

The Drake Group

Defending Academic Integrity in the Face of Commercialized College Sports

<http://www.thedrakegroup.org>

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Form 990 Redesign
ATTN: SE:T:EO
1111 Constitution Ave., N.W.
Washington, DC 20224

The attached commentary is in response to your request for public comment on the discussion draft of a redesigned Form 990, Return of Organization Exempt from Income Tax, filed by many public charities and other exempt organizations. These comments, presented on behalf of The Drake Group (TDG), are focused on the tax-exempt National Collegiate Athletic Association (NCAA) and its member institutions.

TDG believes that an IRS implementation of the recommendations contained in the commentary will not only increase tax revenues, but also help restore academic and financial integrity in colleges and universities supporting big-time sports programs, especially football and men's basketball.

Respectfully submitted,

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Comments by The Drake Group on the Draft of a Redesigned IRS Form 990

BACKGROUND -- The mission of The Drake Group (TDG), <http://www.thedrakegroup.org/>, is to help faculty and staff defend academic integrity in the face of the burgeoning college sport industry whose uncontrolled growth is partially fueled by the governments' favorable tax policy re the NCAA and its member schools.

The increasing commercialization of big-time (NCAA D-1A) intercollegiate athletics and its negative impact on America's higher education enterprise has become evermore apparent to academic leaders, elected public officials, the sports press, and to a growing fraction of the public. After a century of ineffective efforts to reform college sports, there is a growing concern over out-of-control commercialization that is driven by the college-sports entertainment industry to further its financial interests – exploiting college sports and its participating athletes while limiting access to higher education by real students.

There is also concern about compromised academic integrity and the distracting influence of overly commercialized college sports on school officials, on America's youth, and on the nation's diminishing prospects as a leader in the 21st century's global economy.

A revised IRS Form 990 has the potential to fully expose the Achilles' Heel of the NCAA and its member institutions – the extremely weak, if any, educational basis for the current financial structure of big-time college sports. This would not only force very major reform, but provide unassailable “cover” for reform-minded university presidents and governing boards as well. However, it is likely that the NCAA and its member institutions would stage a “no-holds-barred fight” to save the millions of dollars in benefits stemming from its current tax-exempt status by arguing that its affiliation with the educational mission of its member colleges and universities is direct rather than tangential at best.

TDG AND CONGRESS – After TDG's 2004 work with Congresswoman Jan Schakowsky's staff, prior to her Extended Remarks for the Congressional Record,¹ TDG worked closely with the staffs of the Oversight Subcommittee of the House Committee on Ways and Means and the Senate Finance Committee to reveal the brutal truth about big-time college sports that is often obfuscated by myths, misrepresentations, and misinformation promulgated by ardent defenders of the status quo. This work helped contribute to:

1. A sharply-worded letter from the House Committee Chairman Bill Thomas to NCAA President Myles Brand– seeking justification for the NCAA's tax-exempt status as an institution of higher education, specifically asking Brand to explain why, given the NCAA's similarity with pro sports entities in its dealings with media rights and other big-money issues, it should continue to be tax-exempt, and
2. The December 5, 2006, meeting of the Senate Finance Committee that, among other things, probed the NCAA's response to the Thomas letter via testimony from Dr. James Duderstadt, Emeritus President, University of Michigan.

Details on these congressional efforts as well as historical perspectives that help get at the truth about big-time college sports can be found in a recent article in *The Montana Professor*.²

In his most recent book,³ Duderstadt, wrote: “While they (faculty) deplore the exploitation of student athletes and the corruption of academic values, they feel helpless to challenge the status quo in the face of pressures from coaches, athletic directors, and boosters – not to mention the benign neglect by presidents and trustees.” This statement preceded Duderstadt's conclusion

that “it is time for Congress to step in, at least in a limited way, to challenge several of the current anomalies in federal tax policy that actually fuel the commercial juggernaut of big-time college sports.”

THE REVISED IRS FORM 990 – It is our understanding that the discussion draft constitutes a significant redesign of Form 990 and that the IRS anticipates using the revised form for the 2008 tax year. We also understand that the redesign of Form 990 is based on three guiding principles:

1. **Enhancing transparency** means providing the IRS and its stakeholders with a realistic picture of the organization and its operations, along with the basis for comparing the organization to similar organizations.

2. **Promoting compliance** means the form must accurately reflect the organization’s operations and use of assets, so the IRS may efficiently assess the risk of noncompliance.

3. **Minimizing the burden on filing organizations** means asking questions in a manner that makes it relatively easy to fill out the form, and that do not impose unwarranted additional recordkeeping or information gathering burdens to obtain and substantiate the reported information.

TDG COMMENTS

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

2. **The FERPA Factor** – The IRS needs be mindful of the fact that the NCAA and its member schools routinely resist requests for information or data on student athletes – citing the Family Educational Rights and Privacy Act (FERPA) and other federal laws – in effect, shielding academic corruption from public view.⁴ This corruption not only allows them to sustain their phony ‘student-athlete’ ruse with its derivative tax-exempt status, but also to recruit, sign, and roster academically unqualified blue-chip athletes requisite to fielding professional-level teams for their college sports entertainment businesses. Thus, the recommendations provided herein are rooted in the compelling need to require the NCAA and its member institutions to disclose information that can provide tangible evidence that their athletes function as real students.

