

PREFACE – The following essay is based on The Drake Group's September 12, 2007, commentary on the Revised IRS Form 990. It was accepted for publication in the November 2007 issue of THE INTERFACE, the joint newsletter of the Institute of Electrical and Electronic Engineers (IEEE) Education Society and the American Society for Engineering Education (ASEE) Electrical and Computer Engineering Division, <<http://www.ewh.ieee.org/soc/es/>>.

Reclaiming Academic Primacy in Higher Education: The Revised IRS Form 990 Can Accelerate the Process¹

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BACKGROUND – America's institutions of higher education that support big-time (NCAA D-1A) athletics programs are now declining toward the total prostitution of their colleges and universities in their seemingly desperate quest for more money, power, and prestige. These institutions are apparently either unwilling or unable to work seriously to restore academic primacy and integrity to their institutions and to the whole of higher education.

With the co-option of the Knight Commission on Intercollegiate Athletics by the NCAA, there is no one outside the government charged with anything resembling responsibility for controlling the NCAA's college sports entertainment business that has become expert at resisting true reform. The business has exploited college athletes, provided weak rules enforcement, shown a lack of concern with regard to violence by college athletes and the connection of violence to the use of performance enhancing drugs, while limiting access to higher education by real students and shrouding its conduct in a veil of secrecy – taking inappropriate, if not illegitimate, refuge in the privacy provisions of the Buckley Amendment to the Family Educational Rights and Privacy Act (FERPA).²

The increasing commercialization of big-time athletic programs and its negative impact on America's higher education enterprise has become evermore apparent to some academic leaders, elected public officials, the sports press, and to a growing fraction of the public.

After a century of ineffective efforts to reform college sports, there is a growing concern over this apparently out-of-control commercialization that is driven by the NCAA to further its financial interests. There is also concern about compromised academic integrity and the distracting influence of overly commercialized college sports on school officials, on America's youth, and on the nation's diminishing prospects as a leader in the 21st century's global economy.

So it is ironic that current federal tax policy forces parents, students, and other American taxpayers to help foot the bill for multimillion-dollar salaries for coaches, 'stadium wars,' tax breaks for wealthy boosters, NFL and NBA minor league teams, and other artifacts of the big-time college sports arms race while the NCAA works effectively to thwart any and all serious reform efforts – especially those that could expose their 'student-athlete' ruse or possibly reduce their revenues.

In his most recent book,³ **Jim Duderstadt**, President Emeritus and University Professor of Science and Engineering at the University of Michigan, wrote: "While they (faculty) deplore the exploitation of student athletes and the corruption of academic values, they feel helpless to challenge the status quo in the face of pressures from coaches, athletic directors, and boosters – not to mention the benign neglect by presidents and trustees." This statement preceded Duderstadt's conclusion that "it is time for Congress to step in, at least in a limited way, to challenge several of the current anomalies in federal tax policy that actually fuel the commercial juggernaut of big-time college sports."

The good news is that the Senate Finance Committee has given serious consideration to recommendations for sports program transparency and reporting at the NCAA and its member institutions. Momentum built in Congress to investigate how universities with big-time sports programs use their tax-exempt status to pay multi-million-dollar coaches' salaries and build extravagant athletics facilities. Senator **Chuck Grassley** of Iowa, the Ranking Member of the

Senate Committee on Finance, asked the Congressional Budget Office to investigate the tax-exemption issue.⁴

Grassley and Senator **Max Baucus**, the committee chairman, have worked together to conduct oversight and achieve major legislative reforms of the laws that help to govern tax-exempt organizations. They not only sought greater transparency into the workings of these organizations, but also urged the Treasury Secretary to update the IRS tax form used by the nonprofit sector to make gathering more and better information a top priority and to pay particular attention to the operational complexities of nonprofit hospitals and universities.

“While we always hear that sunshine is the best disinfectant, sunshine can’t do its work unless we open the blinds,” Grassley and Baucus wrote.⁵ “The sooner we open those blinds the better.” “At this point, it’s clear the IRS needs to get a better picture on a wide range of issues involving tax-exempt organizations,” Grassley said.

THE RECENTLY REVISED IRS FORM 990 – The revised Form 990, “Return of Organization Exempt from Income Tax,” filed by many public charities and other exempt organizations, has the potential to fully expose the Achilles’ Heel of the NCAA and its member institutions – the extremely weak, if any, educational basis for the current financial structure of big-time college sports. This would not only force very major reform, but provide unassailable “cover” for reform-minded university presidents and governing boards as well.

