THE DRAKE GROUP EDUCATION FUND

Realizing The Promise Of College Athletics

POSITION STATEMENT

Congress Granting a Conditional Limited Antitrust Exemption to the NCAA and Its Member Institutions[1]

EXECUTIVE SUMMARY

The Drake Group seeks a limited antitrust exemption to support specified educational functions for the NCAA. The NCAA should be allowed to impose requirements on member institutions for educational purposes which may have commercial implications and could otherwise expose it to substantial liability from antitrust actions. Actions that should be considered the legitimate functions of a nonprofit national intercollegiate athletics governance association and protected by such a limited and conditional exemption include, among others: (1) imposing limits on the length of the seasons, the number of scholarships and athletic personnel, and the scheduling of competitions and practices, (2) imposing limits on the number and value of participation, championship, and special achievement awards, (3) controlling certain runaway costs that are a function of the artificial labor market in intercollegiate athletics, such as extravagant coaches' salaries and perquisites, lavish facilities not available to non-athlete students, and excessive recruiting expenses, (4) imposing limits on athletes' use of their own names, images, and likenesses (NILs), including requirements that (a) the payment be at fair market value, (b) the stipulated work actually be performed, and (c) the payment not constitute an inducement to enroll at or remain at the institution, and (5) prohibiting the remuneration of athletes for their participation in institutional athletic activities other than the award of scholarships and other payments tethered to educational costs and benefits.

Some of these limits have been the target of antitrust lawsuits, while some of these limits have not been imposed due to antitrust liability concerns. A limited antitrust

[1] Brian Porto, Gerald Gurney, Donna Lopiano, Mary Willingham, B. David Ridpath, Allen Sack, and Andrew Zimbalist. (2019) *The Drake Group Position Statement: Congress Granting a Limited Antitrust Exemption to the NCAA and Its Member Institutions*. Retrieve at: https://www.thedrakegroup.org/positions-issues/official-positions/ This paper was originally issued on June 1, 2015, revised October 4, 2019, October 25, 2019 and February 5, 2023)

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. Clarity as to what are appropriate limits would free up those funds that then could be used to advance the nonprofit educational purposes of the NCAA and its members.

The Drake Group believes such a limited antitrust exemption should not apply to (1) antitrust lawsuits brought by athletes related to limits on the provision of educational benefits and (2) control of athlete employment or external exploitation of athlete NILs by the athlete or third parties operating on their behalf other than in connection with the guardrails enumerated above.

Thus, the Drake Group[2] maintains that such a limited antitrust exemption should be narrowly defined and conditioned on specific educational and athlete support 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." Guidelines for the construction of such a limited antitrust exemption as well as recommendations for the specific educational practices that Congress should require as a condition of granting such an exemption are offered.

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 lowering output, increasing prices, and reducing consumer choice. Courts and administrative agencies such as the Federal Trade Commission and the Department of Justice 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 evolves 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. The Drake Group believes that this key question should focus on whether the rule is necessary to the preservation of the primacy of the educational process which is at the core of the separation between college and professional sports. 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.

[2] The Drake Group Education fund is a non-profit education organization generates fact-based research and recommendations that enable policymakers to make college sport a better place by ensuring that there is academic and ethical integrity in the conduct of college athletics programs. For further information see: https://www.thedrakegroupeducationfund.org/

A limited antitrust exemption would define those NCAA actions that are permitted under the Sherman Antitrust Act because they are necessary to achieve the priority purposes of higher education while conducting intercollegiate athletics as an extracurricular activity. Thus, the scope 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 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 function of a nonprofit national intercollegiate athletics governance association and protected by such a limited and conditional exemption include, among others: (1) imposing limits on the length of the seasons, the number of scholarships and athletic personnel, and the scheduling of competitions and practices, (2) imposing limits on the number and value of participation, championship, and special achievement awards , (3) controlling certain runaway costs that are a function of the artificial labor market in intercollegiate athletics, such as extravagant coaches' salaries and perquisites, lavish facilities not available to nonathlete students, and excessive recruiting expenses, (4) imposing limits on athletes' use of their NILS, including requirements that (a) the payment be at fair market value, (b) the stipulated work actually be performed, and (c) the payment not constitute an inducement to enroll at or remain at the institution, and (5) prohibiting the remuneration of athletes for their participation in institutional athletic activities other than the award of scholarships and other payments tethered to educational costs and benefits.

