



**THE DRAKE GROUP**

Advancing Positive Legislative  
Change In College Athletics



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## **Congressional Briefing Paper and Recommendations**

### **Preliminary Assessment: Title IX and Other Implications of the Proposed Settlement of *House v. NCAA, Hubbard v. NCAA, and Carter v. NCAA* on Intercollegiate Athletics Programs**

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# Congressional Briefing Paper

## Preliminary Assessment: Title IX and Other Implications of the Proposed Settlement of *House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA* on Intercollegiate Athletics Programs

### EXECUTIVE SUMMARY

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On May 23, 2024, the NCAA and the highest-powered athletic conferences -- the Big Ten, SEC, Pac-12, Big 12, and ACC (often referenced as the NCAA Division I Power Five conferences) -- jointly announced a proposed settlement to resolve three pending federal antitrust lawsuits: *House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA* (hereafter referred to as “three lawsuits”). Each of these cases, all pending in the Northern District of California, includes both the NCAA and the Power Five conferences as defendants. This briefing paper examines the proposed settlement and implications for college athletics including the application of Title IX to revenue-sharing, NIL payments and athlete employment.

An actual settlement agreement needs to be developed and signed by the parties (as opposed to the reported current 13-page term sheet). The sequence of events once there is a signed agreement is a) the court must preliminarily approve the agreement, b) an opt out and objection period of at least 90 days, and c) finally the court, after reviewing the objections and number of opt outs, will decide whether to order a final approval. The final approval would be subject to appeal. Pursuant to the media reports of the term sheet (which has not been disclosed to the public), there are at least two core parts of the proposed settlement: one for past damages and the other for injunctive relief focusing on the next ten years.

With respect to past damages, the NCAA would pay **approximately \$2.8 billion** to past and current Division I college athletes over a 10-year period for NIL payments that, but for the NCAA rules, the athletes would have received.

More specifically, of the \$2.8 billion, the NCAA will pay approximately \$1.15 billion from its reserves, catastrophic insurance, new revenues, and budget. The remaining \$1.65 billion will be paid by reducing distribution payments it makes to conferences from its Final Four Men’s Basketball revenues by an average of 20 percent over the next ten years. The Power Five conferences will pay 40 percent of the \$1.6 billion and the remaining Division I conferences, none

of which were named defendants in any of the three lawsuits, will pay 60 percent – a point of contention.

**In addition to the past damages relief**, the second core part of the proposed settlement provides for injunctive relief. More specifically, Division I institutions will be permitted to share revenues with college athletes going forward **for a 10-year period**, with an initial cap of 22 percent of the average of the annual revenue of the institutions in the Power Five conferences. The proposed agreement includes escalation clauses that may result in increased dollar amounts that the schools may provide to their athletes. The NCAA estimates that these revenue-sharing payments will provide \$10-\$15 billion (\$1 to \$1.5 billion dollars per year) to college athletes. It is not clear the extent to which non-Power Five conferences will have the resources to participate in revenue-sharing.

The proposed settlement terms would also require the elimination of the NCAA's current constitutional principle prohibiting institutions from compensating athletes for participating in a sport other than for grants-in-aid and compensation and benefits tethered to educational expenses. Further, it is reported that the settlement would reconfigure Division I scholarship and roster limits.

In addition to the implications discussed herein, it strikes us that without a Congressional antitrust exemption or classification of athletes as employees who are permitted to collectively bargain, any cap on institutions for revenue-sharing or pay-for-play, such as the proposed 22 percent cap, likely is an illegal restraint on pay by the NCAA and Power Five who arguably have market power. Thus, the imposition of such a cap could immediately subject the NCAA and Power Five conferences to additional antitrust litigation by athletes who seek to recover more than 22%.

Notably absent from media reports about the potential implications of the proposed settlement, that we discuss herein, are:

- the financial impact with regard to institutions' Title IX obligations to provide equal financial assistance, benefits, and treatment to male and female athletes;
- whether the NCAA Board of Governors or any divisional governance body had the authority to approve a settlement framework that on its face appears to be in violation of the NCAA's constitutional provisions without a special convention and vote of the membership;
- the viability of non-revenue sports and impact on the success of our Olympic or World Championship USA national teams; and
- the future business model of the entire intercollegiate athletics industry.

Significantly, there is much dispute in the press and among the parties about how Title IX applies to the settlement agreement's proceeds to athletes. [One of the plaintiff's attorneys has stated](#) that 90 percent of the settlement dollars for past damages would go to male athletes (75 percent to football and 15 percent to men's basketball), 5 percent to women's basketball and 5 percent to "other" with no indication of sport or sex. The cost of the settlement for past damages must therefore include an additional Title IX compliance expense estimated to be close to 90 percent as explained herein. And, the future revenue sharing similarly must be provided proportionally to men and women. Certain reports state that Title IX does not apply to either the past damages or future revenue sharing payments; that Title IX can be evaded by payments made through third parties and that the application of Title IX to such cash payments that have not been made to parties previously must be decided in the future by the courts. Both of these are wrong – Title IX cannot be evaded by funneling the payments through non-school entities and the cash payments are financial assistance and treatment and benefits that must be proportionally provided to women and men. More specifically, while Title IX regulations clearly cover all NCAA member institutions that are recipients of federal financial aid, they also cover entities comprised of the member institutions such as conferences and the national governing organization. Title IX applies to all forms of financial assistance provided to college athletes whether labeled scholarships, revenue-sharing, pay-for-play, NIL payments, employment, or similar classifications of cash payments or benefits. Current law requires that male and female athletes are entitled to equal amounts proportional to their percentage of athletics participants in any past or future year in which settlement payments for past damages are made or revenue is shared in the future. The formulas for each institution to determine its specific additional Title IX equity obligation are provided.

These and other issues are considered in this briefing paper.

# Congressional Briefing Paper

## Preliminary Assessment: Title IX and Other Implications of the Proposed Settlement of *House v. NCAA*, *Hubbard v. NCAA*, and *Carter v. NCAA* on Intercollegiate Athletics Programs<sup>1</sup>

### 1.0 Background: College Athletics Terminology, NCAA Structure, Historical Context

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#### 1.1 The NCAA, its divisions and its member institutions

Athletics programs require conferences (groups of institutions which regularly play each other) and national governing bodies to standardize rules of the sports and adopt eligibility and other rules ensure fair play. These organizations are developed by the institutions themselves that then form committees of institutional representatives to recommend such rules. Each member conference or institution authorizes its respective representative to vote on adoption of the rules. The NCAA is by far the largest national collegiate governance association in the USA; others include organizations such as the National Association for Intercollegiate Athletics (NAIA) and the National Junior College Athletic Association (NJCAA).

In 2022-23 the NCAA consisted of 1,077 active member institutions and 131 conferences organized by competitive divisions and subdivisions.<sup>2</sup> **Division I** consisted of 348 member institutions and 41<sup>3</sup> conferences with 188,485 participants that compete in three subdivisions:

- The **Football Bowl Subdivision (FBS)** consisted of 130 member institutions organized into 10 conferences with the top five highly financially resourced conferences (65 institutions) referred to as the “Power Five” and the remaining five conferences (65 institutions) referred to as the “Group of Five.”<sup>4</sup> Notre Dame (ACC) and UConn (Big East) compete in

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<sup>1</sup> Thanks to the nationally recognized experts who contributed to this briefing paper. The Drake Group is a 501(c)(4) non-profit organization working to better educate the U.S. Congress and higher education policy-makers about critical issues in intercollegiate athletics.

<sup>2</sup> Source of NCAA membership data in this section: [2022-23 NCAA statistics](#); source of participation data: [2023 NCAA Demographics Database. “Active” members do not include provisional, exploratory, or those institutions in the reclassification process.](#)

<sup>3</sup> Only the 37 multisport conferences will participate in settlement payments.

<sup>4</sup> Power Five consists of ACC, Big Ten, Big 12, PAC-12, SEC; Group of Five consists of AAC, C-USA, MAC, MWC and SBC). We use the term “Power Five” throughout and not the “Power Four” because the three lawsuits name the NCAA and the Power Five as defendants. The use of the term “Power Four” has been adopted by the media because of the PAC-12, has lost 10 of its 12 members to other Power Five conferences in the most recent bout of



FBS football as “independents.”<sup>5</sup> All FBS football members compete for a berth in the *College Football Playoff* (CFP). The CFP is a national football championship independently owned by the 10 FBS conferences and Notre Dame rather than owned by the NCAA. The new 12-team CFP begins in 2024 and through the six-year period ending in 2031 will produce annual media revenues of \$1.3 billion which will be split 29 percent to the Big Ten, 29 percent to the SEC, 17 percent to the ACC, 15% to the Big 12, 9 percent to the Group of Five conferences as a whole, and the remainder for the independents and bonuses.<sup>6</sup> In all other sports, the institutions each compete for their respective conference championships and for berths in an NCAA Division I or Open (open to teams from all three competitive divisions) national championship for their respective sports.

- The **Football Championship Subdivision (FCS)** consisted of 121 member institutions organized into 14 conferences. This division plays football at a lower resourced level. The institutions each compete for their respective conference championships in football and all compete for berths in the NCAA FCS football championship. Sport programs other than football compete for berths in an NCAA Division I or Open (open to teams from all three competitive divisions) national championship for their respective sports.
- The **Division I Subdivision (DI-AAA)** consisted of 97 member institutions organized into 17 conferences. These schools focus on achieving Final Four Men’s Basketball success and either do not sponsor the sport of football or choose not to engage in highly competitive football programs vying for the FBS or FCS football championship. Each sport other than football competes for their respective sport’s conference championships and for berths in an NCAA Division I or Open (open to teams from all three competitive divisions) national championships for their respective sports.

**Division II** consisted of 296 institutions and 23 conferences with 134,666 participants. Division II institutions have greater scholarship and other expenditure restrictions than Division I and compete for their conference and NCAA Division II or open national championships by sport. **Division III** consisted of 433 member institutions and 67 conferences with 202,933 participants. Division III institutions do not award athletics scholarships, are generally lower resourced than Division II institutions, and compete for a NCAA Division III or open national championship for

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conference realignment. Whether the remaining two member of the PAC-12 (Oregon State and Washington State) will seek to reconstitute its membership with other schools or dissolve is still uncertain.

<sup>5</sup> Notre Dame is a full voting member of the ACC and UConn is in the Big East but they do not compete in those conferences in football.

<sup>6</sup> Heltman, Russ. (March 15, 2024) Report: Conference Revenue Sharing Splits Revealed From New College Football Playoff Media Contract. *SportsIllustrated.com*. Retrieve from: <https://www.si.com/college/cincinnati/football/report-conference-revenue-sharing-splits-revealed-from-new-college-football-playoff-media-contract>

their respective sports. Almost all are totally subsidized by institutional general funds and, other than seeking donor support, do not engage in commercialized athletics programs. It has been reported that the proposed settlement does not impact Divisions II or III.

## **1.2. The role of athletic conferences**

Generally, geographically or academically similar institutions within each NCAA division or subdivision form into small groups or conferences for the purpose of playing against each other for the bulk of their regular season schedule and conducting a post-season conference championship. The conferences give schools leverage in controlling officiating and other costs, improve the ease in scheduling contests, sponsoring championships, and negotiating for media rights.

The conference office staff perform scheduling functions, train and assign game officials, and perform coordinating functions that result in the more efficient execution of intercollegiate sport programs. Together the conference commissioner and athletics directors also work together to create a layer of “local” rules or agreements applicable to all conference members with a focus on controlling costs and maximizing competitive balance.

The role of Division I athletic conferences is the same as Division II or III conferences with the added responsibility of maximizing athletics-generated revenues for members, primarily by arranging for television exposure and generating media rights fees for regular season and post-season conference championships. The conference commissioner is held responsible for seeking media-related revenues and elevating the national stature and commercial success of the conference. The Commissioner of the conference is often a significant “power broker” in that he or she is usually responsible for regularly convening the presidents of institutions to act in their often more formal than substantive capacity as the conference board of directors. The role of athletics directors is to work with the commissioner to evaluate, approve, and promote conference programs in the interests of member institutions. Because most college presidents do not have the time to focus on athletics issues, the Commissioner becomes the trusted “handler” and key influencer in these relationships. Athletic directors trust their conference commissioners to effectively communicate their needs and advance their strategic plans.

Like the NFL or NBA, conferences work to achieve greater competitive balance among member institution because the more competitive the games and conference rivalries, the more enthusiastic the fans, the greater the number of tickets that will be sold, the greater the interest of sponsors and sponsorship income, and the greater interest of television distributors and generation of media rights fees.

### **1.3 What are name, image, and likeness (NIL) rights and how do they relate to the proposed settlement?**

Institutions are legally obligated under certain state “right of publicity” laws to obtain permission from athletes’ to use their publicity rights, typically referred to as “name, image, and likeness” rights or “NILs,” for use in media guides, promotions, advertisements, television appearances, etc. Some state laws provide that there is no right of publicity in live broadcasts. There is no federal law regarding privacy rights. Nevertheless, in the past, the NCAA had a rule that prohibited third parties and institutions from paying athletes for their publicity rights. The athletes were required to sign a form indicating they would abide by these rules or be denied participation in their sport. Athletes gave permission for the institution, its conference, and the NCAA to use their NIL. And, in the past, the NCAA punished athletes for receiving any compensation from third parties for their NILs. While that NCAA rule prohibiting third parties from paying athletes for their NILs has been suspended, schools and conferences are still prohibited from paying athletes directly for their NILs and still require the athletes to sign a form granting the entities permission to use the athletes’ NILs with no compensation.

The three lawsuits allege that the NCAA rules - agreements to pay athletes zero for their NILs --is an illegal restraint under the Sherman Act. The proposed settlement would require the elimination of such rule and, as discussed later, provide for past damages and future payments to athletes for the use of their NILs.

### **1.4 What do “pay-for-play” and “revenue-sharing” mean in the context of college athletics?**

The three litigations that are the subject of the settlement proposal challenge, among other things, the NCAA rules that prohibit athletes from being compensated by institutions beyond their educational expenses and for playing their sports. The NCAA currently limits athletics scholarships to “cost of education” (e.g., tuition, required fees, room, board, books and “cost of attendance” stipends as calculated according to federal student financial aid rules by each institution’s Office of Student Financial Aid). Since the *Alston* SCOTUS 2021 decision (discussed later), college athletes are also permitted to accept up to \$5,980 in athletic achievement awards and any academic-tethered benefit such as summer abroad programs, internships, graduate and vocational school tuition, computers, musical equipment, etc.

“**Pay-for-play**” is a term commonly used to refer to any financial assistance to athletes that is not tied to educational expenses. The NCAA Constitution, Article 1 (Principles), Section B, specifies: "The Collegiate Student-Athlete Model. Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with guidelines established by their NCAA division."

“**Revenue-sharing**” is a term referred to in the context of the settlement proposal as athletics’ generated revenues to include TV contracts, video games, ticket sales and sponsorships, excluding donor contributions. These are not the only revenues that support athletics programs. Because athletics programs reside within their tax-exempt educational institutions, they benefit from being able to use tax-exempt bonds for stadiums and other major construction projects, receive lower cost of goods and services due to local and state tax exemptions, and receive gifts from generous donors who benefit from personal tax deductions for their gifts to athletics programs (as long as they reside in 501 (c) (3) charitable/education non-profit entities).

Institutional direct subsidies to athletics programs are significant and are derived from student tuition, mandatory student activity fees and other governmental or non-athletics revenue sources. These subsidies vary by NCAA competitive division and subdivision:

<u>Division/ Subdivision</u>	<u>Student Fees/General Fund (Tuition) Subsidies as Percent of Revenues*</u>
<u>Division I</u>	
Power 5	10%
Group of 5	56%
FCS	71%
I-AAA	77%
<u>Division II</u>	
Programs with Football	96%
Programs without Football	92%
<u>Division III</u>	
Programs with Football	100%
Programs without Football	100%

\*Sources of Financial Data: [Division I – 2021-22 Data](#), [Division II – 2020-21 Data](#), [Division III – 2019-20 Data](#)

Further, “revenue-sharing” has no relationship to “profit-sharing.” While it is accurate to say that football and men’s basketball generate revenue, they typically do not bring in profit if measured properly with all appropriate expenses allocated to all the sports in the department. For example, in 2023-24 only 28 of 2,000 athletic programs in higher education institution

realized more revenues than they expended on an operating basis. If these data include debt service and other institutional subsidies and the cost savings derived from the education institution's tax-exempt status, it is doubtful whether any athletics program is self-sufficient. This is important, because if there is no profit, the populist argument that college football and basketball athletes should be paid more than female athletes because of "market" forces is inaccurate.

Last, it is important to note that "revenue-sharing" prior to this litigation lies at the heart of funding all sports programs and Title IX compliance. Revenues from all sources flow to the athletic department budget and are used to fund all sports. Title IX requires that those revenues, regardless of source, must be used by the institution for equal financial assistance, benefits, and treatment of male and female athletes.

### **1.5 Historical context of athletics scholarships compared to pay-for-play**

The tying of scholarships to educational expenses has had both negative and positive impacts on college athletes. Any student can be both a student and an employee and many students are. The downside of overly-controlled and high time-demand athletic programs result in insufficient time to meet academic requirements, insufficient recovery from strenuous athletics training, and coaches and staff participating in academic fraud by placing students in less challenging majors and coursework to keep them eligible. These commonly known abuses often prevent athletes from successfully completing educational degrees that lead to meaningful careers. Conversely, few people realize how cost controls such as no pay-for-play have created benefits for college athletes that their Olympic and professional non-school sports counterparts do not enjoy: paid room and board, year-round access to the best and greater numbers of sports coaches, athletic trainers, nutritionists, free tutoring, and other academic assistance and facilities that are superior to those provided for Olympic and professional athletes. These resources may be eliminated once athletes receive considerably more compensation. As employees, college athletes may collectively bargain for such benefits, but there are doubts whether cash compensation will take the back seat to all of the above. The new coin for successful recruiting of prospects, with or without employee status, will most likely shift from educational expenses to NIL and revenue-sharing cash financial assistance with no restraints. Such an emphasis on earning cash as a sport "employee" can easily become a student priority over academic achievement, ill-serving the vast majority of 188,000 Division I athletes who will not become professional sport athletes (fewer than [4 percent of NCAA Division I draft eligible football and basketball players are selected](#) each year).

## 1.6 Recent litigation against the NCAA and its member institutions

Antitrust lawsuits against the NCAA and the Power Five conferences have proliferated in the last decade as the narrative became louder and louder that African-American football and men's basketball players produce a large share of their respective athletic department's revenues but receive too few benefits and no compensation – no cash. Some athletes drew much attention when noted that they went to bed hungry because they had no cash to buy extra food. The narrative includes that these athletes pay for mostly white athletes to compete in so-called Olympic sports given that athletic departments share revenues earned from their higher producing revenue sports with those that make very few revenues. And, at the same time as this narrative was gaining popularity, coaches' salaries and facilities spending skyrocketed. Of course, the general commercialization of college sports – especially the increased dollars from media rights -- has increased exponentially during this time period, contributing to the debate of how the money should be most fairly spent.

At the heart of the debate is the NCAA's long-time mantra of the necessity of amateurism. The theory of the antitrust cases, generally, is that schools through the NCAA and the conferences, have via their rules agreed to pay collegiate athletes zero—a price fixing agreement under the Sherman Act. The NCAA has justified its rules by arguing that amateurism is necessary in order for college sports to prosper—e.g., demand would go down if athletes were paid. Increasingly, the courts have become skeptical of this manta. As a result, some of the cases chipped away at the NCAA rules that prohibited schools from providing unlimited benefits that are educationally related and some at the ability of third parties to compensate athletes for their name, image and likeness (NIL); and, now, current cases attack almost every NCAA rule that prohibits any type of compensation to athletes regardless of the source. We very briefly highlight a few of the cases.

The most significant is the SCOTUS decision in *Alston v the NCAA et al (In re Athletic Grant in Aid Cap Antitrust Litigation)*. In 2021, the SCOTUS held schools must be permitted to provide all (reasonable)<sup>7</sup> benefits as long as they are educationally tethered. Included as an educationally tethered benefit that is permitted is a \$5,890 cash award for academics (that many schools are awarding to athletes merely for being eligible). *Alston* is most significant, not for the rules that were struck down, but because the Court poked a big hole through the NCAA's amateurism justification in antitrust cases. It held that no longer will the NCAA and conferences be treated differently in antitrust cases where as in the past they were given special deference for their rules because of the character of intercollegiate sports. The *Alston* Court observed that intercollegiate

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<sup>7</sup> The Court did impose a “no-Lamborghini” rule—but, to no avail. Indeed, UT most recently displayed in their athletic department parking lot a variety of Lamborgini's as football recruits came to visit.

sports is “in fact organized to maximize revenues” (141 S. Ct. 2141 2159 (2021)). Further, significant in *Alston* is the concurring opinion by Justice Kavanaugh in which he stated that the NCAA is “not above the law.” He raised the point that intercollegiate sports should be held to the same antitrust standards as other industries—*i.e.*, that no longer should the NCAA, conferences, and schools receive deference on the basis that they are protecting amateurism. Continuing, he said: “And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.” 141 S. Ct. 2141 (2021).