The discussion draft of the Revised IRS Form 990 constitutes a significant redesign of Form 990 that was based on three guiding principles: 1) *Enhancing transparency* to provide the IRS and its stakeholders with a realistic picture of the organization and its operations, along with the basis for comparing the organization to similar organizations, 2) *Promoting compliance* demands that the form must accurately reflect the organization’s operations and use of assets, so the IRS may efficiently assess the risk of noncompliance, and 3) *Minimizing the burden on filing organizations* means asking questions in a manner that makes it relatively easy to fill out the form, and that do not impose unwarranted additional recordkeeping or information gathering burdens to obtain and substantiate the reported information.

The IRS solicited public comment on the discussion draft of the redesigned Form 990, that was due on September 14, 2007. The Drake Group (TDG) seized this opportunity to have the IRS ask for information regarding sports programs. The TDG commentary focused on the tax-exempt NCAA and its member institutions. Here’s why:

After work with the staff of Congresswoman **Jan Schakowsky** throughout 2004 – an effort that led to her Extended Remarks for the Congressional Record⁶ – TDG worked closely with the staffs of the Oversight Subcommittee of the House Committee on Ways and Means and the Senate Finance Committee to reveal the brutal truth about big-time college sports that is often obfuscated by myths, misrepresentations, and misinformation promulgated by ardent defenders of the status quo.

This work helped contribute to a sharply-worded letter from the then House Committee on Ways and Means Chairman Congressman **Bill Thomas** to NCAA President **Myles Brand** – seeking justification for the NCAA’s tax-exempt status as an institution of higher education, specifically asking Brand to explain why, given the NCAA’s similarity with pro sports entities in its dealings with media rights and other big-money issues, it should continue to be tax-exempt, and the December 5, 2006, meeting of the Senate Finance Committee that, among other things, probed the NCAA’s response to the Thomas letter via testimony from Duderstadt.⁷

TDG COMMENTS – Although TDG agreed with the guiding principles for the revised Form 990, it said that the revisions should be amended since the proposed Form 990 does not ask for the level of disclosure that TDG and the Congress are seeking as well as what the IRS ought to have. TDG said it focused its earlier recommendations to the U. S. Congress on the need for greater transparency and reporting that could be required of NCAA sports programs at colleges and universities – arguing that this transparency and reporting would provide supporters, the general public, present and future students and their parents, the media, and policymakers with a much better understanding of “what is really going on” at the NCAA and their sports programs at big-time colleges and universities. TDG said that without enhanced transparency via disclosure there will be no reform in big-time college sports. Here are some specific comments:

The FERPA Factor – TDG said the IRS needs be mindful of the fact that the NCAA and its member schools routinely resist requests for information or data on student athletes – citing the Family Educational Rights and Privacy Act (FERPA) and other federal laws – in effect, shielding academic corruption from public view. This corruption not only allows them to sustain their phony ‘student-athlete’ ruse with its derivative tax-exempt status, but also to recruit, sign, and roster academically unqualified blue-chip athletes requisite to fielding professional-level teams for their college sports entertainment businesses. Thus, the recommendations provided herein are rooted in the compelling need to require the NCAA and its member institutions to disclose information that can provide tangible evidence that their athletes function as real students.

The NCAA’S Student-Athlete – Without facts obtained by independent parties, disclosure, and external oversight, the NCAA cannot know that athletes are really students receiving a bona fide, rather than a “pretend” college education. Since the NCAA lacks verifiable evidence – indicating that athletes are progressing on accredited-degree tracks – there appears to be no rational basis for the NCAA to use the term ‘student-athlete’ when referring to college athletes who are, in effect, full-time employees of their schools. The NCAA’s use of the term may very well represent a false claim in violation of laws governing truth in advertising.

Michigan State University College of Law Professors **Robert and Amy McCormick** argue in a *Washington Law Review* article that grant-in-aid athletes in revenue-generating sports at NCAA Division I institutions should not be viewed as “student-athletes” as the NCAA asserts, but should, instead, be considered “employees” under the National Labor Relations Act.⁸

In many, if not most, instances, college athletes’ participate in an alternative educational experience that is not part of the school’s serious academic life, but rather a customized pseudo-academic experience engineered by academic support center staff members who work at the behest of the school’s athletic department to maintain the eligibility of the school’s athletes.

Recent and ongoing research strongly suggests prevalence clustering of entertainment-sport college athletes, especially minority athletes, in such alternative educational programs.^{9,10} In addition to such pseudo majors, the phenomenon of “one and done” athletes, who utilize college sport as a short-term stepping-stone to a professional sport career, contributes to a lessening of universities’ academic standards and a marked deviation from educational missions.

