If the effect of the proposed amendment is determined to be prospective, it will limit the Legislature's ability to raise revenues by expanding casino gambling activities after the passage of the amendment. However, if the amendment is determined to have a retrospective application, it would ultimately nullify any actions taken by the Legislature prior to November 2018 that run counter to the amendment.