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The Federal Income Tax and Reform of College Athletics: A Response to Professor Colombo and an Independent Critique

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Large athletics programs bring a lot of attention to themselves and the universities of which they are a part. Once, that attention came only from success on the field or court. Now it also comes from how much money these programs spend, and on what, and its source. Calls to use the federal tax code to rein in athletics spending are, we believe, ill-advised. The IRS has limited resources and a lot to do. Its staff members know tax law, not the ins and outs of college athletics. Because universities are adept at “zeroing out” revenues and expenses, it is unlikely that new tax rules and added IRS oversight would do much to curtail spending. They could, however, impose significant compliance costs on universities. The result could be the worst of all worlds: considerable expense on universities to comply; little or no spending reform achieved; and an IRS diverted from core responsibilities.

Setting the Stage: Why the Reformers Want to Reform

Big time university athletics programs generate revenues in ways the rest of the university does not. Institutions in the football bowl subdivision of NCAA Division I (“Division I FBS”) have the largest and most well-funded athletics departments. They pay head football and men’s (and sometimes women’s) basketball coaches several multiples of the salaries paid to chaired full professors who bring in major research grants, to senior administrators, and sometimes even to university presidents at their institutions. Increasingly in these Division I FBS programs, associate head football coaches and coordinators make substantially more money than full professors. Athletics capital projects likely would not make a list of the top 50 capital needs on any campus, and yet a second, or third, football practice facility gets built

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while fixing the ceiling in the computer laboratory is put on hold. At the same time, the overall cost of a university education, particularly tuition, increases every year.

To those who find salary and other athletics expenditures “unseemly” when students are incurring heavy debt to cover college expenses and indefensible when those athletics expenditures are subsidized by general university funds, athletics spending limits are an obvious, if only partial, answer. To those who decry the level and content of athletics commercial and marketing efforts, curtailing athletics spending means reducing the need for these efforts. To those who worry that athletics programs increasingly are not integrated into the general functioning and ethos of the university, the level and manner of athletics spending are major impediments to integration. In any free-market system, those who spend more may get more. Translated to athletic competition, those who spend more may win more. University presidents may wish to limit athletics spending, particularly when it draws on an already strained academic budget, but may face considerable political pressure if their effort is seen to undercut the football team’s chances to win a conference or national title. Joint institutional action to cap coaching salaries would violate the current scope of the antitrust laws as would certain other joint efforts to limit spending. (*Law v. NCAA*, 1998).¹

The Federal Income Tax and Reform

Over time there have been suggestions that the Internal Revenue Service (“IRS”) use the federal income tax law to rein in athletics spending. Most recently, Professor John Colombo (2009) evaluated whether the federal income tax law might be the vehicle to achieve reform. He provided a clear description of how the income tax exemption Congress provides universities also covers their athletics departments. He also explained the important difference between a tax exemption such as that enjoyed by Division I universities² and the NCAA³ and the so-called “unrelated business income tax” (UBIT).⁴ In brief, an exemption shelters income generated by an institution as part of its tax-exempt function, while the UBIT attaches to income generated by a business operated by the otherwise tax-exempt institution. For example, a hospital can be a charity exempt from federal income taxation. If the tax-exempt hospital sells drugs to its patients, the income generated by such sales is exempt from income taxation because providing drugs to patients is part of the hospital’s tax-exempt charitable activity. However, if the hospital operates a drug store open to the general public, the income generated by the public drug store would be unrelated business income subject to the UBIT even though the hospital uses the drug store revenue to support its charitable activities.

Professor Colombo first addressed arguments that the IRS should terminate in whole the tax-exempt status of certain universities (for example, those who pay coaches multimillion dollar salaries or that generate millions of dollars of revenues through broadcast contracts, licensing fees, and merchandise and ticket sales) or, in the alternative, should impose a tax on the net income from their athletic programs without regard to whether the income would be unrelated business income as currently understood. He demonstrated that long-standing IRS treatment of universities and their athletics departments—as well as the complicated organizational nature of a university—means that, under current law, the IRS would have little chance to

do either. After noting that he is a tax expert, not an expert in sports law or administration, he concluded by suggesting that Congress could institute for Division I institutions and their athletics programs three kinds of tax regulation (discussed later) that might facilitate reform efforts.