Next, we mention three other antitrust cases because they are the subject of the proposed settlement agreement (there are other antitrust cases pending against the NCAA’s rules that impose limits on pay and on other types of playing requirements (e.g., transfer rules).

First, and furthest along in litigation which had a trial date of January 2025 (now stayed pending the settlement process), is *In re College Athlete NIL Litigation*, No. 4:20-cv-03919-CW (N.D. Cal. June 15, 2020) (referred to herein as “*House*”). *House* challenges the rules that prohibit athletes from receiving from their schools, conferences or third parties, anything of value in exchange for the commercial use of their NILs, particularly from revenue produced via broadcast rights (but not limited to that source of revenue). After the filing of the *House* case, the same attorneys, filed the *Carter* case which broadened their attack and challenged every rule that prohibits any compensation from any entity (including schools, conferences and the NCAA) to athletes. (Case no. 4:23-cv-06325-DMR (N. D. CA., Dec. 7, 2023). At its core, *Carter* challenges the pay for play rules.

The third case is *Hubbard/McCarrell* (known as “*Hubbard*”). (Case No.4:23-cv-01593, N.D. CA, April 4, 2023). It seeks damages on behalf of all Division 1 athletes who would have received the *Alston*-permitted \$5,980 in cash if *Alston* had been decided earlier.

The complaints in the three lawsuits allege slightly different classes (men v. women; football and basketball v. all sports, Power Five v Division 1, etc.) and have different time periods. And, within the *House* and *Carter*, the classes differ depending on past damages versus future injunctive relief. Classes have only been certified in the *House* case (*Carter* and *Hubbard* have not gotten that far in the litigation).

The proposed class in *Hubbard* (seeking only past damages for the *Alston* award money totaling up to \$5980 per athlete) is of all Division 1 athletes who competed between April 1, 2019, and the date of certification in that case.

The proposed classes in *Carter* are for injunctive relief: all Division 1 athletes who competed between Dec. 7 and the date of judgment in the case; and for past damages: Power Five conference plus Notre Dame football players and basketball players who competed prior to March 21, 2017. *Carter*, again, seeks for the free market to control compensation.

Illustrative of the differences are the following classes from the *House* litigation:

- **Injunctive Relief Class:** All college athletes who compete on, competed on, or will compete on a Division I athletic team at any time between June 15, 2020 and the date of judgment in this matter. This class seeks a change in the NCAA rules prohibiting NIL compensation from any entity.
- **Damages Classes:**
  - **Football and Men’s Basketball Class:** All current and former college athletes who have received full Grant-in-Aid (GIA) scholarships and compete on, or competed on, a Division I men’s basketball team or an FBS football team, at a college or university that is a member of one of the Power Five Conferences (including Notre Dame), at any time between June 15, 2016 and the date of the class certification order in this matter. This class is alleged to have been deprived of compensation they would have received for the use of their NILs in broadcasts of FBS football or Division I basketball games, and video games.
  - **Women’s Basketball Class:** All current and former college athletes who have received full GIA scholarships and compete on, or competed on, a Division I women’s basketball team, at a college or university that is a member of one of the Power Five Conferences (including Notre Dame), at any time between June 15, 2016 and the date of the class certification order in this matter. This class is alleged to have been deprived of compensation they would have received for the use of their NILs in broadcasts of Division I basketball games.
  - **Additional Sports Class:** Excluding members of the Football and Men’s Basketball Class and members of the Women’s Basketball Class, all current or former college athletes who competed on a Division I athletic team prior to July 1, 2021 and who received compensation while a Division I college athlete for use of their name, image, or likeness between July 1, 2021 and the date of the class certification order in this matter and who competed in the same Division I sport prior to July 1, 2021. This class is alleged to have been deprived of compensation from third-party NILs that they would have received before the interim NCAA policy went into place permitting such compensation.

Thus, the variety of the classes demonstrates some of the complexity in settling the three lawsuits together. And, as obvious from the *House* and *Carter* complaints that focus on Power Five football and basketball players, the past damages in those cases will significantly go to football players as discussed in Section 3 of this report.

To be noted, in addition to these three litigations and other antitrust cases, there is significant other litigation pending that seeks additional benefits for intercollegiate athletes but invoke the National Labor Relations Act and the Fair Labor Standard Act. The aim of all these cases is to



provide greater compensation and benefits for college athletes and also collective bargaining (NLRA cases).

## **2.0 Fluid Status and Absence of Settlement Terms Limit Definitive Analysis**

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Without a definitive term sheet or written settlement of the three lawsuits -- House/Hubbard/Carter -- any definitive analysis of its implications is conjecture. Yet, we attempt herein to understand and anticipate the possible implications so that decision-making is based on facts and law rather than fear instilled by reports that if the *House* case goes to trial the damages could be as high as \$20 billion given that antitrust damages are trebled. The \$2.8 billion potential financial impact of a settlement is a greatly “reduced” amount from the speculated potential jury verdict. Further, we note that the proposed settlement includes two distinct parts -- the \$2.8 billion in past damages and \$10-\$15 billion in going-forward injunctive relief over a ten-year period, with the latter raising questions regarding court approval. Both elements, singly or together, are likely to cause massive disruption because they will require the elimination of current NCAA constitutional provisions that prohibit cash payments to athletes that are not educationally tethered, changes to other existing NCAA rules that control costs, and significant Title IX gender equity expenses.

The proposed settlement unquestionably will cause fundamental change to the business model of intercollegiate sports. This demands anticipatory due diligence to guide decision-makers. Complicating any planning is that higher education leaders and members of Congress are being urged to take actions in support of the settlement without any entity easily able to dig into the weeds given the lack of transparency of the proposed settlement terms. Toward that end, The Drake Group (TDG) has assembled Title IX, sports economics, and other experts to organize factual information that might better educate policy makers. We urge others to make similar efforts.

## **3.0 Overview of Settlement Framework – Cost Estimates**

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**NCAA Financial Reports.** We develop detailed estimates of the costs to conferences and institutions based on the proposed settlement agreement, but note that the data, based on NCAA financial reporting, which includes financial data submitted by institutions for their annual Equity in Athletics Disclosure Act disclosures, reflect primarily operating expenses. Unaccounted for are significant institutional or government expenditures related to capital construction. Many capital projects are financed by the school or state issuing bonds and paying debt service. Debt service appears on school or state budgets, not on the athletic department ledgers. The effect of this deficiency is an understatement of expenses. Further, there is a significant understatement of support from institutional subsidization in the data submitted because non-Power Five athletic programs experience significant annual operating losses that are often assisted by drawing on

reserves from or assigning costs to auxiliary enterprises such as dormitories, bookstores, and student union operations.

**Snapshot of Division I Finances by Subdivision.** Table 1 below provides a snapshot of Division I finances showing average annual athletics generated revenues and expense by institution, total subdivision athletics generated revenues and total subdivision athletic program subsidies primarily derived from general student tuition and mandatory student activity fees. The table also includes the extent to which the subdivision’s athletics programs are dependent on institutional-provided subsidies.

<b>TABLE 1 - 2022-23 NCAA DIVISION I FINANCIAL DATA OVERVIEW: SUBSIDIES, GENERATED REVENUES AND EXPENSES BY SUBDIVISION</b>						
<b>Based on Finances of Intercollegiate Athletics: Division I Dashboard: Division I Subdivisions</b>						
<a href="https://www.ncaa.org/sports/2022/10/14/finances-of-intercollegiate-athletics-division-i-dashboard.aspx">https://www.ncaa.org/sports/2022/10/14/finances-of-intercollegiate-athletics-division-i-dashboard.aspx</a>						
<b>Settlement Source</b>	<b>Annual Institution Average Athletics Generated Revenues*</b>	<b>Annual Institution Average Athletics Expense**</b>	<b>Total Institution Subsidies Provided to Athletics - Total by Subdivision***</b>	<b>Total Annual Athletics-Generated Revenue -- Total by Subdivision</b>	<b>Total Revenue of Subdivision -- Institution Subsidies Plus Athletics Generated Revenue</b>	<b>Percent Dependence on Subsidies Provided by Institution</b>
Power Five	\$ 123,188,406	\$ 129,492,754	\$ 800,000,000	\$ 8,500,000,000	\$ 9,300,000,000	8.6%
Group of Five	\$ 21,538,462	\$ 46,107,692	\$ 1,700,000,000	\$ 1,400,000,000	\$ 3,100,000,000	54.8%
FCS	\$ 6,976,744	\$ 23,542,636	\$ 2,200,000,000	\$ 900,000,000	\$ 3,100,000,000	71.0%
D-IAAA	\$ 5,154,639	\$ 21,639,175	\$ 1,600,000,000	\$ 500,000,000	\$ 2,100,000,000	76.2%
* Total annual athletics-generated revenues by subdivision divided by number of member institutions in that subdivision.						
** Total annual athletics-expenses by subdivision divided by number of member institutions in that subdivision.						
***Nominal student activity fees, Institution general fund (tuition) and other government subsidies						

**Legal Fees.** Reports of the proposed settlement do not mention legal fees which frequently are 25-35% of reported class actions, albeit usually, the larger the recovery, the lower the percentage. Throughout, with regard to our discussion of NCAA and conference payments of reported settlement costs, we use \$2.8 billion for past damages and \$10-15 billion for athlete payments going forward inclusive of all legal fees. With regard to estimates of institutional Title IX payments to female athletes, we have based our computations on \$2.1 billion for past damages payments to athletes -- \$2.8 billion minus 25% legal fees -- and assumed that payments from the 10-years-going-forward-injunctive-relief athlete payment pool will comply with Title IX male/female proportionality requirements and include no legal costs.

**Payment for Past Damages.** All NCAA Division I conferences and the NCAA will pay past damages totaling approximately \$2.8 billion to 14,000 former (dating back to 2016) and current athlete plaintiffs. This represents lost NIL payments, Alston Academic Award payments, and

revenue-sharing to be paid over a period of 10 years starting in 2025-26. This “back pay” portion of the settlement will be paid 41 percent from existing NCAA reserves, catastrophic insurance, new revenues and budget cuts while the remaining 59 percent will be derived from reductions in future NCAA revenue distributions to all Division I conferences. At the institutional level for members of each conference, these reductions will represent losses of athletics-generated revenues that will need to be offset by new athletics-generated revenues, increases in institutional subsidies derived from student activity fees and/or general fund (tuition) allocations, and/or budget cuts. While the specific contents of the actual term sheet are unknown, we base our cost estimates on reported comments by NCAA representatives, conference representatives, and plaintiffs’ attorneys as cited in Table 2 through 5 below.

Table 2 on the next page estimates the financial impact on the NCAA, Division I subdivisions, and their respective member institutions for the past damages portion of the proposed settlement.

**TABLE 2 - ESTIMATED IMPACT OF PAYMENTS OVER THE NEXT TEN YEARS FOR PAST DAMAGES PORTION OF THE SETTLEMENT BY SUBDIVISION AND INSTITUTION**

Settlement Source	Percent Total of \$2.8 Billion Past Damages Settlement Amount*	Estimated Total \$ Past Damages Settlement Amount**	Estimated Annualized \$ Past Damages Amount over 10 Years***	2025 Estimated Number of Member Institutions****	Estimated Average Annual Settlement Amount Per Institution	Annual Institution Average Athletics Generated Revenues*****	Settlement Contribution as % of 2022-23 Annual Average Athletics Generated Revenues*****
NCAA	41%*****	\$ 1,148,000,000	\$ 114,800,000	xx	xx	xx	xx
<b>Division I Conferences</b>							
Power Five	24%	\$ 672,000,000	\$ 67,200,000	69	\$ 973,913	\$ 123,188,406	0.8%
Group of Five	10%	\$ 280,000,000	\$ 28,000,000	65	\$ 430,769	\$ 21,538,462	2.0%
FCS	13%	\$ 364,000,000	\$ 36,400,000	129	\$ 282,171	\$ 6,976,744	4.0%
D-IAAA	12%	\$ 336,000,000	\$ 33,600,000	97	\$ 346,392	\$ 5,154,639	6.7%
<b>Total</b>	<b>59%</b>	<b>\$ 1,652,000,000</b>	<b>Conference payments: Power 5 (40%) Non-Power Five (60%) of th 59%</b>				
<p>*No settlement terms have been released; reports of estimated total of the damages settlement range from \$2.75 to \$2.8 billion with the latter used for this analysis based on NCAA President Charlie Baker's May 14, 2024 memo to Power Five presidents and conference commissioners Retrieve from: <a href="https://x.com/RossDellenger/status/1794087238692716578">https://x.com/RossDellenger/status/1794087238692716578</a> ( Note: while document was posted on May 24, 2024, it was reported by Yahoo/Dellenger on May 15 - see <a href="https://x.com/RossDellenger/status/1794087238692716578">https://x.com/RossDellenger/status/1794087238692716578</a>; subdivision percentages as confirmed by NCAA representatives as reported by USA Today on May 25, 2024. Retrieve from: <a href="https://www.usatoday.com/story/sports/college/2024/05/25/ncaa-lawsuit-settlement-revenue-sharing-legal-questions/73843373007/">https://www.usatoday.com/story/sports/college/2024/05/25/ncaa-lawsuit-settlement-revenue-sharing-legal-questions/73843373007/</a></p>							
<p>** According to ESPN, these amounts reflect the total estimated NCAA (\$1.15 billion) and conference obligations (\$1.65 billion). Conference amounts will be covered by the NCAA by reducing its annual contributions to members over a ten year period. Of the \$1.6 billion, the NCAA will be withholding distributions from six funds across its Division I leagues, including the basketball performance fund (NCAA Final Four tournament), grants-in-aid, the academic enhancement fund, sports sponsorships, conference grants and the academic performance fund. These withheld distributions represent what would normally be athletics-generated revenues by the institutions receiving them. Further, three categories of NCAA payments are not expected to be impacted: the equal conference fund, the student-athlete opportunity fund and the special assistance fund. The NCAA does not plan to take money away from its Division II and Division III distributions. ESPN and its sources cautioned that the numbers are fluid and could change. Retrieved from: <a href="https://www.espn.com/college-sports/story/_/id/40167617/ncaa-settlement-plan-house-v-ncaa-case-irks-non-power-5-schools">https://www.espn.com/college-sports/story/_/id/40167617/ncaa-settlement-plan-house-v-ncaa-case-irks-non-power-5-schools</a></p>							
<p>***Unknown whether annualized amounts will be equal or gradually escalating.</p>							
<p>****We use May 10, 2024 FBS conference realignment data as reported by the College Football Network. 69 Power Five: ACC (17), Big10 (18), Big 12 (16), Pac-12 (2), SEC (16), 65 Group of Five: AAC (14), CUSA (12), MAC (13), MWC (12), SunBelt (14), 2 Independents: Notre Dame, UConn, Retrieve from: <a href="https://collegefootballnetwork.com/2025-college-football-realignment/">https://collegefootballnetwork.com/2025-college-football-realignment/</a> We use reported 2024 FCS 129 teams competing in 13 conferences - retrieve at: <a href="https://fearthefcs.com/fcs-conferences-and-teams/">https://fearthefcs.com/fcs-conferences-and-teams/</a>. Division I-AAA = 97 Retrieve from: <a href="https://ncaaorg.s3.amazonaws.com/research/sportpart/2022-23RES_NCAAMembershipBreakdown.pdf">https://ncaaorg.s3.amazonaws.com/research/sportpart/2022-23RES_NCAAMembershipBreakdown.pdf</a></p>							
<p>*****2022-23 data. Retrieve from: <a href="https://www.ncaa.org/sports/2022/10/14/finances-of-intercollegiate-athletics-division-i-dashboard.aspx">https://www.ncaa.org/sports/2022/10/14/finances-of-intercollegiate-athletics-division-i-dashboard.aspx</a> Divide total annual conference athletics generated revenues by # of institutions in the conference</p>							
<p>*****Estimated annual average settlement amount per institution divided by the annual average institution athletics generated revenues</p>							
<p>*****According to ESPN (Thamel, May 17, 2024), the NCAA's \$1.15billion is expected to come from NCAA reserves, catastrophic insurance, new revenue and budget cuts, all of which may affect all 1,100+ member institutions and all of which are unspecified reductions.</p>							

**Institution Title IX Obligations.** Title IX regulations clearly apply to all NCAA member institutions that are recipients of federal financial aid and, regardless of the sources of funds, apply to all forms of student financial assistance whether they are labeled scholarships, revenue-sharing, pay-for-play, NIL payments, employment, or similar classifications of cash payments or benefits. The institution will be required to make equitable Title IX payments to female athletes in addition to the \$2.8 billion settlement cost. See Table 3 below.

**TABLE 3 - ADDITIONAL FUNDS NEEDED TO MEET TITLE IX REGULATIONS BASED AN ESTIMATED \$2.1 BILLION DISTRIBUTION TO PREDOMINATELY MALE ATHLETES.**

Subdivision	\$2.1 Billion* Past Damages Payout - Percent to Athletes by Subdivision**	\$2.1 Billion Past Damages Payout - Dollars to Athletes by Subdivision***	Estimated 89.4%**** incremental cost of Title IX payments to female athletes	Annualized \$ Amount of Title IX payments over 10 Years	2025 Estimated Number of Member Institutions	Estimated Average ANNUAL Title IX Impact Per Institution *****	Estimated Average ANNUAL Cost Per Institution - Past Damages Plus Title IX Payments *****	Settlement Plus Title IX Payments as % of Average Annual Athletics Generated Revenues *****
Power Five	97%	\$ 2,037,000,000	\$ 1,821,078,000	\$ 182,107,800	69	\$ 2,639,243	\$ 3,613,157	2.9%
Group of Five	1%	\$ 21,000,000	\$ 18,774,000	\$ 1,877,400	65	\$ 28,883	\$ 459,652	2.1%
FCS	1%	\$ 21,000,000	\$ 18,774,000	\$ 1,877,400	129	\$ 14,553	\$ 296,724	4.3%
D-IAAA	1%	\$ 21,000,000	\$ 18,774,000	\$ 1,877,400	97	\$ 19,355	\$ 365,746	7.1%

\*We assume customary practice by estimating that 25 percent of the \$2.8 billion settlement will go to attorney fees.

\*\*Carter v. NCAA and Hubbard v. NCAA class certification is not yet decided. Therefore, we have assumed payments based on House v. NCAA class certification: 95 percent will go to Power Five plus Notre Dame athletes (75% football, 15%, men's basketball and 5% women's basketball) and the remaining 5 percent will go to the "additional sports class." Retrieve from:

[https://www.reddit.com/r/CFB/comments/1diunb4/nakos\\_steve\\_berman\\_the\\_colead\\_counsel\\_for/](https://www.reddit.com/r/CFB/comments/1diunb4/nakos_steve_berman_the_colead_counsel_for/) We have assumed for purposes of this estimate, that such NIL compensation will have been heavily weighted to Power Five athletes (not football or basketball players) who were more likely to be of the stature to command NIL social media and other outside income and, therefore, have split this 5 percent payment obligation 2% Power Five, 1% Group of Five, 1% FCS, and 1% D-IAAA.

\*\*\*These estimates reflect the percentage amounts in dollars by subdivision over the 10 year payment period..

\*\*\*\*If we take only the shares that are gender-specified, men get 90 out of 95 percent or 94.7 percent of the settlement dollars and women get 5.3 percent. Therefore we assume that of the total amount of the settlement distribution, female athletes should receive 94.7 percent minus 5.3 percent already received by female athletes or 89.4 percent. This estimate assumes 50%-50% male/female athlete participation and multiplies the annualized amount in the previous column by 89.4 percent. We note that individual institutions will be required to compute their Title IX obligation based on each year's proportion of male and female athletes assuming Prong One Title IX participation compliance.

\*\*\*\*\*Estimated cost of Title IX compliance in addition to settlement cost. Again we note that Institution distributions will vary because they must be based on the actual proportion of male and female athletes in the distribution year which should be equal to percentage of males and females in the full-time undergraduate student body if the institution does not qualify for a Title IX participation Prong Two or Three exception.

\*\*\*\*\*Adds the estimated annual average Title IX impact per institution to the estimated average annual past damages amount per institution (see Table 2).

\*\*\*\*\*See column 2 of Table 1 for 2023 average annual athletics generated revenue. However, we point out that the Power 5 percentage will be significantly lower as a percent of 2025 average athletics generated revenues because of the new \$1.3 billion per year College Football Playoff television contract and the new significantly higher Big Ten and SEC conference television agreements which will be in place that year and going forward.

