Issue Summary: Seeking an Antitrust Exemption Issue for Intercollegiate Athletics
Coalition on Intercollegiate Athletics, August 2014

There has been discussion for many years of the possibility that major problems threatening intercollegiate athletics may be impossible to address within the framework of existing antitrust legislation, and that the NCAA or some other body may wish to seek from Congress a limited exemption from antitrust laws for college sports. However, because there exist inherent risks in requesting legislation to regulate activities of colleges and universities, approaching Congress on this issue has been viewed as a last resort, and there has been little impetus to pursue it.

Recent pressures on the NCAA and its member schools may be changing attitudes towards this issue. A recent report in *The Chronicle of Higher Education* notes that even before the August 8 initial court ruling in the O'Bannon lawsuit against the NCAA, discussion of antitrust legislation was increasing in NCAA circles, and reported comments since seem to bear out that the issue is drawing serious attention. In light of this, the Coalition on Intercollegiate Athletics is circulating this summary of the issue to its member senates. If an initiative is undertaken, the impact on our universities will be substantial, and the views of the faculty should be part of the conversation. COIA has taken no position on the appropriateness of seeking an antitrust exemption, or the terms any such exemption should include, but is anxious that faculty be prepared to decide whether and how to speak in the event an initiative is taken.

Background

The basic problem that the NCAA and its members face with regard to antitrust laws is that these laws circumscribe the degree to which the NCAA, as a consortium, can make coordinated plans with regard to the economic aspects of college sports. Costs for athletics have been on a sharply rising curve for many years and for Division I schools they now exceed revenues by over $1 billion per year ($4 billion, if all NCAA divisions are considered).[*] School budgets generally address this shortfall by two means: subsidies from the institution's general fund and/or student fees. This results in a diversion of funds from academics and increases in the total cost of college attendance for students. It has been understood for many decades that a certain level of subsidy for athletics could be consistent with the academic mission of universities, because college sports are presumed to enrich the academic experience by strengthening campus community, creating loyal alumni networks, generating public good will, and providing a valuable enhancement to students who participate as athletes. However, at a time when budgets are strained and the cost of education rising, the degree to which the aspirational goals of athletics can justify significant and increasing subsidies is in question.

The largest budget area for college sports, particularly at the Division I level, is compensation (salaries), with coaching salaries a major component. According to the Knight Commission on Intercollegiate Athletics, over 34% of all expenditures in DI athletics programs for 2010 were for compensation. (Athletic student aid, by contrast, represented just 14% of expenditures.)[**]

Recognizing at an earlier point the key role of coaching salaries in the economic health of college sports, in 1992 the NCAA legislated limits on certain assistant coach salaries. The coaches filed suit,

[*] These figures are based on a report of the President of the National Association of College and University Business Officers, delivered at the 2012 COIA Annual Meeting.

[**] Based on a report of the Commission Executive Director presented at the 2014 COIA Annual Meeting. For fiscal trends at Division I schools, consult the Commission's Athletic & Academic Spending Database.

claiming that this was a violation of antitrust prohibitions against collective action in restraint of trade, and a series of court rulings supported this view, leading the NCAA to cancel the restriction in 1995, and ultimately yielding a $66 million judgment against the NCAA in 1998 ($96 million in 2014 dollars).

This misadventure ended NCAA attempts to act as a consortium in mandating rules that entail economic restrictions on salaries, and there has been no willingness to test whether collective restrictions on the size of capital budgets or operating budgets would encounter similar penalties.