The United States Supreme Court has held that “income” is an accession to wealth, clearly realized, over which the recipient has complete dominion. (*Commissioner v. Glenshaw Glass Co.*, 1955). Athletics-generated revenues fit that definition. Professor Colombo described the current exemption for athletics revenue as “a *sui generis* exception” to general tax policy. He concluded, and we agree, that because university athletics income does not fit within the overall justifications offered when income is exempted from taxation, Congress could shift its current approach and impose limits on enjoyment of such an exemption without disrupting or confusing tax policy. Professor Colombo also concluded, and once again we agree, that for such a shift to take place, Congressional action would be needed. Finally, Professor Colombo suggested that Congress change the federal income tax law to impose limits on the revenue generated by major athletic programs and to require universities and the NCAA to disclose financial information related to athletics revenue. We do not believe that limiting revenues, or providing disclosure as advocated by Professor Colombo, would do much to further the goals of those who advocate reform (and it is unclear to us whether Professor Colombo holds out much hope that what he suggests would achieve significant reform). At a minimum, we think the goals in practice would be difficult to achieve. More fundamentally, we take issue with the suggestion that the tax law be used to regulate athletics revenue.

As members of a university faculty, we certainly understand that big-time university athletics programs create problems and significant challenges for universities, both fiscally and in maintaining the primacy of academic standards and the academic mission. We hold no brief for the size of coach salaries, both as an absolute and also when considered in the context of university salaries, and we worry about what the disparity signals regarding the values of higher education and of society generally. We note, however, that modern universities independent of their athletics programs are engaged in revenue-producing commercial and marketing activities—and necessarily so, given the increasingly limited public dollars supporting higher education. And, whatever the excesses, we believe that it is bad tax policy, and probably bad public policy as well, to use the tax law to try to achieve reform—acknowledging, as we must, that Congress regularly uses the federal tax law for just such nontax purposes.

As Professor Colombo correctly noted, Congress has never articulated a justification for excluding from taxable income revenues generated by certain charitable entities. He summarized arguments advanced by academic writers attempting to justify or at least explain the exemption:

a common theme of virtually all these theories is that charities supply some sort of good or service or “way of doing things” that is not replicated in the private market or by government—some kind of public good or quasi-public good that otherwise would not exist. The “good” supplied might be a specific item not available from the private market (e.g., symphonic music) or something as diffuse as a “nonprofit ethic” that takes a different (and presumably unique) approach to providing something that might otherwise be available

in the market—for example, a nonprofit hospital might approach patient care in a different manner than a for-profit one, even though the services provided (e.g., a heart bypass) are ultimately the same.

He concluded, correctly in our opinion, that none of these theoretical justifications support an exemption for revenue generated by major athletic programs and that, as a practical matter, “big-time college athletics revenues clearly do fit the normative tax base: payments for tickets sold, television and other media rights fees, advertising and so forth are absolutely no different from or harder to calculate than these same revenues flowing to professional, for-profit sports.” But if college athletics revenues fit no theoretical justification for an exemption, then the appropriate Congressional action, if action is to be taken, is to eliminate the exemption, not to tinker with it by creating additional rules to be administered.

We agree with Professor Colombo that, were all athletics income subject to the UBIT—in other words, were all athletics revenues classified as unrelated to a university’s mission—there might still be little revenue subject to tax. Standardizing the treatment of what is taxable revenue will be a problem. For example, some athletics departments handle their own sale of merchandise (and thus have revenue subject to the UBIT) while others contract out merchandise sales and receive royalties (not subject to tax).⁵ In addition, a large number of Division I FBS athletics departments are not self-sustaining and draw on funds from the rest of the university. Even those that show revenues in excess of expenses for football and men’s basketball would be unlikely to do so if the cost of facilities for those sports were allocated to them. Yet another issue, as Professor Colombo pointed out, is that charities are adept at “zeroing out” income from unrelated business activities.