Table 3 above estimates the overall cost of Title IX payments to female athletes to be 89.4% of the overall portion of the past damages. We adjust the total amount by deducting the legal fees to arrive at \$2.1 billion that actually flows to male and female athletes. The computation of this percentage was based on the composition of the plaintiff classes as represented by plaintiffs' attorney as 90 percent Power Five male athletes (75 percent football and 15% men's basketball), 5 percent Power Five female athletes and 5 percent to the "additional sports class" consisting of Division I scholarship athletes from all four subdivisions other than the Power Five football and basketball players whose sex is unspecified.<sup>8</sup> This "additional sports class" athletes must have competed on a Division I athletics team prior to July 1, 2021 and received NIL compensation in the same sport while they were college athletes. We have assumed for purposes of this estimate, that such NIL compensation will have been heavily weighted to Power Five athletes (excluding football or basketball players) who were more likely to be of the stature to command NIL social media and other outside income and therefore, have split this 5 percent payment obligation 2% Power Five, 1% Group of Five, 1% FCS, and 1% D-IAAA with no assumption of sex of participants. The estimated 89.4 percent of payments to male athletes shown in Table 4 provides a rough average annual incremental institutional cost of providing Title IX matching funds to female athletes.

We emphasize that exact determinations made at the institutional level must be based on actual proportions of male and female athletes at each school and whether males and females had received their financial aid entitlements in the year for which the payments to male and female athletes occurred. In sections 7.5 and 7.6, we describe the methodology which should be used for these determinations. Table 3 also approximates the average accumulated cost of the past damages portion of the settlement plus Title IX payments as a percentage of average annual athletics-generated revenues.

**Going-Forward Injunctive Relief.** The second core part of the proposed settlement provides for injunctive relief for current and future athletes. More specifically, all Division I institutions will be permitted (not required) to share revenues with grant-in-aid college athletes going forward for a 10-year period. The Year One (2025-26) maximum athlete payment pool will be determined by computing the total countable athletics generated revenues of the 69 Power Five institutions in three categories television rights fees, ticket sales and sponsorships. Twenty-two percent of that amount will establish an athlete payment pool and cap up to which any Division I member institutions would be permitted to revenue share or make NIL payments to its athletes. Tables 4 and 5 computations include only the Power Five conferences because as a

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<sup>8</sup> The unspecified group also appears to be heavily male given the composition of the classes explained in Section 1.6 of this paper.

practical matter, only these institutions will have the financial resources to adopt athlete pay-for-play recruiting and retention programs.

Table 4 below illustrates the computation of the Year One injunctive relief athlete payment pool.

TABLE 4. Power Five Institution's Estimated First Year (2025-26) Cost of Injunctive Relief Assuming Each Institutions Pays Athletes Up to the Maximum 22 Percent of Countable Revenues Athlete Payment Pool							
2025-26 Reconstructed Power Five Conferences Membership Numbers	BASE 2023 Estimated Total Countable Revenues: TV Rights, Ticket Sales, and Sponsorships*	Estimated Increase in CFP annual conference payout**	Estimated Increase In Annual Average Conference TV Rights Fees***	Adjustment for Annual Revenues Unrealized due to NCAA Distributions Withheld for Payment of Settlement Past Damages ****	2025-26 Estimated Conference Total Revenues from Countable Sources*****	22% of Countable Revenues by Conference and Overall of 2025-26 Total Estimated Conference Revenues from Countable Sources*****	PER INSTITUTION 2025-26 Initial Year One Athlete Payment Pool Cap - 22% of Total Estimated Annual Average Power Five Conference Revenues*****
SEC (16)	\$1,318,512,220	\$ 303,400,000	\$ 385,000,000	(\$15,582,608)	\$1,991,329,612	\$438,092,515	
Big Ten (18)	\$1,634,462,452	\$ 303,400,000	\$ -	(\$17,530,434)	\$1,920,332,018	\$422,473,044	
ACC (17)	\$1,160,226,942	\$ 147,400,000	\$ -	(\$16,556,521)	\$1,291,070,421	\$284,035,493	
Big 12 (16)	\$730,038,565	\$ 121,400,000	\$ 160,000,000	(\$15,582,608)	\$995,855,957	\$219,088,311	
PAC-12 (2)	\$87,197,164	\$ -	\$ -	(\$1,835,826)	\$85,361,338	\$18,779,494	
<b>TOTAL Power 5 (69)</b>	<b>\$4,930,437,344</b>	<b>\$875,600,000</b>	<b>\$545,000,000</b>	<b>(\$67,087,997)</b>	<b>\$6,283,949,347</b>	<b>\$1,382,468,856</b>	<b>\$20,035,781</b>
<p>* Sportico's College Sports Finances Database, 2023 revenues (FOIA NCAA Financial Reports) available for these three categories for public schools only - added actual revenues for all public schools; determined a public school average which was then used for each conf. member with no 2023 data. Note that these revenues were based on 2023 conference membership: ACC (14), Big10 (14), Big 12 (14), Pac-12 (12), SEC (14), reflecting TV rights fees for those conferences in 2023. The conference members were then realigned to reflect 2025-26 conference membership and each of the three revenue categories were totalled to estimate total annual countable revenues for the three categories. Retrieve from: <a href="https://www.sportico.com/business/commerce/2023/college-sports-finances-database-intercollegiate-1234646029/">https://www.sportico.com/business/commerce/2023/college-sports-finances-database-intercollegiate-1234646029/</a></p>							
<p>**A new CFP TV rights agreement will begin in 2025 - \$7.8 billion divided by 6 years= \$1.3 billion/yr. and we conservatively assume at least this amount to continue for the remainder of 10 year period; the \$1.3 billion/yr was then split according to the announced new percentages: 29% to Big Ten, 29% to SEC, 17% to ACC, 15% to Big 12, 9 percent to the Group of Five conferences as a whole, and the remainder for the independents and bonuses. Note: no PAC-12 allocation. In the previous revenue structure (<a href="https://sports.yahoo.com/how-the-new-college-football-playoff-format-came-to-be-and-what-it-means-for-the-sports-future-165149801.html">https://sports.yahoo.com/how-the-new-college-football-playoff-format-came-to-be-and-what-it-means-for-the-sports-future-165149801.html</a>) the Power 5 conferences split evenly 80% of the CFP's \$460 million in annual revenue - 80% x \$460 million = \$368 million divided by 5 conferences = \$73,600,000 per conference per year which was then subtracted from the conference's new percent of \$1.3 billion share to represent the additional CFP revenue expectation in 2025 and going forward.</p>							
<p>***Difference between 2023 conference TV rights agreements and Projected new Conference TV Agreements effective in 2025 was estimated based a March 19, 2024 report retrieve from: <a href="https://businessofcollegesports.com/current-college-sports-television-contracts/">https://businessofcollegesports.com/current-college-sports-television-contracts/</a> NOTE: ACC and Big Ten listed as "0" increases because their 2023 agreements extended into the 2030's and new agreements yet to be realized. PAC-12 agreement ends in 2024 and whether the PAC-12 will dissolve (only two members left) or restructure is still to be determined</p>							
<p>**** See Table 1 - estimated per institution annual revenue loss due to NCAA reductions in revenue distribution to pay PAST DAMAGES portion of settlement (NCAA distributions assumed to be derived from Final Four and other championship media rights fees, ticket sales and sponsorships). For Power 5 = \$973,913 average per institution annually multiplied by number of conference members</p>							
<p>*****Columns (B2+B3+B4)-(B5)</p>							
<p>*****Multiply 2025-26 estimated total countable revenues for each conference and overall by 22 percent</p>							
<p>*****Overall total of 22 percent of 2025-26 Power Five Conference revenues divided by total number of Power Five members (69)</p>							

We also note that most institutions new to the various conferences will not immediately receive full shares of television media rights fees or other conference distributions. If such information was available, it is noted in Exhibit D.

In Year Two and subsequent years, escalation clauses increase the athlete payment pool dollar amounts; the Year One 22 percent of total countable revenues cap is not recalculated. Reports of settlement terms indicate that over the first three years of the proposed settlement, and initial escalation clause will increase the athlete payment pool by 4 percent each year and in Year Four, the dollar amount will undergo further evaluation. For purposes of estimating the 10-year cost of athlete payments, we project a continuation of the 4 percent per year escalation through Year Ten but make no attempt to project divisional growth in athletics generated revenues which we believe may result in resetting the athletics cap in Year Four or subsequent reevaluation years. Table 5 below projects the estimate cost of 10 years of athlete payments.

<b>TABLE 5 - 10 YEAR COST OF INJUNCTIVE RELIEF ATHLETE PAYMENTS ASSUMING FOUR PERCENT ANNUAL INCREASE</b>		
<b>Year</b>	<b>Estimated Power 5 Conferences' TOTAL Athlete Payment Pool with 4% increases each year</b>	<b>Maximum Annual Athlete Payout Pool per Power Five Institution (69 schools)</b>
<b>22% of Rev. 1*</b>	<b>\$1,382,468,856</b>	<b>\$20,035,781</b>
<b>2</b>	<b>\$1,437,767,611</b>	<b>\$20,837,212</b>
<b>3</b>	<b>\$1,495,278,315</b>	<b>\$21,670,700</b>
<b>4</b>	<b>\$1,555,089,448</b>	<b>\$22,537,528</b>
<b>5</b>	<b>\$1,617,293,025</b>	<b>\$23,439,029</b>
<b>6</b>	<b>\$1,681,984,746</b>	<b>\$24,376,591</b>
<b>7</b>	<b>\$1,749,264,136</b>	<b>\$25,351,654</b>
<b>8</b>	<b>\$1,819,234,702</b>	<b>\$26,365,720</b>
<b>9</b>	<b>\$1,892,004,090</b>	<b>\$27,420,349</b>
<b>10</b>	<b>\$1,967,684,253</b>	<b>\$28,517,163</b>
<b>10-Yr Total</b>	<b>\$16,598,069,183</b>	<b>\$240,551,727</b>

Reports also indicate, albeit not clearly, there will be special consideration for as much as \$2.5 million in Alston-related money (academic achievement awards) and \$2.5 million in additional scholarships, which we assume may be structured as incentives for institutions to continue making annual Alston payments and increasing scholarship expenditures.



To further explain why we believe that few if any non-Power Five Schools will engage in significant use of the player payment pool, the 291 non-Power Five Division I institutions combined currently generate only \$2.8 billion in annual athletics revenues while receiving \$5.5 billion in institutional subsidies to support their athletic program budgets. In comparison, the 69 Power Five Institutions combined currently generate \$8.5 billion in annual athletics revenues while only receiving \$800 million in institutional subsidies (see Table 1).

**Other Reported Elements of the Settlement.** In addition to the sources of information noted in Tables 1 through 5, we used [Duane Morris](#), [Ropes and Gray](#), [Dellenger](#), [Jindal](#), and [Greska](#) reports to provide more detail on the various elements of the settlement proposal.

- **Settlement Modeled on NFL/NBA Professional Sport CBA Agreements.** It appears that the intent of the plaintiffs' attorneys was to produce going-forward injunctive relief athlete payments modeled after NFL and NBA professional sport collective bargaining agreements that share 50% of revenues with athletes. The combination of 22% of athletics-generated revenues payments, current athlete scholarship costs, more generous scholarship limits based on roster size, and other existing and new athlete benefits appear to approach 50 percent of athletic department revenues.
- **Settlement athletics revenue definition.** Current and future athlete payment pools are calculated based on conference and institution athletics-generated revenues -- media rights fees, ticket sales, and sponsorships -- excluding donor contributions (which currently approach 25 percent of all Power Five revenues) rather than total athletics generated revenues from all sources. Note that these revenues (including the donor contributions) are also the current sources of revenues that contribute to all athletics program costs.
- **Roster Limits Replace Current Scholarship Limits.** Current NCAA scholarship limits will be eliminated to permit greater numbers of scholarships and be replaced by roster size restrictions, reportedly capping football rosters at 85 and eliminating walk-on athletes, a reportedly contentious element.
- **Removal of Current Rule Prohibiting Institutions from Paying Athletes for Their NILs.** The current rule prohibiting institutions from engaging in NIL deals with college athletes will need to be removed with other internal but not revealed changes in NCAA rules needed to implement the settlement.
- **Distributions to Individual Athletes.** The distribution of going-forward injunctive relief revenues to current and future athletes is at the discretion of each school so amounts to individual athletes may differ.
- **Title IX is Not Addressed in the Settlement Terms.** [The NCAA president has stated](#) that Title IX applies to opportunities and not monetary compensation (we disagree). Others

have suggested using outside third parties (e.g., collectives) paying athletes in order to evade Title IX equal treatment obligations (we don't believe this will be permitted). See section 7 of this report for a more detailed explanation of the application of Title IX to proposed settlement payments to athletes.

Recognizing that the details of the settlement are still subject to negotiations, summarizing the terms of the settlement is problematic.

#### **4.0 Impact of the Proposed Settlement on the Association, Its Competitive Divisions, and College Athletes**

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It appears that a small group of NCAA association and Power Five leaders engaged in settlement negotiations with no consultation with non-Power Five conference leaders. The resulting plan for paying the \$2.8 billion past damages and going-forward settlement provisions has been questioned by non-Power-Five institutions with regard to economic and competitive fairness and acceptance of a pay-for-play system contrary to the existing NCAA constitution.

**Impact on the Association as a Whole.** The NCAA coffers serving 1,068 member institutions would be responsible for paying 41 percent or approximately \$1.15 billion of the \$2.8 billion past damages settlement. Funds would come from Association reserves, staffing cuts, reductions in annual member distributions, and programs and other expense cuts with few precise details of how such expenditure reductions would affect which membership categories. There is little doubt that given the 2022 NCAA constitutional changes which transferred rule making, rules enforcement, and distribution of Association proceeds to Divisions I, II, and III respectively, resources will be pulled from Association-wide programs currently benefitting all members. The most commercially successful programs will continue to realize a greater share of Division I championship proceeds to fund their football and basketball arms races with few if any restraints. Divisions II and III will most likely continue to receive access to NCAA association-executed national championships but the size of championship fields (number of teams or individual participants who qualify) and travel and other benefits associated with such championships may be reduced. It is unclear whether the costs of association-wide programs such as catastrophic injury insurance, financial aid to assist students who have completed eligibility but not yet graduated, athlete emergency assistance funds, etc., will be passed on to the divisions respectively or discontinued. Since most of these programs were financed by the billion-dollar Division I Final Four Men's Basketball tournament, there are unanswered questions regarding the degree to which this largess will continue to benefit non-Division I institutions.

The proposed settlement taxation of non-Power Five members and agreement to make major changes in NCAA rules will most likely be accepted by most non-FBS and Divisions II and III institutions because they continue to fear that the Power Five will leave the NCAA, start its own national governance association, and eventually pull the Final Four Men's Basketball financial rug out from under the NCAA as a whole.

**Impact on the Power Five Conferences.** Since 1997, Power Five conference leaders have methodically pursued financial independence and autonomous rulemaking. In 1997, the FBS (Power Five and Group of Five) leveraged their power within the NCAA by openly threatening to leave the organization if the NCAA created an FBS national football championship. Instead, the ten FBS conferences established the *College Football Playoff* (CFP). It will soon generate \$1.3 billion per year to the ten conferences. It is led by the Power Five which holds an 80% CFP interest and has been steadfast in its refusal to share proceeds with the Association or other Division I institutional members. There is little hope of any future revenue-sharing related to this property as the Power Five solidifies its financial position, fully prepared to embrace a professional sports model with few expenditure constraints. Since 1997, the Association and its membership have also permitted the Power Five to be autonomous in setting many of its own rules with no membership oversight. The proposal to establish a new Power Five subdivision simply institutionalizes its already existing "autonomy" status. There is no real arms grace or concern about the Group of Five. Thus, the Power Five entered settlement discussions in a strong financial position.

Under the proposed settlement, the Power Five conferences would be responsible for 24 percent of the \$2.8 billion past damages settlement cost. This Power Five charge represents a mere 0.8 percent of the \$8.5 billion annual athletic-generated revenues of their 69 member institutions.

In addition to their 24% of costs for past damages, the Power Five institutions will most likely embrace the 10-years-going-forward injunctive relief consisting of \$20-25 million in annual direct pay-for-play payments to athletes because it will be necessary in order to stay competitive and will not economically harm their football and basketball programs. Indeed, the new CFP contract and its 80% Power Five CFP share combined with more lucrative new Power Five conference television contracts will do much to offset these future athlete pay-for-play costs.

The big question is whether the Power Five will confront currently bloated football and basketball coaching and other support staff (large numbers and lavish compensation) — or leave revenue programs relatively unscathed, looking to save money by reducing expenditures on non-revenue sports. Most athletics administrators recognize the significant downside of eliminating any sports program. Dropping a team ignites the passion of decades of former player alumni

who threaten never again to donate to the institution and create an extended media nightmare potentially damaging the reputation of the institution. A more likely outcome is athletic departments embracing financially-tiered athletic programs. Football and basketball players would be treated like kings and an equal proportion of female participants (not teams) would be treated like queens. A middle tier would have equal proportions of male and female athletes with reduced numbers of scholarships, recruiting budgets and numbers and salaries of coaches. The lowest tier would treat an equal proportion of male and female athletes like club sports, providing just the basic necessities.

Because the Power Five possesses market power, it will remain highly susceptible to antitrust litigation absent Congressional action to provide an antitrust exemption and/or declare college athletes non-employees. It is no accident that the Power Five and NCAA lobbyists are pleading with a dysfunctional Congress to take both of these actions. If Congress does not grant the NCAA an antitrust exemption, it may only be a matter of time before Power Five schools actively encourage athlete employment/unionization and its institutional employer costs as a path to obtain the antitrust protection of collective bargaining agreements under the National Labor Relations Act (NLRA). The settlement represents what they hope will be a 10-year lawsuit reprieve while they continue to explore the possibility of Congressional support.

It also appears likely that independent Power Five subdivision status could eventually lead to the elimination of the Group of Five from CFP access and ownership.

Last, it should be noted that within the 69-member Power Five, there also will be many institutions unable to compete in this revenue-sharing and NIL-fueled recruiting stratosphere. SEC and Big Ten domination is likely because of their superior financial resources, including wealthy-donor-financed NIL collectives. The future Power Five collegiate sports market will most likely retain the tax-exemptions and other benefits of its non-profit education mother ships that enable these programs to operate without the financial constraints of the free market. There are few signs that they will self-impose the guardrails that have made professional sports profitable by controlling excessive spending such as a strong player draft, free agency limits, equal distribution of television proceeds, player salary caps, and luxury taxes. At least for the 10-year future, college athletics may be able to operate unfettered by any free market economic reality.

**Impact on the Non-Power Five Conferences.** Note that the NCAA and the Power Five are defendants in the three lawsuits; none of the other 291 Division I member institutions are named in any of these actions and they were not consulted with regard to the settlement terms or how the past damages would be paid.

The 291 non-defendants (the FBS Group of Five and the remaining 23 non-FBS conferences) may end up paying 35 percent or \$1 billion of the \$2.8 billion annual damages cost. This payment would be achieved through the NCAA reducing annual distributions to these members over the 10-year settlement payment period, effectively imposing forced budget cuts unless those institutions generate new revenues to offset this lost revenue -- an unrealistic expectation. This \$1 billion amount represents 35% percent of the current \$2.8 billion total athletics-generated revenues of these institutions. The impact of the revenue loss will be significant and affect member institutions differently. [Greska](#) characterized the payment plan as “privatizing profit and socializing cost”:

*The way the NCAA went about it, they set up the model based on a 9-year look of distributions to conferences. But there’s a huge disconnect, the NCAA revenue doesn’t include anything from football. The College Football Playoff isn’t run by the NCAA and the money from that completely bypasses the organization. So basically, what the NCAA is doing is ignoring any profit that schools have made from football. Which is insane!*

The Big East and the 22 other non-FBS conferences pushed for an alternative payment system that would have at least switched the percentages so that the Power Five paid a larger share. Although the disparate impact of the proposed payment plan on non-FBS athletic programs was evident, the proposal was rejected. No doubt, we will hear more from the non-FBS schools as the terms get refined and the court considers objections to the settlement.

The financial gap between Power Five and non-Power Five institutions will adversely affect the access to and success of the non-Power Five Division I Final Four Men’s Basketball tournament. The FCS and the majority of DI-AAA non-football institutions most likely will create a more sensible financial structure that doesn’t involve paying athletes for other than educationally tethered expenses. Because they do not have market power, these programs likely will not face the antitrust risks of the Power Five. In fact, the FCS and D-IAAA athletic directors have completed considerable work on a [Division I Next Generation Educational and Student-Athlete Centric Model](#). The model is transparent with regard to purposes: positioning FCS and D-IAAA schools to retain access to DI championships, and in particular the Division I Men’s Basketball tournament, continuing to receive DI revenue distributions, and greater involvement in DI governance. The model also acknowledges two fundamental differences from the Power Five: (1) the financial framework of these institutions is supported by institutional subsidies and community support and not by commercially driven resources, and (2) programs are measured by the academic as well as athletic success of participants rather than revenue generation. However, the real significance of the model is to create an academic and athletic integrity blueprint for elite sport within higher education: the development of [minimum standards for coaches](#), an [elite sport performance for credit curriculum](#), and adoption of an [athletic program](#)

[high performance model for athlete success](#) characterized by performance indicators measuring the personal, academic, and athletic experiences of athletes.

