THE DRAKE GROUP
Advancing Positive Legislative Change In College Athletics

**H.R. 4312: The SCORE Act: Concerns and Impact Comments**

Please contact Donna Lopiano – 516-380-1213 if you have questions about the following comments and analysis

**SEC. 2 – SENSE OF CONGRESS**

**Such a provision is non-binding – any "sense of Congress" expresses an opinion or goal of Congress (similar to a resolution) and <u>has no force in law</u>**—that it includes wording that is almost arrogant such as:

(1) National governance assoc. shall "*represent the interests of student-athletes, institutions, conferences and allow for student input and consideration in decision-making*"

(2) National governance association "*may consider new governance proposals that ensure that student interests are fairly represented*"

(3) Institutions and conferences should "*consider, thoroughly and in good faith, means to create additional revenue sufficient to maintain*" sports programs, including proposals to Congress to amend media marketing law and "*strive to avoid use of student fees*"

(4) So generically stated non-binding re: meaning: such a transfer rules should (A) prioritize academics, (B) provide time/support to maintain eligibility and degree progress, and (C) minimize disruptions created by transfer decisions or timelines

**SEC. 3 – DEFINITIONS**

(4) COLLEGE SPORTS REVENUE

The NCAA could designate (H) "Any additional form of revenue it wishes to include with respect to calculating the pool limit…" This provision replaces "fundraising" – which can still be designated – and doing so would significantly increase the revenue pool, calculated based on the average annual revenues of the top 70 schools. Since fundraising accounts for 24%-26% of FBS top quartile revenues compared to 14-20%, it would further widen the gap between the top 25 schools—mostly those generating more money than they spend (mainly in the SEC and Big Ten)—and the rest of the FBS.

(5) COMPENSATION

(B) (vii) as written, academic awards could be granted selectively to individuals with no limit other than a maximum overall cap. This would be a new way to pay selected athletes without their compensation counting against revenue pool limits, and it could serve as a new mechanism to incentivize attendance or retention at an institution. NOTE: Financial awards for academic performance should be based on neutral academic criteria and fixed dollar amounts for each standard, ensuring they are awarded uniformly to all athletes. For example, $1,000 per semester for maintaining the necessary GPA and academic progress to remain eligible; $1,000 for passing standardized examinations; half a year of grade level improvement for students with reading, writing, or math deficiencies; and $10,000 for graduation, among others.

(19) PROHIBITED COMPENSATION

(A) requires all associated entities and individuals to pay only legitimate NIL: "for a valid business purpose related to the promotion or endorsement of goods or services provided to the general public for profit, with compensation at rates and terms commensurate with compensation paid to individuals with name, image, and likeness rights of comparable value who are not student athletes or prospective student athletes with respect to such institution," but (B) does not apply any conditions to institution-provided NILs except that any individual payment to an athlete or prospect not exceed the revenue pool cap – allowing institutions to call all athlete payments "NIL payments" even if they do not comply with "A"'s definition of legitimate NIL agreements. Thus, all revenue pool payments may be based solely on athletics participation and perceptions of athlete value related to revenue production.

**SEC. 4 – PROTECTION OF NAME, IMAGE, AND LIKENESS RIGHTS OF STUDENT ATHLETES**

(a) (a) (3) Dispute resolution process (ALL NEW sections are difficult to understand) – see also Sec. 4 (f), Sec. 4(g), Sec. 7 (a)(3), Sec. 7(b)(1), which grants NCAA authority to enforce rules. Do all these imply that a student disputing prohibited compensation has no options other than the NCAA process, which includes mandatory arbitration that may violate state sovereign immunity laws forbidding arbitration agreements by state entities? However, there is an exception: if they complete NCAA-designated processes, a state attorney general can file a civil suit—placing the burden on the student to sue rather than offering an appeal process to an independent tribunal, such as the FTC.

**SEC. 5 – SPORT AGENT RESPONSIBILITY AND TRUST ACT**

The NCAA would assume responsibility for certifying all agents who serve college athletes, a major task that was previously handled by the states. The NCAA's athlete and institutional enforcement processes have faced heavy criticism in the past and are now nearly nonexistent. It is uncertain whether this move is advisable.

(3) Sec. 9 SPARTA Act (a)(1) This is new and unclear why a disclosure of "Whether the agent is a fiduciary" exists rather than making it a requirement that the agent must have fiduciary ethical and legal obligation (to act in the best interest of the client).

**SEC. 6 – REQUIREMENTS APPLICABLE TO CERTAIN INSTITUTIONS**

(a)(1) and (2) All institutions should be required to provide the educational and medical benefits described in Sec. 6 (a) (1) and (2), not only those designated in (c).

