POSITION STATEMENT

Congress Granting a Conditional Limited Antitrust Exemption to the NCAA and Its Member Institutions

June 1, 2015

EXECUTIVE SUMMARY

Absent an antitrust exemption, which only the Congress can provide, the NCAA will continue to be the target of antitrust lawsuits whenever it tries to implement educationally defensible reforms that have commercial consequences. Actions that should be considered the legitimate functions of a nonprofit national intercollegiate athletics governance association include, among others: (1) controlling the type and amount of funds that can support athletics (student fees and general funds presently subsidize many athletic departments) so the support of athletics programs does not impinge on funds that otherwise would be spent on primary academic programs, (2) preventing varsity sport programs from conflicting and interfering with students’ academic responsibilities (e.g., sport schedules that conflict with class attendance, athletic participation by academically underperforming students, time spent on sport activities prohibiting sufficient time for study, etc.) and (3) protecting the health and welfare of college athletes (e.g., insurance and protections related to return-to-play guidelines following injury).

Some of these actions also have commercial implications and currently and in the past have been the target of antitrust lawsuits. A limited antitrust exemption that applies only to legitimate categories of controls will enable higher education institutions collectively to enact needed reforms without fear of legal liability. Antitrust lawsuits involve huge outlays for attorneys’ fees, court costs, and potential damages. These funds would otherwise be available to advance the nonprofit educational purposes of the NCAA and its members.

Why is the Sherman Antitrust Act’s Application to NCAA Rules so Challenging?

The Sherman Antitrust Act was designed to prohibit business activities that unreasonably restrain trade, thereby increasing prices and reducing consumer choice. Courts determine which activities are unreasonable restraints within the meaning of the Sherman Act. The NCAA’s activities are unique because the NCAA must make certain rules for its product—college sports—to exist. Some of these rules undoubtedly restrain trade. Arguably, though, they also have a procompetitive effect. The procompetitive effect generally evolve from the NCAA’s stated purpose of maintaining college sports’ uniqueness by preserving a line of demarcation between college and professional sports. The NCAA seeks to justify many of its rules as necessary to protect this line of demarcation by controlling commercialization. If courts deem rules necessary to protect college sports as a distinct entity, absent a less restrictive alternative, they uphold the rules even though, in the typical commercial situation, comparable rules might be deemed to illegally restrain trade.

Because the Sherman Act applies only to commercial decisions, a lingering question concerns whether, and if so, how, it applies to hybrid activities with both commercial and noncommercial effects, such as NCAA rules. Current antitrust lawsuits against the NCAA implicate this hybrid space—where a key question is whether rules seeking to control compensation to athletes and coaches, the number and value of athletic scholarships, etc., are necessary to preserve the separation between college and professional sports.

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2 The Drake Group is a national organization of faculty and others whose mission is to defend academic integrity in higher education from the corrosive aspects of commercialized college sports. The Drake Group goals include: (1) ensure that universities provide accountability of trustees, administrators, and faculty by publicly disclosing information about the quality of educations college athletes receive; (2) advance proposals that ensure quality education for students who participate in intercollegiate athletics, (3) support faculty and staff whose job security and professional standing are threatened when they defend academic standards in intercollegiate sports; (4) influence public discourse on current issues and controversies in sports and higher education; and (5) coordinate local and national reform efforts with other groups that share its mission and goals. The Drake Group is “In residence” at the University of New Haven. For further information see: http://thedrakegroup.org or contact Gerald S. Gurney, President at geraldgurney@gmail.com
A limited antitrust exemption would define those NCAA actions that are compatible with the Sherman Antitrust Act because they are necessary to achieve the priority purposes of higher education, including maintaining the line of demarcation between college and professional sport, while conducting intercollegiate athletics as an extracurricular activity. Thus, the definitions of such actions cannot be overly broad or vague or give inappropriate commercial license to the NCAA; they must be as narrow and precise as possible. Ultimately, in granting such an exemption, Congress must determine the definition of permissible NCAA actions.