There may be some DI-AAA conferences like the Big East that will adopt pay-for-play for their basketball programs and attempt to compete with Power Five basketball programs. Similarly, some of the 65-Group of Five schools may make similar and smaller pay-for-play investments in their football programs. Group of Five and some of the top D-IAAA may also consider private equity investments. The [Group of Five is reportedly considering the establishment of its own post-season football playoff property](#). Such an event is more probable given the new CFP distribution of only 9 percent to the Group of Five, down from 22 percent from the previous CFP media rights deal.

**Impact on College Athletes.** The impact of an approved settlement on college athletes is most likely to be a proverbial “tale of two cities.”

### **The Educational Sport Model**

If the FCS and D-IAAA adopts the proposed next generation education- and student-centric model of sport, the installation of such a new sport culture could go a long way toward overcoming the lack of academic integrity and abuse concerns in Division I. Athletes in these programs could experience the best of college sport – pursuit of meaningful degrees, more reasonable athletics time demands congruent with time required for academic success, and athletic programs where coaches are trained educators and measure their success and financial rewards by the performance of their teams and the academic outcomes of their players.

The financial impact on non-FBS schools from paying their \$1 billion past damages portion of the settlement plus matching Title IX funds for female athletes creates the need for significant budget reductions. These programs will not have the resources to afford an employee model and most likely will need to limit benefits to athletes to those tethered to education. It is difficult to predict whether the Group of Five and top D-IAAA basketball programs will choose a new education/athlete centered model to further distinguish themselves. And, while a few may attempt to compete with the extraordinarily well-financed programs of the Power Five by paying certain athletes to play in order to stay competitive, especially in men’s basketball, other teams likely will be negatively impacted, especially participants in non-revenue sports – fewer scholarships, more restricted travel, fewer coaches and support personnel, etc. Because these non-Power Five programs are heavily dependent on institutional subsidies derived from general student tuition and student activity fees, the prospect of subsidy increases in an era of declining higher education enrollment is slim. Thus, it is likely that very few institutions in the non-Power

Five conferences will have the resources to pay athletes anything to play much less anywhere close to what the Power Five may pay.

### **The Employee Model**

The other side of the coin is a Power Five dominated employee model on steroids with male and female revenue sport athletes realizing significant compensation and benefits and concomitant pressures to perform. The prospect of Power Five athletic programs adopting the FCS/D-IAAA student-centric and academically integrated model is unlikely. High-powered coaches will bristle if they are required to meet higher coach preparation standards or prioritize student academic success over maximization of sport training time. Power Five head football and basketball coaches are more powerful than faculty senates or college presidents, and will continue to command multi-million-dollar salaries incentivized by the singular pursuit of winning. Their daily excessive demands on athlete time, including tolerance of abusive pedagogy, is protected by wealthy alumni and trustees addicted to their affiliation with winning teams.

The proposed rules changeover from scholarship restrictions to roster limits will likely result in more football and basketball players on full scholarships and few if any walk-ons. Male football and basketball players and an equal proportion of female athletes would be treated like kings and queens. The most highly skilled athletes will have unlimited freedom to seek higher financial rewards in an unregulated transfer portal at any point in their college careers and pursue external NIL employment opportunities bloated by alma mater roster value rather than free market value. The pressure to seek financial benefits may undermine academic priorities and further endanger the mental health and well-being of these students.

A financially driven downward trend for non-revenue sport athletes would be inevitable. Past and current predominantly male football and basketball athletes would receive past damages compensation consistent with the settlement with institutions obligated to provide additional new funds to female athletes consistent with Title IX regulations. The past damages expenses coupled with new gender equitable \$20-\$22 million per year revenue-sharing and NIL injunctive relief payments to male and female athletes going forward over a ten-year period will significantly increase costs, resulting most likely in financially tiered athletic programs. Fearful of alumni and wealthy donor reaction to dropping the non-revenue sports in which they participated, Power Five programs will not risk dropping sports. Alternatively, participants in non-revenue sports would be relegated to the lower funding tiers and likely be adversely affected – fewer scholarships, more restricted travel, fewer coaches and support personnel, etc.

Power Five and any Group of Five and D-IAAA football and basketball programs that choose an employee model future will be financially incentivized to retain their current

academically exploitive practices. Schools would most likely continue to admit talented football and men's and women's basketball players without regard to normal admissions standards or commitments to address learning disabilities or remedy reading, writing and math deficiencies. Institutions will continue to place their most highly valued and academically underprepared athletes in less challenging courses and majors to keep them eligible to compete. It is doubtful that schools will hold themselves responsible for remediation of these students or invest in academic support necessary to do so. See [The Drake Group Education Fund research report](#) on Division I football and basketball graduation rates, academic support program deficiencies, and the disparate impact on athletes of color who comprise the majority of Division I football and basketball players.

We suspect it may be too late to unwind the basketball/football commercial sport dependence on academic fraud or control the pressure on athletes in these sports to pursue available financial awards. For many of these athletes, the short earning window of elite level college sport unleashed by court approval of the proposed settlement will be a strong incentive to relegate college graduation to a lower priority. Athlete free agency, chasing increased NIL and other compensation via recruiting fueled by unrestricted financial offers from schools and NIL collectives, and the current unrestricted transfer portal could enable athletes to reap once-in-a-lifetime monetary rewards. Although transferring institutions could put in place rules that more credits for graduation because of unaccepted courses from their previous institution or graduation requirements that require a minimum number of credits be earned at the institution granting the degree, it is likely that athletes will ignore such realities in the new compensation-incentivized environment and instead focus only on how much money they can earn immediately.

The injunctive relief which permits schools over the next 10 years to provide male and female athletes with generous revenue-sharing or NIL compensation on top of full athletic scholarships will happen only if the settlement is approved by the court. Because the proposal currently contains a maximum cap on athlete payroll as part of its going forward injunctive relief provisions, if there is no antitrust exemption approved by Congress, it is unknown whether this potential antitrust violation will create a settlement approval issue. It is also unknown whether athletic scholarships that are benefits of employment will remain tax deductible. However, it is known that athletes will be required to pay income tax on at least non-scholarship compensation and benefits (revenue-sharing, NIL income, use of complimentary automobiles or other benefits arranged by the institution).

The *House-Carter-Hubbard v. NCAA* settlement gambit is not only an attempt to get non-Power Five have Congress to give them an antitrust exemption and declare athletes are non-



employees. If Congress doesn't deliver these legal or financial protections or the settlement is not approved by the court, the attitude of the NCAA and Power Five conferences about athletes not being classified as employees may change given that labor unions may negotiate a collective bargaining agreement (CBA) and accordingly obtain an antitrust exemption under the NLFA. Then, it is likely that the CFP and NIL Collectives' money spigots will fund the Power Five athletes as employees.

Contrary to the populist position that collective bargaining will give athletes the power to stand up to their coaches and athletic department and negotiate solutions to academic integrity or time abuse issues endemic to the current Power Five system, this notion may be a pipe dream. Odds are stacked high against college athlete unions winning collective bargaining battles versus athletic department management. They would be the youngest, most inexperienced, and most transient bargaining units ever. Key to labor union CBA success is cohesion and union members as a group willing to forego short term gains by striking for long term wins. College athletes are a transitory population with short sports participation earning windows. Ninety-five percent of Division I college athletes will never play a day in the NBA, NFL, or WNBA but Power Five athletes are likely to ignore those odds. They will continue to believe the recruiting promises of their college coaches that playing college sport is their only route to the possibility of professional sports. More likely than not, college athlete unions may be more willing to trade money in the present for just about anything and view player strikes as defeating their future professional sport aspirations. Further, improvement of working conditions favoring academic success may not even be on athlete union agendas because reducing time spent on training may be considered antithetical to such aspirations.

Also, [McNicolaoas, Poydock, and Schmitt](#) (2023) note that the NLRA requires bargaining in good faith but does not require unions and management to reach an agreement, thereby heavily favoring management. If no agreement is reached, union members are left in the state they were before negotiations. Or, if no agreement is reached in a timely fashion, delays may result in weakening the cohesion necessary to strike or increasing the likelihood of union concessions. Without a strong and well-organized union, there is always a risk of losing benefits currently enjoyed. That being said, on the positive side, [Leroy](#) (2012) points to the "union substitution effect;" the mere existence of a union can result in policy changes such as improved benefits for players, increased representation, and increased athlete participation in governance. He suggests that the NCAA and institutions consider provision of a voluntary "union substitute" limited in bargaining scope or that they seek state or federal laws that accomplish a similar solution. All of these possibilities should be considered when assessing the possible impact of Power Five college athlete employment.

Yet another obstacle may be the construction of such unions. Generally, most observers believe that unions will be sport and conference specific rather than national or multisport in scope. Such construction compared to a national union for all athletes or all athletes in a specific sport may create significant competition, recruiting, and transfer problems because free agent athletes will be drawn to the unions delivering the best CBAs. Some experts have suggested that Congress should create a hybrid employee definition that gives college athletes numerous protections, declares they are not employees, but requires collective bargaining.

Finally, there are various other consequences that must be considered. The CBA requirements in professional sport unions might be considered, including agreements for smaller teams that support fewer athletes in order to create better compensation and benefits for smaller number of employees. Walk-ons may become a thing of the past. And, always a possibility, employers can fire employees as long as such decisions are not retaliation which is prohibited under the NLRA. Title IX also creates a challenge in that CBA agreements cannot obviate the individual institution's Title IX equal treatment obligations.

## **5.0 Serious Problems in the Process by Which the Proposed Settlement Framework was approved.**

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It is not clear whether non-Power Five NCAA member institutions will seek to void the proposed settlement by mounting an internal NCAA objection or rescission effort challenging the authority of the Board of Governors or the Division I Board of Directors to approve the settlement, engaging in litigation versus the NCAA, or formally objecting to the settlement at the court settlement hearings, among other avenues of dissent. We discuss these and other possible issues that may affect the approval of the proposed settlement.

### **5.1 There is no provision in the NCAA Manual that addresses the authority of any NCAA entity to enter lawsuit settlement agreements.**

There is no provision in the NCAA Manual that addresses the authority of the NCAA Board of Governors or any NCAA divisional governance body to enter lawsuit settlement agreements, let alone define the necessary approval process. Thus, it appears that in order for a lawsuit involving the NCAA to be settled by the Board of Governors or a Division or conference, the NCAA Constitution must first be amended via a full Association membership vote to designate explicit authority to the Board of Governors or a division or subdivision. Constitution Art. 2, Sec. B. of the D-I Manual contains twelve enumerated items that set forth the authority of each division and item number 12 provides: "*Authorities not explicitly enumerated in this Constitution for Association-wide governance are reserved to the divisions or, at their discretion, to subdivisions,*

conferences or individual institutions." The authority to approve the entering of a lawsuit settlement agreement appears to be reserved to the D-I member institutions and can only be delegated to the conferences by a vote of all the D-I members. No such vote occurred.

## **5.2 The NCAA Board of Governors appears to have acted improperly, violating both its Constitutional authority and the principles of the Constitution.**

NCAA Constitution, Art. 2, Sec. A. 3. d., which sets forth the duties and responsibilities of the Board of Governors, provides:

*(xi) Monitor adherence by the divisions to the principles in Article I. Call for a vote of the entire membership on the action of any division that it determines to be contrary to the basic purposes and general principles set forth in the Association's Constitution. This action may be overridden by the Association's entire membership by a two-thirds majority vote of those institutions voting.*

Constitution, Art. 1 (Principles), Sec. B provides:

*The Collegiate Student-Athlete Model. Student-athletes may not be compensated by a member institution for participating in a sport but may receive educational and other benefits in accordance with guidelines established by their NCAA division.*

The terms of the settlement violate this constitutional provision by allowing revenue-sharing pay-for-play and NIL payments. The Board of Governors was therefore obligated to follow NCAA Constitution, Art. 5 provisions that explicitly specify how amendments to the Constitution may be made:

- A. Provisions of the NCAA constitution may be amended only at a special or annual Convention. The membership shall receive reasonable notice of proposed amendments. An amendment may be sponsored only by the Board of Governors or by a two-thirds vote of a divisional leadership body. A sponsored amendment shall require a two-thirds majority vote of all delegates present and voting. The chair of each divisional Student-Athlete Advisory Committee shall be eligible to vote.*
- B. Sponsored amendments shall include a statement of intent and rationale. Amendments to amendments may be sponsored as set forth above but may not expand the scope of the original amendment. Amendments to amendments shall require a two-thirds majority vote of all delegates present and voting.*

- C. *Approved amendments shall become effective on the first day of August following adoption, unless another effective date is approved by a two-thirds majority vote of all delegates present and voting.*
- D. *Before the end of a special or annual Convention, any member who voted on the prevailing side may move for reconsideration.*

### **5.3 The NCAA Board of Governors has failed to conduct comprehensive due diligence on its legislative authority or the impact of the proposed settlement on the financial well-being of the member institutions and conferences.**

It appears that only representatives of the NCAA and the Power Five conferences engaged in settlement negotiations, never involving the other Division I members or conferences. We are not aware of any reports produced by the NCAA that address:

- The positive or negative affect on student academic outcomes from the adoption of college athlete pay-for-play;
- the financial impact of the proposed settlement with regard to Title IX obligations to provide equal financial assistance, benefits, and treatment to male and female athletes (we address these issues in Section 6 of this report);
- the authority to approve a settlement framework that was in violation of any constitutional provision without a special convention and vote of the membership;
- the disparate financial impact of the proposed settlement terms on Group of Five or other non-FBS conferences;
- the impact of the settlement on support of non-revenue sports or participation opportunities generally, or how it might result in the restructure of the entire intercollegiate athletics industry;
- the impact of the financial terms of the proposed settlement on Divisions II or III annual distributions which fund their championships and enforcement programs; and
- the litigation risk to the NCAA, the Power Five or any other entities absent a Congressional antitrust exemption or exemption from existing state laws regarding pay-for-play or other limits.

### **5.4 The NCAA Division I Board of Directors appears to have acted improperly.**

The Division I Board of Directors voted on a settlement that violated the principles of the Constitution (Art. 1, Sec. B). The Division I Board of Directors did not timely or directly advise the Division I membership of its action or the specifics of the settlement thereby not permitting an

objection to legislative process or access to the NCAA Operating Bylaw 9.2.2.2.7 rescission process.

## **5.5 The likelihood of NCAA members objecting to the settlement or insisting on a special convention to amend the NCAA constitution to permit “pay-for-play.”**

First, whether NCAA members will object to the settlement during the court hearing that will be conducted to approve the proposed settlement is unknown. Houston Christian University has already [filed a motion](#) to intervene.

Second, it appears highly unlikely that Division I members will exercise their authority to rescind Division I Board of Directors approval of the settlement. The 2022 revision of the NCAA Constitution gave Division I the authority to make and enforce its own rules and determine distribution of revenues. Division I then reorganized to remove individual institution member voting on Bylaw amendments, instead creating a Division I Council (one representative from every Division I conference) and Division I Board of Directors (voting is weighted in favor of the FBS subdivision) to fulfill these functions. No Division I Council proposal may be adopted without the approval of the Board of Directors. Thus, the only recourse for Division I NCAA institution members is to rescind actions taken by either of these entities. The rescission must be within the 60-day limit and requires a two-thirds vote of the membership.

Politically, the possibility of assembling a two-thirds coalition is slim. If the FBS subdivision votes as a 140-member block, mathematically they negate the combined voting power of the other two subdivisions that totals 249 votes (FCS=135 member votes; D-I AAA=114 member votes). These 249 votes would fall 10 short of the 259 two-thirds vote required for rescission. It is also politically unlikely that ten Group of Five defectors would oppose the wishes of the Power Five. The Group of Five defers to the Power Five because of fears that their chances of being selected in the future for the *College Football Play-off* might be diminished and/or their current 25 percent cut of CFP revenues might be reduced via an undetermined NCAA subdivision restructure or possible Power Five pullout of football or institutions from the NCAA.

It appears similarly unlikely that a two-thirds vote of the entire membership voting at an annual or special meeting to oppose any change in the constitutional principle prohibiting pay-for-play could be mustered, even though the math favors the larger membership. While the FBS would likely generate its 140 votes, the 1,068 combined voting power of all other members (Division II=319 votes; Division III=500 votes; Non-FBS Division I=249 votes) could easily meet the 805 votes two-thirds requirement. Like the Group of Five fearing future retribution from the Power Five, Divisions II and III fear that the Power Five will act on its frequent threats to leave the NCAA, undermine the revenue generating Final Four Men’s Basketball national championship

property thereby pulling the financial rug out from under the NCAA and their current guarantee of full funding of NCAA enforcement and other member services and the expenses of all participants in NCAA Division II, III and Open national championships. The choice appears to be whether financial considerations are prioritized over retaining a student/educator versus employee/commercial sport philosophy.

College presidents also appear unlikely to become involved. Most college and university Presidents have been relatively detached from NCAA and conference governance issues and the weeks of deliberations on the announced settlement have only included the five Power Five conferences. Presidents depend on the advice of their athletic directors and conference commissioners. Neither will athletic directors and conference commissioners fill this void. It is unlikely that the salaries of conference commissioners or college athletic directors will be affected by the settlement. A legitimate question to raise is whether the self-interest of those advising mostly detached college presidents will take precedent over institutional cost or even insistence on comprehensive due diligence. NCAA attorneys and staff advising college presidents have similar conflicts of interest.

The populist thought that not agreeing to the proposed settlement will financially blow up the current NCAA appears overwhelming. It is notable that the proposed settlement has effectively undermined the stated position of the Division I Council, representing the considered interests of all Division I conference and the recommendations that it had forwarded to the Division I Board of Directors for approval. The Division I Council is on record as supporting the existing constitutional principle that it would not permit revenue-sharing pay-for-play and NIL payments. In response to our questions on the status of the position of the Division I Council, we received the following information on April 9 from the NCAA:

- Element 1. Name, Image and Likeness. The DI Council will act on multiple proposals in April. The proposals do not permit direct institutional payment to student-athletes for their NIL, which was part of the concept from NCAA President Baker's December memo. Division I is not currently developing a proposal of this sort at this time, but may consider it in the future-no time certain.
- Element 2. President Baker's enhanced educational benefits proposal. Due to external factors, work is not being done on this element. If work starts, it will be done by a working group, comprised largely by autonomy representatives. The Council coordination committee made that determination, but no group has been established.
- Element 3. President Baker's New Power Five Subdivision and Trust Fund proposal. There are discussions occurring about the DI governance structure and development of DI Board strategic priorities. The Council is working toward August 2024 for final DI Board priorities,

and the NCAA does not expect action on this before then. The trust fund concept is not being developed in the form it was presented in the December memo, primarily due to external factors.

Last, [as stated by the Plaintiffs' attorneys](#), the settlement eliminates certain NCAA rules, although the membership has not been informed of such details. We are not aware of any sports governance organization that would allow any member or organizational structure to enter into a settlement that binds the organization to suspend the rules of the organization as enumerated in the Constitution, with no vote of the membership.

## **6.0 Possible Barriers to Court Approval of the Proposed Settlement**

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**Request for a Stay Pending Outcome of Member Lawsuit Challenging NCAA Board of Governors Authority.** A non-Power Five Division I member conference could bring a lawsuit challenging the authority of the NCAA Board of Governors' or the Division I Board of Directors to approve the proposed settlement. Or, they could seek to intervene in the *House-Carter-Hubbard* case and ask the court to disapprove or delay the settlement hearing. It seems pretty clear that the proposed settlement may cause harm to non-Power Five Division I conferences and institutions, giving them standing to challenge the proposed settlement either in their own lawsuit or as an intervenor.

**Settlement Provisions Requiring an Antitrust Exemption.** There is doubt that the settlement whether approved with a \$22 million or any percentage cap on institutional contributions or roster size restrictions unless Congress grants an antitrust exemption. Such a determination would be based on the probability that an antitrust violation would be found "under the rule of reason" that would focus on the degree of anti-competitive harm and whether there are reasonable justifications for such restraints.

**Extensive Restructuring of College Sport.** Judge Wilkin could determine that the settlement would entail "such an extensive restructuring of college sport," especially given that the NCAA has previously prioritized education over a pay-for-play minor league model, or be seen as "undermining the core principles of antitrust and labor laws," That she would reject the settlement. See [McCann](#).

**The Forward Provisions of the Settlement May Not be Acceptable.** The court could determine that a 10-years-going-forward settlement is too lengthy and might prevent athletes from organizing unions as employees and benefit from collective bargaining with their institutions, conferences, or the NCAA to negotiate more favorable terms. See [McCann](#).

If the settlement is not approved, the parties may choose to return to the settlement negotiations. Absent a settlement, the lawsuits will proceed and court decisions on the merits are likely to result in years of appeals.

