Outfoxed or Conning Ourselves? Balancing Accountability, Business, and Fiscal Interests in Location-Based Tax Incentive Deals

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I. INTRODUCTION

In 2017, Wisconsin solidified the largest location-based tax incentive package in the United States involving a foreign corporation. The deal gives Taiwan-based Foxconn approximately $4 billion in location-based tax incentives over 15 years, including $2.85 billion in cash incentives from the State of Wisconsin and another $700 million in TIF incentives from Racine County. While the deal is large, Wisconsin is not alone in its aggressive posture. States like Michigan, Indiana, Ohio, and North Carolina also offered large deals, with Michigan technically offering $800 million more than Wisconsin, and Ohio rumored to have pitched a similarly sized package as Michigan.[1] The enormity of the total deal was even comparable to the total incentives offered to Amazon for its second headquarters by New York and Virginia[2]—the culmination of a multi-state pitch and intensely watched competition.[3] However, as details of the project have developed, the deal has come under intense scrutiny and criticism, not only for the price of Foxconn's economic impact, but also the company's changing strategy and reduction in promises. While Wisconsin's politicians continue to battle over the wisdom of the deal, the incentive package itself prompts several questions: Was this deal truly a bust? Did the state do enough to protect itself if the deal goes sideways? In the end, was this worth it for Wisconsin and Racine County?

This Note will posit, through a comparison of three state approaches to location-based tax incentives, that larger location-based tax incentives will be a net-drain on state and local economies if there is no yardstick for success and no clear-cut mechanism for recouping or limiting those incentives when a firm has failed to deliver on their promises. If states intend to engage in tax incentive deals to lure new businesses to the state, there must be a reasonable balance between fiscal responsibility and the desire to create jobs.

In Part II, this Note will review the landscape of economic development tax credits across the nation, highlight different methods of accountability, and briefly outline the legislation and contract authorizing the Foxconn tax credit package itself. In Part III, the Note will analyze how Wisconsin, Ohio, and Michigan (all states that were in the running for the plant) structure their tax-credits and other location-based incentive accountability measures, and will use the Foxconn deal as a lens through which to view their success. Finally, in Part IV, the Note will recommend a series of actions that could help restore the balance of interests between businesses and the state.

II. BACKGROUND

While estimates of the amount of economic development tax incentives and grants are hard to calculate on a national scale, an analysis from 2002 estimated state and local

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1. Jason Stein, *Michigan Offered Foxconn $3.8 Billion for Flat-Screen Plant, Still Lost to Wisconsin's $3 Billion Bid*, MILWAUKEE J. SENTINEL (Oct. 19, 2017, 12:32 PM), https://www.jsonline.com/story/news/politics/2017/10/19/michigan-offered-foxconn-3-8-b-flat-screen-plant-still-lost-wisconsins-3-b-bid/772803001/.

2. Rich Kirchen, *Did Wisconsin Overpay for Foxconn in Light of Amazon HQ2 Incentives?*, MILWAUKEE BUS. J. (Nov. 16, 2018, 2:00 PM), https://www.bizjournals.com/milwaukee/news/2018/11/16/did-wisconsin-overpay-for-foxconn-in-light-of.html.

3. *See* Kaya Yurieff, *Amazon Received 238 Proposals for Second Headquarters*, CNN BUS. (Oct. 23, 2017, 11:30 AM), http://money.cnn.com/2017/10/23/technology/amazon-hq2-proposals-update/index.html (noting the nationwide competition for Amazon HQ2 headquarters included hundreds of proposals).

governments gave out $50 billion annually.[4] A more recent *N.Y. Times* accounting of state and local incentives put that number higher, having accounted for $80.4 billion worth of tax and grant incentives nationwide in 2012. Michigan, Wisconsin, and Ohio accounted for almost 15% of that amount.[5] That same report found 48 companies that received more than $100 million a year in incentives through one or more grants.[6] No matter the set of numbers, analysts have said that the number of tax incentive programs appear to have increased "substantially over the last 20 years."[7] While some of the reasons for state adoption may relate to effectiveness, some analysts theorize that the increase is due to the political effectiveness of the deals and the assumption by the public that government incentives helped bring work to the region.[8]

While states have doled out tax incentives for business relocation since the late 19th century, scrutiny of those incentives and their effectiveness has ramped up considerably in the last 25 years.[9] At least 40 states have developed job-creation tax credits, many enacted following the economic downturn of 2008.[10]

At the same time, observers have criticized the efficacy and accountability of those programs.[11] Some experts and taxpayers have gone even further, scrutinizing location-based programs as possibly conflicting with the dormant commerce clause.[12] Those who want to end incentives argue they create a "bidding war" among states and municipalities vying for business relocation or retention, others have argued that many of the tax credit programs fail to produce an adequate return for state and local governments simply because state and local governments do not attempt to hold the companies accountable for their promises.[13] Divergent views on the tax incentive efficacy have led some to suggest different models for ensuring accountability. While some have advocated ending tax incentives altogether through legal action or collaboration, this Note recognizes the

4. Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. AM. PLAN. ASS'N 27, 28 (2004).

5. Louise Story et al., *United States of Subsidies: Explore the Data*, N.Y. TIMES, http://archive.nytimes.com/www.nytimes.com/interactive/2012/12/01/us/government-incentives.html (last visited Oct. 3, 2017).

6. *Id.*

7. *Economic Development Tax Incentives: Frequently Asked Questions*, PEW CHARITABLE TR., http://www.pewtrusts.org/en/projects/economic-development-tax-incentives/frequently-asked-questions (last visited Oct. 3, 2017).

8. *See* Jennifer L. Gilbert, *Selling the City Without Selling Out: New Legislation on Development Incentives Emphasizes Accountability*, 27 URB. LAW. 427, 436–38 (1995) (noting that some politicians may offer the deals despite a lack of effectiveness because of the perception it creates among voters).

9. *See id.* at 427–29 (noting that state governors in the mid-90s were more likely to ask for proof of return on investment than their counterparts in the mid-80s); Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97, 102 (2000) (detailing examples of how economic development deals have not realized their full potential).

10. *Job Creation Tax Credits – 50 State Table*, NAT'L CONF. ST. LEGISLATORS, http://www.ncsl.org/research/financial-services-and-commerce/job-creation-tax-credits.aspx (last visited Oct. 1, 2017).

11. *See generally* Weber, *supra* note 9.

12. *See generally* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998) (arguing for an evaluation of when business subsidies may be impermissibly discriminatory on interstate commerce).

13. *See, e.g.*, Kary L. Moss, *The Privatizing of Public Wealth*, 23 FORDHAM URB. L. J. 101, 108–09 (1995); Ernest Sternberg, *Why Firm-Specific Subsidies Don't Work*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 347, 353–55 (1996).

unlikelihood of that outcome and will thus focus on accountability measures to balance competing state and business needs.

This Part will first focus on two generalized theories for ensuring accountability: 1) proactive measures designed to ensure compliance (such as requiring eligible companies to meet certain requirements before receiving credits or disclosing details of their use of the credits) and 2) reactive measures, termed "clawbacks" or "recapture," designed to force business to return funds if they later fail to meet their obligations for job creation, capital investment, or other standards set either in the contract or by state statute. Next, this Note will detail the outline of the three programs being compared: Wisconsin's specifically tailored statute and contract for Foxconn, which led to their relocation, Ohio's Job Creation Tax Credit, which was used for retaining larger firms in the past, and Michigan's Good Jobs Tax legislation, which was a portion of the package the state planned to offer Foxconn.

A. Proactive Accountability Measures

Several states have enacted statutes that require companies to meet specific qualifications before receiving tax credits or grants.[14] Some programs, such as historic rehabilitation tax credits and Enterprise Zone Tax Credits, may be couched as so-called "entitlement credits," which are automatically awarded upon meeting some qualification from the state.[15] The state may also create "discretionary" credits that put further qualifications on credits, such as that a program cannot move forward without the credits.[16] However, in larger deals, the State Legislature may need to pass a separate incentive package where the state amends statutes to accommodate the size of the credit. In this case, the state may draft a separate agreement between a company and the state to enforce the terms of relocation.[17] In either case, states usually require companies to reach a threshold of job creation, capital investment, wage rates for workers, or other metrics for economic development.[18]

In other instances, states may adopt one of two types of disclosure requirements: Either the state publishes information on the amount, use, and return on certain firm-specific incentives or the firm is required to submit information to the state to verify its compliance with goals outlined in their contract.[19]

Those seeking to strengthen economic development credits have touted such accountability measures, but critics have suggested these measures are rarely specific enough to ensure accountability. Some critics have pointed out that many of the accountability measures depend on self-reporting standards by the company—which the state doling out the credits does not always independently verify.[20]

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14. *See* WASH. ST. INST. PUB. POL'Y, ECONOMIC DEVELOPMENT ACCOUNTABILITY LAWS 1 (2004), http://www.wsipp.wa.gov/ReportFile/857/Wsipp_Economic-Development-Accountability-Laws_Full-Report.pdf (describing accountability measures states have enacted for companies that are given incentives).

15. Geoffrey J. Troan & Janette M. Lohman, *Best Practices for Obtaining and Evaluating Credits and Incentives*, 24 J. MULTISTATE TAX'N & INCENTIVES 6, 9 (2014).

16. *Id.*

17. *Id.* at 4.

18. *See* WASH. ST. INST. PUB. POL'Y, *supra* note 14.