The continued rise in expenditures and deficits in athletics program prompted Myles Brand in 2001 to identify the dynamic as an "arms race" among schools striving to maintain or improve the reputational advantages that their athletics programs had produced. When Brand was subsequently appointed to lead the NCAA, he took steps to seek ways to address this problem. Although the NCAA considered the possibility of seeking an antitrust exemption, the risks associated with involving Congress in university regulation led to an alternative approach, undertaken in 2005 by an NCAA Presidential Task Force. The Task Force took two major steps in this connection: it articulated the "Collegiate Model" of academically based amateur sports and it developed an extensive system of financial information sharing that would allow every program to measure its expenditures in relation to those of its peers. The hope was that these elements would provide a principled guideline and practical tools to promote expenditure restraint without the type of explicit coordination among institutions that would violate antitrust prohibitions. Other tools that were developed at this time and after included model contracts for schools to use in the appointment of coaches, stressing incentives for team academic success as a balance to incentives for on-field success, and limited changes in revenue sharing that increased rewards for academic success and diminished financial rewards for winning.

It is difficult to assess the effects these initiatives may have had, but it is clear that they have been far from adequate to address the problem of spiraling expenditures and average deficits. Recently, the Commissioner of the Big 12 Conference, Bob Bowlsby, noted that athletics expenditure growth among the Big 5 Conferences is currently outpacing revenue growth by 1.5% annually, and this is despite dramatic rises in television revenues (which now exceed $1 billion per year for those conferences alone). Bowlsby noted that the financial commitments of the Big 5 Conferences are expected to jump significantly with costly new athlete benefits that the conferences are committed to providing athletes under the NCAA's recent grant to them of increased autonomy. These new expenditure demands will create tension between programs with different resource levels, and, at many schools, between campus sports. Noting that coaches and ADs will resist pay cuts, Bowlsby predicted that without any ability to reduce compensation, schools would most likely meet their new financial obligations by cutting non-revenue sports and contracting their athletics programs. This would undermine one of the key justifications for colleges to sponsor intercollegiate athletics. It is an outcome nobody wants.

Within days of Bowlsby's comments, Conference USA announced its intention to provide some of the same costly athlete benefits as the Big 5 Conferences, suggesting that additional conferences may choose to remain competitive with the Big 5 by raising expenditure levels.

It is important to note that an important consequence of the "arms race" in athletics has been to make colleges and universities, particularly in Division I, dependent on escalating media revenues in order to try and reduce deficits. Producing athletics events in the revenue sports that can sustain media interest is, however, in itself a major upward force on expenditures in ways too numerous to list here.

The result has been that college sports are increasingly perceived as entertainment industry enterprises rather than as collegiate auxiliaries, with personnel compensation levels that have moved entirely off the scale of the academic institutional context. This has weakened the claim that athlete participation is an extracurricular enhancement, and created rising public pressure to extend compensation to athletes based on their "market value," which would not only add significant new expenses, moving the cost spiral to new levels, but would undermine the principled basis of college sports reflected in the Collegiate Model.

The fragility of the Collegiate Model has been demonstrated over the past year by two legal developments: the O'Bannon Lawsuit and the Northwestern University Unionization Case. The O'Bannon lawsuit charges the NCAA with acting in restraint of trade by marketing athlete images in forms such as video games, while requiring that athletes relinquish rights to revenues from these sources. The initial court ruling in the O'Bannon case did not adopt the NCAA's arguments, and the ultimate outcome could lay groundwork for broader athlete claims to compensation, a step towards a semi-professionalized model of some or all college sports. In the Northwestern case, the university football team sued for and was preliminarily granted the right to unionize, recognition that college athletes in highly commercialized high-revenue contexts are essentially employees. The Collegiate Model of athletics as an extracurricular amateur pursuit that enhances the academic experience would not likely survive the effects of these cases, with their implications for professionalization and unionization. An antitrust exemption could be tailored to mitigate those effects moving forward.

These are some of the factors that have led to increased discussion of the antitrust approach.

Possible Features

The core of any potential proposal for an antitrust exemption would be a request that Congress establish a framework under which the NCAA (or a successor organization, which would necessarily resemble the NCAA in most respects) and its member schools could coordinate action that could be construed as being in restraint of trade. But for a proposal to be successful, it would also need to outline features of the regulatory framework that would govern such coordination. Congress will certainly not give the NCAA blanket sanction to impose restraints on trade such as arbitrary salary limits without assurance built into the regulatory regime that this sanction would be used in a way that promoted those interests which Congress felt it essential to the public interest to protect: for example, promotion of academic quality and control of education costs.