## **7.0 Title IX Implications of the Proposed Settlement**

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Title IX prohibits sex discrimination in athletic programs. Providing more cash to male athletes than to female athletes, regardless of its reasons, is sex discrimination. The law on its face, the legislative history, the regulations and interpretations and the extensive case law makes it abundantly clear that there is no justification for treating men's football and men's basketball programs, separately for determining sex discrimination. Yet, this is exactly what the proposed settlement seeks to do.

The publicly available information about the terms of the proposed antitrust settlement does not include anything about the applicability of Title IX to its disclosed provisions, from roster and scholarship limitations to the payments to athletes. Instead, the plaintiffs' attorneys and the defendants have stated that the Title IX implications will be left to future courts and Congress. From news reports, it is clear that schools, conferences, and the NCAA are scrambling to develop justifications on how Title IX might be ignored and consequently how they may avoid treating women equivalently to men.

Plaintiff's lawyer, Steve Berman has even explicitly suggested that conferences may be able to launder payments to athletes in order to evade Title IX:

*"We told the court well, we don't think Title IX applies because in our world, this is money that goes to the conferences. And then the conferences are allowing schools to pay it, so it's not directly from schools. Not sure that argument is now going to fly given the structure."* ([See Dosh](#))

This attitude is alarming. While the plaintiffs' attorneys may not have to worry about the Title IX consequences of the settlement and can focus mostly on the total amount of money for their clients (over 90% of whom are men) and themselves, everyone else in college athletics must worry about the larger picture and the consequences, including compliance with federal laws, such as Title IX. Unfortunately, NCAA President Charlie Baker, while generally adopting a mantra about the importance of Title IX, has not provided leadership on how it applies to the proposed settlement and instead has raised doubt about its applicability to this situation despite the NCAA's position in the *House* case, arguing that the distribution of the funds that would allow different amounts to football and men's basketball as revenue-producing sports violated Title IX. See Barbara Osborne expert report in connection with opposition to class certification (Case 4:20-



cv-03919-CW, Document 251-3, filed April 28, 2023, (“House expert report”) (concluding that the funds would fall within both the financial assistance and treatment and benefits requirements of Title IX). President Baker now ignores that position and is punting the issue to “the feds”.

*“This is a really hard question for schools to answer on their own for a whole bunch of reasons. The biggest one most schools have said to us is ... the rules around equity when it comes to Title IX and around men's and women's sports ought to be relatively consistent from school to school and conference to conference. That's going to require a national standard. If we create a national standard at the NCAA, the problem with that would be if anybody doesn't like it one way or the other ... it would be challengeable in court. What we really need on this one, in particular, is the feds to give us guidance that says this is what a national standard with respect to Title IX and rev share should look like.”* ([See Talty](#))

If the NCAA and its member institutions do not understand the Title IX implications of the proposed antitrust settlement, they may discover that solving their antitrust problems in ways that disproportionately benefit male athletes opens the door to liability under Title IX. They likely will find themselves facing new problems, new litigation, and new financial obligations. This section addresses some of the important Title IX issues they should consider.

It is important to note that no administrative guidance or court decisions exist yet regarding the various athlete payments that will be made possible by NCAA rule changes provided in the proposed settlement. They do not exist mainly given that this is new territory -- such payments have never been made before to athletes. While the settlement hasn’t been approved yet, the NCAA rules haven’t changed yet permitting such payments, and the new payments and benefits haven’t begun, this issue is ripe and should not be deferred to later. The discussion below explains why the payments and benefits fall under Title IX and why institutions, including the schools, conferences and NCAA, should be held responsible if the funds are not distributed equitably to men and women.<sup>9</sup>

## **7.1 College athletics are educational programs and must comply with Title IX**

College athletic programs are educational programs subject to Title IX – whether or not the athletic programs themselves directly receive federal funding. Title IX prohibits sex discrimination in matters from curriculum to employment of students and faculty to all sorts of

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<sup>9</sup> This section does not address the roster and scholarship limits that are being discussed given that their parameters are not yet publicly released. But, these and other possible settlement terms likely will have Title IX implications.

clubs and extracurricular activities.<sup>10</sup> Athletic programs are included and have special regulations given that separate sports are permissible as long as they are equivalent.

Congress cemented this fact through its enactment of the Civil Rights Restoration Act of 1987, which defines “program or activity” broadly to cover all operations of an educational institution (and other enumerated entities) if any part of the entity receives federal funds. *20 U.S.C. §1687*.<sup>11</sup> See Exhibit A for the full language of the statute. In other words, institutions must make sure that all their programs comply with Title IX and do not discriminate on the basis of (whether or not those programs or activities receive federal funds). This law is well-settled, and has been consistently reinforced by Congress, the Department of Education, and the courts.

Further, Title IX prohibits discrimination on the basis of sex in all federally funded programs, including college athletics, whether or not the specific method of discrimination is set forth in the statute. Notably, specific regulations exist for “financial assistance” (106.37), “employment assistance to students” (106.38), “athletics” (106.41), “employment” (106.51), “employment criteria” (106.52), “recruitment and hiring” (106.53) and “compensation” (106.54). The following information explains how we have based our analysis on this existing Title IX general student and athlete guidance (see Exhibit A). See also the [Department of Justice Title IX Legal Manual](#), excerpts from which are contained in Exhibit B.

And, Title IX regulations and guidance specify three main criteria for how to evaluate whether an intercollegiate athletic program is in compliance with Title IX. Schools must comply with each of the three components. The first requirement is that male and female athletes must have an equal opportunity to participate. If 56% of the student body is female, then 56% of the athletic opportunities must be for women. We do not discuss this herein although note that the changes to roster sizes may implicate this requirement. Second, schools must provide financial assistance in proportion to the number of students of each sex participating in athletics. And, third, schools must provide equitable treatment and benefits in their athletic programs. We discuss the second two criteria herein.

We emphasize that while there is no case law or formal Title IX guidance related to the newly proposed athletics practices of “revenue-sharing” or “NIL payments” as labeled in the

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<sup>10</sup> At some institutions, intercollegiate athletics are conducted as extracurricular educational programs. However, many colleges provide college athlete participants in their intercollegiate athletic programs with academic credit, similar to the academic credit provided to students in physical education classes.

<sup>11</sup> Public Law No. 100-259, 102 Stat. 28 (1988). See also S.Rep.No. 64, 100<sup>th</sup> Congress, 2d Sess. 4 (1998) (explaining Congress wanted to prohibit discrimination throughout an institution if any part of the institution received federal money). When the U.S. Supreme Court narrowed the application of Title IX from institutions as a whole to only the specific programs that receive federal funding, in *Grove City College v. Bell*, 465 U.S. 555 (1984), Congress passed the Civil Rights Restoration Act of 1987, to reinstate its original intent to cover all programs. That original intent is clear in the legislative history we have provided as Exhibit E.

settlement, these are clearly forms of financial assistance, benefits, and treatment that fall squarely within the purpose and language of Title IX regulations. The same is true with regard to payments from “NIL collectives” if the institution is significantly entwined with the collective.

## **7.2 There are no Title IX exemptions for football or revenue producing sports**

Title IX provides no special treatment for sports that bring in more revenues, publicity, notoriety or popularity. Title IX applies regardless of the commercialization pressures of outside interests. Title IX applies regardless of the source of the funds or benefits.

Congress and the courts have made it clear that Title IX does not include any exemptions or special rules for men’s football, men’s basketball, or any purported “revenue” producing sports. This legal fact is critical, because it contradicts the positions of many who think that these sports and the athletes who play them should be treated differently, should receive special benefits, or should receive the payments contemplated by the proposed antitrust settlement even if other athletes do not and even if they lead to sex discrimination through the disproportionate distribution of athletic financial assistance and benefits. Because this fact contradicts the inclinations of so many athletics personnel quoted in the press, it is important that it be thoroughly explained and understood.

The plain language of the statute, the purpose of the statute, and its legislative history (see Exhibit E) make clear that Title IX does not exempt athletics as a whole or “revenue” producing sports in particular. Congress has been lobbied and considered such exemptions numerous times.<sup>12</sup> Each time it has rejected them and upheld the principle of equity. It has chosen Title IX and equal opportunity for women’s sports over athletic exemptions and over allowing men’s “revenue” producing sports to keep their revenue for themselves.

Thus, the amount of revenues earned by a particular sport or attributable to a particular athlete are explicitly not a permissible justification to engage in sex discrimination under Title IX. Revenues come into the institution from all sources: institutional subsidies derived from tuition and mandatory athletics fees, gate receipts, concessions, parking fees, sponsorships, licensing and royalty agreements, television rights fees, legal settlements, etc. The institution’s obligation is to treat male and female athletes equitably in the way it spends its revenues: uniforms, equipment, supplies, travel, scholarships, recruiting, facilities, etc. No sport is permitted to keep

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<sup>12</sup> The Department of Health, Education, and Welfare took the position that “There is no basis under the statute for exempting such [revenue] sports or their revenues from coverage of Title IX,” citing the plain language of the statute, the defeat of the Tower Amendment, and the passage of the Javits Amendment. 40 Fed. Reg. 24128, 24,134 (June 5, 1975).

the money it generates.<sup>13</sup> Neither can budget woes excuse the failure to treat male and female athletes equally.

As a consequence, Title IX applies to and prohibits sex discrimination in all aspects of college athletic programs. Participation opportunities, athletic financial assistance, and athletic benefits must be allocated equitably – whether or not the sport is popular and whether or not it produces revenue or makes a profit. The proposed settlement of antitrust cases against some institutions cannot and does not change these legal requirements.

Nor can NCAA rule revisions change these legal requirements. Nor can pundit statements that college sports should be treated like for-profit businesses instead of as educational programs change Title IX. Nor can administrative policies exceed the authority of the statute. Simply, long-standing legal precedent and congressional intent, in addition to the 37 words of the law, cannot be ignored just because a new kind of assistance, benefit, or treatment is permitted by the NCAA. If educational institutions or commercial interests want to change Title IX's legal requirements so that they can pour more money into certain men's sports, as contemplated by the proposed antitrust settlement, they must convince Congress that such sex discrimination leads to a greater good and convince Congress to change the law itself.

### 7.3 Title IX Regulations<sup>14</sup>

Title IX's core language provides:

*No person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*  
*20 U.S.C. §1681(a)*

The Title IX regulations include provisions that directly and indirectly impact intercollegiate athletics. 34 C.F.R. Part 106. Section 106.31 includes a broad mandate that applies to all educational programs and activities, including athletics. Other general sections of the regulations that apply to athletics include financial aid (§106.37), recruiting (§106.23), admissions (§106.21), and facilities (§106.33). Section 106.41 addresses athletics directly:

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<sup>13</sup> While revenue sport budgets may reflect higher support, revenues belong to the institution and are then distributed consistent with institutional policy and compliance with laws. The institution may accept donations restricted for the use of specific sports (i.e., endowed scholarships or coaching positions in a men's or women's sport, a team raising funds for a spring break trip to play in a special tournament, etc.) only if such expenditures do not result in inequitable treatment of male and female athletes. When those funds are expended, if necessary, the institution assigns other sources of support to provide equitable treatment and benefits to the opposite sex.

<sup>14</sup> For convenience, the "Title IX Regulations" are [located here](#) and financial assistance, employment assistance, athletics, employment, and compensation excerpts are in Exhibit A of this paper.

§ 106.41 Athletics.

(a) General.

*No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.*

(b) Separate teams.

*Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.*

(c) Equal opportunity.

*A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, **among other factors** (emphasis added):*

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;*
- (2) The provision of equipment and supplies;*
- (3) Scheduling of games and practice times;*
- (4) Travel and per diem allowances;*
- (5) Opportunity to receive coaching and academic tutoring;*
- (6) Assignment and compensation of coaches and tutors;*
- (7) Provision of locker rooms, practice and competitive facilities;*
- (8) Provision of medical and training facilities and services;*
- (9) Provision of housing and dining facilities and services;*
- (10) Publicity*

Subpart (a) tracks Title IX but notably adds to the basic language that no one shall be treated differently than any other person on the basis of sex. If an institution has different policies for men's and women's teams, applies policies disproportionately to athletes from one sex, or makes different decisions or structures its athletic program in different ways for men and women and if that different treatment harms women, then such actions fall within this broad regulation.

Subpart (b) permits, indeed, requires separate programs for men and women in the broadly-defined category of contact sports. Subpart (c) gets even more specific. Item (c)(1)

requires effective gender accommodation of athletic interests and equitable allocation of athletic participation opportunities. Notably, the effective accommodation provision focuses on the assessment of athletic interests and abilities, selection of sports, and levels of competition --- not just counting the numbers of athletes. And, items (2) through (10) in addressing equal opportunity and the allocation of athletic benefits (commonly referred to as the Title IX “laundry list” of treatment and benefits), makes it clear that the list is non-exclusive. It is provided for illustrative purposes.

In 1979 the U.S. Department of Health Education & Welfare (the precursor to today’s U.S. Department of Education) released what is known as the [1979 Policy Interpretation on Sex Discrimination in Intercollegiate Athletics](#) (the “1979 Policy Interpretation”). 44 Fed. Reg. 71413 et seq. Exhibit D. The 1979 Policy Interpretation is separated into three main areas: (1) the allocation of athletic participation opportunities and “whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the allocation of athletic benefits; and (3) the allocation of athletic financial assistance.

#### **7.4 Title IX Implications of the proposed settlement for educational institutions**

If the institution makes any payment to an athlete because the student is an athlete, Title IX applies. The 1979 Policy Interpretation (44 F.R. at 71415) defines participants as those athletes:

- (a) Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved (e.g., coaching, equipment, medical and training room services) on a regular basis during a sport’s season; and*
- (b) Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport’s season; and*
- (c) Who are listed on the eligibility or squad lists maintained for each sport; or*
- (d) Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.*

Participation in an actual competition is not required to count as a participant. NCAA requires Institutions to keep a record by athlete of every practice, meeting, competition, or athletics-related activity attended by the athlete. Both scholarship and non-scholarship athletes must be counted as participants.

It does not matter whether the student receives payments as an athletic scholarship, an award for academic achievement, compensation for the use of the student’s NIL, as a third-party contractor for services rendered (pays own income taxes), as a salaried employee (institution

withholds income taxes and pays/withholds Medicare and other employment taxes) if the financial assistance requires that the athlete be a “athletic participant.”

## **7.5 Title IX Implications of the Proposed Settlement for the NCAA and Athletics Conferences**

The Civil Rights Restoration Act of 1987, 20 USC 1687(4) holds that institutions that are subject to Title IX cannot avoid being responsible under Title IX by combining to form a third entity. There is a compelling legal argument that Title IX applies to intercollegiate conferences and national governing organizations, including the NCAA. The only Supreme Court case to address the issue is *NCAA v. Smith*, 525 U.S. 459 (1999). There the Supreme Court held that membership dues from educational institutions were not a sufficient basis upon which to hold the NCAA subject to Title IX. However, the Court (Justice Ginsburg) stated that a different theory – the controlling authority theory – might be a sufficient basis upon which to hold that Title IX applies to the NCAA. The Court explained that the controlling authority theory – “when a recipient of federal funds cedes controlling authority over a federally funded program to another entity, the controlling authority is covered by Title IX regardless of whether it is itself a recipient.” This argument was not asserted in the lower courts in the case and therefore was not decided by the Supreme Court. Further, the Supreme Court admonished that “entities that receive federal assistance, whether directly or indirectly through an intermediary, are recipients within the meaning of Title IX.”

See also *Communities for Equity v. Michigan High School Athletic Ass’n.*, 80 F. Supp. 2d 729 (W.D. Mich. 2000), the court explained: “any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.... Because the plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds... and because holding otherwise would be nothing more than empty formalism, the court concluded that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.” *Id.* at 930. Numerous other federal and state cases have held that state athletic associations are subject to Title IX’s jurisdiction.

And, significantly, the NCAA admitted as part of the *House* case legal filings, that the conferences are subject to Title IX jurisdiction. As stated there: “Plaintiffs’ proposal that the Conferences make the revenue share payments ...does not allow [them] to evade Title IX. .... [F]unds are not exempt from Title IX merely because they come from an outside source.” See Barbara Osborne expert report (Case 4:20-cv-03919-CW, Document 251-3, filed April 28, 2023, Paragraph 152 (“*House* expert report”). The report also states that Title IX applies because the conferences act through their member institutions, and the member institutions either own their

own broadcast rights or transfer them to the conferences. These same rationales apply to the question of whether when the NCAA supplies the funds (as it will do for past damages as part of the settlement agreement), they are subject to Title IX's jurisdiction.

The implications of Title IX's application to conferences and the NCAA mean that these entities, like institutions, cannot discriminate on the basis of sex in their programs (e.g., quality and treatment and benefits provided to athletes in post-season championship play, provision of television exposure for men's and women's post-season events, etc.). Important for the implementation of the proposed settlement is that neither the NCAA nor conferences can evade the application of Title IX by being the distributors of or participants in the mechanics of the distribution of settlement proceeds to members of the plaintiff class, all of whom also were or are athletic participants.

## 7.6 How Title IX applies to college athlete NIL payments

**Applicable Title IX regulations.** Section 106.37 (a) of the Title IX Regulations specify that a recipient of federal financial assistance shall not:

- (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;*
- (2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or*
- (3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.*

Section 106.41 of the Title IX Regulations specify with regard to athletics programs:

- (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.*
- (c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, **among other factors** (emphasis added):*

....

*(10) Publicity*



Section 106.38 of the Title IX Regulations specifies that with regard to employment assistance to students:

*(b) Employment of students by recipients. A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.*

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited, Section 106.51 of the Title IX Regulations specify with regard to the employment of students by a recipient of federal funds:

*(a) General.*

- (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.*
- (2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.*
- (3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.*

*(b) Application. The provisions of this subpart apply to:*

- (1) Recruitment, advertising, and the process of application for employment;*
- (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;*
- (3) Rates of pay or any other form of compensation, and changes in compensation;*
- (4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;*
- (5) The terms of any collective bargaining agreement;*
- (6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;*
- (7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;*

- (8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;*
- (9) Employer-sponsored activities, including those that are social or recreational; and*
- (10) Any other term, condition, or privilege of employment.*

Subpart E, Section 106.52 of the Title IX Regulations specifies with regard to the **employment criteria** applied to students by a recipient of federal funds:

*A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:*

- (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and*
- (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.*

Subpart E, Section 106.53 of the Title IX Regulations specifies with regard to the **recruitment** of students for employment by a recipient of federal funds:

- (a) Nondiscriminatory recruitment and hiring. A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.*
- (b) Recruitment patterns. A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.*

Subpart E, Section 106.54 of the Title IX Regulations specifies with regard to the **compensation** of students employed by a recipient of federal funds:

*A recipient shall not make or enforce any policy or practice which, on the basis of sex:*

- (a) Makes distinctions in rates of pay or other compensation;*
- (b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.*

**Application to “NIL payments.”** If the institution, the conference, the NCAA or any other entity on their behalf, pays athletes to use their publicity rights for use in media guides, publicity, advertisements, television appearances, etc., (NIL payments), it must not discriminate on the

basis of sex. Accordingly, the entities must pay male and female athletes equivalently. The Title IX regulations governing financial assistance and equal publicity and benefits and treatment support this basic proposition. Indeed, the NCAA admitted such in its filings in the *House* case. As stated by their expert, in connection with class certification opposition, “While Plaintiffs’ Broadcast Model [whereby athletes are compensated for their NIL rights as part of a revenue sharing scheme] presents a novel scheme for college football and basketball players, the application of such a model is something Title IX was designed to prohibit.” See Barbara Osborne expert report (Case 4:20-cv-03919-CW, Document 251-3, filed April 28, 2023, Paragraph 147 (“*House* expert report”)).

A. Financial Assistance.

Title IX requires that financial assistance be provided in proportion to the number of students of each sex participating in athletics. Among the types of financial assistance discussed in the regulations and cases are scholarships, grants-in-aid, cost-of attendance, grants, work study payments, loan assistance, etc.—recognizing that some of these terms actually apply to the same substantive assistance.

The NIL payments fall within the financial assistance requirements of Title IX whether provided to a team as a whole, with or without different amounts to teams, or differing amounts to individual athletes based on their FMV. If the institution wishes to treat athletics differently by sport or by individual (such as applying a fair market value standard to individuals), it may use the athletic scholarships “aggregation-by-sex” methodology to determine gender equity. The “aggregation-by-sex” equity determination is used for Title IX athletics scholarship and other types of financial assistance. The methodology requires that the total amount of scholarship aid or other financial assistance made available to male athletes in the aggregate and female athletes in the aggregate respectively, be substantially proportionate (within a one percent variance standard) to their athletics’ participation rates (which must be proportional to the percent of full-time undergraduate males and females unless the institution meets the two allowable exceptions). The aggregation-by-sex method of determination of equity permits athletic scholarships and other financial assistance to differ by the sex of the individual athlete receiving the award, whether the athlete participates in a revenue producing sport, or even on the basis of a fair market value, skill level, or other assessment of a prospective or current athlete’s abilities. Neither does this methodology require an equal or proportionate number of males and females who receive scholarships. Thus, if the institution wishes to vary NIL payments to athletes, the use of the aggregation-by-sex methodology should be used to determine gender equity.