For most, if not all, universities, individual units, including athletics departments, do not file their own tax returns. Athletics, the library, the college of arts and sciences, university medical services, the book store, university performing arts center—all these are university units that report revenues and expenses to the campus. The campus then organizes these into one tax return (or, in a university system, may send its combined revenues and expenses to the system office where it will be combined with the revenue and expense reports from each of the other campuses). With revenues and expenses merged into one big tax return, any revenues over expenses produced by athletics are offset by losses in other units.

Focusing on NCAA practices seen by reformers to be commercial exploitation of student-athletes poses a special problem.⁶ The vast majority of NCAA annual “expenditures” are simply distributions to member institutions. As Professor Colombo wrote, “one presumably would not want to limit such revenue sharing.”

It may well be unlikely that much tax revenue would be generated if all athletics revenues were subject to the UBIT. Nonetheless, these revenues should be subject to tax if they are the type revenue that Congress created the UBIT to address. Such a change would bring little solace to reformers, however. If imposing the UBIT would have little tax consequence to major athletics departments, then there also is little likelihood that the UBIT will reform conduct.

Adjusting the Exemption as a Means to Reform: An Assessment of Professor Colombo's Three Suggestions

Professor Colombo did not propose elimination of the exemption for athletics departments both because of the practical considerations listed above and also because of his belief, one we share, that there is little realistic possibility for doing so. There are 339 universities in Division I and 119 in Division I FBS. These universities sit in the states and congressional districts of the members of Congress who would have to vote to remove the exemption. Without regard to any “parochial” political interest that might be at play, moreover, revocation of the exemption could have substantial negative policy consequences. Athletics revenues neither are funneled solely into football and basketball nor directed primarily at paying big salaries and covering those expenditures at which reformers point as excessive. Instead, these revenues support athletics opportunities for women and, more generally, for nonrevenue producing sports. Not only is it unclear whether a tax on all athletics revenues would generate significant tax dollars, therefore, but there also is the specter of substantial adverse impact on nonrevenue producing sports, including women’s sports.

In an effort to wend a path through the tax code that reformers might follow to achieve at least some of their goals, Professor Colombo suggested three approaches Congress might implement:

1. Require a demonstration that a significant portion of athletics revenues subsidizes educational or athletics activities outside revenue-producing sports;
2. Impose annual limits on targeted expenditures, such as coaches’ salaries and recruiting trips;
3. Require disclosure of information related to the operation of athletic activities via Form 990 (the annual information return that certain tax-exempt organizations must file).

It is here that we have our major difference of opinion with Professor Colombo. If Congress concludes that public policy interests dictate action, then Congress should eliminate the tax exemption for athletics revenues rather than impose conditions on qualifying for it. The fact that Congress regularly uses the tax law to accomplish nontax goals begs the questions whether that practice is prudent or effective, particularly here, where there are practical difficulties of implementation related to the complicated organization of universities and the absence of standardized practices consistent across them.

The primary purpose of the federal income tax is to raise revenue. Using that law to accomplish other goals is tempting because there is already an administrative bureaucracy (the IRS) to enforce the tax law.⁷ If, for example, Congress wants to encourage homeowners to save energy by insulating their homes, offering a tax

credit to help pay the cost of insulation seems on its face sensible. The use of that credit will be policed not by an administrative agency expert in energy savings, however, but by an administrative agency expert in enforcing tax law. The IRS is not equipped to determine whether adding a particular type of insulation to a particular home will increase energy efficiency. The best the IRS can do is to attempt to determine whether those taking the credit satisfy the technical rules established by Congress. In that regard, keep in mind that the national audit rate on individual income tax returns is currently hovering around one percent. In other words, the IRS will not examine most returns claiming the tax credit, thus increasing the risk that a significant number of homeowners may use the tax credit without satisfying the requirements for it. Of course, an alternative to using a tax credit to encourage insulation would be to establish a new federal bureaucracy to process requests for direct payments (or reimbursements) of some of the costs of insulation. Thus, the question, at least in the abstract, is whether the cost of setting up a new agency outweighs the problems of using the tax law to encourage insulation. Unfortunately, there is little evidence that Congress has weighed these costs before using the tax law to achieve nontax goals.