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

Robert and Amy McCormick, from the Michigan State University College of Law, argue in a *Washington Law Review* article that grant-in-aid athletes in revenue-generating sports at NCAA Division I institutions should not be viewed as "student-athletes" as the NCAA asserts, but should, instead, be considered "employees" under the National Labor Relations Act.⁵

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

Recent and ongoing research strongly suggests prevalence clustering of entertainment-sport college athletes, especially minority athletes, in such alternative educational programs.^{6,7} In addition to such pseudo majors, the phenomenon of "one and done" athletes, who utilize college sport as a short-term stepping-stone to a professional sport career, contributes to a lessening of universities' academic standards and a marked deviation from educational missions.

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

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

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

5. Compensation – The proposed revisions to Form 990 do require far more detail regarding compensation of officers, directors and "key employees" (generally defined as someone who has management-like responsibilities for "a discrete segment or activity of the organization that represents a substantial portion of the activities, assets income or expenses of the organization. . ." on new Schedule J. The new definition of "key employee" which is now essentially the same as the definition for "excess benefit transactions" in Section 4958 of the Code, is likely to include NCAA Div. I-A football and basketball head coaches, so the IRS will likely get to know somewhat more about their compensation packages than it does now, but only for organizations required to file a Form 990

Also, the Form 990 and Form 990T should be amended to include questions about the "total compensation arising out of the connection to the non-profit". For example, coaches and others are paid a small salary by the university-relatively – but they receive much larger compensation

from other sources that would not be available to them “but for” their position at the university. Accordingly, the Form 990 does not reflect the compensation that the institution is legally liable to provide. The form should show the highest paid people irrespective of the position they hold.

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

7. Unrelated Business Income – The commercial connections and government subsidies to college sports are well documented. For example, Andrew Zimbalist provides the story behind the gutting of the law pertaining to Unrelated Business Income Tax (UBIT) ... law that was written to provide for the taxation of the activities of a tax-exempt organization that are not substantially related to the exempt purpose for which it was formed.⁸ It is understood that public universities were made subject to the UBIT provisions by special rule.

A good sense of the magnitude and ubiquitous nature of the very powerful legal and lobbying forces at the command of the NCAA and its member institutions can be obtained from the story of their suppression of the 1977 UBIT case brought against Texas Christian University by the Dallas office of the IRS.⁹

RECOMMENDATIONS

TDG believes that implementation of the following recommendations by the IRS will not only increase tax revenues, but also help restore academic and financial integrity in colleges and universities supporting big-time sports programs, especially football and men’s basketball. The recommendations and the appended explanatory notes are based on the appended references.^{1-3, 5-13} It is understood that some of these recommendations may very well require congressional action.

TDG recommends that the IRS:

1. Amend the revised Form 990 and schedules to provide a meaningful level of enhanced transparency – requesting the NCAA and its member institutions to disclose information that will:

a) Provide evidence that their athletes are maintained as an integral part of the institution's student body¹⁴

b) Provide evidence that their athletes attend regular whole-period classes¹⁵

c) Provide evidence that their athletes are on accredited degree tracks and are held to the same academic standards of performance as all other students¹⁶

d) Provide evidence that their athletes realize a 2.0 grade-point average, quarter-by-quarter or semester-by-semester to gain and maintain eligibility for participation in athletic events, with the grades and academic records certified by the school's chief academic officer¹⁷

2. Advise the NCAA and its member institutions that:

a) The need to vastly improve their transparency and reporting is a very serious matter and that their tax-exempt status will be conditioned on full disclosure

b) Their operations will be subject to IRS and congressional oversight as well to severe penalties (in addition to the loss of their tax-exempt status) for noncompliance.¹⁸

3. Eliminate what appear to be clear violations of fundamental tax principles such as the loopholes that were inserted in the tax laws to enable practices such as tax deductions for contingent fees on seat tickets and skybox lease payments.

4. Be more rigorous in assessing the UBIT status of the revenues received by organizations, such as the NCAA, whose sports entertainment business mission is largely tangential to the educational mission of colleges and universities.

5. Require the NCAA and their member institutions to employ a standard uniform system of accounting in their athletic departments that is subject to public financial audits.¹⁹

Frank G. Splitt
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John Gerdy -- Author and Visiting Professor in Sports Administration at Ohio University, a former professional basketball player as well as a legislative assistant at the NCAA and the Associate Commissioner of the Southeastern Conference,

Amy McCormick -- Professor, Michigan State University College of Law, and cited author on sports related law,

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Andrew Zimbalist -- Professor, Economics Department at Smith College of Economics, Smith College, and noted author in the realm of sports business.

APPENDIX – REFERENCES AND EXPLANATORY NOTES

¹ Schakowsky, Janice D. "Call for attention to the work of Dr. Frank Splitt," Congressional Record, Extension of Remarks, March 17, 2005, – p 9, http://thedrakegroup.org/Splitt_Essays.pdf.