This methodology should be used to determine gender equitable distribution of damages or payments going forward under the settlement. The male and female total amounts awarded by the settlement should be added to the actual total scholarship amounts received by male and female athletes in the applicable years. The settlement-adjusted aggregated amounts should then be used to determine if males and females received their respective proportions based on total male and female athletics participation in each year (or, if the institution was not in compliance with the two allowable exceptions to providing athletic opportunities proportional to the percentage of male and female full-time undergraduate students, this percentage should be used). If either sex receives less than their entitlement, the determination of the payout for the underrepresented sex is a simple subtraction. That payout entitlement should be distributed in an equal amount to either the male or female athletes who were shortchanged from their proper proportion of financial assistance.

B. Treatment and Benefits requirements.

Title IX requires that male and female athletes receive equal opportunities with respect to treatment and benefits. As noted above, Section 106.41c includes a list of the type of opportunities that may be considered to arrive at a conclusion whether the overall effect of treatment of and benefits to male and female athletes are equivalent. However, these factors are not exclusive. Clearly cash should be considered a benefit, and the receipt of cash is a treatment.

The analysis must be a qualitative assessment of the mechanism of the benefit. If cash payments are made to males, cash payments rather than an alternative type of benefit (i.e., free merchandise, free on-campus parking in preferred lots, free tickets, etc.) should be made to females. If the institution chooses cash as the mechanism for NIL payments, equity should be determined according to the aggregation-by-sex method used for financial assistance as described in section A. above. If the institution determines that non-cash compensation will be used for male and female athletes, it must demonstrate the qualitative mechanism and value of the non-cash benefit are equivalent.

Thus, the NCAA got it right when in connection with the class certification motion, it concluded that the proposed payments in *House* are both financial assistance and treatment and benefits that must not be provided in a gender discriminatory manner. See Osborne expert report, *supra*.

## **7.7 How Title IX applies to college athlete revenue-sharing or other pay-for-play financial assistance or employment**

The same Title IX regulations and payment methodologies as described in section 7.6.A above apply to all forms of financial assistance, employment or direct compensation.

## **7.8 How Title IX applies to institutions and covered entities entering into third party licensing agreements that generate NIL compensation to the institution and their athletes.**

Institutions may enter into a group licensing program that does not benefit men and women equally (e.g., group licensing programs such as a football video game manufacturer that separately enters into NIL agreements with the institution and one or more current former or current athletes respectively. The third party providing each with royalties or a bookstore may contract with the institution to use its marks and with athletes to use their names on the back of game jerseys offered for sale. The institution may do so only if it enters into one or more separate sex sport group licensing agreements that benefit an equal proportion of male and female athletes or ensures that an equal proportion of female athletes receives comparable financial assistance. Further, if institutions permit athletes to use their institution's NILs for third party NIL compensation, they may not permit a larger proportion of male athletes than female athletes to use such institutional assets for private gain pursuant to Title IX and its financial assistance and treatment and benefits requirements. Indeed, the plain language of Title IX would prohibit such discrimination.

## **7.9 Conditions under which Title IX applies to an institution and other covered entities' involvement with "NIL collective" payments to athletes.**

An institution can be held responsible under Title IX for the activities of a third party that discriminates on the basis of sex. Section 106.37 (a) of the Title IX Regulations specifies that a recipient of federal financial assistance shall not:

- (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;*
- (2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex;*

An institution may be held responsible under Title IX for the activities of a third party such as an NIL collective that discriminates on the basis of sex. There are still many collectives that have

been established to support a single men's football or basketball team. OCR would assess whether the institution has been sufficiently involved in assisting, delegating, or otherwise supporting such third parties -- individuals or collectives -- that engage in sex discrimination. If so, then the institution will be found responsible under Title IX.

With respect to assessing what is "sufficiently involved," any one of the following practices show significant involvement between the institution and the third-party individual or collective's activities, and shall be attributed to the institution:

- Athletics department staff member (or company owned by staff member) representing enrolled athletes for NIL deals, including securing and negotiating deals on behalf of the athlete.
- Any individual or entity acting on behalf of the athletics department (e.g., third-party rights holders, third-party agents) representing enrolled athlete for NIL deals, including securing and negotiating deals on behalf of the athlete.
- Institution entering into a contract with an athlete for the sale of product related to the athlete's NIL (co-licensing, group licensing, etc.).
- Conference and institution athlete revenue sharing: broadcast revenue, NIL revenue, etc.
- Institutional staff members who own businesses separate from the institution, providing NIL deals with an athlete.
- Institutional coach compensating athlete to promote the coach's camp.
- Athlete receiving compensation from institution directly or indirectly for promoting an athletics competition in which they participate.

When the institution has not engaged in any of the NIL activities described immediately above, the totality of the following circumstances should be considered to determine if the institution's involvement in obtaining NIL opportunities for the athlete is sufficient to hold the institution responsible under Title IX. The following factors related to institutional involvement will be considered:

- Engages the NIL third party to inform athletes of NIL opportunities.
- Engages the NIL third party to administer a marketplace that matches athletes with NIL opportunities without involvement of institution.
- Provides information to athletes about opportunities of which the institution has become aware or transmits information without further involvement.
- Provides athlete contact information and other directory information to the NIL entity (e.g., collectives and others seeking to engage athletes).
- Provides stock and/or stored photo/video/graphics to an athlete or the NIL entity to utilize in athlete promotions or NIL employment.
- Introduces athletes to representatives of the NIL entity.

- Arranges space for the NIL entity and athlete to meet on campus or in the institution’s facilities.
- Promotes the athlete’s NIL activity, whether or not such promotion requires value or cost to the institution (e.g., retweeting or liking a social media post).
- Promotes the athletes’ NIL activity on a paid platform unless the athlete or NIL entity is paying going rate for such advertisement (e.g., NIL entity pays for advertisement on video board).
- Purchases items related to an athlete’s NIL deal that are de minimis in value or for the same rate available for the general public.
- Staff member assists the NIL entity in raising money for the NIL entity (e.g., appearances at fundraisers, donates autographed item, urges support through written or electronic communications, media interviews or public appearances).
- Provides institutional assets (e.g., tickets, suite) to the NIL entity under a sponsorship agreement unless such access to assets are available to and on the same terms, as other sponsors.
- Requests donor to provide funds to the NIL entity with or without such funds being used for a specific sport or athlete.
- Provides institutional donor or ticket purchaser information or facilitates meetings between donors and the NIL entity.

**Additional red flags to be assessed in the determination of whether an NIL collective or other organization discriminates on the basis of sex.** The following additional factors demonstrate that the collective engages in discrimination on the basis of sex if:

- It is formed just for male athletes or male sport teams.
- It is formed for selected men’s and women’s sports that do not represent an equal proportion of male v. female athletes.
- It includes all sports but the promotional and publicity activities of the collective or organization favors one sex over the other.
- It includes all sports but the number of deals and dollar amounts favors men’s vs. women’s sports based on proportion of males v. female athletes or Prong One compliance (proportional to enrollment)
- Makes representations that a specific value of NIL deals will be provided to athletes of one sex but not the other.
- Its donor/NIL employer solicitation material specifically promotes recruiting benefits or purposes that it will favor men’s vs. women’s sports.
- The institution designates the NIL Collective as “the official collective” of an institution constitutes the provision of “significant assistance.” Indeed, OCR has long interpreted “significant assistance” to include a school’s “giving an organization special status or

privileges that it does not offer to all community organizations,” including “official recognition of the organization, the designation of faculty sponsors, or the use of campus facilities at less than fair market value.”

Section 106.38 of the Title IX regulations specifies the following with regard to “employment assistance to students”:

- (a) Assistance by recipient in making available outside employment. A recipient which assists any agency, organization or person in making employment available to any of its students:
  - (1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and*
  - (2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.**
- (b) Employment of students by recipients. A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part. (see Exhibit A attached)*

In addition to the above, an institution or covered entity is not permitted to assist any outside third party that is recruiting on its behalf and over which it does not have control with regard to recruiting, promotion, publicity, financial aid, treatment or benefits. See also letter from OCR to Ricky Volante (Exhibit B attached) in response to his letter date July 3, 2012, where the OCR stated that it prohibits schools “from aiding or perpetuating discrimination by providing significant assistance to any outside organization that discriminates on the basis of sex in providing any aid, benefit or service to students or employees.” The letter further states that an institution that assists an outside organization in making employment available to any of its students must assure itself that such employment is made available without discrimination on the basis of sex and not render such services to any agency, organization or person which discriminates on the basis of sex in its employment practices.”

## **7.10 Cautions and Conclusions**

Because the various athlete payments permitted in the proposed settlement will be called something besides athletic scholarships or will be new athletic benefits that educational institutions and regulators have not previously encountered, no case law or administrative guidance directly on point exists yet about how they fit within Title IX. But the use of new nomenclature does not mean they do not fall within existing definitions, as well as the overall purpose of the statute.



Accordingly, educational institutions should be aware that any payments they make or facilitate to be made to student athletes (directly or indirectly) constitute athletic financial assistance under 34 C.F.R. 106.37, just like current athletic scholarship payments do now, and thus will have to be allocated equitably under the same parameters.

Moreover, the newly proposed payments constitute athletic benefits and recruiting inducements provided to college athletes because of their position as student athletes, just like any other benefits (e.g., publicity, promotion, recruiting, housing, tutoring, per diem, equipment, facilities, coaching, athletic training, etc.). As such, they must be provided equitably, either to all male and female athletes individually or collectively in proportion to their participation rates.

The source of the new forms of financial assistance and athletic benefits does not matter. If boosters, collectives, conferences, the NCAA, attorneys or other third parties provide a benefit to male athletes because they are athletes on athletic teams at an institution, the institution must encourage the third parties to provide the benefit equitably, reject the benefit outright, or make up the difference, just as they must do now when donors, e.g., offer to fund projects for the men's football team or men's basketball team. No matter the source, institutions must make sure that their male and female athletes receive comparable benefits and that those benefits are distributed equitably.

Educational institutions should also be aware that they may be held responsible for the actions of third parties if they have been sufficiently involved and the third party then discriminates on the basis of sex.

Moreover, the NCAA, athletic conferences, and others should be aware that they may be held responsible if they make inequitable payments under the settlement, whether as financial assistance or benefits because (1) they are direct or indirect recipients of federal financial assistance; (2) they operate or exhibit controlling authority over a federally funded program (college athletics); or (3) they fall under 20 U.S.C. §1687(4) as an entity formed by federally funded educational institutions to help operate one of their educational programs (college athletics).

In conclusion, the NCAA had it right last year! The NCAA must not be permitted to say one thing during litigation and now take a wholly opposite or, at best, ambiguous position during the settlement discussions. Its expert had it right in all respects: conferences here are subject to Title IX's requirements<sup>15</sup> and the money being provided to athletes as part of the revenue share/NIL payments falls within both the financial assistance and treatment and benefits requirements of Title IX.

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<sup>15</sup> And, by extension of the same rationale, the NCAA too is subject to Title IX.

## **8.0 How policy decisions to compensate athletes for the use of their names, images, or likenesses (NILs) or to share revenues in pay-for-play financial assistance to athletes may come under antitrust scrutiny**

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Institutions (and other covered entities) are legally obligated under right to publicity laws to obtain athletes' permission to use their NILs in media guides, publicity, advertisements, television appearances, etc. Institutions are not required to pay athletes for these rights, as long as the institution receives such permission. To date, the NCAA by rule has prohibited member institutions from paying athletes for participating in a sport or their publicity rights, permitting only financial assistance related to education expenses or awards (e.g., scholarships, academic awards, etc.). In response to this rule, institutions have required college athletes as a condition of participation in college athletics to grant their publicity rights to the institution, conferences, the NCAA and other post-season bowl associations while receiving no payments for those rights. The NCAA, athletics conferences and member institutions have been vulnerable to antitrust litigation because the institutions agree on the rules promulgated by the NCAA (a horizontal agreement), NCAA has market power (monopoly and monopsony) and the NCAA previously had an NCAA rule that limited or capped athlete compensation at zero.

Rules prohibiting "pay for play" or NIL payments would not draw antitrust scrutiny if imposed by an individual institution or more than one institution, even all members of its athletics conference, so long as if combined, they do not have market power. Legal problems arise only when institutions with sufficient market power (individually or collectively) agree to rule limitations that affect the market.

No matter what, all institutions and conferences that choose to offer pay-for-play revenue sharing or NIL institutional payments, will have to adhere to Title IX, treating such payments as "financial assistance" or "treatment and benefits" which must be distributed to male and female athletes proportional to their athletic participation.

## **9.0 Issues that Should be Considered by Congress to Protect the Education, Health, and Wellbeing of College athletes and the Educational Interests of Institutions of Higher Education.**

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### **9.1 Why supporting the Settlement by giving the NCAA an antitrust exemption for the purpose of “saving college sports” will not advance these educational interests.**

Congress is being asked to support the settlement by giving the NCAA an antitrust exemption for the express purpose of “saving college sports”. Supporting the settlement will most likely accomplish the following:

- a. Power Five control of college sports and its rules system will most likely increase, thereby allowing these programs to continue exploiting athletes for revenue generation and failing in their recruiting promises to deliver a meaningful education in an academic degree of the athlete’s choice;
- b. Treating athletes as employees is likely to prioritize making money over being a bona fide student pursuing a degree;
- c. Creating financial incentives for maximization of revenues to comply with the conditions of the settlement and that will most likely result in continued excessive expenditures on a revenue sports arms race and reduced funding of or elimination of non-revenue sports: and
- d. The full acceptance of tax-exempt educational organizations conducting professional sport enterprises that are highly subsidized by:
  - higher education tuition and mandatory student activity fees from debt-burdening students, backed by \$130 billion in Higher Education Act student loan and Pell grant appropriations;
  - tax exemptions for athletic program donors
  - tax exemptions for the purpose of goods and services, lowering costs for the purpose of continuing to offer excessive employee salaries
  - use of tax exempt bonds to build lavish facilities attractive to recruits

### **9.2 Why there is no immediate need for Congressional intervention.**

There is no immediate need for Congressional action as the settlement approval process will take months if not a year. Congress should consider opposing the settlement based on (a) above and instead, explore mechanisms similar to those suggested in 8.3 below that would reset

the intercollegiate athletics enterprise to realign with the educational purpose of its institution and better protect the interests of both college athletes and their educational institutions.

### **9.3 If Congress considers providing a conditional and limited antitrust exemption to governance entities, it should do so only to better protect college athletes and their education institutions.**

If Congress is considering the provision of an antitrust exemption, it should be narrowly limited and conditional to not only control costs but imposing the following athlete protection conditions:

- (1) require all member institutions that award athletics grants-in-aid to annually provide direct compensation and benefits to eligible athletes that is equal to or exceeds direct compensation and benefits to athletics department coaches and staff (Note: Meeting this standard will not affect head or assistant coach salaries; the practical effect will be to reduce the current excessive number of coaching and staff positions at Division I institutions.)
- (2) enact cost control rules that enable institutions to control coach/staff salaries and benefits, meet obligations related to medical care of injured athletes, and comply with Title IX, including rules that:
  - a. limit numbers of athletics personnel by sport;
  - b. establish coach and staff aggregate salary caps;
  - c. limit excessive coach and administrative staff employment terms including severance provisions; and
  - d. establish maximum contest limitations by sport that better balance athletes' time demands with adequate time to meet academic responsibilities and enough sleep to permit recovery from the physical and mental demands of competitive sport.
- (3) require at least fifty percent of voting members on all committees and boards be graduated former athletes with expertise in law, economics, sports medicine, athletics administration, and education who are nominated and elected by currently participating athletes except that such athletes' representatives shall not be involved in the setting of academic eligibility standards;
- (4) require a third-party Title IX athletics regulations assessment at least once every five years and correction of identified inequities within one year as a condition of membership;
- (5) with regard to athletics grant-in-aid to attend, continue such financial support for five

- years or until graduation, whichever occurs first, with no withdrawal for reasons of injury or inadequate performance and conditioned only on the student meeting participation, academic eligibility and student conduct standards;
- (6) not revoke an athletic scholarship or deny eligibility to participate based on a violation of the institution's student code of conduct or team rules without adjudication by the institution's regular student disciplinary authority;
  - (7) not declare an athlete ineligible for participation for violation of athletic governance association rules without due process and appeal guarantees that include:
    - a. mandated use of independent investigators and adjudicators (e.g., former administrative law judges) based on a violation severity threshold;
    - b. fair notice, timely process, penalties consistent with severity of offenses; and
    - c. athlete access to AAA arbitration;
  - (8) not permit any staff member employed by a member institution to restrict the rights of athletes to select academic courses and majors of their choosing, even if such requirements conflict with some athletics practices or contests;
  - (9) not permit members to restrict the right of athletes to organize and protest consistent with the rights of all students;
  - (10) not restrict the right of any athlete to transfer to other institutions by imposing athletics eligibility penalties;
  - (11) assist in the provision of financial support for and require member institutions to provide for the care of athletic injuries including short- and long-term athletics injury insurance, coverage of all medical costs of athletics injuries not covered by insurance, the cost for second opinions, catastrophic injury coverage, mental health services, and rehabilitation services;
  - (12) require all members to provide athlete academic advising and support programs under the control of the institution's provost rather than the athletic department;
  - (13) require all members to provide non-athletic department confidential student ombudsperson services to any athlete expressing concerns regarding treatment by athletics personnel, including any violation of athletics-related time limitations for athletes;

## EXHIBITS

### EXHIBIT A

#### Part 106 – Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance – Excerpts from Title IX Regulations

##### TITLE 34 EDUCATION

##### SUBTITLE B REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

##### CHAPTER I OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

#### **PART 106 NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE**

##### **§ 106.37 Financial assistance.**

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and §106.41.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

#### **§ 106.38 Employment assistance to students.**

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.41 Athletics.**

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.



Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

### **Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited**

#### **§ 106.51 Employment.**

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

- (1) Recruitment, advertising, and the process of application for employment;
- (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation, and changes in compensation;
- (4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;
- (5) The terms of any collective bargaining agreement;
- (6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;
- (7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;
- (8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;
- (9) Employer-sponsored activities, including those that are social or recreational; and
- (10) Any other term, condition, or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980, as amended at 65 FR 68056, Nov. 13, 2000]

**§ 106.52 Employment criteria.**

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

- (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and
- (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.53 Recruitment.**

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

**§ 106.54 Compensation.**

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

## EXHIBIT B

### The Department of Justice Title IX Manual – EXCERPTS

<https://www.justice.gov/crt/title-ix#B.%C2%A0%20Employment%20Discrimination>

### Disparate Impact, Employment Discrimination, Financial Assistance, Employment Assistance, Other Benefits

#### Section IV. Discriminatory Conduct

##### A2. Disparate Impact

In contrast to disparate treatment, which focuses on the intent to cause sex-based results, disparate impact focuses on the consequences of a facially sex-neutral policy or practice. Under this theory of discrimination, the core inquiry focuses on the results of the action taken, rather than the underlying intent.<sup>46</sup> Because of this difference in focus, evidence of a discriminatory intent or purpose is not required. Indeed, "intent" is not an element in the disparate impact analysis.

Following the Title VI model, Congress delegated to each funding agency the authority to implement Title IX's prohibition of sex discrimination in educational programs or activities of recipients of federal financial assistance by issuing regulations, and those regulations have the force and effect of law.<sup>47</sup> In furtherance of this broad delegation of authority, federal agencies have uniformly implemented Title IX in a manner that incorporates and applies the disparate impact theory of discrimination.

The courts have sustained the use of disparate impact theory as lawful and proper exercises of agencies' delegated authority, even where the challenged actions or practices do not constitute intentional discrimination and thus are not prohibited directly by the explicit language of either Title VI or Title IX.<sup>48</sup>

Under the disparate impact theory, a recipient violates agency regulations by using a neutral procedure or practice that has a disparate impact on protected individuals, and such practice lacks a substantial legitimate justification. As in Title VI disparate impact cases, the elements of a Title IX disparate impact claim derive from the analysis of cases decided under Title VII disparate impact law.<sup>49</sup>

In a disparate impact case, the focus of the investigation concerns the consequences of the recipient's practices, rather than the recipient's intent.<sup>50</sup> To establish discrimination under a

disparate impact scheme, the investigating agency must first ascertain whether the recipient utilized a facially neutral practice that had a disproportionate impact on the basis of sex.<sup>51</sup> In doing so, the investigating agency must do more than demonstrate that the practice or policy in question is a "bad idea."<sup>52</sup> The agency must show a causal connection between the facially neutral policy and the disproportionate and adverse impact on a protected group.<sup>53</sup>

If the evidence establishes a prima facie case, the investigating agency must then determine whether the recipient can articulate a "substantial legitimate justification" for the challenged practice.<sup>54</sup> "Substantial legitimate justification" is similar to the Title VII concept of "business necessity," which involves showing that the policy or practice in question is related to performance on the job.<sup>55</sup>

To prove a "substantial legitimate justification," the recipient must show that the challenged policy was "necessary to meeting a goal that was legitimate, important, and integral to the [recipient's] institutional mission."<sup>56</sup> The justification must bear a "manifest demonstrable relationship" to the challenged policy.<sup>57</sup> In an education context, the practice must be demonstrably necessary to meeting an important educational goal, i.e. there must be an "educational necessity" for the practice.