**What is a limited antitrust exemption and why should Congress consider granting it to the NCAA and its member institutions?**

Absent an antitrust exemption, which only the Congress can provide, the NCAA will continue to be the target of antitrust lawsuits whenever it tries to implement educationally defensible reforms that have commercial consequences. Actions that should be considered the legitimate functions of a nonprofit national intercollegiate athletics governance association include, among others: (1) controlling the type and amount of funds that can support athletics (student fees and general funds presently subsidize many athletic departments) so the support of athletics programs does not impinge on funds that otherwise would be spend on primary academic programs, (2) preventing varsity sport programs from conflicting and interfering with students’ academic responsibilities (e.g., sport schedules that conflict with class attendance, athletic participation by academically underperforming students, time spent on sport activities prohibiting sufficient time for study, etc.) and (3) protecting the health and welfare of college athletes (e.g., insurance and protections related to return-to-play guidelines following injury).

Some of these actions also have commercial implications and currently and in the past have been the target of antitrust lawsuits. These include capping coaches’ salaries or sport expenses, limiting the dollar amount and numbers of athletic scholarships or other forms of student compensation, prohibiting weeknight games or meets, reducing the length of competitive seasons, and restricting starting times for games or meets, among other examples. A limited antitrust exemption that applies only to such legitimate categories of controls will enable higher education institutions collectively to enact needed reforms without fear of legal liability. Antitrust lawsuits involve huge outlays for attorneys’ fees, court costs, and potential damages. These funds would otherwise be available to advance the nonprofit educational purposes of the NCAA and its members.

Such a limited antitrust exemption should not apply to activities whose primary purposes are commercial, such as selling DVD’s of college games or events, selling clothing such as jerseys or selling the names, likenesses and images of college athletes for videogames, television commercials, or other commercial use and other commercial activities not directly connected to the conduct of intercollegiate athletics events.
Congress has a vested interest in protecting funds that support athletic programs and has historically acted to do so. For instance, Congress has allowed institutions to generate increased revenues through tax preferences granted to college athletics programs. Tax preferences enjoyed by athletics programs include: (1) donations to athletics programs are tax deductible, including 80 percent of donations providing the donor with athletic event seating preferences, (2) net revenues from commercial activities such as ticket sales, sponsorships, licensing fees and royalties, and television rights fees are not “unrelated business income” subject to income taxes, and (3) athletics programs are permitted to use tax exempt bonds to build athletics facilities. Tax preferences are reasonable so long as these privileges advance the educational purposes of the athletics activity and controls exist to prevent excesses inappropriate for nonprofit organizations.

**Under what conditions should Congress grant the NCAA and its member institutions a limited antitrust exemption?**

The Drake Group maintains that two important considerations should dictate the parameters of a limited antitrust exemption.

1. **Narrowly Defined Exemption.** The exemption must be narrowly tailored to apply only to well-defined rules related to legitimate educational purposes, such as academic eligibility, recruitment of athletes, control of the subsidization of non-academic programs by non-profit organizations, and scheduling of competition. It should not be an open-ended definition, such as “all rules for which the primary purpose is educational,” which could be open to an unduly broad interpretation.

2. **Specific Conditions for the Conduct of Educationally Defensible Athletic Programs.** The exemption must be clearly conditioned on specific educational requirements to which the national governance association and its member institutions must adhere, not vague conditions such as “operation of a sound, educationally focused national governance association.” Specific conditions should be related to athlete health and safety (including injury insurance for athletes), academic integrity involving athletic programs, governance such as presidential control, salaries for coaches, facilities for athletics use only, broad national association governance control by all schools and due process protections for athletes, athletics employees, and member institutions, and similar issues.