19. *Id.*

20. *See* PHILIP MATTERA, ET. AL., MONEY-BACK GUARANTEES FOR TAXPAYERS: CLAWBACKS AND OTHER ENFORCEMENT SAFEGUARDS IN STATE ECONOMIC DEVELOPMENT SUBSIDY PROGRAMS, GOOD JOBS FIRST 13 (2012), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/moneyback_0.pdf (detailing 67

Even those programs which try to balance the needs of the business while maintaining the tax base may not "properly measure externalities"—they may enact safeguards without ever evaluating whether the tax incentive package actually brings the resultant boon to the economy and local tax base that lawmakers and the companies receiving the funds have promised.[21] Several states have taken note of this line of criticism and implemented provisions to track how effective incentives create jobs and boost economic growth.[22] However, as a 2017 Pew Charitable Trusts Report on state-by-state plans noted, only about 10 states could describe their evaluation systems as "rigorous," and no states met that standard three years prior.[23]

B. Reactive Accountability Measures

While proactive measures may halt the flow of tax credits to a company until it complies with statutory or contract qualifications, some states may add a reactive component termed "clawbacks" that take back funds already awarded to the company.[24] While other penalties may cut a company off from future tax funds or revise the amount of tax incentives available later on, clawbacks can retrieve money already delivered to the company.[25] A review of state tax incentive programs by Good Jobs Now found that most state programs that have penalties associated with noncompliance include clawback provisions.[26] However, not all of those clawback provisions are automatic, and many have provisions that allow companies to keep the funds under certain extenuating circumstances, or if they resume compliance.[27]

Critics seeking added accountability for the incentives point to clawbacks as the best solution for ensuring a proper return on state incentive packages.[28] If a company does not meet its obligations, the money a state gave them can be retrieved, ensuring a company does not abscond with funds it has not earned. However, some states have been unable to clawback significant amounts of funds from companies because of the target company's bankruptcy.[29] Other observers say that some tax incentive programs, and the clawbacks built into those programs, run into problems defining what "counts" as job creation and how long the jobs should be retained to earn credits.[30] Furthermore, the state may simply

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programs over 27 states that do not have independent verification of firm-submitted numbers needed to earn tax incentives).

21. Matthew Schaefer, *State Investment Attraction Subsidy Wars Resulting from a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response*, 28 N.M. L. REV. 303, 336–37 (1998).

22. PEW CHARITABLE TR., HOW STATES ARE IMPROVING TAX INCENTIVES FOR JOBS AND GROWTH 1 (2017), http://www.pewtrusts.org/~/media/assets/2017/05/edti_how_states_are_improving_tax_incentives_for_jobs_and_growth.pdf?la=en [hereinafter PEW REPORT].

23. *Id.*

24. WASH. ST. INST. PUB. POL'Y, *supra* note 14.

25. MATTERA, *supra* note 20, at 16.

26. *Id.* at 17.

27. *Id.*

28. *See id.* at 4.

29. Gabrielle Gurley, *Can Cities and States "Clawback" Their Economic Development Advantages?*, AM. PROSPECT (Apr. 25, 2016), http://prospect.org/article/can-cities-and-states-%E2%80%9Cclawback%E2%80%9D-their-economic-development-advantages.

30. Adam M. Zaretsky, *Are States Giving Away the Store? Attracting Jobs Can Be a Costly Adventure*, FED. RES. BANK ST. LOUIS (Jan. 1994), https://www.stlouisfed.org/publications/regional-economist/january-

have the discretion to enforce the clawback provisions and hold off on full implementation to keep the company in the state so it can still meet the economic goals of the project.[31] Some clawbacks not written into statutes, however, can be negotiated through contracts with the state to avoid unfairness and take unanticipated events into account.[32] Furthermore, at least some experts advising businesses counsel firms to accept clawbacks if proposed, but to mitigate their effect by reaching an equilibrium for both the state and the company.[33]

It is not surprising that one of the biggest critics of clawbacks are the firms requesting such tax incentives, which may view them as unfair.[34] While companies should not have a "windfall" as a result of pulling out of a project, the argument goes, they should not be penalized in total for failing to reach the finish line when there are less drastic methods for recouping an investment, and in some cases the investment has produced identifiable benefits.[35] However, the fear businesses may have over clawbacks extends to government. While some businesses may be unable to avoid clawback provisions in certain states, they will be advised to avoid the impact of clawback provisions if at all possible.[36] States might be dissuaded from pursuing them simply because the logic behind business development necessitates a certain amount of risk that states have to swallow when offering such deals.[37] Furthermore, to compensate for that perceived risk to a company looking to relocate, a state offering those incentives may feel pressured to offer a larger incentive package to remain competitive among other states' offers.[38]

C. Wisconsin's Foxconn Pitch and Legislation

In early 2017, Taiwan-based technology firm Foxconn, known most widely for its production of Apple's iPhone, announced it planned to build a manufacturing plant in the United States that could create tens of thousands of jobs and result in billions of dollars in capital investment.[39] While several states pitched incentive packages totaling anywhere

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1994/are-states-giving-away-the-store-attracting-jobs-can-be-a-costly-adventure.

31. *See* Jacob Bundrick, *Why Financial Incentives for Businesses Put Taxpayers at Risk*, U. CENT. ARK. (Sept. 13, 2016), http://uca.edu/acre/2016/09/13/why-financial-incentives-for-businesses-put-taxpayers-at-risk/ (highlighting a case of an incentive package for HP where the company failed to produce the required number of jobs, but the state only clawed back a percentage of the subsidy and created a new agreement that encouraged the company to "continue hiring more people") (citations omitted).

32. *See* Gilbert, *supra* note 8, at 453 n.114 (noting that states may use clawbacks as part of negotiating tactics, highlighting the case of Indiana using clawback language to negotiate a better deal).

33. *See* Barry Pisano, *Minimum Qualification Thresholds and Managing Your Economic Development Incentive Program*, 22 J. MULTISTATE TAX'N & INCENTIVES 1, 6–8 (June 2012).

34. Scott M. Susko, Owens-Brockway*,* VWS*, and the Problem of 100% Clawbacks After Partial Performance of Economic Development Incentive Agreements*, 25 J. MULTISTATE TAX'N & INCENTIVES 43, 44 (2015).

35. *See id.*

36. Pisano, *supra* note 33, at 6–8.

37. *See* William Fulton, *The Clawback Clause*, GOVERNING (Oct. 2002), http://www.governing.com/columns/eco-engines/Clawback-Clause.html (detailing the pros and cons of states inserting clawback measures into their tax incentive programs).

38. *See*, *e.g.*, HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS: "GOOD JOBS FOR MICHIGAN" PROGRAM (2017), http://www.legislature.mi.gov/documents/2017-2018/billanalysis/House/pdf/2017-HLA-0242-A21AB8A8.pdf (noting that tax incentive packages have become a competitive necessity among states and that Michigan's lack of them puts it at a disadvantage) [hereinafter "GOOD JOBS FOR MICHIGAN" ANALYSIS].

39. Reuters, *Foxconn Considering Building Plant in U.S.*, N.Y. TIMES (Jan. 22, 2017)

from $550 million into the billions, the state of Wisconsin eventually reached an agreement with Foxconn to locate in Southeastern Wisconsin for a package of approximately three billion dollars in state incentives.[40] While Foxconn reached an agreement in principle to locate there, invest around ten billion dollars in capital, and create at least 3000 jobs to start, the package required separate legislative changes. The Wisconsin Legislature approved that package in a "special session" months after the agreement was reached.[41]

2017 Wisconsin Act 57 greenlit the Foxconn deal by creating an electronics and information technology manufacturing zone,[42] a tax credit program based off of the state's Enterprise Zone tax credit program, that ties tax credits to certified job creation and capital investment.[43] The Act would allow the state to deliver tax credits equal to 17% of Foxconn's payroll expenditures and 15% of its significant capital expenditures, which could cap out at about $2.85 billion over 15 years.[44] Aside from specifying that the company cannot recover tax credits for activities outside the state, the bill says WEDC "shall revoke certification" for the tax credits if the company falsifies data, leaves the zone (a physical area where they would initially base their operations) to conduct "substantially" the same activity outside of the zone, or ceases activities for 12 months.[45] However, there is nothing in the language of the Act that specifies whether that revocation is temporary or permanent.[46] Furthermore, while the statute allows for WEDC to claw back funds for a year in which it failed to meet its job creation and capital investment obligations, it ties those obligations to the agreement made between the state and Foxconn and specifies no further clawbacks beyond that year.[47] WEDC is also required to verify the company's job and capital investment numbers, but the Act does not specify how, except that it is subject to an annual evaluation of its verification process by the Legislative Audit Bureau for five years.[48]

The contract itself, signed between WEDC and SIO International Wisconsin, Inc., a holding company for Foxconn, laid out similar clawback language to the recently passed law.[49] However, it also specified a schedule for both doling out the tax credits and for clawbacks in the event of specific defaults.[50] More specifically, the contract places different ceilings on the money that could be clawed back for a failure to provide the

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https://www.nytimes.com/2017/01/22/business/foxconn-might-build-plant-in-us.html.

40. Stein, *supra* note 1.

41. August 2017 Engrossed Assembly Bill 1, https://docs.legis.wisconsin.gov/2017/related/proposals/au7_ab1-engrossed.pdf.

42. *Id.*

43. *Enterprise Zone Tax Credits*, WIS. ECON. DEV. CORP., https://wedc.org/programs-and-resources/enterprise-zone-tax-credit/ (last visited Feb. 7, 2019).

44. DEP'T OF REVENUE, FISCAL ESTIMATE – 2017 SESSION, LRB 17-4050/1, 2, https://docs.legis.wisconsin.gov/2017/related/fe/au7_ab1/au7_ab1_DOR.pdf.