If the recipient can make such a showing, the inquiry then turns to whether there are any "equally effective alternative practices" that would result in less adverse impact.<sup>58</sup> Evidence of either will support a finding of liability. . . . .

## **Section IV. Discriminatory Conduct**

### **B. Employment Discrimination**

#### **3. Prohibited Employment Practices**

As noted above, the Title IX common rule specifically incorporates the disparate impact standard as part of its prohibitions against sex-based employment discrimination.<sup>83</sup> In addition, the Title IX common rule applies its prohibition against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention or treatment of employees.<sup>84</sup> The Title IX common rule addresses various areas including the treatment of pregnancy as a temporary disability, pre-employment inquiries regarding marital or parental status, imposition of employment criteria or testing devices having a disproportionate impact, recruitment, and compensation and benefits (including equal pension contributions and benefits).

Where the Title IX common rule does not address some aspect of the employment relationship or where more detailed guidance is required beyond that provided by the Title IX common rule (and if there is no relevant guidance issued by the Department of Education interpreting its Title IX regulations), agency officials should review and apply the applicable standards and policies developed under Title VII.

## **Section IV. Discriminatory Conduct**

### **C. Specific Provisions**

#### **1. Specific prohibitions (i½§ \_\_.400(b))**

Under the Title IX common rule, as a general matter, in providing any aid, benefit, or service, a recipient may not, on the basis of sex:

- Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Deny any person any such aid, benefit, or service;
- Subject any person to separate or different rules of behavior, sanctions, or other treatment;
- Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition.
- Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

65 Fed. Reg. at 52870.

## **6. Financial Assistance (17 CFR 430)**

When a recipient provides financial assistance to any student participating in an educational program or activity, the recipient must ensure that it does not provide different types or amounts of assistance, limit eligibility for such assistance, apply different criteria, or otherwise discriminate in the provision of financial assistance on the basis of sex. See 65 Fed. Reg. 52871 at 17 CFR 430(a)(1). Similarly, the recipient must not assist, solicit, list, approve, provide facilities to, or assist in any other manner, a "foundation, trust, agency, organization, or person that provides such assistance to any of the recipient's students" in a sexually discriminatory manner. 65 Fed. Reg. 52871 at 17 CFR 430(a)(2).

Although recipients are allowed to administer or assist in administering specific sex-restricted scholarships, fellowships, or other forms of financial assistance to students through a domestic or foreign will, trust, bequest, or similar instrument, the Title IX regulations require that the overall effect of such sex-restricted financial assistance not discriminate on the basis of sex. 65 Fed. Reg. 52872 at 17 CFR 430(b). To ensure compliance with Title IX regulations, recipients must develop and use procedures that select students to be awarded financial assistance in a nondiscriminatory manner and not on the basis of availability of funds restricted to members of a particular sex. 65 Fed. Reg. 52872 at 17 CFR 430(b)(2)(i). This means that a recipient cannot deny a scholarship or other financial assistance to an individual because the available monies are restricted to members of a particular sex. For example, recipients must select in a sex neutral fashion who is eligible for assistance. They are then free to allocate assistance to those selected individuals from among sex restricted scholarships. However, they cannot deny assistance to selected individuals because scholarships or other financial assistance is sex restricted.<sup>92</sup>

## **7. Employment Assistance (17 CFR 435)**

A recipient who assists any agency, organization, or person in making employment available to its students must ensure that the employment is not provided in a discriminatory manner on the basis of sex. If the agency, organization, or person is offering employment in a discriminatory manner, the recipient must not assist such an agency, organization, or person by providing its employment service. 65 Fed. Reg. 52872 at 17 CFR 435(a)(1),(2).

## **8. Health and insurance benefits and services (17 CFR 440)**

Under the Title IX common rule, a recipient must not discriminate on the basis of sex in providing health and insurance benefits or services. Specifically, the provision of such benefits and services to students must meet the same requirements as outlined in the employee provisions of the common rule. 65 Fed. Reg. at 52873-52874. However, these provisions do not

prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service must provide gynecological care. 65 Fed. Reg. at 52872.



**EXHIBIT C**  
**Office of Civil Rights Response to Ricky Volante letter**

Ricky Volante on Twitter: "@achristovichh and @andyhre" +

https://twitter.com/RickyVolante13/status/161646183339698177

**Tweet**

**Ricky Volante**  
@RickyVolante13

Replying to @RickyVolante13 @achristovichh and @andyhre

Here is the reply from OCR. Seems to directly address what is now an NIL collective in Paragraph 4.

Dear Ricky Volante:

Thank you for your July 3, 2017, letter to the U.S. Department of Education's Office for Civil Rights (OCR) regarding the HBCU League's plan to form and operate a men's collegiate basketball league and to "provide payment to players above and beyond cost of attendance (COA) scholarships in the form of a salary."

As you know, OCR is responsible for enforcing, among other civil rights statutes, Title IX of the Education Amendments of 1972, which prohibits sex discrimination in all educational programs and activities, including athletic programs, receiving Federal financial assistance from the Department. Although OCR does not give legal advisory opinions or offer opinions or guidance about specific facts without first conducting an investigation, we are happy to provide information about the laws that OCR enforces.

Title IX requires recipient institutions to provide equal athletic opportunities for members of both sexes. 34 C.F.R. § 106.41(c). And if a recipient awards athletic financial assistance, it must provide reasonable opportunities for such awards for members of each sex in proportion to the participation rates of student-athletes of each sex. 34 C.F.R. § 106.37(c).

Title IX obligations are not obviated or alleviated by a rule or regulation of an outside organization or league. 34 C.F.R. § 106.6(c). Indeed, a recipient institution may violate Title IX when it assists an outside organization that engages in sex discrimination. As part of its broad prohibition on sex discrimination, the Title IX regulations prohibit recipients from aiding or perpetuating discrimination by providing significant assistance to any outside organization that discriminates on the basis of sex in providing any aid, benefit or service to students or employees. 34 C.F.R. § 106.31(b)(6). Similarly, a recipient that assists an outside organization in making employment available to any of its students must "assure itself that such employment is made available without discrimination on the basis of sex" and "not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices." 34 C.F.R. § 106.38(a). Additional resources are available on OCR's website at [www.ed.gov/ocr/frontpage/fairreadingroom.html](http://www.ed.gov/ocr/frontpage/fairreadingroom.html).

Correspondence issued by OCR in response to an inquiry from the public does not constitute a formal statement of OCR policy and should not be construed as creating or articulating new policy. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Sincerely,

Program Legal Group  
Office for Civil Rights  
U.S. Department of Education

10:45 AM · Jan 20, 2023 · 1,085 Views

## EXHIBIT D

### COMPUTATION OF ESTIMATED 2023 CONFERENCE REVENUES IN THE THREE COUNTABLE CATEGORIES: MEDIA RIGHTS, TICKET SALES, AND SPONSORSHIPS INCLUDING LICENSING AND ROYALTIES FOR 2025-26 RECONSTRUCTED POWER FIVE CONFERENCES and RESEARCH ON 2025-26 INCREASES IN CONFERENCE MEDIA RIGHTS FEES

[Sportico's College Sports Finances Database](#), 2023 revenues was used for Table 4 countable revenue category estimates. Data were derived from NCAA annual financial reports obtained via FOIA requests to each institution. Data for the three categories was available from public schools only. A public school average was determined by adding actual revenues for all public schools divided by the number of schools with such data. The public school average was then used for each private school conference member. Note that these revenues were based on 2023 conference membership: ACC (14), Big10 (14), Big 12 (14), Pac-12 (12), SEC (14) reflecting TV rights fees for those conferences in 2023. The conference members were then realigned to reflect 2025-26 conference membership and each of the three revenue categories were totaled to estimate total annual countable revenues for the three categories.

The Table 4 data used to estimate the difference between 2023 conference TV rights agreements and projected new conference television agreements effective in 2025 was based a March 19, 2024 [Business of College Sports](#) report and this estimate is described below each conference table.

**COMPUTATION OF ESTIMATED 2023 CONFERENCE REVENUES:  
Media Rights, Ticket Sales, Sponsorships, Licensing, Royalties for  
Reconstructed Conferences and Conference Media Rights Fees Research**

**Atlantic Coast Conference**

Reconstructed ACC	Media Rights	Ticket Sales	Sponsorships, Licensing, Royalties	All Ath. Gen Rev	Total Oper. Exp	Members Without Data- Used Public Member Avgs.
California	\$25,468,834	\$10,227,443	\$14,449,998	\$92,372,018	\$134,872,860	Boston College
Clemson	\$30,282,526	\$31,016,873	\$22,332,849	\$189,346,423	\$174,276,658	Duke
Florida State	\$32,315,659	\$24,654,553	\$23,361,428	\$160,828,945	\$172,130,700	Miami
Georgia Tech	\$41,489,046	\$8,895,794	\$5,507,749	\$120,649,345	\$132,273,817	Pittsburgh
Louisville	\$29,141,287	\$25,710,879	\$28,701,669	\$136,686,505	\$140,216,963	SMU
NC State	\$37,830,659	\$23,301,846	\$2,326,099	\$114,313,884	\$118,653,089	Stanford
North Carolina	\$33,259,960	\$30,113,765	\$16,444,723	\$124,537,050	\$139,079,504	Syracuse
Virginia Tech	\$41,867,811	\$18,594,777	\$3,299,540	\$113,787,155	\$116,947,347	Wake Forest
Virginia	\$30,376,274	\$14,072,469	\$9,193,283	\$116,518,131	\$138,225,818	Notre Dame (not including football)
9-school Avg	\$33,559,117	\$20,732,044	\$13,957,482	\$129,893,273	\$140,741,862	
# Schools	17	17	17	17	17	
17 School Est.Total*	\$570,504,995	\$352,444,754	\$237,277,194	\$2,208,185,639	\$2,392,611,650	
<b>Total Countable Revenues</b>		<b>\$1,160,226,942</b>	<b>% total rev/exp.</b>	<b>52.5%</b>	<b>48.5%</b>	

Research - Increase in ACC Media Rights Fees from New Agreements

**Used "0" increase from previous agreement because there is no "NEW" agreement and impact of three new members on the actual annual distribution is unclear Deal Expiration: 2036**  
**First-tier rights: \$4.8 billion, ESPN (20 years-2016-2036)**  
**Per-year average: \$240 million -- Per-school, per-year average: \$17.1 million - 14 schools**  
**SMU-Stanford-Cal.** SMU nine years with no broadcast media revenue, Cal and Stanford Years 1-7 30% share of ACC payout; that number will jump to 70% in Year 8, 75% in Year 9 and then full financial shares in the 10th years. **That money being withheld is expected to create an annual pot of revenue between \$50 million and \$60 million.** Some of the revenue will be divided proportionally among the 14 full-time members and Notre Dame, and another portion will be put in a pool designated for success initiatives that rewards winning programs.

## Big 12 Conference

Reconstructed BIG 12	Media Rights	Ticket Sales	Sponsorships, Licensing, Royalties	All Ath. Gen Rev	Total Oper. Exp	Members Without Data- Used Public Member Avgs.
Arizona State	\$23,464,997	\$13,600,838	\$20,206,152	\$93,408,700	\$141,717,696	Baylor
Arizona	\$27,522,988	\$17,553,528	\$12,468,828	\$95,452,127	\$142,814,430	BYU
Cincinnati	\$0	\$11,186,715	\$6,195,530	\$48,896,568	\$91,905,599	TCU
Colorado	\$19,358,000	\$15,721,953	\$6,674,982	\$95,142,525	\$136,114,470	
Houston	\$0	\$4,904,800	\$5,648,678	\$34,357,494	\$81,517,354	
Iowa State	\$24,800,014	\$21,664,778	\$3,147,790	\$113,794,892	\$115,523,596	
Kansas State	\$32,581,452	\$18,941,330	\$1,909,126	\$102,332,761	\$95,281,944	
Kansas	\$34,359,440	\$22,181,075	\$12,668,916	\$126,693,033	\$124,210,259	
Oklahoma State	\$35,333,019	\$13,292,987	\$7,242,029	\$121,292,698	\$121,003,194	
Texas Tech	\$25,661,053	\$18,213,458	\$15,755,580	\$141,069,796	\$136,364,850	
UCF	\$127,000	\$6,238,571	\$12,675,241	\$47,936,076	\$88,199,644	
Utah	\$21,836,189	\$12,841,187	\$12,196,867	\$108,109,841	\$124,453,484	
West Virginia	\$27,511,174	\$17,805,317	\$9,664,752	\$99,476,123	\$103,142,400	
13-school Avg	\$20,965,794	\$14,934,349	\$9,727,267	\$94,458,664	\$115,557,609	
# Schools	16	16	16	16	16	
16 School Est.Total*	\$335,452,709	\$238,949,584	\$155,636,272	\$1,511,338,626	\$1,848,921,748	
Total Countable Revenues		\$730,038,565	% total rev/exp.	48.3%	39.5%	

### Research - Increase in BIG 12 Conference Media Rights Fees from New Agreements

**Old Deal \$220 million/yr for 2023 and New Deal \$2.28 Billion divided by 6 yrs = \$380 million/ yr- diff =\$160 million** Deal Expiration: first deal expires 2024-25; new deal starts in 2025-26 and runs through 2030-31 (6-year deals) Deals Worth: \$2.6 billion for 13 years for deal expiring in 2024-25 with ESPN and Fox/FS1; \$2.28 billion for deal running 2025-26 through 2030-31 with ESPN and Fox/FS1 (with pro rata increase for new schools entering the conference)

Per-year average: \$220 million for deal expiring in 2024-25; \$380 million for deal running 2025-26 through 2030-31

Per-school, per-year average: \$22 million for deal expiring in 2024-25; \$31.7 million for deal running 2025-26 through 2030-31

## Big Ten Conference

Reconstructed BIG TEN	Media Rights	Ticket Sales	Sponsorships, Licensing, Royalties	All Ath. Gen Rev	Total Oper. Exp	Members Without Data- Used Public Member Avgs.
Illinois	\$50,677,044	\$19,797,391	\$6,610,416	\$137,736,285	\$152,809,698	Northwestern
Indiana	\$47,879,026	\$24,459,938	\$17,425,791	\$136,541,943	\$139,087,323	USC
Iowa	\$49,379,026	\$29,671,222	\$13,159,689	\$166,767,806	\$160,302,475	
Maryland	\$0	\$12,838,239	\$11,530,077	\$103,280,413	\$121,160,348	
Michigan State	\$47,879,025	\$27,378,693	\$18,016,546	\$167,794,969	\$181,850,581	
Michigan	\$47,879,025	\$65,106,623	\$33,027,615	\$229,382,593	\$225,548,280	
Minnesota	\$47,879,025	\$19,771,006	\$12,605,721	\$140,734,667	\$146,982,927	
Nebraska	\$48,898,410	\$38,062,001	\$31,343,073	\$204,831,356	\$190,870,384	
Ohio State	\$49,796,025	\$73,386,886	\$42,832,059	\$279,549,337	\$274,948,554	
Oregon	\$26,438,935	\$24,266,592	\$26,475,915	\$150,074,981	\$146,778,941	
Penn State	\$40,137,387	\$47,936,612	\$14,762,879	\$202,200,023	\$202,073,671	
Purdue	\$47,879,025	\$18,112,904	\$8,958,094	\$124,290,313	\$119,773,814	
Rutgers	\$44,137,387	\$14,783,535	\$7,203,165	\$99,368,713	\$153,523,767	
UCLA	\$25,450,263	\$20,208,575	\$18,337,047	\$103,361,505	\$141,964,728	
Washington	\$25,093,888	\$27,780,734	\$21,202,614	\$141,320,405	\$150,037,375	
Wisconsin	\$45,879,026	\$33,765,220	\$26,756,124	\$194,103,301	\$194,020,289	
16-school Avg	\$40,330,157	\$31,082,886	\$19,390,427	\$161,333,663	\$168,858,322	
# Schools	18	18	18	18	18	
18 School	\$725,942,832	\$559,491,942	\$349,027,678	\$2,904,005,936	\$3,039,449,799	
Total Countable Revenues	\$1,634,462,452	% total rev/exp.	56.3%	53.8%		

Research - Increase in BIG 10 Conference Media Rights Fees from New Agreements

**No increase - in midst of 7 yr. deal**

Deal Expires:

End of 2029-2030 academic year (7-year deals)

Deals Worth: \$8.05 billion; FOX/FS1, CBS, NBC and Big Ten Network

Per-year average: \$1.15 Billion

Per-school, per-year average: \$71.875 million

## PAC-12 Conference

DEconstructed PAC-12	Media Rights	Ticket Sales	Sponsorships, Licensing, Royalties	All Ath. Gen Rev	Total Oper. Exp	Members Without Data- Used Public Member Avgs.
Oregon State	\$26,953,494	\$9,950,387	\$10,041,519	\$80,375,159	\$98,423,805	None
Washington State	\$25,468,828	\$10,198,582	\$4,584,354	\$71,797,690	\$90,909,237	
2-school Avg	\$26,211,161	\$10,074,485	\$7,312,937	\$76,086,425	\$94,666,521	
# Schools	2	2	2	2	2	
2 Schools	\$52,422,322	\$20,148,969	\$14,625,873	\$152,172,849	\$189,333,042	
Total Countable Revenues	\$87,197,164	% total rev/exp.	57.3%	46.1%		

Research - Increase in PAC-12 Conference Media Rights Fees from New Agreements

No increase - no 2025 contract - unclear whether conference will dissolve

## Southeastern Conference

Reconstructed SEC	Media Rights	Ticket Sales	Sponsorships, Licensing, Royalties	All Ath. Gen Rev	Total Oper. Exp	Members Without Data- Used Public Member Avgs.
Alabama	\$55,636,567	\$41,845,780	\$16,211,860	\$197,349,496	\$212,030,188	Vanderbilt
Arkansas	\$37,798,607	\$51,117,442	\$20,247,255	\$167,366,549	\$166,552,649	
Auburn	\$48,001,566	\$32,376,895	\$9,253,662	\$160,442,763	\$192,030,692	
Florida	\$48,697,357	\$35,098,942	\$10,248,588	\$184,273,231	\$175,738,444	
Georgia	\$42,906,922	\$38,549,829	\$23,194,797	\$206,490,502	\$186,604,238	
Kentucky	\$56,670,762	\$43,086,795	\$9,245,150	\$174,485,651	\$169,565,280	
LSU	\$46,291,607	\$50,978,657	\$3,651,920	\$200,476,979	\$199,110,998	
Mississippi	\$42,548,892	\$17,262,530	\$7,665,826	\$115,664,788	\$120,959,663	
Missouri	\$37,519,607	\$16,961,664	\$8,437,186	\$117,879,866	\$141,558,286	
Oklahoma	\$27,180,240	\$48,206,341	\$23,411,285	\$199,295,570	\$198,975,224	
Ole Miss	\$42,236,573	\$22,445,112	\$8,118,683	\$138,713,343	\$150,195,985	
South Carolina	\$38,739,053	\$29,118,428	\$11,508,016	\$155,984,173	\$160,420,148	
Tennessee	\$37,816,107	\$39,753,883	\$23,914,209	\$201,475,704	\$191,032,519	
Texas	\$23,228,176	\$63,251,701	\$54,674,883	\$271,129,326	\$232,323,521	
Texas A&M	\$37,708,357	\$54,529,762	\$26,937,928	\$267,188,334	\$194,692,848	
15-school Avg	\$41,532,026	\$38,972,251	\$17,114,750	\$183,881,085	\$179,452,712	
# Schools	16	16	16	16	16	
16 School	\$664,512,419	\$623,556,012	\$273,835,998	\$2,942,097,360	\$2,871,243,395	
Total Countable Revenues	\$1,561,904,429	% total rev/exp.	53.1%	54.4%		

Research - Increase in SEC Conference Media Rights Fees from New Agreements

Used \$355 million/yr for 2023 and \$740 million/yr - difference = \$385 million/yr First-tier rights: Reportedly \$6 billion (only one outlet reporting a figure) from ESPN for 20 years through 2033-34 (extension inked in 2013 with start of SEC Network)

Second-tier rights: \$55 million/year, CBS (through 2023 season); \$300 million/year, ESPN/ABC (10 years starting in 2024)

SBJ has the total value of the SEC's deals beginning in 2024 at \$7.1B for \$710M per year, but that doesn't exactly match any of the reports for first- and second-tier rights above.