Congress should define the minimal conditions that should be met for intercollegiate athletics to be considered an extracurricular activity that does not cross the line into professional sports. The Drake Group has suggested that a Presidential Commission on Intercollegiate Athletics consider and develop these conditions. Following is a list of conditions proposed by The Drake Group that deserve consideration:
a. **Injury Insurance.** The national association should have exclusive control of all national championships. The proceeds from these properties should finance athletic injury and catastrophic insurance programs at no cost to college athletes or their parents/legal guardians. The insurance programs should apply to students participating in intercollegiate athletics at all member institutions in all competitive divisions or similar athlete health, welfare, or educational benefits.

b. **Athlete Rights.** The national governance association should be required to adopt rules that protect athletes’ rights, including the rights to (1) transfer to other institutions without a participation penalty, (2) receive medical prevention education and baseline health monitoring assessments, (3) obtain a return-to-play determination following injury from a licensed physician, (4) receive initial and continuing treatment for athletic injuries at no cost to athletes or their parents/legal guardians for up to two years following graduation, (5) long-term protection for permanent and catastrophic injuries, and (6) respectful treatment along with protection from abusive coaching and pedagogical practices.³

c. **Governance Voting.** Member voting in any decision-making should be based on one-vote-per-member-institution or be vested in a blue-ribbon board of independent directors expert in higher education and athletics. The new arrangement would replace the current voting structure, in which the most commercialized athletic programs have a weighted advantage, thereby institutionalizing the self-interest of this membership subset.

d. **Scholarship Values.** The maximum amount of athletics-related financial that may be awarded to a college athlete participating in the Association’s membership division generating the highest commercial revenues should cover the full “cost of attendance” (COA) as defined in the Federal Student Aid Handbook and as determined by the member institution’s office of student financial aid in a manner identical for all students at that institution. Athletics department personnel would be prohibited from participation in determining the cost-of-attendance limits by an institution.

e. **Whistle-Blower Protection.** ‘Whistle-blower protection’ should be afforded to college athletes, faculty, and other institutional employees who disclose unethical behavior or governance organization or institutional rules violations related to the conduct of athletics programs.

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f. **Peer Certification.** Each member institution’s athletics program should be required to undergo a certification review at least once every ten years. The certification process should consist of peer review, external to the institution as administered and funded by the national athletic governance organization. Peer reviewers would examine a campus-wide self-evaluation conducted by various committees assembled for that purpose, with faculty members composing the majority of these committees. The national athletic governance organization’s Board of Directors should establish certification standards consistent with the purposes of the organization, its stated principles, and the conditions detailed for limited antitrust exemption eligibility.

g. **Academic Support Programs.** Academic counseling and academic support services for college athletes should be under the direct supervision and budgetary control of the member institution’s academic authority, should be administered outside the athletics department, and should mirror counseling and support services available to all students.

h. **Budgetary Controls.** The governance organization should legislate control of athletic program expenditures with caps on operating budgets based on competitive division and school and conference revenues and salaries/wages consistent with faculty and educational administrator compensation levels and the operation of nonprofit higher education organizations generally. This change would minimize institutional subsidization of athletics and ensure priority funding for academic programs.

i. **Minimum Continuing Eligibility Standard.** No student with a cumulative GPA less than 2.0 should be eligible to compete in athletics. That student should remain ineligible until the cumulative 2.0 GPA is achieved. Any athlete with a cumulative GPA of less than 2.0 should be restricted to a maximum of 10 hours per week of practices or athletics-related activity.