45. WIS. STAT. § 238.396(4) (2018).

46. *Id.*

47. WIS. STAT. § 238.396(4)(b) (2018).

48. WIS. STAT. § 238.396(4)(fm); WIS. STAT. § 13.94(1)(u).

49. *See* ELECTRONICS AND INFORMATION TECHNOLOGY MANUFACTURING ZONE TAX CREDIT AGREEMENT BETWEEN THE WISCONSIN ECONOMIC DEVELOPMENT CORPORATION AND SIO INTERNATIONAL WISCONSIN, INC., FEWI DEVELOPMENT CORPORATION, AND AFE, INC., SIGNED NOV. 9, 2017, 13–15 [hereinafter FOXCONN CONTRACT] (detailing default provisions in the event of leaving the Enterprise Zone to conduct business elsewhere, providing false information, ceasing operations for a year or failing to meet job credit standards).

50. *Id.* at 24, 26.

number of contracted jobs as opposed to all other default provisions.[51] The maximum amount the contract would clawback in the event of total default would be $965 million, an amount that declines steadily after 2025 to only $386 million in the contract's last year.[52] The contract anticipates a similar drop with clawbacks solely from a failure to meet a minimum of 6500 jobs, which is half the end goal of 13,000 jobs.[53] Further, the contract specifies that while Foxconn would be responsible for 75% of the clawbacks, Foxconn CEO Terry Gou and the SIO Holding company would be responsible for the remainder.[54] The contract also requires the company to provide financial records and, notably, a copy of its unemployment numbers and wages.[55]

As such, the amount the state is left with depends on when and how the company defaults. For example, if the company were to meet the maximum job creation and capital investment targets for the first five years, but ceases operations starting in its sixth year, the state could claw back about 95% of its credits. But if the same default were to occur at the end of its 15-year period, the state could only recover 14%—and only 25% of that amount would be guaranteed by a third party.[56]

D. Ohio's Jobs Tax Credit

Because Ohio has not yet made public any of its overtures to Foxconn, it is unclear how any proposal might have been structured and whether it would have taken advantage of existing statutory programs. However, Ohio has used its Job Creation Tax Credit to lure large companies before, offering General Electric 85% refundable credits through the program to create new jobs in the state and transfer some workers from other sites to a new location.[57]

1. Ohio's Accountability Mechanism

In contrast to Wisconsin's statutory language for its tax credit system, Ohio has a much more defined system for clawbacks and accountability. Ohio's statutes governing the state's job creation tax credits and grants allow clawbacks in a number of scenarios and may require either a percentage of the credit to be paid back or may require payment subject to the state's discretion.[58] For instance, all companies earning the credit are required to stay

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51. *Id.* at 26.

52. *Id.*

53. *Id.* at 25–26. Despite the 6500 job threshold, the contract gives the company 180 days to cure the job creation default. However, Foxconn can also carryforward up to 3000 jobs in excess of the minimum set in earlier years to fill gaps in later year. For example, Foxconn could create 6000 jobs starting in 2020, where the target listed in the clawback schedule is 1300 jobs. However, if the company remained at that level when the threshold raised to 6500 jobs in 2024, the company could carryforward 500 jobs for six straight years to avoid any default.

54. *See* FOXCONN CONTRACT, *supra* note 49, at 26.

55. *Id.* at 18.

56. Calculations are based on assumption that maximum total award had been given up to the point of default. For instance, if default occurred after first five years of job creation and capital investment, Foxconn would earn approximately $1.01 billion in credits, subject to a $965 million clawback. A default in the last year, where approximately $2.72 billion, would be subject to only a $385 million clawback.

57. Chelsey Levingston, *This Company Just Received Ohio's Most Valuable Tax Credit in 10 Years*, DAYTON DAILY NEWS (July 6, 2014), https://www.daytondailynews.com/news/this-company-just-received-ohio-most-valuable-tax-credit-years/yym5OMcPt2zKaSbEAh3zlL/.

58. *See generally* OHIO REV. CODE ANN. § 122.17 (West 2017).

in the state for either seven years or three years beyond the timeframe in which they receive the credits.[59] If a company leaves before the credits have been fully delivered, the state may recoup all of the tax credits.[60] If, however, the company leaves before the three years after the credit has been delivered, the state may only recoup 75% of the credit.[61] Other statutory provisions give the state discretion to clawback whatever amount it chooses in the event a company fails to "substantially" meet its job creation obligations under the tax credit agreement.[62]

Ohio still allows a business to limit clawbacks if it can successfully argue that the job creation shortfall was the result of "market conditions" and if the company maintains employment elsewhere within the state.[63] While the statute says there are only factors to be considered in assessing a clawback, this approach is usually included in the state's economic development contracts with a company. Those agreements are based on some objective criteria evaluating the company's performance.[64]

Further rules are listed in the Ohio Administrative Code, some of which add more flexibility. For instance, the definition of "substantially" in the requirement to hit job creation targets means only 50% of those targets must be met to avoid clawbacks.[65] Further, the code says no grant may be awarded for more than ten years and 75% of the excess income tax revenue created by the company,[66] in effect ensuring the state never pays out more in credits than it is taking in. However, other provisions in the code provide exceptions on a case-by-case basis that allow extending those limits to 15 years and beyond the 75% threshold.[67]

2. Enforcement of Ohio's Accountability Mechanisms

Not only does Ohio take concrete steps to clawback funds from noncompliant companies, it is mandated by state law to report on such efforts.[68] However, it appears clawbacks are only imposed on grant recipients, not those only taking a tax credit.[69] Instead, the state merely cuts the tax credit period short in most cases and may take no remedial action in others.[70] Part of this may be due to the newer nature of some of the state's clawback provisions, which were only passed in 2015.[71] However, it is not clear

59. OHIO REV. CODE ANN. § 122.17(D)(3) (West 2017).

60. OHIO REV. CODE ANN. § 122.17(K)(1)(a)(i) (West 2017)

61. OHIO REV. CODE ANN. § 122.17(K)(1)(a)(ii) (West 2017).

62. OHIO REV. CODE ANN. § 122.17(K)(1)(b, c) (West 2017).

63. OHIO REV. CODE ANN. § 122.17(K)(3) (West 2017).

64. *See* OHIO ATTY. GEN. MIKE DEWINE, 2016 REPORT TO THE GENERAL ASSEMBLY: COMPLIANCE WITH STATE AWARDS FOR ECONOMIC DEVELOPMENT 1–2 (2016), https://www.ohioattorneygeneral.gov/Files/Reports/Economic-Development-Accountability-Report/2016-Economic-Development-Accountability-Report.aspx (discussing common contract language tying consecutive months of manufacturing economic decline as defined by the Federal Reserve to so-called "market conditions" evaluation) [hereinafter 2016 OHIO REPORT].

65. OHIO ADMIN. CODE 122:7-1-01(W), (X) (2016).

66. OHIO ADMIN. CODE 122:7-1-06(A), (B) (2016).

67. OHIO ADMIN. CODE 122:7-1-06(E), (F) (2016).

68. 2016 OHIO REPORT, *supra* note 64, at 3.

69. *See id.* app. 3 & 4 (showing clawback measures for several grant recipients, but not tax credit recipients).

70. *Id.* at app. 4.

71. *State and Local Tax Alert: Ohio Budget Bill Tax Provisions - Business Community Dodges a Bullet But More Battles to Come in 2016*, VORYS (July 14, 2015), https://www.vorys.com/publications-1528.html.

how aggressive or appropriate the clawbacks are: in 2015, the state performed clawbacks on seven of the 17 job creation grants that were noncompliant;[72] in 2016, that number was nine out of 16, totaling $776,900 in funds clawed back.[73] Of that amount, only one of the companies mentioned in the report was referred for collection; all others either had agreed to repay funds or set up a payment plan for the clawbacks.[74]

E. Michigan's "Good Jobs" Program

After Michigan replaced its business tax with a Corporate Income Tax,[75] the state stopped issuing new tax credits through its Michigan Economic Growth Authority (MEGA).[76] However, the state underestimated the expected redemption of those remaining credits, leading to an eventual recalculation of tax liabilities from the credits of more than nine billion dollars.[77] As a result, the state largely moved away from large tax credit programs until 2017, when the state passed three bills, labeled the "Good Jobs" bills as part of an effort to lure larger companies to Michigan.[78] Under this legislation, between 50% and 100% of new employee income tax withholdings may be "captured" by businesses creating new jobs in the state if its meets certain criteria.[79] However, Michigan's bill would provide far less in credits to a company like Foxconn compared to Wisconsin. Michigan's total incentive package pitch for two plants topped $7.3 billion, but only about $1.2 billion would have come in the form of cash incentives,[80] which Foxconn specifically was seeking from states bidding on the program.[81] Of that amount, more than two-thirds would have come from the incentives passed as part of the "Good Jobs" program. However, the Legislature later reduced the amount that could be captured to $200 million.[82] As such, the total liability to the state is far less than what Ohio or Wisconsin might have. Furthermore,

72. OHIO ATTY. GEN. MIKE DEWINE, 2015 REPORT TO THE GENERAL ASSEMBLY: COMPLIANCE WITH STATE AWARDS FOR ECONOMIC DEVELOPMENT app. 3 (2015), https://www.ohioattorneygeneral.gov/Files/Reports/Economic-Development-Accountability-Report/2015-Economic-Development-Report_FINAL-(11_23_15).aspx [hereinafter 2015 OHIO REPORT].

73. 2016 OHIO REPORT, *supra* note 64, at app. 3.

74. *Id.*

75. Memorandum from Jim Stansell, Senior Economist at the Mich. House Fiscal Agency to the Mich. House Appropriations Comm. (Feb. 5, 2015), https://www.house.mi.gov/hfa/PDF/Alpha/MEDC_Tax_Credits_Memo.pdf.

76. Renu Zaretsky, *MEGA Tax Credits: Will Michigan Bust a Deal, or Will Residents Face the Wheel?*, TAX POL'Y CTR. (July 1, 2015), https://www.taxpolicycenter.org/taxvox/mega-tax-credits-will-michigan-bust-deal-or-will-residents-face-wheel.