Just like the NCAA, the Congress and the IRS, must take the word of school administrators that athletes are really students on track to receive a bona fide, rather than a “pretend” college education. The fact that the NCAA has never endorsed proposals for academic disclosure by its member institutions seems to indicate that NCAA officials do not want to have public evidence that could prove embarrassing.

Transparency/Disclosure – It seems clear that the Congress and the IRS want transparency on the nature of a tax-exempt organization that would reveal whether or not it warrants this status. The issue here is whether or not intercollegiate athletics is an integral part of the educational mission which is indeed exempt. The way universities can establish their claim to their being integral to the educational mission is through transparency in the athletes’ experience and their progress as legitimate students.

Other than the new Schedule J, there appears to be nothing in the proposed form regarding specific disclosures on college athletic programs. In fact, Schedule E, which is the schedule filled out by “private schools” exempt under 501(c)(3), has not changed at all. As mentioned previously, the proposed Form 990 does not ask for the level of disclosure that TDG and (we believe) the Congress are seeking as well as what the IRS ought to have. Even if it did, public universities could probably evade such disclosure because many, if not most or all of them, would not file a Form 990. This appears to be a major problem since public universities usually are not required to file Form 990s, because they are part of state government, not a private entity exempt under 501(c)(3). It would probably take a separate law enacted by Congress to require public universities to file a Form 990.

Compensation – The proposed revisions to Form 990 do require far more detail regarding compensation of officers, directors and “key employees” (generally defined as someone who has management-like responsibilities for “a discrete segment or activity of the organization that represents a substantial portion of the activities, assets income or expenses of the organization. . .” on new Schedule J. The new definition of “key employee” which is now essentially the same

as the definition for “excess benefit transactions” in Section 4958 of the Code, is likely to include NCAA Div. I-A football and basketball head coaches, so the IRS will likely get to know somewhat more about their compensation packages than it does now, but only for organizations required to file a Form 990

Also, the Form 990 and Form 990T should be amended to include questions about the “total compensation arising out of the connection to the non-profit”. For example, coaches and others are paid a small salary by the university-relatively – but they receive much larger compensation from other sources that would not be available to them “but for” their position at the university. Accordingly, the Form 990 does not reflect the compensation that the institution is legally liable to provide. The form should show the highest paid people irrespective of the position they hold.

Contingent Benefits – Currently, quid-pro-quo contributions – payments that are required in order to receive benefits from nonprofit organizations – are eligible to be claimed as a charitable contribution, for example, seat “taxes” for premium seats or lease fees for luxury skyboxes. The large income stream stemming from the skybox boom has been assisted in large part by a 1999 IRS ruling that allows boosters to deduct most of the donations they make to lease skyboxes ... donations estimated to account for billions of dollars to Division I universities.

Unrelated Business Income – The commercial connections and government subsidies to college sports are well documented. For example, **Andrew Zimbalist** provides the story behind the gutting of the law pertaining to Unrelated Business Income Tax (UBIT) ... law that was written to provide for the taxation of the activities of a tax-exempt organization that are not substantially related to the exempt purpose for which it was formed.¹¹ It is understood that public universities were made subject to the UBIT provisions by special rule.

In their account of the suppression of the 1977 UBIT case brought against Texas Christian University by the Dallas office of the IRS, **Allen Sack** and **Ellen Staurowsky** provide a good sense of the magnitude and ubiquitous nature of the very powerful legal and lobbying forces at the command of the NCAA and its member institutions.¹²

RECOMMENDATIONS – TDG recommendations and related explanatory notes were based on the above comments and cited references.^{2, 5, 6, 8-16} It is understood that some of these recommendations may very well require congressional action. Specifically, TDG recommended that the IRS:

1. Amend the revised Form 990 and schedules to provide a meaningful level of enhanced transparency – requesting the NCAA and its member institutions to disclose information that will provide evidence that their athletes: a) Are maintained as an integral part of the institution’s student body;¹⁷ b) Attend regular whole-period classes;¹⁸ c) Are on accredited degree tracks and are held to the same academic standards of performance as all other students;¹⁹ and d) Realize a 2.0 grade-point average, quarter-by-quarter or semester-by-semester to gain and maintain eligibility for participation in athletic events, with the grades and academic records certified by the school’s chief academic officer.²⁰
2. Advise the NCAA and its member institutions that: a) The need to vastly improve their transparency and reporting is a very serious matter and that their tax-exempt status will be conditioned on full disclosure; and b) Their operations will be subject to IRS and congressional oversight as well to severe penalties (in addition to the loss of their tax-exempt status) for noncompliance.²¹
3. Eliminate what appear to be clear violations of fundamental tax principles such as the loopholes that were inserted in the tax laws to enable practices such as tax deductions for contingent fees on seat tickets and skybox lease payments.
4. Be more rigorous in assessing the UBIT status of the revenues received by organizations, such as the NCAA, whose sports entertainment business mission is largely tangential to the educational mission of colleges and universities.
5. Require the NCAA and their member institutions to employ a standard uniform system of accounting in their athletic departments that is subject to public financial audits.²²