² Splitt, Frank G., "The U.S. Congress: New Hope for Constructive Engagement with the NCAA and Intercollegiate Athletics", *The Montana Professor*, Spring 2007, <http://mtprof.msun.edu/Spr2007/splitt.html>

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

⁴ FERPA is part of the Federal General Provisions Concerning Education (GEPA), a set of unfunded conditions on the receipt of federal education funds. It is commonly referred to as the Buckley Amendment to GEPA. See Matthew R. Salzwedel & Jon Ericson, "Cleaning Up Buckley: How the Family Educational Rights and Privacy Act Shields Academic Corruption in College Athletics," *Wisconsin Law Review*, Volume 2003, Number 6, 1053-1113. Supplementary recommendations relative to FERPA that will ensure academic integrity of institutions of higher education follow:

a) Under Department of Education guidelines, "Directory Information" shall be amended to insert "courses, including the name of the professor" following "major field of study."

b) Institutions shall make public academic records of members of student groups sufficient in number to protect the privacy of individual students, students' courses including the grade, name of the professor and course GPA. The records shall be in the listed in order of grades received, i.e., courses in which the student received an A, courses in which the student received a B, and so forth.

⁵ McCormick, Robert A. and Amy C., "The Myth of the Student-Athlete: The College Athlete as Employee," *Washington Law Review*, Vol. 81, pp. 71-157, 2006, Available at SSRN: <http://ssrn.com/abstract=893059>

⁶ College Sport Research Institute, "Study of 2006 NCAA Division I men's basketball tournament players' majors," Memphis, TN, 2007

⁷ Finley, P. S. and Fountain, J. J., "Academic stacking of athletes on low-performing Division I football teams," Paper presented at the annual meeting of The Drake Group, Cleveland, OH, March 2007.

⁸ Zimbalist, Andrew, *Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports*, Princeton University Press, 1999; See pp. 128 and 129 in the Paperback Edition, 2001.

⁹ Sack, Allen L and Staurowsky, Ellen J., *College Athletes for Hire: The Evolution and Legacy of the NCAA's Amateur Myth*, Praeger Publishers, 1998.

¹⁰ Splitt, Frank G., "Are Big-Time College Sports Good for America?" http://www.thedrakegroup.org/Splitt_Good_for_America.pdf

¹¹ _____, "The U. S. Congress, Higher Education, and College Sports Reform" http://thedrakegroup.org/Splitt_The_Interface.pdf

¹² _____, “The Congressional Challenge to the NCAA Cartel’s Tax-Exempt Status”
http://thedrakegroup.org/Splitt_Congressional_Challenge.pdf

¹³ _____, “Don’t Overlook the Congress for Serious College Sports Reform”
http://thedrakegroup.org/Splitt_Dont_Overlook.pdf

¹⁴ Over the years, the NCAA has made a number of rule changes that have emphasized athletics over academics so as to move their D-1A football and men’s basketball programs to professional levels. The NCAA has resisted providing college athletes meaningful opportunities to function as real students by not agreeing to:

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

¹⁵ Attending class is a public act; disclosing the names of courses and professors while not releasing students’ grades provides the appropriate balance between a student’s right to privacy and the public’s right to know the conduct of faculty, administrators and governing board members. The purpose of transparency is to focus on the conduct of faculty, administrators and governing board members, not on student conduct.

Transparency would require disclosure of courses taken by the school’s football and basketball team players as well as cohorts representing 50% of the players with the most playing time, the average grades for the athletes and the average grades for all students in those courses, the names of advisors and professors who teach those courses, and whole-period class attendance records for the athletes.

It is suggested that the Congress add interpretive wording to FERPA’s student privacy provisions to make abundantly clear that this legislation does not prohibit release of information on the academic performance of individual athletic teams in whole or in part, so long as the data do not identify individual team members.

¹⁶ The schools should be required to identify:

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

¹⁷ It is reasonable to expect that a legitimate student have no less than a "C" average. The school's chief academic officer should be held personally accountable for academic corruption.

¹⁸ Conditioning the continuation of the NCAA's tax-exempt status on their meeting specific reporting requirements such as outlined herein and plugging the tax loopholes that help subsidize the college sports arms race will provide a strong message as to the seriousness of the revised Form 990 and its schedules.

Self assessment and reporting by colleges and universities, as well as weak enforcement by the NCAA, and even weaker penalties for infractions, provide an enormous incentive for schools to scheme and cheat. Failure to implement and comply with the IRS reporting requirements should put the NCAA and/or individual institutions at risk of losing their tax-exempt status. Once implemented, evidence of a continuation of existing patterns of fraud, continued efforts by universities and colleges to circumvent the intent of these measures, or, retaliation against whistleblowers, should garner severe penalties

¹⁹ Convenience accounting and budgeting practices will continue to be used by the NCAA cartel to deceive and confuse faculty, the public, the Congress and the IRS about athletic department financials unless and until schools are forced to employ a uniform system of accounting that includes total capital expenditures, depreciation, and total staff costs from all sources, as well as be subject to public financial audits. The threat of Sarbanes-Oxley would certainly bring the NCAA and its member institutions to sharp attention.

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