77. Lindsay Vanhulle, *Audit: Confidentiality Agreements with Companies Limit MEGA Transparency*, CRAIN'S DETROIT BUS. (Sept. 6, 2017), http://www.crainsdetroit.com/article/20170906/news/638281/audit-confidentiality-agreements-with-companies-limit-mega-transparency.

78. Lauren Gibbons, *"Good Jobs" Bills for New Business Tax Incentives Heads to Governor*, MLIVE.COM (July 12, 2017), http://www.mlive.com/news/index.ssf/2017/07/good_jobs_business_ incentives.html.

79. "GOOD JOBS FOR MICHIGAN" ANALYSIS, *supra* note 38, at 1–2.

80. Letter from Jennifer Nelson, Mich. Econ. Dev. Co. to Andrea Laramie, Senior Manager, Ernst & Young (June 25, 2017), https://graphics.jsonline.com/jsi_news/documents/Michigan%20offer.pdf [hereinafter MICHIGAN OFFER TO FOXCONN].

81. *See* Austin Carr, *Inside Wisconsin's Disastrous $4.5 Billion Deal with Foxconn*, BLOOMBERG BUSINESSWEEK (Feb. 6, 2019), https://www.bloomberg.com/news/features/2019-02-06/inside-wisconsin-s-disastrous-4-5-billion-deal-with-foxconn (noting that Foxconn negotiator Louis Woo at one point texted a Wisconsin state official saying "Give us 200m upfront then it's a done deal.").

82. MICHIGAN OFFER TO FOXCONN, *supra* note 80, at 5–6.

Michigan's contracts for the recapture must include a provision that the state could reclaim the tax credits if the company fails to meet its obligations and an understanding that if the company falsifies or creates misleading information, it could be subject to clawbacks and a ten percent penalty.[83]

Perhaps most interesting is the distinction between withholding capture rates—companies are incentivized to create at least 500 jobs to meet the threshold for capturing a maximum of 50% of tax withholdings, but only achieves a possible total capture if they create 3000 jobs at a wage of 125% above the region's average wage.[84] How much of the amount is claimed is eventually determined by the need for the credits by the company, the wage rates offered, the number of jobs created, and whether the company will make a "good faith" effort to employ "Michiganders."[85] The state at least seems to be tying the amount of money to the actual economic impact the job creation will have on the surrounding area beyond mere job numbers.

III. ANALYSIS

To analyze the effectiveness and possible best practices of location-based tax incentives, this Part will evaluate Wisconsin's statutory regime and how it impacted the drafting and accountability outcome of the WEDC-negotiated contract. It will then evaluate how Michigan and Ohio's tax incentives may have modified the contract and accountability measures. This Note will take three ideas into consideration when evaluating each state: 1) the ability of the state to limit its exposure on the deal, both in terms of clawbacks and in terms of the structure of the credits themselves, 2) the methods for verifying compliance with state statutes, and 3) the degree to which the accountability measures might deter a company from moving operations to the state.

A. Foxconn Contract and Wisconsin Statute

There is no doubting, based on the ultimate outcome, that both Wisconsin's clawback language and accountability measures were palatable to Foxconn and might not dissuade similar companies. But Wisconsin's contract terms, which are relatively clear, never come close to total clawbacks of the credits delivered to the company and set out terms that are relatively discretionary on when the state might find the company in default. Furthermore, while the contract does include one provision that strengthens the state's potential to verify the company's compliance with job requirements, state statute requires no such verification and does nothing more to ensure compliance.[86] In many ways, the contract is structured to ensure targets are met before money is handed out, but given the sheer amount of cash available and the minimum targets for capital investment, tax credits result in a high ratio of credits for jobs created.

83. "GOOD JOBS FOR MICHIGAN" ANALYSIS, *supra* note 38, at 7.

84. *Id.* at 6.

85. *Id.*

86. *See* FOXCONN CONTRACT, *supra* note 49, at 14–15 (saying the company may be given no more than 180 days to cure a potential default, but also that WEDC reserves discretion "at its sole option" to revoke tax credit authorization and clawback funds).

1. Comparison with Kohl's Contract

Before going into the contract itself, it is important to understand how comparable contracts worked in Wisconsin prior to Foxconn. While the state had never approached the scale of incentives enjoyed by Foxconn, Wisconsin had signed another Enterprise Zone contract of a similar structure with Kohl's Corporation in July of 2012.[87] While the contract was based on a separate statute authorizing the credits,[88] that statute was the model for the Enterprise Information Technology Zone that was created for Foxconn. The contract, much like Foxconn, split incentives into credits awarded for capital investments and those awarded for job creation, both set to specific schedules with specific metrics to hit.[89]

The contract is not as involved as that of Foxconn, but there are some notable differences. First, the actual amount of tax credits Wisconsin offered to Kohl's is based directly upon a percentage of base wages earned by its employees multiplied by either six or five percent (depending on when the wages are added).[90] A similar calculation is used to determine the amount of tax credits it should receive for capital investments—pointing to the state statute's requirement that Kohl's be given at a rate of 8.5 percent of its total eligible investment.[91] Furthermore, the clawback schedule is simple: if the company leaves within five years, relocates or lies about its progress, the state can recoup all of its credits.[92] If, however, it simply fails to meet its obligations under the contract for job creation or capital investment, for instance, the state can clawback a percentage of all credits given to Kohl's, depending on the date of default.[93] Even if the default occurred near the end of its contract in 2023, however, the state could still recoup 50% of its total investment.[94] Lastly, neither the contract nor the schedule for payment links job creation to the capital investment goals—both are calculated separately.

The Foxconn contract, on the other hand, doubled the amount of eligible capital investment credits (15%),[95] nearly tripled the credit per job created,[96] and is more deferential to Foxconn on its clawback schedule. For instance, the first five years of the contract do not count missed job creation targets as a default.[97] Furthermore, once the clawbacks do kick in, they recoup a steeper percentage of the funds than the Kohl's contract. While the amount the state could clawback from Kohl's dropped steadily by five percent every year they fulfilled terms of the contract, the Foxconn contract allows complete clawbacks in the first five years of the contract, but then drops to 71% in the sixth year, then 57% in the seventh year, and 49% by the eighth year.[98] That maximum amount that can be recouped only drops from there, hitting a low of $386 million in the last year

87. *See generally* Enterprise Zone Tax Credit Agreement Between the Wisconsin Economic Development Corporation and Kohl's Corporation, (signed July 17, 2012) (on file with author) [hereinafter KOHL'S CONTRACT].

88. *See Id.* at 1–2 (citing WIS. STAT. § 238.399 (2011) as the authorizing statute).

89. *Id.* at 13.

90. *Id.* at 3.

91. *Id.*

92. KOHL'S CONTRACT, *supra* note 87, at 5.

93. *Id.* at 9.

94. *Id.*

95. FOXCONN CONTRACT, *supra* note 49, at 8. While the contract specifies 15%, the limit was also written into the state statute governing the EITZ. WIS. STAT. § 71.28(3wm)(bm) (2017).

96. FOXCONN CONTRACT, *supra* note 49, at 7; WIS. STAT. § 71.28(3wm)(b) (2017).

97. *Id.* at 26.

98. FOXCONN CONTRACT, *supra* note 49, at 26.

of the contract, only 14% of the maximum amount awarded at that point.[99] The amount is even lower if the default is based solely on a failure to retain a minimum job mark—ranging from about 37% in the sixth year to only nine percent in the final year.[100] While this incentivizes the company to keep more employees later in the contract when the penalties are far less severe, it also means the state actually has a greater risk of missing its "break-even" point on the deal the later it gets into a contract.[101]

While this approach may have significant benefits when attracting businesses,[102] it also ties the ultimate tax liability of the state to the terms laid out by negotiators at WEDC and approved by the WEDC Board of Directors.

The Electronics and Information Technology Manufacturing Zone only authorizes the state to recoup "any tax benefits the business claims for a year in which the business failed to maintain employment levels" required by an agreement with the state,[103] which implies only that the company may take back credits that were never earned to begin with. What is more problematic is that the statute includes no other provisions to clawback funds for major breaches, such as leaving the state or ceasing operations. Instead, those situations only necessitate revoking "certification" for tax benefits,[104] essentially stopping the company from recouping any more credits. Because the statute never outlines a process for retrieving funds already awarded, it relies on whatever contract the parties drafted to implement clawback provisions.

As such, nothing in the statute gives the state an independent remedy to recoup funds outside of basic contract law principles, which could necessitate debate or litigation over what constituted a total breach and when the state may be able to adequately claim breach to recoup the funds.

2. Job Verification and Lasting Presence

While the contract and state statute do make some attempt to ensure the capital investment and job claims are independently verified, the state does not appear to have thought through the total impact of the deal on its own finances—and has not included sufficient mechanisms to protect itself in the event the company does not fulfill its bargain. The contract does specify certain documentation must be turned over to WEDC to verify job creation numbers and that Foxconn must hire a CPA chosen by WEDC to independently verify those job creation numbers,[105] it does not specify how such

99. *Id.*

100. *See id.* (showing no funds can be clawed back in the first four years of the contract—and a maximum of $500 million starting in year five—for not meeting the jobs quota).

101. For a further explanation of this risk, compare FOXCONN CONTRACT, *supra* note 49, at 26, with the fiscal analysis prepared on the bill. Memorandum from the Leg. Fis. Bureau on 2017 Wisconsin Act 58 (Foxconn/Fiserv) (Oct. 4, 2017) [hereinafter FOXCONN/FISERV]. If the company defaults after 2023 by ceasing operations, the state could recoup $965 million maximum, which would be a net gain for the state based on the cumulative revenue shortfall of $613 million in 2023–24. However, if the company defaults in 2031, the state can only clawback $386 million maximum, which would still leave a tax revenue shortfall of approximately $650 million. The clawback numbers are even lower if the default is only due to missing job creation targets, but continued tax revenue from the company, suppliers and other indirect economic impacts may offset future revenue gaps if they maintain operations.