(a)(3) Does not include any provision requiring grants-in-aid to be awarded for five years or until graduation, whichever comes first. Therefore, most grant-in-aid agreements, all of which depend on participation, are limited to one year. Given the institution's significant control over grant-in-aid termination conditions (see NCAA D-I Manual, 15.3.4.1 (e)) and the Act's statement that college athlete compensation is not considered employment, athletes recruited for athletics should, at minimum, be assured of financial support through graduation. Additionally, this provision, which outlines reasons (A) through (D) that cannot be used to terminate the agreement during the award period, does not include "receipt of revenue pool payments." (Sec. 3(18)(B))

(a)(5) Title IX Section 106.37 (athlete financial assistance) should be included with Section 106.41 (participation, selection of sports, and treatment and benefits) regarding how the minimum of 16 or 14 varsity sports should be supported. Failing to include this removes any obligation for financial assistance (grant-in-aids).

(c) This section specifies that Sec. 6 obligations apply only to schools that generate more than $25,000,000 in annual athletics revenues, instead of saying they should apply to all schools that "opt-in" to participating in the distribution of "revenue pool" funds. If schools can find the new revenues to pay athletes $20.5 million per school per year untethered to educational purpose, an amount that will gradually escalate as revenues grow, the first call on new resources should be the provision of all benefits in (a) (1) through (a) (5)-comprehensive academic and career support, adequate medical care for athletics injuries, payments tied to the cost of education, degree completion assistance for non-graduates, and adequate support of a broad program of sports to all athletes rather than paying athletes on top of full cost-of-attendance scholarships.

**SEC. 7 – ROLES OF INTERSTATE INTERCOLLEGIATE ATHLETIC ASSOCIATIONS**

(a)(2) The requirement to establish and implement a process for collecting and publicly sharing aggregated and anonymized data related to the name, image, and likeness agreements of student athletes should specify that data be disaggregated by sex, sport, purpose, and source (institution, associated entity, non-associated entity).

(a)(5) Congress should not be codifying into law legal settlement revenue pool provisions or designating any amount of athletics-generated revenues or other revenues flowing to the not-for-profit educational institution that could be awarded to college athletes for other than educational purposes, or setting conditions for receiving same. All revenues flowing to the institution should be used by the institution to accomplish its stated tax-exempt purpose.

(a)(9) Congress should not codify into law any national governance entity rule that specifies conditions for access to participate in a competitive division that is determined based on voting in which any subset of schools in the division enjoys a weighted voting advantage -- which allows the subset to restrict membership to their benefit.

(a)(11) As previously stated in Sec. 3 (5)(B)(vii) above, financial awards for academic performance paid to a student should be based on neutral academic criteria and fixed values for each standard that are awarded to all athletes on the same basis.

(b)(2) Twenty percent athlete representation on governance boards and committees is insufficient, and athlete representation defined as a former or current athlete within the last ten years is inadequate without specifying the mechanism for nomination and selection, which should be by an independent athletes' organization or direct election by athletes rather than institutional or conference student appointments.

**SEC. 8 – TITLE IX**

(a) Without a provision that makes explicit the application of Title IX to all benefits in the Act, this provision invites the stated intent of institutions, conferences, and national governance entities to declare that NIL and revenue payments are not financial benefits. As absurd as

that statement appears, 80% to 90% of the $20.5 million revenue pool, is being distributed to male athletes in revenue-producing sports, untethered to the cost of education and mislabeled as being something other than financial benefits that should be included under Title IX. NCAA member institutions are being encouraged to defend this position in court and have athletes sue to determine otherwise. If the institutions, conferences, or national governance entities wish to amend Title IX to not count NIL and revenue pool payments as financial benefits, they should do so by directly seeking to amend Title IX. Title IX defines gender equity as distributing financial benefits proportionally based on percent male and female athletes in the program. What is the meaning of "otherwise affect." Note: institutions are currently permitted under Title IX to distribute 80-90% of all financial benefits for males to male football and basketball players. See explanation.

**SEC. 9 – LIABILITY LIMITATION**

(a) and (b) Congress should not grant an antitrust exemption without addressing the flawed provisions identified above.

**SEC. 10 – EMPLOYMENT STANDING**

Congress should not adopt any law that declares college athletes not to be employees that contains provisions permitting financial payments untethered to educational purpose or allowing institutions, conferences, or national governance entities to control athletes as if they were employees. The SCORE Act does both.

**SEC. 11 – STUDENT ATHLETIC FEES**

**SEC. 12 – PREEMPTION**

(a)(1)(A )Congress should not adopt laws that preempt state laws related to compensation, payment, benefits, or employment status or eligibility of college athletes without addressing the flawed provisions identified above.

**SEC. 13 – REPORTS**

The bill lacks an oversight or enforcement mechanism that ensures adherence to the "non-delegation doctrine"—which states that Congress cannot delegate its legislative powers to private entities. The SCORE Act only requires reports to Congress, which does not meet that obligation. The FTC could easily serve as the appeals body for enforcing rules by national governance entities.