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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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October 19, 2011

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The Honorable Lamar Smith, Chairman
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Smith:

I write to request that the Committee conduct hearings regarding antitrust and due process issues relating to intercollegiate athletics, with a particular focus on the impact of recent realignments and legal disputes on smaller, minority conferences and athletes. It has become increasingly clear to me that the combination of issues and challenges facing intercollegiate sports have reached a tipping point calling for Congressional attention.¹ I would propose that among other things, the Committee review the following:

- **Conference Realignment** – In recent months and years, conference realignment has had a dramatic impact on college sports, including the viability of smaller conferences and schools. If anything, the trend and economic impact of major conference realignment appears to be growing on a near daily basis. The impact of major conference realignment on lower-profile sports teams, parents, and smaller and independent universities – notably Historically Black Colleges and Universities (HBCUs) – are of particular concern. As participants in last month's Congressional Black Caucus Annual Legislative Conference explained to me, HBCUs and other universities appear to have been relegated to difficult bargaining postures due to the recent realignments. This issue overlaps with antitrust issues involving the so-called Bowl Championship Series (BCS), which both our

¹For an excellent summary on a number of issues surrounding college sports, see Taylor Branch, *The Shame of College Sports*, The Atlantic, October 2011, available at <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/>; Taylor Branch, THE CARTEL (2011).

Committee and the Senate Judiciary have considered in recent years,² and which is the subject of antitrust review by the Department of Justice.³

- **Control of Athletes' "likeness"** – On July 21, 2009, University of California, Los Angeles (UCLA) 1995 National Champion basketball player Ed O'Bannon filed a class-action antitrust suit against the NCAA based on the profits that the NCAA and UCLA continue to garner from the use of his likeness in video sales. Numerous former collegiate athletes have joined O'Bannon's suit, and the case will likely center around whether the NCAA requirement that every athlete authorize the use of "your name or picture . . . to promote NCAA championships or other NCAA events, activities, or programs"⁴ extends in perpetuity and to entertainment products.
- **Due Process Rights of Athletes** – The NCAA's bylaws have also come under scrutiny in the case of Oklahoma State University pitcher Andrew Oliver. The University declared Mr. Oliver ineligible after questions surfaced whether, after being drafted to play in the Major League out of high school, Mr. Oliver's lawyers were present at negotiations with the Minnesota Twins. In the declaratory judgment in *Oliver v. NCAA*, Judge Tygh Tone of Erie County, Ohio struck down the NCAA ban on lawyers negotiating on collegiate athletes' behalf.⁵ Judge Tone ruled that the ban not only violated customary legal practices regarding the role of attorneys in contract negotiations, but that it was

²*Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the H. Comm. on the Judiciary*, 108th Cong. (Sept. 4, 2003), available at <http://judiciary.house.gov/legacy/89198.PDF>;

The Bowl Championship Series: Is it Fair and In Compliance with Antitrust Law?: Hearing Before the S. Judiciary Comm., 111th Cong. (July 7, 2009), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da14c6156>.

³In May of this year, the Justice Department's Antitrust Division opened an inquiry into activities of the NCAA and BCS. It explained, "Serious questions continue to arise suggesting that the current Bowl Championship Series (BCS) system may not be conducted consistent with the competition principles expressed in federal antitrust laws." Letter from Christine A. Varney, Ass't Att'y Gen., Antitrust Div., U.S. Dept. of Justice, to Mark A. Emmert, Ph.D., President, Nat'l Collegiate Athletics Ass'n (May 3, 2011).

⁴Form 11-3a Academic Year 2011-12, Student-Athlete Statement – NCAA Division I, as required by the NCAA Constitution 3.2.4.6 and NCAA Bylaw 14.1.3., available at http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Form%2011-3a.pdf.

⁵*Oliver v. NCAA*, 155 Ohio Misc.2d 17, 920 N.E.2d 203, 252 Ed. Law Rep. 488 (2009). The case was ultimately settled between Oliver and the NCAA, and the NCAA's bylaws that Judge Tone ordered an injunction against remain in effect.

tantamount to an attempt to supersede the judicial system.

- **Responsibility in Event of Athletes' Injury** – A myriad of liability and due process concerns remain unresolved as a result of the 1957 Colorado Supreme Court decision in *State Compensation Insurance Fund v. Industrial Commission*.⁶ The court ruled that the widow of Fort Lewis A&M College football player Ray Herbert Dennison could not receive worker's compensation death benefits after Mr. Dennison died from a head injury sustained during a game. Using the defense that their players are "student-athletes" and not employees, colleges have rejected attempts by players and their families to recover damages relating to injuries and deaths that have occurred during athletic events.
- **Limitation on Duration of Athletic Scholarships** – Former Rice University football player Joseph Agnew filed a class-action antitrust lawsuit in October 2010 against the NCAA, arguing that the one-year limit on athletic scholarships constitutes a "blatant price-fixing agreement" between the collegiate governing body and its member institutions.⁷ The Justice Department has reportedly initiated an investigation into the Association's use of this rule.⁸

I fully appreciate the concerns some may raise concerning our Committee devoting a portion of its time to these issues. I would note, however, that modern-day college athletics is a massive business, with widespread economic impact on athletes, their families, broadcasters, and fans as well as universities and colleges all over the country. The industry commands billions of dollars in revenue annually, and the NCAA alone has an operating budget of nearly \$800 million.⁹ In addition, much of the power of the NCAA and the impetus behind recent conference realignments appear to stem from federal antitrust law and Supreme Court antitrust decisions. The Sports Broadcasting Act of 1961, which conditioned approval of the NFL merger upon the requirement that it would not schedule Saturday games in competition with college football,

⁶State Compensation Ins. Fund v. Industrial Com'n, 314 P.2d 288 (1957).