102. *See infra* Part III.A.3.

103. WIS. STAT. § 238.396(4)(b) (2017).

104. *Id.* § 238.396(4)(a).

105. FOXCONN CONTRACT, *supra* note 49, at 11–13.

verification is to be performed on WEDC's end. The state statute says only that the corporation "shall verify" the numbers, without giving any direction as to how it should be done.[106] Given the past failures of WEDC to perform this task adequately,[107] the lack of statutory guidance for verifying job creation or capital expenditures may be an oversight, but the Foxconn language provides far greater mechanisms for job verification than what was included in the Kohl's Contract.[108] While the Kohl's form only required a business affidavit and statement of business activities,[109] the Foxconn Contract required a payroll report, capital expenditure report and a copy of their quarterly Unemployment Insurance filing with the Department of Workforce Development,[110] the sort of data that is used by the Bureau of Labor Statistics to get an accurate census of employment and wage information across the United States.[111] Relying on that data to help verify total job creation efforts could ensure the numbers being supplied by the company are accurate depictions of their current employment and wage levels.

However, the remaining structure of the deal—which lawmakers have touted as ensuring Foxconn does not get paid if it doesn't create jobs—actually allows a fair amount of money to flow to Foxconn in the event they do not hit their maximum targets. The problem with this is that it might have an adverse effect on the state's finances. First, the Foxconn contract does make a choice that the Kohl's contract did not: it ties the capital investment credits to a specific level of job creation. In theory, this approach makes financial sense: while both job creation and capital investment create additional tax revenue (the latter through construction employment and its secondary impacts), capital investment could easily be used to create facilities focused on automated production, without the necessity of nearly as many employees.[112]

The amount given for capital investment carries a risk of overpayment based on the benefit it creates. First, the job creation targets are not a minimum threshold for obtaining any capital investment credits: they are a threshold for obtaining the maximum amount ($192,857,143) of credits available each year. As the contract states, if the company fails to hit that job creation threshold, the eligible amount of credits "will be decreased by the percentage amount equal to the difference between the number of actual full-time Jobs employed as a percentage of the respective" job creation target.[113] So if Foxconn had a maximum target of 5200 jobs in a given year and only employed 4160, it would still earn $154,285,714 if it made its total capital investment.[114] While economic impact studies

106. WIS. STAT. § 238.396(4)(d).

107. *See* LEG. AUDIT BUREAU, REPORT 17-9: WISCONSIN ECONOMIC DEVELOPMENT CORPORATION 28 (2017), https://legis.wisconsin.gov/lab/media/2627/17-9full.pdf [hereinafter 2017 AUDIT].

108. *See* KOHL'S CONTRACT, *supra* note 87, at 5 ("Kohl's shall provide WEDC with an Annual Project Report . . . and all required supporting documentation for the Annual Project Report including payroll reports and documentation of capital investment as outlined in more detail in exhibit B.").

109. *See id.* at 11. The supporting documentation included more than these documents but were not explicitly requested in the contract itself.

110. *See* FOXCONN CONTRACT, *supra* note 49, at 28.

111. *Quarterly Census of Employment and Wages: Frequently Asked Questions (FAQs)*, BUREAU LAB. STATS., https://www.bls.gov/cew/cewfaq.htm#Q01 (last visited Feb. 7, 2019).

112. In fact, that is exactly what Foxconn CEO Terry Gou has stated as his end goal. Ziyi Tang & Tripti Lahiri, *Here's How the Plan to Replace the Humans Who Make iPhones with Bots Is Going*, QUARTZ (June 22, 2018), https://qz.com/1312079/iphone-maker-foxconn-is-churning-out-foxbots-to-replace-its-human-workers/.

113. FOXCONN CONTRACT, *supra* note 49, at 9.

114. *Id.*

commissioned by the WEDC pointed to at least 20,415 construction jobs created by about $5.57 billion in capital investment,[115] the Legislative Fiscal Bureau only assumed that 16,200 jobs would be created and that it would only generate $186.9 million in tax revenue over four years of construction.[116] As such, some amount of tax revenue recoupment must come from taxes generated by job creation, as those are expected to last far longer than the four-year construction period. However, under this deal, Foxconn could conceivably earn the full $192 million in 2019 with only 520 employees, negating in one year the entire additional tax revenue expected to be generated by construction over four years. As of 2018, the company had only employed 176 employees, falling short of the 260 minimum needed to qualify for job creation credits for Fiscal Year 2018.[117] The capital investment credits will not kick in until 2019.

While the capital investment piece does carry significant exposure to the state, perhaps more concerning is what happens if the full terms of the deal are fulfilled; the Fiscal Bureau analysis finds that if, at the end of the 15-year period, Foxconn recoups the full $2.85 billion in credits, the state would at that point have a net position $1.04 billion lower than before the start of the deal. Instead, the deal counts on approximately 25 years of operational and indirect economic impact from Foxconn's activity for the state to break-even on tax revenue.[118] That estimate is also based on assumptions regarding the number indirect or induced jobs created by the mere presence of the plant, an average salary of $59,600 and assumes that the company does eventually create and maintain 13,000 jobs during that time.[119] In the event that the company creates fewer jobs than that, it could push the state's breakeven date even further out, due to the structure of the capital investment credits.[120]

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115. PROJECT FLYING EAGLE: UPDATED LIMITED SCOPE REPORT, WIS. ECON. DEV. CORP. & BAKERTILLY (Aug. 10, 2017), https://graphics.jsonline.com/jsi_news/documents/foxconn_scopereport.pdf [hereinafter PROJECT FLYING EAGLE].

116. FOXCONN/FISERV, *supra* note 101, at 24. Perhaps more concerning is that a separate analysis conducted by Ernst & Young, which estimated total tax collections based on construction jobs at $345 million, did not take into account sales tax exemptions that are part of the deal. Subtracting the $150 million in exemptions from that estimate brings it to $195 million in tax collection over four years of construction, far closer to the Fiscal Bureau estimate. *See generally* PROJECT FLYING EAGLE, *supra* note 115 (detailing different job, wage and economic impact estimates based on EY and BakerTilly studies).

117. Riley Vetterkind, *Foxconn falls short of job creation quota for 2018* (Jan. 19, 2019), http://www.apnews.com/19ad66888d314fa8749bdbc11960479.

118. FOXCONN CONTRACT, *supra* note 49, at 25–27. For more on the unpredictability of companies staying in a state or community based on tax incentives, see Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012), http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html? pagewanted=all.

119. FOXCONN/FISERV, *supra* note 101, at 24. Furthermore, several media reports indicated Foxconn only promised to create 3000 jobs, Tom Kertscher, *Scott Walker Says Foxconn 'Bringing' 13,000 Jobs to Wisconsin—What Exactly Does That Mean?*, POLITIFACT (July 27, 2017), https://www.politifact.com/wisconsin/statements/2017/jul/27/scott-walker/scott-walker-says-foxconn-bringing-13000-jobs-wisc/, and in fact missed its first job creation mark of 260 jobs, meaning it missed out on $9.5 million in job creation tax credits. Jess Macy Yu & Karl Plume, *Exclusive: Foxconn Reconsidering Plans to Make LCD Panels at Wisconsin Plant*, REUTERS (Jan. 30, 2019), https://www.reuters.com/article/us-foxconn-wisconsin-exclusive/exclusive-foxconn-reconsidering-plans-to-make-lcd-panels-at-wisconsin-plant-idUSKCN1PO0FV. Foxconn noted that it has invested $200 million in Wisconsin thus far, Letter from Louis Woo, Foxconn, to Mark Hogan, Wis. Econ. Dev. Corp. (Jan. 17, 2019), https://www.wisconnvalleycenter.com/wp-content/uploads/2019/01/Letter-to-WEDC.pdf, but the contract schedule does not award capital investment tax credits until 2020. FOXCONN CONTRACT, *supra* note 49, at 25.

120. FOXCONN/FISERV, *supra* note 101, at 27. ("If [Foxconn only created 3000 jobs] . . . payments of the EITM zone payroll tax credit would be reduced from just under $1.5 billion to approximately $345 million over

Such a structure ensures that even a mildly successful version of the deal, where the company provides enough jobs to earn tax credits, but not anywhere near its original promise, puts the state in the red for years after it ends and relies on the company to stay without further financial incentive in order to recoup its investment.

Lastly, the scenario in which the terms of the deal are renegotiated may limit the pain of the initial deal, but it would still be a net loss to the state even under the most optimistic scenarios. In a recent study performed by Timothy J. Bartik of the Upjohn Institute, such an "optimistic" scenario was presented: Instead of assuming that 13,000 jobs would be created, only 1500 to 1800 jobs are created, while the incentives for capital investment are reduced to 13.5 percent of $2 billion.[121] Using a formula that weighs the costs of the project against the net benefit to the state finances, labor market and K-12 spending, it estimates that a deal that counted on 1,800 workers and a capital investment of only $2 billion with the 13.5 percent incentive would have the best chance of recouping its value. However, that deal would still produce only $259 million in net benefits compared to total incentives paid of $366 million; a benefit cost ration of .71.[122] In his worst case scenario (1500 jobs and existing 15 percent incentive for capital investment), the state actually produces no net benefit, coming out to an additional cost of $8 million on top of $447 million already spent.[123]

Under any of the possible scenarios available under Wisconsin's existing law and contract with Foxconn, the state seems to be putting itself in a precarious position.