Per-year average: \$355 million through 2023-24; \$740 million per SBJ for 2024-25 through 2033-34

Per-school, per-year average: \$14.6 million through 2023-24; \$68.75 million 2024-25 through 2033-34 using SBJ's per-year average at the 14 members in existence at the time of the deal

## EXHIBIT E

### Legislative History: No Exemptions for Football or Any Revenue Producing Sports

The plain language of Title IX and its explicit exemptions demonstrate that football and revenue producing sports are not exempted from its mandates.

Title IX's core language states:

*No person in the United States shall, based on sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.*  
20 U.S.C. §1681(a)<sup>16</sup>

The statute includes specific exemptions (e.g. military academies, fraternities/sororities, Boys/Girls State, father/son and mother/daughter activities, beauty pageant scholarships). 20 U.S.C. §1681(a)(4)-(9).<sup>17</sup> Athletics is not one of them. HEW Secretary Casper Weinberger noted this fact during his testimony in support of Title IX's athletics regulations. Had Congress intended to exclude athletics, it could have done so. It did not.<sup>18</sup> Instead, Congress directed HEW to issue regulations that expressly included athletics and that considered the various needs of different sports. See 20 U.S.C. §1682, as amended by Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974) (the Javits Amendment).

The statute's legislative history shows that this omission was intentional. As discussed below, Congress rejected all attempts to exempt athletics or even "revenue producing" athletics from Title IX – despite the unrelenting pressure of advocates for men's sports and even the NCAA.<sup>19</sup> Had Congress as a whole agreed with the exemptions requested by football interests, it could have adopted them. Despite intense pressure, it considered them but then rejected

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<sup>16</sup> See Exhibit A for the full language of the statute

<sup>17</sup> Congress knew how to adopt exemptions when it wanted to do so. In 1976, four years after passing the initial statute, Congress amended Title IX to exempt social fraternities/sororities, YMCA/YWCA, Girl/Boy Scouts, and similar organizations. See 20 U.S.C. §1681(a)(6). It amended it again to exempt Boys/Girls State conferences, father/son and mother/daughter activities, and beauty pageant scholarships. Pub.L.No. 94-482, S. 412 (1976), codified at 20 U.S.C. 1681 (a)(7)-(9). See 122 Cong.Rec. 27974 – 27,988 (August 26, 1976) for the Senate debate and votes on the amendment.

<sup>18</sup> See Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post-Secondary Education of the Committee on Education & Labor, 94<sup>th</sup> Cong. 438 (1975)(statement of Caspar Weinberger). Congress later cited this testimony in passing the Civil Rights Restoration Act of 1987. 20 U.S.C. 1687. S.Rep.No. 100-64 at 9-10 (1987).

<sup>19</sup> See Jocelyn Samuels & Kristen Galles, *In Defense of Title IX Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003), for a detailed list of the various bills and resolutions submitted but rejected by Congress ("Samuels & Galles").

them. Congress deliberately chose not to exempt athletics or revenue producing sports from the mandates of the law.<sup>20</sup>

Congress' rejection of such an exemption aligns with its statutory purpose. Congress passed Title IX in order to eliminate sex discrimination at institutions that receive federal funds and to protect individuals from such practices.<sup>21</sup> The hearings it held amassed extensive evidence of sex discrimination in all aspects of education, including athletics. The Senate and House hearings on the Title IX regulations did the same. Indeed, athletics departments were among the worst offenders. Reading a non-existent athletics exemption into the law or allowing revenue sports to be treated differently, would thwart a major explicitly stated purpose for the law.

Throughout the 1970s some legislators tried to amend Title IX to limit its application only to the specific programs within an institution that received federal funding rather than to all educational programs within the institution. Under this view, if only the physics department received direct federal grants for things like research, then only the physics department or the specifically funded research projects would fall under Title IX. The biology department would not. One goal of such efforts was to remove athletic programs from its dictates if they did not receive direct federal funding. Congressional debate highlighted that such a reading of or amendment to the statute would undermine its purpose to open up more programs to women and to eliminate sex discrimination. It also would undermine congressional intent to make sure that federal money paid to schools through tuition grants and loans did not support (directly or indirectly) sex discrimination.<sup>22</sup> Accordingly, all these attempts failed.

The U.S. Dept. of Health Education & Welfare, the precursor to today's Department of Education, issued Title IX regulations in 1974. 39 Fed. Reg. 22,228 (June 20, 1974). Those regulations included provisions related to athletics.<sup>23</sup> Some legislators objected to the inclusion

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<sup>20</sup> See *Haffer v. Temple Univ.*, 524 F.Supp. 531, 534 (E.D.Pa. 1981) "It is obvious from a full reading of the legislative history of the statute that Congress approved of the broad scope of Title IX, and specifically its application to intercollegiate athletics" and institutions receive federal funding directly benefit from the fact that the institution as a whole receives federal funding and that its students receive federal funding in the form of grants and loans. That federal funding enables institutions to divert money to other programs.

<sup>21</sup> The purpose of Title IX was "designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution..." 34 C.F.R. 106.1

<sup>22</sup> As HEW and some legislators also pointed out, such a limited reading of the statute ignored the fact that even programs that do not receive federal funding directly benefit from the fact that the institution as a whole receives federal funding and that its students receive federal funding in the form of grants and loans. That federal funding enables institutions to divert money to other programs.

<sup>23</sup> HEW noted in its release of final Title IX regulations in the Federal Register in 1975 that "athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of Title IX even in the absence of Federal funds going directly to athletics," citing court cases recognizing the importance of athletics in education. 40 Fed.Reg. 24128, 24,134 (June 5, 1975).



of athletics in the regulations and to the coverage of athletics under Title IX in general. They tried to amend Title IX to prevent its application to athletics (or at least intercollegiate athletics). These attempts also failed.

In 1974 Senator John Tower proposed an amendment that exempted revenue producing sports from Title IX. He later altered it to exempt the revenue from revenue producing sports. It stated that Title IX “shall not apply to an intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity.” Cong. Res. S 8488 (May 20, 1974); 120 Cong. Rec. 15,322-15,323 (May 20, 1974). In other words, he wanted revenue producing sports to be able to keep the money they produced for themselves. Sen. Hruska, urged by Nebraska football interests, supported the amendment in part because of the “financial chaos” that Title IX’s application to athletics or revenue producing sports would bring to college athletics.<sup>24</sup> Despite the efforts of the football lobby, the proposal was rejected in conference. Instead, Congress accepted an amendment submitted by Sen. Jacob Javits that acknowledged Title IX’s application to athletics and that directed the Department of Health, Education, & Welfare (“HEW”) to issue regulations that “include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.” See 20 U.S.C. §1682, as amended by Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). The concern was that, e.g., football uniforms cost more, compared to women’s volleyball uniforms or that game expenses to accommodate larger crowds for football would be considered discriminatory with regard to funding women’s sports.

After receiving nearly 10,000 comments, many of which related to athletics, HEW issued final regulations on June 5, 1975. 40 Fed.Reg. 24128, 24,134 (June 5, 1975). They included provisions specific to athletics such as §106.37(c) (athletic financial assistance) and §106.41 (athletics) that comported with the Javits Amendment. Under then-existing law, Congress had 45 days to pass a joint resolution rejecting the regulations in whole or in part.<sup>25</sup> Both houses of Congress held hearings and received testimony and comment from numerous groups.<sup>26</sup>

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<sup>24</sup> Remarks of Sen. Hruska relating to the Tower Amendment at 120 Cong. Rec. 15,340 (May 20, 1974).

<sup>25</sup> See *North Haven Bd. of Educ.*, 456 U.S. 512, 531-532 (1982), re Section 431 (d)(1) of the General Education Provisions Act, Pub.L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. §1232(d)(1)(2000). The provision was intended “to afford Congress an opportunity to examine a regulation and, if it found the regulation ‘inconsistent with the Act from which it derives its authority’ to disapprove it in a concurrent resolution. If no such disapproval resolution was adopted within 45 days, the regulation would become effective.” Today, this process is covered by the Congressional Review Act, 5 U.S.C. §§801-808.

<sup>26</sup> Reports on the congressional hearings on the Title IX regulation include: (1) Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post-Secondary Education of the Committee on Education & Labor, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. (June, 1975) and (2) Prohibition of Sex Discrimination: Hearings Before the Senate Subcommittee on Education of the Committee on Labor and Public Welfare, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Sept 16-18, 1975).

The NCAA, the College Football Coaches Association, and other groups that represented the interests of men's sports or "revenue" sports lobbied extensively against the final athletic regulations. NCAA President John Fuzak complained in his testimony that the regulations would require that revenues received from men's football and basketball programs be shared with women's sports which, due to the lack of spectator interest, were not revenue producers. He further complained that HEW's requirement that institutions treat revenue and non-revenue producing sports alike reflected an unwillingness to recognize the "economic structure and realities of college athletics."<sup>27</sup>

The legislative supporters of these groups offered numerous resolutions to reject the athletic regulations, to exclude athletics from Title IX altogether, and/or to exempt "revenue producing" sports or revenue from "revenue producing" sports from the law.<sup>28</sup> Many were particularly concerned about the impact on men's football, which they asserted brought in the revenue that paid for all the other sports. They warned that if revenue producing sports were not exempted and were not allowed to keep the money they brought in, then institutions would have to make substantial cuts to their program offerings.

As one example, Senator Laxalt submitted S.Con.Res. 52 to disapprove of the Title IX regulations relating to athletics because he believed that revenue producing sports should be able to keep their own revenue and not share it with other sports.<sup>29</sup> He expressed concern about what would happen to the quality of the University of Michigan's men's football and basketball teams if they had to share the revenue they earned with other teams. He feared it could "destroy our popular and personally enriching system of intercollegiate athletics as it currently exists." 121 Cong.Rec. 22,940 (July 16, 1975). Overall, his statements showed concern for preserving and supporting men's sports so that they could remain competitive "in an already satiated entertainment market" and not concern about providing female athletes with equitable opportunities or treatment. Congress rejected his position.

HEW, meanwhile, took the position that "There is no basis under the statute for exempting such [revenue] sports or their revenues from coverage of Title IX," citing the plain

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<sup>27</sup>Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post-Secondary Education of the Committee on Education & Labor, 94<sup>th</sup> Cong. 98-101 (1975)(testimony of NCAA president John A. Fuzak starts at p. 98). Under questioning, Mr. Fuzak admitted that the revenue sports he sought to exempt did not necessarily generate profit after the deduction of all attributable expenses. *Id.* at 103.

<sup>28</sup> Such resolutions included S.Con.Res. 46 by Sen. Helms, H. Con. Res. 310 & 311 by Rep. Martin, H. Con.Res. 329 & 330 submitted by Rep. O'Hara, and S.Con.Res. 52 submitted by Sen. Laxalt. For a thorough examination of these efforts see Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports Law Rev. 1, 40-47 (2003).

<sup>29</sup> See S.Con.Res. 52 summary, 94<sup>th</sup> Cong. (1975), available at [www.congress.gov/bill/94th-congress/senate-concurrent-resolution/52](http://www.congress.gov/bill/94th-congress/senate-concurrent-resolution/52) and 121 Cong. Rec. 22,940-22,941 (July 16, 1975).

language of the statute, the defeat of the Tower Amendment, and the passage of the Javits Amendment. 40 Fed. Reg. 24128, 24,134 (June 5, 1975).

Other legislators responded with attempts to amend Title IX itself. Sen. Helms and others introduced S. 2146 to prohibit the application of the Title IX regulations to athletics.<sup>30</sup> 121 Cong. Rec. 23,845-23,847 (July 21, 1975). He opposed the list of athletic benefits that HEW stated it would consider when assessing Title IX compliance. He also opposed Title IX's application to any program that was not "an integral part of the required curriculum of an educational institution." *Id.* at 23,846. Unlike other bills, S.2146 reflected Sen. Helms' opposition to Title IX's application to employment in education and thus opposed Part E of the Title IX regulations relating to employment. The bill failed.

Rep. O'Hara introduced H.R. 8394 & H.R. 8395 relating to Title IX's application to revenue producing sports.<sup>31</sup> 121 Cong. Rec. 21,685 (July 8, 1975). The bills would have allowed institutions to use money received from revenue producing sports only on those sports or to use the money to make sure all the needs of those sports were met before sharing any excess revenue with women's sports or other men's sports. The bills died in committee.

In 1975 Senator Tower again submitted a bill to exempt revenue-producing sports from Title IX. 121 Cong.Rec. 22,775 (July 15, 1975). His S. 2106 sought to prevent Title IX's application to "an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity."<sup>32</sup> He argued that it was necessary to stop HEW from undercutting revenue producing sports. "HEW, in its laudable zeal to guarantee equal athletic opportunities for women, is defeating its own purpose by promulgating rules which will damage the financial base of intercollegiate athletics." 121 Cong.Rec. 22,778 (July 15, 1975). In his view, treating male and female athletes equitably would destroy college athletics completely.

Senator Roman Hruska from Nebraska spoke in support of Tower's bill. He was particularly concerned about protecting men's football from what he perceived would be Title IX's negative impact on men's sports, particularly football. He argued that revenue producing sports should be permitted "to plow back sufficient moneys to keep operating on a basis which would assure continued revenue" lest there be "danger of a decline in the level and quality of

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<sup>30</sup> See S.2146 summary, 94<sup>th</sup> Cong. (1975), available at [www.congress.gov/bill/94th-congress/senate-bill/2146](http://www.congress.gov/bill/94th-congress/senate-bill/2146) and 121 Cong.Rec. 23,845-23,847 (July 21, 1975).

<sup>31</sup> See H.R. 8394 summary, 94<sup>th</sup> Cong. (1975), available at [www.congress.gov/bill/94th-congress/house-bill/8394](http://www.congress.gov/bill/94th-congress/house-bill/8394) and H.R. 8395 summary, 95<sup>th</sup> Cong. (1975), available at [www.congress.gov/bill/94th-congress/house-bill/8395](http://www.congress.gov/bill/94th-congress/house-bill/8395).

<sup>32</sup> See S. 2106 summary, 94<sup>th</sup> Cong. (1975), available at [www.congress.gov/bill/94th-congress/senate-bill/2106](http://www.congress.gov/bill/94th-congress/senate-bill/2106), and 121 Cong.Rec. 22,775 and 22,777-22,778 (July 15, 1975).

major intercollegiate sports such as football, basketball, and in some regions of the Nation, ice hockey.” 121 Cong. Rec. 22,170 (July 10, 1975). He feared that if football revenues were diverted to other sports to achieve Title IX compliance then the quality of the football program would decline and ticket sales and donations would decline, making budget deficits inevitable. *Id.* at 22,171. His focus was not on Title IX, education, sex discrimination, or equal treatment of women’s sports but on entertainment: “These sports provide entertainment for and elicit the interest and loyalties of millions of Americans. They are very much a part of the American scene and of the identities of the schools involved.” *Id.* at 22,170. Despite these pleas, Tower’s bill again failed without even making it out of committee.

Congresswoman Patsy Mink described the various proposals as follows:

*The implication is that sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from Title IX.*

....

*We cannot in good conscience continue to allow our educational institutions to deny women and girls the educational opportunities that have been the assumed right of their brothers.*<sup>33</sup>

Congresswoman Patricia Schroeder testified during the House hearings on the regulations that she was:

*Shocked by the hysteria that has surrounded these regulations, especially those relating to sports and athletic programs...The specter of that sacrosanct institution, big time football, dying at the height of its glory, of football heroes in tattered uniforms playing to half-empty stadiums, are alarmist tactics that serve only to cloud the issue.*<sup>34</sup>

The issue to supporters of the regulations was the elimination of sex discrimination in intercollegiate athletics, not protecting big time football or the preferential treatment that men’s teams had previously enjoyed. After all, that was the purpose of the underlying statute. As Senator Bayh, the author of Title IX in the Senate noted:

*Oddly, no one making the argument that athletics should not be covered by Title IX does so on the premise that there is no discrimination. No one denies that there is something fundamentally wrong with a college or university that relegates its female athletics to*

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<sup>33</sup> Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post-Secondary Education of the Comm. on Education & Labor, 94<sup>th</sup> Cong. 166 (1975)(Statement of Rep. Mink).

<sup>34</sup> *Id.* at 206.

*second-rate facilities or second-rate equipment or second-rate schedules solely because they are female.*<sup>35</sup>

Attempts to amend Title IX continued even after the Title IX regulations were finalized. In 1976, Sen. McClure sponsored Am. No. 389 to S. 2657 of the Education Amendments of 1976. The bill sought to limit the meaning of “education program or activity” to “the curriculum or graduation requirements of the institutions.” 122 Cong. Rec. 28136 – 28148 (August 27, 1996). Sen. McClure simultaneously sponsored Am. No. 390 to S. 2657, which sought to limit coverage to programs that directly received federal funds. 122 Cong. Rec. 28144 (August 27, 1996). While neither amendment was focused on athletics, Congress’ rejection of them ensured Title IX’s continued application to athletics, whether or not they received direct federal funding.

In 1977, Sen. Helms again tried to amend Title IX by reintroducing S.2146 as S. 535 to prohibit application of the finalized Title IX regulations to athletics. His efforts again failed. Ultimately, Congress rejected all attempts to alter or disapprove Title IX’s athletic regulations and all attempts to amend Title IX to exempt revenue producing sports.

This legislative history, including the statements of Sen. Hruska and Sen. Laxalt, are important because they show that Congress heard and understood the arguments of the football lobby. They understood that some people saw college sports as entertainment rather than education and saw football as a cultural phenomenon that should be protected. They wanted to let football keep any revenue it produced so that it could recruit and retain the competitiveness needed to win and to make money. They wanted to protect and favor football even if it meant discriminating against women’s sports. Despite these protestations, all efforts to amend Title IX to allow different treatment of revenue producing sports failed. The regulations became final and remain controlling today. Under those regulations, revenue from all sources must be used to ensure the equitable allocation of participation opportunities, athletic financial assistance, and athletic benefits among male and female athletes.

Many of the failed arguments from 50 years ago continue today: Football makes revenue because spectators want to watch football and booster want to support it; therefore, football and other revenue producing sports should be exempted from Title IX and educational institutions should be allowed to lavish their football athletes with money and other benefits unavailable to others. Football players should receive unlimited, direct payments for their participation, but other athletes that work just as hard at their sports should not, because no one wants to watch them on TV. Congress has repeatedly and consistently rejected this position by

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<sup>35</sup> Id. at 171.

rejecting all attempts to exclude athletics, “revenue” producing sports, or any specific sport from the mandates of Title IX.<sup>36</sup> It has repeatedly affirmed that Title IX requires equity and that providing opportunities and equity for women’s sports was an important purpose of the legislation. Educational institutions should keep this in mind as they contemplate the implications of the proposed antitrust settlement.

**Congressional intent: The Civil Rights Restoration Act.** When the Supreme Court narrowed the application of Title IX in *Grove City College v. Bell*, 465 U.S. 555 (1984), it stopped most enforcement of Title IX’s athletics provisions, because few athletic programs (at least at the college level) receive direct federal funding. This consequence became a key motivating factor for Congress’ passage of the Civil Rights Restoration Act of 1987 (discussed above). 20 U.S.C. §1687. The debate on the statute demonstrated that Congress intended Title IX to be a remedial statute to eliminate sex discrimination in intercollegiate athletics.<sup>37</sup> As Sen. Packwood noted:

*Prior to the Grove City case, everyone – and I mean Republican, Democrat, conservative, liberal; Gerald Ford, Richard Nixon, Jimmy Carter, right up until the Reagan administration – thought that the Title IX regulations meant institution-wide coverage. And this, very frankly, is how we finally were able to get universities and other educational units, schools, high schools, to give equal treatment to women in athletics. This was the opening wedge.*

*- 132 Cong. Rec. 247 (1988)*

At the time Congress amended Title IX to pass the CRRRA, it could have passed other amendments.<sup>38</sup> It could have passed legislation to change Title IX’s application to college sports. It could have revisited its previous rejections of Title IX exemptions for revenue producing sports, but it chose not to do so. Indeed, many amendments were considered, but none limited Title IX’s application to athletics. Instead, it focused on re-instating protections for women’s sports, not creating new exemptions for men’s sports. This legislative history demonstrates that male athletes should receive no special exemption in order to permit payments to them at a higher

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<sup>36</sup> See generally *Haffer v. Temple Univ.*, 524 F. Supp. 531, 534-536 (E.D. Pa. 1981) (describing rejected attempts to modify Title IX and noting the importance of athletics in the discussion).

<sup>37</sup> Congress wanted to continue the progress of “creating a more level playing field for female athletes.” *Cohen v. Brown University*, 1993 WL 111514 at \*3 (1<sup>st</sup> Cir. 1993).

<sup>38</sup> In 1986 Congress passed the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7, in response to another Supreme Court decision, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). The statute made clear that Congress intended that recipients of federal funding waive sovereign immunity to suits to enforce Title IX and other laws by accepting the federal funds. It also stated that “remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.” Once again, Congress knew how to amend Title IX when it thought it necessary. Notably, each time it reaffirmed or strengthened its application or enforcement.

total dollar or number for their NILs or as part of a revenue sharing scheme than what is paid to women athletes.