Any proposal that may be made to Congress by the NCAA or on its behalf would need to include the following features:

- Specification of the need for and goals of the proposal
- Demonstration that these goals are in the public interest
- An outline of a regulatory scheme that would ensure that the exemption was used in alignment with those goals

A specific proposal could be configured in broad terms. For example, at Division I schools, as of 2010, compensation and facilities costs (including debt service) represented 55% of all athletics program expenditures. A broadly framed proposal might largely restrict itself to describing ways in which coordination to reduce these levels would be permitted, stipulating how savings would be identified and the permissible ways in which those savings could be applied (for example, to reduce

subsidies from the general fund or student fees, allowing targeted academic investments, lowered tuition or total student costs, etc.), and designing a protocol of annual Federal monitoring. Such a minimal approach would leave much of the NCAA as it is, but provide the NCAA with a powerful tool to address problems currently out of its reach.

A different approach would be more prescriptive, and could stipulate the reformation of many NCAA policies and procedures as a condition of the exemption. For the past year, The Drake Group, a college sports reform advocacy organization, has been designing a highly prescriptive antitrust bill, which it calls the "College Athlete Protection Act," and the framework of this effort, along with copies of the latest draft legislation, is available on the group's website. Specific formulas for limiting head coach salaries, the eligibility of first year student-athletes, and many other features appear in the draft. This can serve as an adequate illustration of what a highly prescriptive bill would look like.[*]

One further feature of a proposal that should be noted is that it would most likely need to include some description of sanctions that could be leveled if the NCAA or its member institutions were found to be out of compliance with the regulatory code. One type of sanction that has been discussed, for example, would be forfeiture of tax exempt status for athletics donations or net revenues, an approach which Congress has already signaled some interest in exploring through an exchange between the Chair of the House Ways and Means Committee and the NCAA President in 2006.

It should be added that no proposal, no matter how detailed or prescriptive, can in itself limit any actual bill that may be adopted by Congress. Once Congress becomes engaged in drafting legislation with regard to the NCAA or any similar consortium of colleges and universities, it is possible that the bill will grow to include elements that the NCAA and its members would not find acceptable, but that would no longer be under their control to eliminate.

Points Pro and Con

As with many proposals, advocates tend to focus on intended consequences, the lack of alternatives, and the urgency of action, while opponents focus on unintended consequences, potential alternatives, and a lack of immediate urgency. As a first step in thinking through the implications of supporting or opposing an antitrust exemption proposal, COIA and its member senates would need to consider a variety of pro and con arguments from various perspecives and determine whether there was any consensus among senates for a policy position. An initial, non-exhaustive list of arguments to reflect on might include the following:

1. Pro: Spiraling costs will soon force schools to cut non-revenue sports and build public support for athlete compensation on the basis of fairness and the essential commercial nature of the enterprise. The Collegiate Model is at immediate risk.

Con: The current dynamic is not new and decades of predictions of its "unsustainability" have not come true. TV revenues will continue to rise in the short term and though much of that money may already be committed, there may be enough to keep deficits from a qualitative jump.

[*] Representatives of The Drake Group presented a draft of this proposal at the 2014 COIA Annual Meeting. The general response from COIA representatives was admiration of and appreciation for the effort, but strong reservations about its highly prescriptive approach. There was no consensus, formal or informal, about the wisdom of pursuing this or any other form of Congressional exemption.

2. Pro: Without the tool of an exemption permitting collaborative action, past experience has proven that presidents and schools, acting individually, do not have the necessary leverage to overcome the dynamic of the "arms race."

Con: The NCAA has yet to fully exploit the full potential of revenue sharing to lower incentives to invest for the immediate purpose of winning. Moreover, the legality of incorporating some forms of financial constraints, such as total spending caps, at the individual conference level, where level-playing-field arguments are strongest, has yet to be fully tested, and could represent a less risky approach.