3. Little Red Tape Provides Attractive Option for Firms

Of course, the obvious upside to this accountability scheme is that it ultimately landed Foxconn for Wisconsin and allowed flexibility in negotiations with the company. However, while the RFP sent out to states did specifically note the "cost of doing business" as a key requirement for relocation,[124] all indications show Wisconsin also landed the contract through a combination of key real estate placement, infrastructure, and a more relaxed regulatory and tax framework following years of pro-business legislation.[125] While the company did emphasize the need to move quickly on approval of permits and other regulatory matters, that simply does not necessitate the lack of statutory language governing Foxconn's deal. The MOU between Foxconn and the state of Wisconsin only anticipated legislation specific to the company, but not any specific terms for compliance.[126] It is unlikely that job verification or clawback provisions would have

the 15-year life of the EITM zone, but the capital expenditure credit would still be estimated at $1.35 billion. The estimated ongoing tax benefits from the project would decrease from $115 million to $27 million per year, and the breakeven point would be well past 2044-45.").

121. TIMOTHY J. BARTIK, COSTS AND BENEFITS OF A REVISED FOXCONN PROJECT 10 (July 31, 2019), https://research.upjohn.org/cgi/viewcontent.cgi?article=1244&context=reports.

122. *Id.*

123. *Id.*

124. Arthur Thomas, *WEDC Documents Shed Light on Foxconn Wages, Financials and Wish List*, BIZ TIMES (Nov. 13, 2017), https://www.biztimes.com/2017/ideas/government-politics/wedc-documents-shed-light-on-foxconn-wages-financials-and-wish-list/.

125. *See* Ron Starner, *Bagging the Big One: How Wisconsin Landed Foxconn*, SITE SELECTION MAG. (Sept. 2017), http://siteselection.com/issues/2017/sep/upper-midwest-bagging-the-big-one-how-wisconsin-landed-foxconn.cfm (characterizing Wisconsin's pro-business efforts as "six years" in the making).

126. *See generally* MEMORANDUM OF UNDERSTANDING, THE STATE OF WISCONSIN AND HON HAI PRECISION INDUSTRY CO., LTD. (July 27, 2017), https://www.documentcloud.org/documents/3935829-Foxconn-

slowed down the speed with which Foxconn could move (especially given the four-year grace period for meeting job numbers) if placed in statute. The only explanation for not including them is to offer flexibility in the negotiating process. Effectiveness in that respect is hard to know without more information.

B. Applying Ohio's Model to the Foxconn Deal

While little is known about Ohio's pitch to Foxconn to land the company, the state's preexisting accountability scheme provides some choice lessons about how other states could have ensured compliance with statutory obligations while still allowing flexibility in contracting that Wisconsin achieved. However, there may be drawbacks to this strategy to luring companies to the state because of a perceived "one-size-fits-all" approach to doling out credits or an anticipated regulatory burden.

1. Statutory Clawbacks May Allow Complete Recapture of Incentives

Ohio's statutory clawback provisions are essentially the opposite of Wisconsin's—whereas the Foxconn credits only allow an unspecified clawback amount when jobs goals are not met,[127] Ohio authorizes clawbacks of tax credits in multiple scenarios with different ceilings for each circumstance, though none below 75% of the total awarded credits.[128]

While the language obviously gives the state power in negotiations, it still allows flexibility in negotiating those clawback amounts. Because the statute leaves clawback amounts up to the discretion of the state when job creation quotas in contracts with businesses are not met, it would likely be interpreted as deferring to the terms or schedule of any tax incentive contract. This would give the state a stronger position from which to negotiate those clawback amounts—a failure to agree on a clawback schedule would leave the state with leeway to request as much or as little of the awarded credits as needed.

The extensive nature of the statute, however, may make enforcement cumbersome. First off, requiring a company to retain jobs for three years beyond the tax credit date may limit the flexibility of negotiations. There is some evidence Ohio recognized this was onerous, as an earlier version of the statute required a company to remain in the state twice as long as the tax-credit award period.[129] Secondly, the statute requiring market conditions to be considered when clawbacks are triggered may limit or entirely halt the ability for the state to recoup funds on failed deals.[130] Lastly, inclusion of a less stringent penalty—reducing the term or percentage of tax credits offered—may effectively take clawbacks off the table as a normal remedy for failure.[131] In effect, at a certain point, writing more remedies and regulations to govern tax credit packages may introduce unintended consequences that kneecap accountability.

What is striking about the differences between Wisconsin and Ohio is that while Ohio's system for clawbacks is specified more transparently in practice and statute, there does not seem to be a significant gulf between the two states in funding recouped. If

MOU-Scott-Walker-Office-of-the-Governor.html.

127. WIS. STAT. § 238.396(4)(b) (2018).

128. *See* OHIO REV. CODE ANN. § 122.17(K)(3) (West 2017).

129. OHIO REV. CODE ANN. § 122.17(D)(3) (West 2007).

130. *See* 2015 OHIO REPORT, *supra* note 72, at 5 (describing the requirement to consider market conditions).

131. *See id.*, at app. 4; *see also* 2016 OHIO REPORT, *supra* note 64, at app. 4 (showing that none of the non-compliant tax credit recipients were subject to clawbacks for failed job numbers).

Wisconsin's $9.9 million in clawbacks extends over the course of WEDC's existence,[132] it would still be approximately $1.65 million per year in clawbacks and likely on par with Ohio's efforts to recoup economic development cash grants—not mere tax credits—over that same timeframe.[133] A direct comparison is difficult given the lack of details from Wisconsin's clawback. Further, a comparison of the relative success of job creation programs is difficult due to a lack of accurate information from Wisconsin.[134] But an evaluation of Ohio's clawback mechanism indicates it may be more of a last option than a robust accountability check, at least as it pertains to how it appears to be implemented based on the Ohio AG's report. If this is the case, it might still be useful as a deterrent from complete contract default but more information would be needed to determine whether that is the case.

2. Lack of Verification, but Evidence of Enforcement

While Ohio does stipulate rules for defining job creation metrics in state statute,[135] it lacks a defined method for verifying job creation numbers and only requires an annual review of company information to ensure compliance.[136] However, the statute's requirement of an annual report does outline briefly how the state Attorney General's Office reviews tax credit and grant awards for compliance with their job creation and retention requirements, how many companies have failed compliance, and what action was taken against them.[137] While it is not a replacement for an outlined verification process, it does provide evidence that the state is making an effort to ensure compliance. It also gives a window into the decisions of the state in not recouping lost credits—the report will detail companies that are non-compliant but nevertheless retained their credits for the full period because they still substantially complied with the requirements or had market conditions that justified noncompliance.[138]

This transparency at the very least provides information to the public and to legislators as to how tax credit amounts are being spent, and may prompt further inquiries into their wisdom that would not otherwise have been asked. The downside is that providing such information could have the opposite effect of papering over deficiencies that might otherwise be revealed in consistent audits, such as those shown in Wisconsin's audits of WEDC.[139] This concern, however, does not negate the usefulness of compliance transparency, especially regarding larger incentive packages. However, it is unclear whether Ohio might have taken a path with Foxconn that would have negated these measures through separate legislation.

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132. WEDC was created in 2011, as a transition agency from the now-defunct Department of Commerce. James B. Nelson, *Walk-O-Meter: Replace Department of Commerce with Development-Focused Agency*, POLITIFACT (Aug. 7, 2013, 9:40 AM), https://www.politifact.com/wisconsin/promises/walk-o-meter/promise/535/replace-department-of-commerce-with-development-fo/.

133. *See* 2015 OHIO REPORT, *supra* note 72, app. 3; 2016 Ohio Report, *supra* note 64, app. 3.

134. *See* 2017 AUDIT, *supra* note 107, at 65, tbl.13 (noting WEDC awards over a five-year span had created 16,393 fewer jobs than reported in their official documents).

135. OHIO REV. CODE ANN. § 122.17(A) (West 2017).

136. OHIO REV. CODE ANN. § 122.17(D)(7) (West 2017).

137. *See generally* 2015 OHIO REPORT, *supra* note 72; 2016 OHIO REPORT, *supra* note 64.

138. *See* 2015 Ohio Report, *supra* note 72, apps. 3 & 4; 2016 Report, *supra* note 64, apps. 3 & 4 (noting some noncompliant companies were still allowed to retain tax credits).

139. *See generally* 2017 AUDIT, *supra* note 107.

3. Possible Drawbacks to Competitiveness

Any discussion about why Ohio missed out on Foxconn is necessarily speculative, given the lack of publicly available information on the state's bid for the project.[140] However, the statutory nature of Ohio's clawbacks may bring significant uncertainty that could cause hesitation—advice for companies negotiating clawback talks about "nonstatutory" clawback provisions as those that can be mitigated.[141] It is entirely possible that Ohio statutes may give an impression of inflexibility, despite being a ceiling rather than a floor. Even if the impact of clawback authorization on Ohio's bid for larger contracts is negligible, the detail of the statutory provisions on what constitutes a full-time job and how the state will define a full-time job may provide too many items that are left out of negotiations.

However, there is an element of certainty to having those provisions out in the open as it makes clear what is on and off the table. Furthermore, the requests for information made under Ohio statute protects their disclosure from public records law,[142] which could help ease concerns that companies have about exposing their finances to the public.[143] However, any company may be wary of problems with public perception if a year's noncompliance ends up on a publicly published list of offenders, which may further dissuade the company from doing business with Ohio.[144]

Lastly, Foxconn or similar companies in its position may balk if that statute is meant to apply to a portion of their tax credit given the laundry list of rules and regulations governing the credit. Not only are requirements and remedies laid out in statute, but they are ensconced in administrative law and subject to limited discretion by a tax incentive authority.[145] Such layers of regulation alone may not dissuade a company from basing operations there, but combined with robust clawback measures and a smaller incentive package, it likely does not help.