CONCLUDING REMARKS – The implementation of the above recommendations by the IRS – requiring enhanced transparency and reporting on the part of the NCAA and its member institutions – would not only increase tax revenues, but also help restore academic and financial

integrity in colleges and universities supporting big-time sports programs, especially football and men's basketball. These restorations would go a long way toward reclaiming academic primacy in higher education – doing that which presidents, governing boards, faculty, the NCAA, the Knight Commission, and others have failed to do for a variety of reasons.

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NOTES

¹ This article is a sequel the author's previous *Interface* articles related to college sports reform, "THE U. S. CONGRESS, HIGHER EDUCATION, AND COLLEGE SPORTS REFORM: Signs of Progress, Truth, and Consequences," and "Federal Intervention Required in the Accreditation Process," that appeared in the April and August 2007, issues. In large measure, it is based on the September 12, 2007, "Comments by The Drake Group on the Draft of a Redesigned IRS Form 990."

² FERPA is part of the Federal General Provisions Concerning Education (GEPA), a set of unfunded conditions on the receipt of federal education funds. It is commonly referred to as the Buckley Amendment to GEPA. See Matthew R. Salzwedel & Jon Ericson, "Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics," *Wisconsin Law Review*, Volume 2003, Number 6, 1053-1113. TDG has recommended that the Congress add interpretive wording to FERPA's student privacy provisions to make abundantly clear that this legislation does not prohibit release of information on the academic performance of individual athletic teams in whole or in part, so long as the data do not identify individual team members. Supplementary recommendations relative to FERPA that will ensure academic integrity of institutions of higher education are as follows: a) Under Department of Education guidelines, "Directory Information" shall be amended to insert "courses, including the name of the professor" following "major field of study," and b) Institutions shall make public academic records of members of student groups sufficient in number to protect the privacy of individual students, students' courses including the grade, name of the professor and course GPA. The records shall be in the listed in order of grades received, i.e., courses in which the student received an A, courses in which the student received a B, and so forth.

³ Duderstadt, James J., *The View from the Helm: Leading the American University During an Era of Change*, p. 326, University of Michigan Press, Ann Arbor, Michigan, 2007

⁴ Fain, Paul, "Senator Questions Colleges' Tax Breaks," *The Chronicle of Higher Education*, April 13, 2007.

⁵ Senate Finance Committee Press Release, "Senators Work to Build Confidence in Nonprofits Through Greater Transparency," May 29, 2007, <http://www.senate.gov/~finance/sitepages/baucus.htm>

⁶ Schakowsky, Janice D. "Call for attention to the work of Dr. Frank Splitt," Congressional Record, Extension of Remarks, March 17, 2005, – p 9, http://thedrakegroup.org/Splitt_Essays.pdf.

⁷ Splitt, Frank G., "The U.S. Congress: New Hope for Constructive Engagement with the NCAA and Intercollegiate Athletics", *The Montana Professor*, Spring 2007, <http://mtprof.msun.edu/Spr2007/splitt.html>
This article contains details on these congressional efforts as well as historical perspectives that help get at the truth about big-time college sports. Also, an article by Brand titled "Faculty Members Constructive Engagement in Intercollegiate Athletics," <http://mtprof.msun.edu/Spr2007/brand.html>, appeared in the same issue. Geoffrey G. Gamble, President of Montana State University and George M. Dennison, President of the University of Montana said this in the *Editor's Introduction*: "While not arranged as an exchange, the two pieces by Myles Brand and Frank Splitt offer contrasting views about the role and control of intercollegiate athletics. Brand argues for faculty engagement to assure that intercollegiate athletics remains an integral part of the academy, while Splitt urges federal intervention by Congress to bring under control what he sees as excessive dedication of higher education resources to intercollegiate athletics."

⁸ McCormick, Robert A. and Amy C., "The Myth of the Student-Athlete: The College Athlete as Employee," *Washington Law Review*, Vol. 81, pp. 71-157, 2006, Available at SSRN: <http://ssrn.com/abstract=893059>

⁹ College Sport Research Institute, "Study of 2006 NCAA Division I men's basketball tournament players' majors," Memphis, TN, 2007

¹⁰ Finley, P. S. and Fountain, J. J., "Academic stacking of athletes on low-performing Division I football teams," Paper presented at the annual meeting of The Drake Group, Cleveland, OH, March 2007.