Some of these limits have been the target of antitrust lawsuits, while some of these limits have not been imposed due to antitrust liability concerns. 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. Clarity as to what are appropriate limits would free up those funds that then could be used to advance the nonprofit educational purposes of the NCAA and its members. 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. For example, The NCAA and other national governance organizations should be allowed to cap payments to athletes that are not tethered to education such as the value of gifts given to participants in athletic events, payments from third parties for NILs pursuant to new national rules and prizes for athletic achievements.

Congress has a vested interest in protecting funds that support athletic programs and has historically acted to do so. For instance, in the past, Congress has allowed institutions to generate increased revenues through tax preferences granted to college athletics programs. Tax preferences enjoyed by athletics programs have included: (1) donations to athletics programs being tax deductible, (2) net revenues from commercial activities such as ticket sales, sponsorships, licensing fees and royalties, and television rights fees not being considered "unrelated business income" subject to income taxes, and (3) athletics programs being 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 tax exempt organizations.

Why should a limited antitrust exemption not apply to certain types of commercial activities?

Athletes should still be able to sue under antitrust laws for (1) the provision of all educationally related benefits included within any athletics scholarship or other financial aid package or related to special needs that may be created by athletic participation (e.g., tutoring support, provision of computers/online access related to attending class while traveling for athletic events, etc.) (2) eligibility for awards related to exemplary academic achievement, (3) the rights to their own NILs unrelated to the athlete's participation in events that are the properties of the athlete's institution, conference or national governing organization not covered by an antitrust exemption, (4) any institutional, conference or national governing body use of the athlete's NIL other than the promotion (e.g., print and electronic advertisements of the event, game programs, etc.) and electronic distribution of institutional athletic or other extracurricular events in which the athlete is currently participating (e.g., selling clothing such as jerseys, selling the names, likenesses and images of college athletes for videogames, selling DVD's of past college games or events, television commercials, etc.), (5) athletic injury or medical benefits related to athletics participation, (6) any rule or prohibition related to external employment other than employment as a professional athlete and (7) any restriction related to obtaining advice from legal counsel or other qualified service provider.

Recent court judgements have made it clear that scholarship values should not be capped with regard to the provision of benefits tethered to education and The Drake Group believes antitrust lawsuits related to educational benefits should not be restricted. However, The Drake Group believes that athletes and non-athletes should be eligible for awards for exceptional academic achievement but should not be eligible for cash awards for meeting minimal standards or normal academic expectations such as maintaining GPAs or regular academic progress standards for athletic participation which are minimal or rewarded for graduating with no academic distinction.

The Drake Group is on record as calling for removal of all NCAA amateur status rules other than the prohibition of being a professional athlete in the same sport.[3] Athlete outside employment or the athlete's exploitation of their own names, images and likenesses unrelated to the use of their educational institution's brand should not be prohibited. Athletes should have the right to bring lawsuits to protect these external employment and NIL rights.

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

The Drake Group maintains that the following 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 legitimate educational purposes that also have commercial implications such as those purposes specified above. The scope should not be open-ended, 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 priority concerns such as academic integrity of athletic programs, athlete health and safety (including injury insurance for athletes), governance systems that protect against the corrupting influence of commercially successful athletic programs, levels of expenditures appropriate for tax exempt organizations, due process protections for athletes, athletics employees, and member institutions, and similar issues.