The same sorts of issues will be present a hundred-fold if Congress elects to regulate major college athletics by imposing conditions on the exemption of income. One problem is the complicated relationships that athletics departments (and other units) have with their parent universities and the consequent lack of standardization of university organization across institutions. Although a few athletics departments are separate tax entities, most are not. Many have their own officer for business and finance; others use services provided by the university. Most but not all use the services of university general counsel. No university of which we are aware allocates to their constituent units the cost to the university of providing such services. Universities differ in whether they allocate scholarship revenues to an athletics department or other constituent unit and, if they do, whether they allocate in whole or in part. Some include athletics ticket costs in student fees; many do not. Where fees include tickets, some universities retain the entire fee, while others share a portion of the fee with the athletics department. Universities may or may not require that the cost of a new athletics facility be expensed during the first year of operation rather than amortized over its useful life. Universities treat revenues from game parking differently (and differ whether there even are revenues generated by parking). The lack of standardization at the university level is replicated within athletics departments. Consider, among others, services such as sports information, sports medicine, trainers and training facilities. These could be allocated per sport (or per student-athlete use) or to the department itself.

Although the IRS has developed expertise in regulating tax-exempt charitable organizations through application of the tax law, that expertise comes at significant cost. To regulate college athletics programs effectively, the IRS likely would need to impose some standard ways of organizing and reporting revenues. In a free-market system, it is not easily possible to regulate a little, or to pick and choose areas to regulate, particularly as human beings are adept at modifying conduct to respond to new rules and yet continue to achieve their base-line objectives. To impose a detailed one-size-fits-all-model on a multitude of entities that differ in a multitude of ways carries considerable risk of inefficiency and additional costs for the entity. To impose broad-based standardization permits universities to adjust

their operations in ways that do not greatly increase administrative burdens but also may avoid tax consequences.

Even to begin to monitor athletics revenues, the IRS would need a staff of employees with sufficient knowledge to provide regular and meaningful oversight. IRS personnel working on college athletics programs would be unavailable to work on other tax matters. In a world in which Congress asks the IRS to do more with less, we do not believe the IRS should be asked to dedicate significant resources to enforce tax rules that seek to regulate the operation of major athletic programs. The question is not so much whether the IRS could do so, but whether it is prudent for it to take on such a narrow project.

In addition to our general disagreement with using tax law to achieve public policy reform of college athletics spending, we have specific concerns addressed to each of Professor Colombo's suggestions:

1. Required Demonstration that a Significant Portion of Athletics Revenues Subsidize Educational or Athletics Activities Outside Revenue-Producing Sports.

Professor Colombo described this suggestion as addressing the claim made by universities that their major athletic programs subsidize other athletic programs that could not survive on their own, thus serving a charitable purpose. We have no quarrel with the notion that universities should be held to do what they say they do. Existing legal, NCAA, and practical constraints on the operation of athletics programs, however, already mean that at least for Division I FBS institutions—the situs of the vast majority of expenditures identified as abuses by reformers—significant redistribution occurs. Title IX gender equity rules mandate equality in services and facilities provided to male and female athletes. For most institutions, Title IX results in the provision of varsity athletics opportunities to women athletes proportionate to their enrollment numbers.⁸ (See *Cohen v. Brown University*, 1993). Institutions also undergo periodic audits by outside entities to assure compliance. Because it is rare that a women's sport produces revenue, Title IX already requires a substantial outlay of funds—in other words, redistribution—to programs other than football or men's basketball.

One of the largest expenses of a sport, moreover, is scholarships. To compete in Division I FBS, an institution must sponsor at least 16 sports and offer at least 50% of the maximum number of scholarships permitted in 14 of them. (NCAA Bylaw 20.9.7.1). In practice, the Division I FBS institutions paying the large coach salaries typically sponsor more than 16 sports and also fully fund scholarships for each sport sponsored. Another large cost is coach salaries. Budget for salaries is a function both of the amount of salary paid and the number of coaches employed. NCAA bylaws dictate the maximum number of coaches per sport. At the Division I FBS level, coaching positions rarely go unfilled. Other team costs relate to the expense of equipment (e.g., gymnastics apparatus, upkeep of the natatorium). Team travel budgets, as another example, vary with distance to competition. Method of travel is constrained to some extent by a university's class and exam schedule. Although athletics departments in theory could require teams to bus to all competition sites, no matter the distance, athletics directors, faculty, and university administrators

are sensitive to student well-being and reasonable treatment and, in any event, the impact on missed class days would foreclose much of such a practice.