¹¹ Zimbalist, Andrew, *Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports*, Princeton University Press, 1999; See pp. 128 and 129 in the Paperback Edition, 2001.

¹² Sack, Allen L and Staurowsky, Ellen J., *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth*, Praeger Publishers, 1998.

¹³ Splitt, Frank G., "Are Big-Time College Sports Good for America?" http://www.thedrakegroup.org/Splitt_Good_for_America.pdf

¹⁴ _____, "The U. S. Congress, Higher Education, and College Sports Reform" http://thedrakegroup.org/Splitt_The_Interface.pdf

¹⁵ _____, "The Congressional Challenge to the NCAA Cartel's Tax-Exempt Status" http://thedrakegroup.org/Splitt_Congressional_Challenge.pdf

¹⁶ _____, "Don't Overlook the Congress for Serious College Sports Reform" http://thedrakegroup.org/Splitt_Dont_Overlook.pdf

¹⁷ Over the years, the NCAA has made a number of rule changes that have emphasized athletics over academics so as to move their D-1A football and men's basketball programs to professional levels. The NCAA has resisted providing college athletes meaningful opportunities to function as real students by not agreeing to: a) Restore first-year ineligibility for freshmen with expansion to include transfer athletes; b) Reduce the number of athletic events that infringe on student class time, with class attendance made a priority over athletics participation—including game scheduling that won't force athletes to miss classes; c) Restore multiyear athletic scholarships—five-year scholarships that can't be revoked because of injury or poor performance (currently, an athletic scholarship is an agreement between athlete and coach/athletic department, renewed based on ATHLETIC performance), or, replace athletic scholarships with need-based scholarships – agreements between a student and the institution based on *academic* performance. If the scholarship is need based, it will be awarded by the institution – just as the institution awards all other need-based aid – in that case, it does not need to be a five year award as the student will continue to receive his or her need-based aid, even if they leave the team. A strong case for switching to need-based aid as the only way to break the cycle of sponsoring professional teams on college campuses is made by John Gerdy in his most recent book, *Air Ball: American Education's Failed Experiment with Elite Athletics*; and d) Require athletes to honor the terms of their multiyear athletic scholarship with appropriate penalties to the school and athlete for broken commitments such as 'one and out' to the NBA.

¹⁸ Attending class is a public act; disclosing the names of courses and professors while not releasing students' grades provides the appropriate balance between a student's right to privacy and the public's right to know the conduct of faculty, administrators and governing board members. The purpose of transparency is to focus on the conduct of faculty, administrators and governing board members, not on student conduct. Transparency would require disclosure of courses taken by the school's football and basketball team players as well as cohorts representing 50% of the players with the most playing time, the average grades for the athletes and the average grades for all students in those courses, the names of advisors and professors who teach those courses, and whole-period class attendance records for the athletes.

¹⁹ The schools should be required to identify: a) The Department of Education's National Advisory Committee on Institutional Quality and Integrity (NACIQI) approved accrediting organization responsible for accrediting the tracks, especially for the general studies and other 'diploma-mill-like' degree tracks commonly engineered for athletes by their school's academic support center staff, and b) The responsible authority for academic counseling and support services for athletes. Such services should be the same for all students and in no way under the influence of the athletic department.

²⁰ It is reasonable to expect that a legitimate student have no less than a "C" average. The school's chief academic officer should be held personally accountable for academic corruption.

²¹ Conditioning the continuation of the NCAA's tax-exempt status on their meeting specific reporting requirements such as outlined herein and plugging the tax loopholes that help subsidize the college sports arms race will provide a strong message as to the serious nature of the revised Form 990 and its schedules. Self assessment and reporting by colleges and universities, as well as weak enforcement by the NCAA, and even weaker penalties for infractions, provide an enormous incentive for schools to scheme and cheat. Failure to implement and comply with the IRS reporting

requirements should put the NCAA and/or individual institutions at risk of losing their tax-exempt status. Once implemented, evidence of a continuation of existing patterns of fraud, continued efforts by universities and colleges to circumvent the intent of these measures, or, retaliation against whistleblowers, should garner severe penalties

²² Convenience accounting and budgeting practices will continue to be used by the NCAA cartel to deceive and confuse faculty, the public, the Congress and the IRS about athletic department financials unless and until schools are forced to employ a uniform system of accounting that includes total capital expenditures, depreciation, and total staff costs from all sources, as well as be subject to public financial audits. The threat of Sarbanes-Oxley would certainly bring the NCAA and its member institutions to sharp attention.