3. Pro: Proposals like The Drake Group's would envision an antitrust bill as an opportunity to improve the NCAA by addressing a wide variety of problems in college sports, not strictly related to economics, such as the recruitment of academically unqualified athletes, or the NCAA's uneven record of enforcement. This could become a vehicle for meaningful reform.

Con: Others see the NCAA as a cartel that has for years restricted the rights of athletes and enforced compliance in ways that have sometimes violated due process. The NCAA administration will likely exert more influence over the form of a bill than any reform group, and thus an antitrust exemption is more likely to protect the NCAA in extending such practices than to reform it through regulation.

4. Con: Any regulatory regime robust enough to prevent the largest programs from fully exploiting and seeking to increase the economic and competitive advantages they now enjoy will simply form an inducement for those programs, which are the few that are not in deficit, to leave the NCAA and form a separate consortium of schools wealthy enough to follow the upward cost spiral without an antitrust exemption. Any restraining effects that present NCAA governance may exert will be lost.

Pro: A regulatory regime can incorporate disincentives substantial enough to prevent such an outcome: for example, it could make membership in the NCAA a condition for continuing the tax-exempt status of athletics programs, without which even the wealthiest programs would be unlikely to flourish.

5. Con: Once a bill is proposed in Congress, there is no way to control the way that Congress can shape it, including the possibility that unwelcome elements will be introduced pertaining to institutional areas of beyond athletics. The strategy puts the entire institution at risk in order to address a concern that applies to an area comprising less than 10% of the university budget.

Pro: The NCAA is a membership organization consisting of over 1000 colleges and universities in all 50 states, and Division I alone has 350. The administrators and faculties at these colleges, their alumni, and their governing boards, can form an influential base, if properly coordinated, with leverage to ensure that this bill is guided through Congress in a way that prevents irrelevant and ill-considered additions, and ensures that the final bill will benefit higher education.

6. Con: It is in any event highly unlikely that Congress will agree to grant an antitrust exemption. Exemptions are rare, and the need to demonstrate a compelling public interest is daunting. It is more likely that Congress will view any proposal as an attempt by the NCAA and its membership simply to deprive athletics employees and others of the market value of their labor, in order to improve their balance sheets and pursue goals that cannot be demonstrated to be compelling alternatives. Student athlete advocates make strong arguments supporting athlete claims to a share in the economic fruits

of their contributions with the protection of union organization – if those arguments are valid, what public interest could justify precluding them?

Pro: The public has a critical interest in strengthening US higher education during an era when other nations are making heavy education investments to challenge American leadership. The annual diversion of more than $4 billion in educational resources so that universities can compete in the proxy area of athletics is a drain on academic resources that the nation cannot afford in an environment of global competitiveness, especially given the prospects that deficits will continue to grow. The health of academics at our universities is a national economic and security issue. If a closely monitored regulatory regime can confirm that new resources generated through an exemption are invested in appropriate academic priorities and tuition controls benefiting all students and the national research infrastructure, the necessary public interest case can be made.

Conclusion

This brief, non-technical guide is intended to provide a basis for interested senates to have a preliminary discussion of these issues, or simply as general background reading to prepare senators for debate should the imminence of an antitrust proposal to Congress at some time during the academic year require it.

As indicated in the final "Pro" point, the success of any proposal to Congress may depend on coordinated efforts among a variety of higher education constituencies, and the decision of a broad faculty coalition such as COIA to voice an opinion or to refrain from doing so could make a difference. This would be particularly true if COIA were to partner with external groups such as the Knight Commission on Intercollegiate Athletics, the AAUP, or the Association of Governing Boards, all of which have partnered with COIA in the past.

While the Coalition leadership has taken no position on whether COIA might best support, oppose, or remain neutral about any specific proposal, or about the idea of seeking an antitrust exemption in general, it does seem clear that if the time comes when there is an opportunity for the faculty speak, the one thing it should not say is that it has not given the issue any thought.