If, despite the issues we have noted, Congress were to decide to require proof of redistribution, then we urge that Congress write the rules rather than delegate the authority to the IRS. Asking the IRS to develop the expertise to write such rules is just not sensible. The question to be resolved is what sort of proof Congress should require.

Professor Colombo would have “universities conducting Division I football or basketball programs . . . spend at least 5% of their total investment in these programs (or 5% of the annual revenues from these programs) to support non-revenue athletic opportunities or other clearly-academic activities.” He did not specify whether failure to satisfy the five percent requirement should cause loss of the tax exemption for the revenues from such programs or imposition of an excise tax similar to that imposed by Internal Revenue Code (“IRC”) Section 4942. The five percent figure apparently comes from IRC Section 4942, which requires private foundations to spend at least five percent of their asset value per year on charitable programs or face an excise tax penalty. Congress concluded that the five percent requirement would prevent private foundations from stockpiling funds. (H.R. Rep. No. 413, 1969).

Most, if not all, Division I FBS athletic programs already exceed a five-percent redistribution. In any event, we are far from certain that a five-percent requirement would ensure the sort of revenue redistribution that the reformers seek or end or even limit the current perceived abuses. For example, suppose a Division I athletics program generates \$50 million in revenue each year (a modest amount for an FBS institution; Ohio State, Texas, and several others have budgets at least double \$50 million). Five percent of \$50 million is \$2,500,000, a significant sum but not one that would automatically preclude paying the basketball coach \$4,000,000 or \$5,000,000 per year, particularly as these salaries may be subsidized in ways that might not constitute revenue to the institution. For example, a coach might receive income paid directly to him from a radio or television broadcast contract or a product manufacturer. If the goal is to require universities to do what they say they do in terms of redistribution, Congress would need to base the amount of required redistribution on something other than an arbitrary percentage of assets or revenues. Determining what that should be may, itself, be more difficult than would be worth the cost of regulation.

2. Impose Annual Limits on Targeted Expenditures, Such as Coaches’ Salaries and Recruiting Trips.

This proposal has a certain appeal because it relates directly to perceived abuses under current law. However, as Professor Colombo conceded, there is much debate over whether salaries for executives and employees of charitable organizations should be lower than they would be in the for-profit sector. Further, as he also concedes, the attempt, in IRC Section 162(m), to encourage limits on executive compensation by limiting the employer’s deduction for such compensation has failed because the deduction cap does not take into account incentive-based compensation. We note that incentive-based compensation (e.g., \$100,000 when a team wins a national championship and \$50,000 for a conference championship) is a

commonplace in head coach contracts. Professor Colombo argued that, whatever the potential difficulty, college athletics may be a suitable case for expenditure limits, particularly with respect to recruiting budgets and coaches' salaries and perks. Because there are so many noneconomic, noncharitable reasons to prize football or basketball success, there are few incentives for most schools to adequately police whether they are getting value for money from these expenditures.

Professor Colombo used as his model IRC Section 501(c)(3) limitations on tax exempt organizations. These limit spending on lobbying and impose excise tax penalties for, among others, political activity expenditures, excess business investments and so-called "jeopardizing investments." Significantly, these provisions are narrowly targeted and do not involve compensation of employees. Because the most notable concern in connection with university athletic programs has been compensation of coaches and because there is significant opposition to attempts to limit such compensation, we doubt that Congress would pass legislation imposing a salary cap. Even if Congress were to consider such a cap, creating an effective cap might be difficult because, as described above, a coach's overall compensation might include funds from outside the university.

Professor Colombo also suggested that annual limits might be imposed on expenditures for recruiting and athletic facilities. We agree that Congress might use the tax law for this purpose, but to do so would raise at least two questions.

