

Sent Via Email

December 9, 2021

Robert Gates
Chair, NCAA Constitution Committee

Dear Mr. Gates:

We write to offer reactions to the updated draft NCAA Constitution shared in your December 7, 2021 memorandum and suggest incorporating several important modifications.

Governance/Board Composition

The governance and leadership of the Association should more fully reflect the principles and purpose articulated in the new Constitution, which states:

“The basic purpose of the Association is to support and promote healthy and safe intercollegiate athletics, including national championships, as an integral part of the education program and the student-athlete as an integral part of the student body.”

With the principles and purpose in mind, we offer the following recommendations:

1. **Demonstrate the NCAA’s commitment to gender equity by requiring at least one male and one female voting athlete on the Board of Governors (BOG) and each division governing board.** We were pleased to see the draft Constitution requires voting representation among college athletes on the BOG and the division boards. We suggest that the requirements for representation be further expanded to achieve equitable athlete representation by requiring at least two college athletes, one male and one female, on the BOG and division boards.

Additionally, as a technical matter and to integrate the preceding recommendation, we believe the draft Constitution should be more precise and amended as below because the Constitution allows the divisions to determine different governing bodies than what currently exists:

*“Student-athletes shall have voting representation, **with at least one male and one female voting athlete**, on the NCAA Board of Governors; **and the division governing boards, that may replace the** Division I Board of Directors, and Division II and Division III Presidents Councils.”*

2. **Appropriately support college athlete well-being by requiring at least one independent director who is a designated expert and/or advocate on college athlete physical and/or mental health on each board.**

A June 2020 Knight Commission [survey](#) of D-I leaders (e.g., CEOs, Directors of Athletics, and Conference Commissioners) found that 80 percent of all respondents supported having board members who explicitly represent the health, safety, and well-being of athletes.

Adding this board expert will directly reinforce the Association’s basic purpose “*to support and promote healthy and safe intercollegiate athletics.*”

3. **Require additional independent directors on each division board.**

Corporate and nonprofit boards typically have a majority of independent directors, who provide unbiased and expert input to reduce the risk that board decisions are unduly influenced by one interest or member group. We continue to believe that constructing the BOG and division boards with a majority of independent directors is in the best interest of college athletes, college athletics, and the educational model of college sports. **At a minimum, there should be a constitutional requirement that the division boards also include voting independent directors for the same reasons and in the same manner that voting independent members are included on the BOG.**

In our June 2020 survey (referenced earlier), Division I leaders favored adding independent directors to the Division I Board of Directors by a more than 2 to 1 margin (52 percent to 24 percent). Division I CEOs were even more supportive of independent directors for the Division I Board, with 63 percent in favor and 18 percent opposed.

4. Clarify and strengthen the definition of an independent director to address key conflicts of interests.

The updated draft NCAA Constitution defines independent directors for the purpose of the BOG composition as: “*...members who are not currently employed or compensated by any member institution.*”

To have truly independent directors, we believe it is essential to amend this definition as follows: “*...members who are not currently employed or compensated by any member institution, **conference, or any commercial or media partners of the NCAA.***”

Clarity on Association Legal Liability and Services

The U.S. Supreme Court’s decision in NCAA vs. Alston served as a primary factor that triggered the constitutional process and underscored the necessity of limiting legal exposure for the Association and its members. It is crucial that the NCAA use this opportunity to align its authority with its responsibility. The draft Constitution is vague on the criteria necessary for a sport to be defined as an NCAA sport—i.e., a sport for which the Association will assume responsibility for rules and services and accept related legal liability for its involvement.

The draft Constitution provides authority for each division to determine the sports for which an Association national championship will be conducted and to determine the access criteria for participation. However, a clear Constitutional requirement should be added that the NCAA’s services, resources, indemnification and legal liabilities will only be provided to sports where the NCAA controls a national championship and receives the championship-related revenue.

These criteria to define “NCAA sports” should be referenced in a new provision in Article 2-Section A (the Association) to make clear that the Association will provide services and bear legal liability **ONLY** for the sports designated for Association championships. Additionally, Article 2-Section A, Item (2) (d), should be amended to make clear that the Association will “establish the rules for sports competition and participation, with flexibility at the division, subdivision or

federated level as deemed necessary,” **only for sports that meet the “NCAA sport” criteria, which are sports designated by the divisions for an NCAA championship—meaning the NCAA owns, operates, and manages the championship, including all related revenue.**

The Association should not leave itself vulnerable to legal liability for the operation of any sport for which there is not an NCAA championship and from which the Association derives no championship revenue.

To put these points in clear terms based on the current operation, the constitutional process must address the NCAA’s historical practice of providing expense-free support and legal defense for FBS football, even though the NCAA doesn’t control the sport’s championship (the College Football Playoff) and its associated revenue.

Finances

1. Association Operating Reserves

We recommend a new section under Article 3 regarding finances to explicitly address the importance of maintaining operating reserves for the Association and the BOG’s responsibility to allocate sufficient reserves annually to support the basic purpose of the Association and all divisions.

In light of potential court rulings, legislative actions, and media contracts that may impact the future of the NCAA’s highest-profile division, along with the more recent depletion of the Association’s reserves, this recommendation would seem a prudent protective measure for the Association.

2. Divisional Revenue Distribution Compliance with Principles

Article 3 gives each division autonomy for revenue distribution to its members. We understand the intent of this provision but suggest that it be made explicit that divisional revenue distribution must comply with and support the Association’s articulated principles. For example, the existing Division I revenue distribution does not comply with the principle of gender equity, as highlighted in the Kaplan Heckler report commissioned by the BOG. The current wording of the Constitution appears to permit these foundational inequities to persist given the future limited authority of the BOG. Divisional revenue distribution should be required to comply with the Association’s Principles and this requirement should be clearly stated in the Constitution.

We would welcome the opportunity to discuss these recommendations with you. We continue to believe that our thoughts and recommendations support our mutual goal of maintaining college athletics as a public trust, rooted in the mission of higher education.

Best regards,



Arne Duncan
Co-Chair



Len Elmore
Co-Chair



Nancy Zimpher
Co-Chair

Cc: Ryan Cassidy, chair, NCAA Division I Student-Athlete Advisory Committee
Jack DeGioia, chair, NCAA Board of Governors
Mark Emmert, NCAA President
Anthony Francois, chair, NCAA Division III Student-Athlete Advisory Committee
Fayneese Miller, chair, NCAA Division III Presidents Council
Jere Morehead, chair, NCAA Division I Board of Directors
Mackenzie O'Neill, chair, NCAA Division II Student-Athlete Advisory Committee
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Members of the Knight Commission on Intercollegiate Athletics
Members of the NCAA Constitution Committee
Divisions I, II and III Conference Commissioners