3. **Recommended specific educational conditions that should be tied to the granting of the limited antitrust exemption:**
   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 Congressional Advisory Commission on Intercollegiate Athletics[4] consider and develop these conditions. Following is a list of conditions proposed by The Drake Group that deserve consideration:

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[3] Donna Lopiano, Gerald Gurney, Fritz Polite, David B. Ridpath, Allen Sack, Sandy Thatcher, Andrew Zimbalist, (2019) *The Drake Group Position Statement: A Critical Analysis of Proposed Models of College Athlete Compensation.* (February 27, 2019; revised March 2, 2019) Retrieve at: https://www.thedrakegroupeducationfund.org/wp-content/uploads/2019/10/COMPENSATION-POSITION-PAPER-March-2.pdf

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 Treatment 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, (6) respectful treatment along with protection from abusive coaching and pedagogical practices[5] and (7) due process.

c. **Athlete Outside Employment and NIL Rights.** There should be no prohibition of outside employment other than employment as a professional athlete in the same sport or competing for prize money in that sport as a condition of eligibility for intercollegiate athletics. College athletes should be permitted to exploit their own names, images and likenesses conditioned on reporting of such outside employment to their educational institutions, not using the name, marks or affiliation with the collegiate institution, compensation required to be consistent with market rates and such employment not being arranged by the institution or representatives of its athletics interest. Congress should grant a specific exemption to allow an independent national commission of economic and higher education experts to establish permissible compensation ranges based on market value benchmarks and set other standards to enable reasonable control of college athlete outside employment for the purpose of preventing recruiting violations and corporate bribery.

d. **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. Who appoints the independent board? 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.

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[4] See https://www.thedrakegroupeducationfund.org/tell-congress/read-the-proposed-bill/ for proposed bill to establish such a Commission.

[5] For further recommendations on the rights of college athletes, see Lopiano, D., Gurney, G., Willingham, M., Porto, B., Ridpath, D.B., Sack, A., and Zimbalist, A. (2015) The Drake Group Position Statement: Freshmen Ineligibility in Intercollegiate Athletics. (June, 2015).Retrieve at: http://thedrakegroupeducationfund.org]

e. **Scholarship Values.** The value of athletic scholarships should be tied to legitimate academic costs and awards. Importantly, academic awards for athletes should not be substantively different than those awarded to non-athletes, e.g., no special awards for maintaining a minimal grade point average, or no special internships, programs or learning supplements whether special computers or musical instruments not otherwise awarded to non-athletes. The Drake Group recognizes that some of these items are permitted by court decisions or remedy an athlete disadvantage such as traveling for competition and requiring access to the internet or classes while on the road. Furthermore, values should be tied to the cost of attendance in the location of the respective educational entity.

f. **Whistleblower Protection.** 'Whistle-blower protection' should be afforded to college athletes, faculty, and other institutional employees who disclose unethical behavior or governance organizations or institutional rules violations related to the conduct of athletics programs.

g. **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.

h. **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.

i. **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 tax exempt higher education organizations generally. This change would minimize institutional subsidization of athletics, facilitate gender equity in athletics, and ensure priority funding for academic programs.

j. **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.

k. **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 of 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.

l. **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 records 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 should be binding arbitration by the American Arbitration Association in which the athlete chooses one arbitrator, the institution or NCAA chooses one arbitrator and the two selected arbitrators choose a third. No institutional or governance association committee should hear these appeals.

m. **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.

n. **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.

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

p. **Treatment as Students, Not Employees.** Member institutions should 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 (including travel), (2) requiring the term of athletics-related scholarship awards to extend to graduation (a maximum of five years as opposed to one-year grants) and (3) mandating that such scholarships be tethered to educational expenses. Such scholarships should not 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 documents or engages in serious misconduct warranting substantial disciplinary penalties consistent with policies applicable to all students at the institution.

q. **Tenured Faculty Oversight.** Each member institution should appoint a faculty-only Committee on Academic Oversight, which annually meets with the faculty senate 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 should be maintained by sport and by subset of athletes admitted below published admissions standards.

r. **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. If the institution utilizes tuition or student fees to fund athletics, the amount of tuition or student fees per student allocated for support of athletics should be transparent.

s. **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.[6]

[6] Further updates and elaboration on Drake position papers related to antitrust, Title IX and NILs can be found at https://www.thedrakegroupeducationfund.org/positions-issues/.