First, how would Congress describe the limitation? A limitation based on a percentage of revenue generated by the program might be the easiest limitation for the IRS to administer, but, as noted above, would be arbitrary and also might be ineffective. A limitation that would require the IRS to evaluate the "reasonableness" of a particular university's expenditures would create the type enforcement problem we described when discussing use of the tax law to achieve nontax goals. For example, recruiting budgets vary with the geographical location of an institution and its attractiveness to elite prospects. They might prefer to be in warm weather, near the beach, in a large city with myriad entertainment options, or in a major media market. The more "built-in" advantages to some athletics programs, the more need for other programs to spend money to offset them. Similarly, high-profile programs with long traditions and BCS ties pose recruiting challenges to programs attempting to break into the "elite" ranks.

Second, expenditure limitations would have to be enforced either by imposition of an excise tax or loss of tax-exempt status. A tax-exempt university is not interested in a deduction for a coach's salary. If the enforcement mechanism is an excise tax, a university might accept the tax as part of the cost of hiring the best coach. Congress might avoid that problem by making the rate of the excise tax high enough, but it is not clear how high that tax rate would have to be to achieve the result, particularly with a seeming endless stream of boosters with deep pockets happy to underwrite coach salaries and other major expenditures. The other alternative is for Congress to authorize the IRS to terminate the privilege of treating a university's athletics program as tax exempt. That penalty may seem draconian, but remember that the university has the burden of establishing that it is entitled to tax-exempt status in general and that the revenue of a major university athletic program has no tax policy claim to exemption. If Congress is unwilling to authorize withdrawal of the tax exemption, then this is yet another reason why Congress should not start down this path at all.

3. Require Disclosure of Financial and Academic Information Related to the Operation of Athletic Activities via IRS Form 990.

From the perspective of the IRS, a disclosure requirement is the most workable of Professor Colombo's three proposals because it uses an existing mechanism (IRS Form 990), an information tax return filed by organizations exempt from federal income taxation under IRC Section 501(c)(3), and would not (if Congress specifies what must be reported) involve the IRS in extensive rule making. Even if the IRS did not review all the reported information, its availability for public inspection might have the effect reformers desire.

However, athletics departments already disclose a significant amount of information and it is unclear to us what additional disclosure Professor Colombo would require. Athletics programs report substantial information to the Department of Education under the Equity in Athletics Disclosure Act and also submit revenue and expense information to the NCAA. The NCAA reports information, although in the aggregate. In addition, a public university's submission to the NCAA may be subject to disclosure under a state's open records act. Over the past several years the NCAA, in conjunction with the National Association of College and University Business Officers (NACUBO), has developed certain "benchmark indicators" in an effort to develop data that may be compared across institutions. Benchmark indicator data specific to an institution are distributed to that institution along with information that permits some comparison with designated peer institutions.

Despite the benchmark indicator data, comparisons among Division I institutions are difficult. Consider sports information as one example. Because of, among other things, squad size, public interest, media attention, and number and geographical distribution of media outlets that cover a sport, sports information staff and resources are not evenly distributed across sports. Are the expenses of a sports information department allocable to the athletics department or should they be allocated to each individual sport? If to the department, does that not understate the costs of staff and other resources devoted to football, for example? What about facilities? If the athletics director and senior athletics staff are officed in the facility with the football stadium, which facility expenses are attributable to football? On the revenue side, are skybox rentals fully allocable to football even though the skybox is used by its occupant on other than game days? Although the NCAA/NACUBO benchmark indicator project has produced some level of comparative data, major differences in organization and accounting methods and practices still remain.⁹

In addition, IRS Form 990 currently is required only of entities tax exempt under IRC Section 501(c)(3). Although some public universities are tax exempt under IRC Section 501(c)(3) and thus have an obligation to file Form 990, many others are tax exempt only under IRC Section 115(1). If, therefore, Congress chooses to require universities to report additional information despite the concerns noted above, Congress would need to extend the obligation to file a Form 990 to those public universities currently covered only by IRC Section 115(1).

As with Professor Colombo's suggestion to limit certain annual expenditures, discussed above, a final significant question would be what penalty to impose for failure to comply with the disclosure requirement. Here we believe that the only

penalty with teeth is termination of the tax-exempt status of athletics departments. And again, if Congress determines this is too draconian a penalty to apply, then Congress should not start down this regulatory path.