j. **Freshmen Ineligibility for Underprepared Students.** Students whose academic profile (high school grade point average and standardized test score) is more than one standard deviation below the academic profile the previous year’s incoming class should be ineligible for competition during the freshman year. Such students should be provided with (1) athletic scholarship support during a year of transition and remedial learning if necessary, (2) required academic skills and learning disability testing, (3) a remediation program supervised by academic authorities that addresses learning disabilities or other academic skill deficiencies, and (4) a reduced college-credit course load to accommodate time required for remediation. These underprepared students should also be restricted to a maximum of 10 hours per week in athletics-related activities (practice, meetings, etc.) and should receive oversight of their academic progress by tenured faculty not associated with the athletics department throughout their enrollment at the institution.
k. **Eligibility Arbitration.** College athletes should not be declared ineligible for competition by their respective educational institutions or a national athletic association for reasons other than an insufficient grade-point average, academic profiles indicating insufficient preparation for college work, failure to make satisfactory progress toward a degree, or similar academic failures, violations of athletics drug-testing regulations or non-athletics institutional determinations related to sexual abuse, sexual harassment, academic discipline or other instances of improper student behavior covered by the student code of conduct applicable to all students. The declaration of ineligibility should not occur until the affected athlete has had an opportunity to exercise the right to appeal such ineligibility determination and seek reinstatement. The exclusive means of appeal shall be binding arbitration. No institutional or governance association committee shall hear these appeals.

l. **Title IX Compliance.** Member institutions not in compliance with Title IX athletics regulations, as determined by mandatory external third party review at least once every four years, should be ineligible for postseason play if identified deficiencies are not remedied within one year. Deficiencies not remedied within two years should result in suspension of membership in the Association.

m. **Faculty Shared Governance.** Member institutions should be required to adopt policies approved by their faculty senates to ensure that athletic contests are scheduled to minimize conflict with class attendance and that regular-season contests are prohibited during final examination periods.

n. **Exclusive Facilities.** Construction and exclusive use of ‘athletics only’ practice, competition, conditioning, academic support, housing, dining (training tables), and other facilities should be prohibited.

o. **Treatment as Students, Not Employees.** Member institutions shall ensure that athletes are treated as students rather than employees by (1) strictly limiting involvement in practice, competition, and athletics-related activities to 20 hours per week while classes are in session and (2) limiting athlete compensation to athletics-related scholarship awards that extend to graduation (a maximum of five years). Such scholarships cannot be reduced or cancelled during the award period based on a coach’s evaluation of athletic ability, performance or contribution to team success, illness, incapacitating injury, or physical or mental condition. Such awards may be reduced or cancelled only if the recipient voluntarily withdraws from participation, fraudulently misrepresents information on any athletics eligibility or financial aid document, or engages in serious misconduct warranting substantial disciplinary penalties consistent with policies applicable to all students at the institution.
p. **Tenured Faculty Oversight.** Each member institution must have a faculty-only Committee on Academic Oversight, which shall meet with the faculty senate annually to report the academic progress and qualifications of players and, when possible, to compare such data to data for non-athletes, including average SAT and ACT scores by sport, Federal Graduation Rates by sport, Graduation Success Rates by sport, independent study classes taken by sport, a list of professors offering the independent studies and their average grade assigned, admissions profiles, athletes’ progress toward a degree, trends in selected majors by sport, average grade distributions of faculty by major, incomplete grades by sport, grade changes by professors, and the name of each athlete’s faculty advisor. Such data shall be maintained by sport and by subset of athletes admitted below published admissions standards.

q. **Student Fee Use Consent.** The use of operating revenues derived from mandatory student fees to support the athletics program should be prohibited absent consent by a majority vote in a student referendum to be held at least once every four years or in any year in which an increase in athletics funding is proposed.

r. **Due Process Rights.** The national governance association should require that serious allegations be investigated by third party contractors and adjudicated by retired or former judges with subpoena power (which Congress should grant). Association rules should prohibit athletic department involvement in appeals of campus-level decisions regarding scholarship termination or other institutionally imposed penalty resulting from the violation of institutional rules or of state or federal laws related to sexual harassment or sexual assault, or from criminal behavior by athletes (misdemeanor or felony).

Such conditions should improve confidence among not just Congress and the general public but also the member schools that the antitrust exemption protects the educational purpose of athletic programs and the academic integrity of higher education institutions.