⁷Agnew v. Nat'l Collegiate Athletic Ass'n, No. 1:11-cv-0293, 2011, WL 3878200 (S.D. Ind. Sept. 1, 2011).

⁸Marlin Garcia, Federal government investigates NCAA scholarship rules, USA TODAY, May 6, 2010, *available at* http://www.usatoday.com/sports/college/2010-05-06-notes-scholarships-hayward_N.htm.

⁹The National Collegiate Athletic Association Revised Budget for Fiscal Year Ended August 31, 2011, *NCAA.org*, *available at* <http://www.ncaa.org/wps/wcm/connect/6d3874004e51aac96e0d622cf56f2f3/2010-11+Condensed+Budget.pdf?MOD=AJPERES&CACHEID=6d3874004e51aac96e0d622cf56f2f3>.

essentially granted the universities a monopoly on Saturday football broadcast revenues.¹⁰ In the 1984 case *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court struck down the NCAA's ability to negotiate contracts for football broadcasting, thereby creating an incentive for large universities to band together to strengthen their own bargaining power over television and cable contracts.¹¹

In addition, I would note that there is ample bipartisan precedent for our Committee reviewing legal issues involving college sports, including, among other recent hearings concerning piracy of sports broadcasting rights,¹² the NCAA's due process guarantees in disciplinary matters,¹³ as well as the aforementioned hearings concerning the BCS. We have also conducted numerous hearings on issues involving baseball's antitrust exemption, as a predicate to enacting legislation modifying that non-statutory exemption.¹⁴ The Committee on Oversight and Government Reform has conducted a series of widely publicized hearings on the impact of steroids and recently initiated a review of human growth hormone and banned substance testing regimes in professional football.¹⁵

I would also note there is a significant public record of concern regarding the impact of finances on college sports, highlighted by three Knight Commission reports. The most recent Knight Commission report concluded: "The pursuit of television contracts and slots in football bowl games, together with the quest to win championship tournaments in basketball, have had a destabilizing influence on athletics programs . . . [T]his model could lead to a loss of credibility

¹⁰15 U.S.C. § 1293.

¹¹*Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948 (1984). See Sally Jenkins, *Tracing the NCAA's path to powerlessness*, WASH. POST, Sept. 24, 2011, at D1.

¹²*Piracy of Live Sports Broadcasting Over the Internet: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (Dec. 16, 2009).

¹³*Due Process and the NCAA: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 108th Cong. (Sept. 14, 2004).

¹⁴15 U.S.C. § 26b.

¹⁵Mark Maske, *NFL, players union to meet with congress members on HGH testing*, WASH. POST, October 13, 2011, available at http://www.washingtonpost.com/sports/redskins/nfl-players-union-to-meet-with-congress-members-on-hgh-testing/2011/10/13/gIQAEftXhL_story.html.

not just for intercollegiate sports but for higher education itself.”¹⁶

Over the last several congresses, our Committee has played a critical role in enhancing both safety and welfare with regard to the burgeoning industry of sports. In 2009 and 2010, our committee initiated hearings into the illnesses facing ex-professional football players and the impact of concussions and other head injuries and their relationship to professional and amateur sports. These hearings helped enhance the treatment of retired professional football players who face debilitating injuries, led to major changes in the NFL’s rules and operations, and spurred additional new investigations, reports, and understanding involving all levels of professional and youth sports.^{17, 18} Today, I believe the time is ripe for our Committee to again take the lead when no other entity appears to have the authority or standing to act to protect the interests of athletes, their families, smaller colleges, and HBCUs.

¹⁶Knight Commission on Intercollegiate Athletics, *Restoring the Balance: Dollars, Values, and the Future of College Sports* 3-7 (June 2010), available at: http://www.knightcommission.org/images/restoringbalance/KCIA_Report_F.pdf. The Report continues, “[T]he influence of big money in high-profile college athletics can and must be reduced.”

¹⁷*Legal Issues Relating to Football Head Injuries: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (Oct. 28, 2009); *Legal Issues Relating to Football Head Injuries, Part II: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (Jan. 4, 2010).

Today, the Senate Commerce Committee will convene a hearing on related issues. *Concussions and the Marketing of Sports Equipment: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 112th Cong. (Oct. 19, 2011), available at http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=3c1ac485-cac3-4d53-9b6a-3f781d32dc49&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=10&YearDisplay=2011.

A general overview of the issue, including the Committee’s role, appears on *The New York Times*’ web site at: Head Injuries in Football, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/f/football/head_injuries/index.html.

¹⁸In 2007, the Committee also reviewed the National Football League’s retirement system. *Hearing on the National Football League’s System for Compensating Retired Players: An Uneven Playing Field?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. (June 26, 2007).

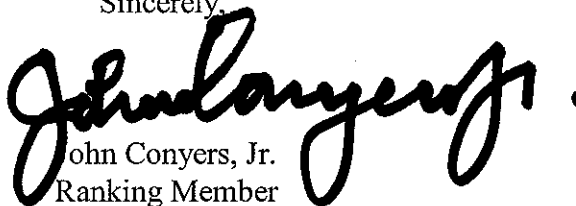
The Honorable Lamar Smith, Chairman

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Given the rapidly evolving nature of intercollegiate sports and our Committee's historic role in the oversight of antitrust and due process concerning sports and other industries, I request your consideration of these important matters.

Sincerely,

A handwritten signature in black ink, reading "John Conyers, Jr.", written in a cursive style.

John Conyers, Jr.
Ranking Member

cc: The Honorable Bob Goodlatte, Chairman, Subcommittee on Intellectual Property,
Competition, and the Internet
The Honorable Mel Watt, Ranking Member, Subcommittee on Intellectual Property,
Competition, and the Internet