C. Michigan

Michigan's plan differs significantly from the others, as there are no traditional statutory clawback provisions. Instead, the state opts to merely curtail the period of tax credit eligibility for not meeting job creation quotas, much like Ohio does in practice. Further, instead of reducing existing tax liability for corporations on a refundable basis like Ohio or Wisconsin, Michigan would redirect tax withholding revenue from employees hired by the eligible company back to the company under certain circumstances.[146] However, the program's revenue limitations, statutory job creation thresholds, and reporting requirements ensure this program will not leave the state open to as much liability

140. However, Ohio Governor John Kasich's comments about bids for the Amazon HQ indicate the state may not have gone out of its way to cater to Foxconn or similar companies, perhaps indicating the state would hew closely to its existing tax incentive structure. Karen Kasler, *Amid Amazon HQ Contest, Kasich Says Ohio Doesn't Use Tax Incentives to 'Buy Deals*,' WKSU (Oct. 23, 2017), https://www.wksu.org/post/amid-amazon-hq-contest-kasich-says-ohio-doesnt-use-tax-incentives-buy-deals#stream/0.

141. *See* Pisano, *supra* note 33, at 3–4. (advising companies to focus on mitigating non-statutory clawbacks).

142. OHIO REV. CODE ANN. § 122.17(G) (West 2017).

143. *See* Pisano, *supra* note 33, at 8–9.

144. *Id.* at 8.

145. OHIO ADMIN. CODE 122:7-1-06 (West 2016).

146. "GOOD JOBS FOR MICHIGAN" ANALYSIS, *supra* note 38, at 1.

as previous programs.

1. Alternatives to Clawbacks Can Limit State Liability

Despite the lack of a built-in clawback mechanism, the Michigan legislation does something the other programs do not: it sets a hard cap on how much money the state will dole out and puts job quotas into statute rather than leaving them up for negotiation.[147]

While the lack of a statutory clawback mechanism does limit the ability of the state to recoup funds from a failed company, because the state limits the redemption period to a mere five years and ties tax credits directly to the tax revenue that would normally be produced by newly hired employees,[148] the argument for requiring a measure is far weaker. Further, because the state can only award $200 million in revenue "over the life of the program,"[149] the stakes are far lower. In addition, requiring a statutorily-imposed cost-benefit analysis—that would ensure a positive fiscal impact to the state[150]—ensures a bit more due diligence on a deal like this than provide for in Wisconsin or Ohio.

Furthermore, Michigan benefits from a factor Wisconsin never had: the political will to adhere to fiscal restraint. As noted before, the original package offered to Foxconn totaled well over $575 million, but the state legislature reduced it to a cap of $200 million. While this creates problems in competitiveness, it does signal a willingness to limit the state's liability and ensure the viability of future economic development programs.

2. A Mismatch in Scale for Large Deals

Perhaps the only element of Michigan's plan that hampers its attractiveness to the Foxconns and Amazons of the world is the lack of scale. At $200 million, this package is simply not designed for a large firm on the scale of Foxconn[151] or competitive with other states, even with other non-refundable corporate and property tax credits. Given Michigan's deleterious history with tax incentives and outstanding tax liability, the reticence is understandable. However, it is hard for Michigan to remain competitive with other states for large projects or to amend existing programs to make room for them when the state is so strapped for available cash grants. The same expediency that allowed the state to maintain fiscal discipline also knee-capped the state's negotiating position.

That being said, the jobs package did manage to help draw in a $4.5 billion additional investment from Fiat Chrysler,[152] though some of that obviously owed to the existing operations of Chrysler in Detroit and additional tax exemptions, loans, and incentives. However, the Good Jobs incentives to Fiat totaled over $100 million for projects that would create thousands of jobs, indicating it at least spurred some of the investment.

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147. *Id*. at 1–2.

148. In some cases the redemption period is ten years. *Id.* at 6–7.

149. *Id.* at 2.

150. *Id.* at 5.

151. Forbes ranked Foxconn the 215th largest public company in the world in 2018, with a market capitalization of $49.5 billion and approximately one million employees. *#215 Hon Hai Precision*, FORBES, https://www.forbes.com/companies/hon-hai-precision/ (last visited Feb. 7, 2019).

152. Emily Lawler, *Fiat Chrysler gets Michigan Tax Incentives for Projects Expected to Create 6,400 Jobs*, MLIVE (May 21, 2019), https://www.mlive.com/news/2019/05/fiat-chrysler-gets-michigan-tax-incentives-for-projects-expected-to-create-6400-jobs.html.

While all three states vary in their levels of vetting, criteria and accountability measures, one odd metric is missing from all three: None of them set a floor or ceiling for the cost of incentive per job. Wisconsin's percentage is tied to average job salary, but it is not specified in state statute. Instead, it was crafted specifically for the contract; Michigan likely comes the closest by setting a minimum job threshold for a higher range of incentives–half of the state income tax revenue generated by its employees if 500 new jobs are created, and 100% of that revenue if it creates 3000 jobs at a higher than average wage.

But the per-job cost is often more than expected. Michigan's Good Jobs plan showed that the three firms received more than $57.4 million in incentives for more than 1300 jobs–a cost of $42,000 per job created.[153] Ohio's jobs tax credits can be refunded for up to 75% of a company's generated state income tax per employee. Under the most optimistic scenario in which the full 13,000 jobs are created, Wisconsin would be paying approximately $219,000 in cash incentives to Foxconn per job created over 15 years, or an average of $14,600 per job, per year. These numbers fluctuate depending on whether one is calculating the amounts on a per-year basis or over the term of the tax credit, but this metric is bandied about in the mainstream press, even if they're not often included in economic development studies.

IV. RECOMMENDATIONS

As shown in prior sections, the current Foxconn contract and Wisconsin's corresponding statutory accountability measures could leave at least millions in the hands of Foxconn, should it default on its obligations later into the contract term, while the company could breach its agreement in the final year, and retain as much as 86% of its total awarded credits.[154] While states like Ohio and Michigan may have added concrete statutory safeguards to a similar contract drafted with their states, Ohio still leaves a fair amount of money subject to negotiation while Michigan may not offer enough cash to persuade large companies to move there.[155] Yet, only Michigan makes any effort to require any sort of fiscal impact study in the statutes governing its tax program.[156]

Devoid of context, robust statutory or administrative accountability measures to protect a state's finances would seem to carry little risk. A state like Ohio may simply remove the "market conditions" factor in its statute[157] and subject any company to total clawbacks if it withdraws from the state. But such a set of measures ignores the allure of the tax credits themselves: companies may be reluctant to engage in a specific agreement without certainty in the terms.[158] So while any accountability measures may start broadly,

153. Lindsey VanHulle, *Michigan Eyes Renewal of Tax Break that Has Cost $40k for Every New Job*, Bridge Mich. (Apr. 30, 2019), https://www.bridgemi.com/michigan-government/michigan-eyes-renewal-tax-break-has-cost-40k-every-new-job.

154. *Supra* Part III. Based upon an assumption of 14 years of maximum tax credits before a company pulls out of the state.

155. *Supra* Parts III.B. & III.C.

156. Wisconsin voluntarily commissioned its own impact study on the Foxconn deal, although it was not required by law. *See generally* PROJECT FLYING EAGLE, *supra* note 115.

157. OHIO REV. CODE ANN. § 122.17(K)(3) (West 2017).

158. *See* Michael R. Press, Brian R. Smith, *The Ten Commandments of Incentives: Best Practices in Negotiating with State and Local Governments*, 11 J. MULTISTATE TAX'N & INCENTIVES 28, 32 (2002) (warning companies not to rely on oral promises or commitments from governments until they are in writing).

they must not be subject to limitless discretion. While these incentive programs routinely err on the side of the firm[159] and should be righted toward more conservative fiscal management, they must also consider how such measures may hamper the state's competitiveness in an economic development agreement.

With that caveat, states should institute three main safeguards while balancing factors of competitiveness: statutory codification of broad clawback powers, mandating job creation and retention verification procedures for state agencies, and implementing a robust "stress test" for tax incentives on the state's financial picture, rather than merely the businesses. Those safeguards, however, will not be implemented without an infusion of political will and states should gird themselves to expect accountability in each deal.

A. Broad Clawback Authority Written into Statute

Ohio's model for clawbacks seem justifiable for most states: simply insert language for each tax incentive program clarifying that a failure to abide by contractual terms may result in the clawback of an amount up to a certain percentage of total committed credits. Wisconsin's current language, which circumscribes clawbacks to the year in which job creation marks are missed, leaves the remaining mechanism for retrieving tax incentives in a contract. If the state wishes to negotiate fallback procedures or remedies for contract breaches, it may, but failing to include such language in statute turns the state's fiscal accountability into a bargaining item itself. Perhaps more importantly, it leaves the state without recourse if they happen to leave it out of the contract entirely, either by design or by mistake.[160]

That is why any statute relating to a relocation-based tax incentive should follow Ohio's model for stating, up front, that the state agency overseeing the program should have ultimate discretion to clawback the funds to avoid a scenario in which the state finds itself without any true legal remedy for making itself whole if a company simply reneges on the deal.

In contrast to Ohio, which may give the state authority to clawback only a percentage of delivered funds in certain circumstances,[161] a state may decide instead to set an absolute floor for clawback amounts. For instance, a state could require that any company that leaves the state within the period of the tax incentive contract would be subject to a clawback of at least 50% of its delivered incentive amount. An amount in the statute should be low enough to allow negotiation for higher percentages at different points in the contract, but high enough to create certainty for the state in the event of default on larger incentive package. Furthermore, a state passing such clawbacks should be sure to limit any promulgation of rules with respect to the terms of clawbacks, as another layer of exceptions and definitions may muddy the negotiating position of the state by leaving too little up for negotiation.