Conclusion

Although many suggest the use of the federal tax code to regulate and curtail college athletics spending, there has been little informed discussion as to how this might be done, with what effect, and at what cost. Professor Colombo deserves much commendation for bringing the full discussion into the forefront. He identifies as a barrier to informed discussion the fact that the tax knowledge of reformers “has appeared woefully inadequate.” In offering a lucid explanation of current law governing tax-exempt status and the UBIT and the substantial impediments to adjusting current law to achieve reform, he fully achieves his goal of educating on how the tax law applies. He also achieves his goal of explaining tax policy and the “standard theoretical paradigm for exemption.” We read his three proposals on the possible uses of federal tax law in connection with reform of major university athletic programs as intended only as suggestions on how the tax code might be used by reformers who remain intent that it should be used. We count ourselves squarely among the growing crescendo of concerned voices—from faculty, tuition-paying parents, members of Congress, and the Knight Commission on Intercollegiate Athletics, among others—that athletics spending increasingly is out of whack and threatens core university values and operations. While we disagree that the federal tax code should be used for policy purposes unrelated to generating revenues, our main concern is that any reform be undertaken with care. Public funds to support higher education are waning and universities are increasingly strapped to support their operations. The worst possible eventuality is one where universities are put to considerable cost to comply with new rules conditioning the exercise of an exemption for athletics spending and yet little or no reform is achieved.

Notes

1. In *Law v. NCAA*, the 10th Circuit Court of Appeals found that an NCAA bylaw that created a coach position with a cap on salary (“restricted earnings coach”) violated the antitrust laws.
2. Public universities are exempt from federal income tax under IRC Section 115(1) because they involve the “exercise of [an] essential governmental function.” Professor Colombo notes that, notwithstanding the exemption under IRC Section 115(1), “many public universities request recognition of exemption under [IRC Section] 501(c)(3) simply to avoid confusion in the minds of potential donors and because grants from private foundations are often limited to ‘charitable’ organizations.”
3. The NCAA is exempt from federal income taxation under IRC Section 501(c)(3).
4. The UBIT is described in IRC Section 511. It applies to state universities covered by IRC Section 115(1) as well as to universities and other organizations covered by IRC Section 501(c)(3). *See* IRC Section 511(a)(2).
5. *See* IRC Section 512(b)(2) (excluding all royalties from the unrelated business income).
6. The bulk of NCAA revenues is derived from media contracts for coverage of the Division I Men’s Basketball Championship.

7. Using the tax law to accomplish nontax goals also may be tempting to Congress because the cost is “off budget.” The tax revenue lost as a result of offering an energy tax credit would not show up as a line item in federal budget documents. The cost of administering a direct program would show up in the budget documents.

8. With regard to athletics competition, there are three ways to meet gender equity under Brown: (1) varsity participation opportunities for male and female students are provided in numbers substantially proportionate to male and female enrollment numbers, (2) an institution has “a history and continuing practice” of adding women’s sports that reflects the athletics interest and abilities of women, or (3) the athletics interest and abilities of women are “fully and effectively” accommodated. In addition, gender equity requires rough equivalence in services and facilities for male and female athletes includes equipment and supplies; scheduling of games and practice times; travel and per diem allowances; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, practice and competition facilities; medical and training facilities and services, housing and dining facilities and services, and sports information services. 34 C.F.R. Section 106.41(c) (1992).

9. One possibility to aid standardization is to secure information in the way that IRS Form 1120 (the corporate income tax return) does it for, among other things, foreign trusts and foregone income. Very specific questions would need to be asked that account for every variation that a university might employ. Take concessions, for example. The form would need to ask whether an athletics department has concessions at athletics events and, if so, whether concessions are handled by the athletics department, by the parent university concessions operation, or outsourced. We owe this suggestion to Nancy Kenny, Associate Athletics Director for Business and Finance at the University of Nebraska-Lincoln. Nancy also is due a big thank you for honing our appreciation of the complex, nonstandard relationship of athletics department and universities.

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