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159. *See supra* Part III.B. (showing how incentive programs err on the side of the firm).

160. For instance, when the initial version of the Foxconn contract was drafted, it was missing key clawback provisions, which delayed its approval. Matthew DeFour, *Foxconn Contract Contained 'Nuclear Bonb' That Left Taxpayers Exposed, WEDC Member Says*, WIS. ST. J. (Oct 25, 2019), https://madison.com/wsj/news/local/govt-and-politics/foxconn-contract-contained-nuclear-bomb-that-left-taxpayers-exposed-wedc/article_be03bc7a-3ee1-5d92-8bb9-ff740e8718c6.html..

161. OHIO REV. CODE ANN. § 122.17(K)(1)(a) (West 2017).

B. Require and Outline Proactive State Verification of Job Creation Numbers

Any state whose tax incentive program ties funding to job creation and retention should require the state verify those numbers and outline a process to do it. While most states require the verification of job numbers, they often rely on self-reporting to achieve this. While it may be burdensome to require every company to hire accountants for verification in all but the largest deals,[162] some measure of state-based accountability should be required to ensure due diligence on the numbers. At the very least, states could supplement compliance information submitted by a firm with information garnered by the Quarterly Census of Employment and Wages provided to the Bureau of Labor Statistics.[163] However, in cases, such as Wisconsin's, where there are no policies governing job number verification, such a policy should at least be compelled by state statute. Unwillingness to do so can, as has been shown, result in consistent failure by the agency to do so on its own.[164]

C. Government Finance Stress Test

Several states have required a regular review of their economic development tax incentive programs for efficiency, while others have also included an economic evaluation of their impact.[165] Those steps, while helpful in evaluating overall incentive schemes, lack any teeth in firm-specific evaluations. While some tax incentive programs overall may be an unwise use of funds, it is megadeals such as Foxconn and Amazon that will draw the most public scrutiny for their size. As such, states should uniformly adopt a threshold for tax-incentive packages or outright cash grants deals that trigger a robust, publicly available economic analysis. These analyses would not only evaluate the state's economy, but the state government coffers and how the package may affect future fiscal policy decisions.

If a company is receiving a sizable break on its taxes, or in Foxconn's case, outright cash grant,[166] legislation will likely need to be passed to authorize it. If that happens, legislative fiscal analyses may only provide the bare nuts and bolts of the deal's impact on state and local finances.[167] Standard economic reports of the direct and indirect economic impacts to the state can give a full picture of the location-specific boon and consequence of granting such an incentive deal, and may be done regardless of a legal requirement. However, Michigan's experience with its old tax-credit program shows the pitfalls of

162. *See* Arthur Thomas, *WEDC to Require Foxconn to Hire CPA to Verify Job Numbers*, BIZTIMES (Oct. 18, 2017), https://www.biztimes.com/2017/ideas/government-politics/wedc-to-require-foxconn-to-hire-cpa-to-verify-job-numbers/ (quoting a WEDC spokesman saying that it would be impractical to require a firm to hire a CPA for all but the largest deals).

163. *See* 2017 AUDIT, *supra* note 107, at 28 (noting that QCEW data could be used to compare firm-specific information for possible inaccuracies).

164. *See id.*

165. *See* PEW REPORT, *supra* note 22.

166. Jason Stein & Patrick Marley, *Foxconn Could Get Up to $200 Million in Cash a Year From State Residents For Up to 15 Years*, MILWAUKEE J. SENTINEL (July 28, 2017, 6:33 p.m.), http://www.jsonline.com/story/news/politics/2017/07/28/foxconn-could-get-up-200-million-cash-year-state-residents-up-15-years/519687001/.

167. *See* ROBERT SCHMIDT, WIS. DEPT. REVENUE., FISCAL ESTIMATE – 2017 SESSION, LRB 17-4050/1, https://docs.legis.wisconsin.gov/2017/related/fe/au7_ab1/au7_ab1_DOR.pdf (detailing the fiscal impact on the state of Wisconsin from the perspective of the Department of Revenue, in an analysis that only spans five pages).

failing to adequately plan for its impacts on the state's own tax policy[168]—including the ability to leverage state funds for future incentive packages.

Therefore, each state should mandate an economic analysis of incentive packages above a certain threshold that determine whether they meet the state's policy goals and what trade-offs occur in diverting funds away from other potential investments. Maryland and Washington provide models for such a report. Maryland undertook a review of the trade-offs of its film tax incentive, including how it would impact state workforce levels and a subsequent reduction in spending by state workers as a result.[169] Washington also evaluated the trade-offs of its film incentive program, but focused specifically on whether the program would break even for the state.[170] Ideally, a stress test for these deals would include not only a break-even report, which Foxconn had in some form, but additional qualitative analyses (such as a policy brief indicating how reduced revenue may impact existing state programs) and quantitative analyses (such as the Upjohn Institute metric used by Tim Bartik to determine the cost-benefit of a large tax incentive deal).[171]

If adopted state-by-state, an incentive packaged tied to an absolute dollar amount in the hundreds of millions, rather than an amount tied to a percentage of the state budget, would be an appropriate threshold to trigger issuance of such a "stress test" report. If the latter approach were taken, it may effectively create another impediment for smaller states vying for relocating businesses. Imposing a trigger based on a round number—$300 million, for instance—would ensure that any large relocation project being bid on by multiple states would place each in the same position of justifying it if they drew the winning bid. Legislation creating this review for contract-by-contract cases could also require a similar evaluation for creation of a separate program or expansion an existing program simply to serve a specific firm.

These evaluations are primarily intended to guide lawmakers toward sound fiscal strategy and the possible elimination of ineffective tax incentive programs.[172] However, such a trigger may also raise red flags for massive tax packages or limit an escalating bidding war between states to ensure a more public and well-thought out vetting of any offered package. This would especially be true if statute requires such a report be reviewed and approved by a specific state legislative committee before state agencies could approve any corresponding incentive contract.

D. Exercising Political Will Toward Uniform Law and Restraint

While the above recommendations may help protect a state's finances from a lopsided tax incentive package, none of it works if legislators and state officials subvert the process by passing enabling legislation for every new corporation that comes to the floor. It is incumbent on politicians to look carefully at the cost-benefit of tax credits for relocation or retention of companies and sometimes decide that inaction is better than reaction.

Months after the Foxconn package was approved, WEDC sent a letter on behalf of Gov. Scott Walker to Kimberly-Clark, offering them a substantially similar tax incentive

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168. *See* STANSELL, *supra* note 75, at 1 (noting that the state had misjudged utilization of MEGA tax credits and, therefore, underestimated total liabilities).

169. PEW REPORT, *supra* note 22, at 16.

170. *Id.*

171. Bartik, *supra* note 121, at 10.

172. *Id.* at 15.

package to keep their plants open in East Central Wisconsin.[173] The letter emphasized that the Legislature would act quickly to approve a package if they agreed to the terms.[174] Such a move would effectively ignore the safeguards in place in current law, disregard any recommendations above and once again place accountability measures in the hands of WEDC negotiators and lawyers, who in this case would be dealing with a company threatening to leave rather than come.

Instead, states like Wisconsin, if they intend on using tax incentives to draw companies to the region (or retain those that might leave), should put effort into overhauling state statutes to apply accountability measures for clawbacks, tax credit levels and basic reporting standards to all existing programs. They should also change all of the statutes to account for a flexible response to an opportunity or crisis. Legislating every deal results in short-term thinking.

In situations where certain tax credit situations do require legislative action, however, states need to be prepared to walk away from a deal. Several studies on incentive packages for job creation have shown they often lack added value or are being awarded to companies that would have created or retained jobs in any case.[175] While political expediency can help push many of these deals forward, the argument for walking away from many of them may be clearer than they first appear. The only way to ensure proper accountability is served is to incentive aggressiveness as a starting point, not an ever-present goal of economic development. That requires legislators and state leaders alike to sometimes pass up on the Foxconn or Amazon jackpot.

V. CONCLUSION

With Foxconn and Amazon having provoked the feared "race to the bottom" between states, tax incentive packages will likely get bolder and bigger. While economic growth makes large tax incentive packages feasible now, a recession that hampers state tax revenues will come eventually. When it does, it is imperative that states have measures in place not only to recoup the investments that have gone south, but also to plan in a way that such deals do not land a fatal blow to state coffers at the expense of necessary services. Robust clawbacks and advanced economic planning can help mitigate these issues, but they must be done across the board. Without some base-line accountability standard across the nation, the "race to the bottom" will inevitably continue, with disastrous results.

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173. Letter from Mark R. Hogan, Wis. Econ. Dev. Corp, to Thomas J. Falk, Kimberly-Clark Corp. (Feb. 15, 2018), http://www.wisinfo.com/appleton/pdf/index.php?x=137.

174. *Id.*

175. *See generally* Nathan M. Jensen, *The Effect of Economic Development Incentives and Clawback Provisions on Job Creation: A Pre-Registered Evaluation of Maryland and Virginia Programs*, RES. & POL. Apr.–June 2017 (showing that most incentives given by those states had little impact on job creation as they likely would have created jobs anyway and that success is relatively unchanged when removing firms subject to clawbacks); Richard Florida, *Handing Out Tax Breaks to Businesses Is Worse than Useless*, CITYLAB (Mar. 7, 2017) https://www.citylab.com/life/2017/03/business-tax-incentives-waste/518754/ (summarizing Upjohn Institute for Employment study on tax incentives that says states often provide too much money upfront, rarely evaluate them to see if they work, and add little value to job creation).