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MEMORANDUM

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To:	**Craig Lindwarm, Vice President of Governmental Affairs, APLU**
From:	**Randy Nuckolls**
Date:	**July 16, 2021**
Subject:	**Best Practices for Ensuring CGA Compliance with Sherman Act Antitrust Provisions after *NCAA v. Alston***

You have asked me to provide a brief analysis of the impact of the recent Supreme Court decision, *NCAA v. Alston* and the principles of antitrust law embodied in Section 1 of the Sherman Act on the meetings, discussions and activities of the Ad Hoc Athletics Task Force of the Council on Government Affairs of APLU. While APLU is not engaged in direct advocacy on collegiate athletics legislation, it provides a forum for its members to discuss relevant federal relations issues. You have also asked that I provide the CGA with guidance to ensure compliance with the Sherman Act and examples of "Do's" and "Don't" to help the Ad Hoc Athletics Task Force or any other CGA committee avoid any activities that might be viewed as in conflict with the principles of the Sherman Act. While this memorandum is not provided as legal advice to any specific higher education institution, it is provided in the hope that it will be helpful to APLU member government relations officers in the context of the CGA and with their other external communications.

The Sherman Act Antitrust Principles

Generally, Section 1 of the Sherman Act prohibits agreements or understandings, whether express or implied, among competitors that "unreasonably restrain competition". The Sherman Act applies to anticompetitive agreements impacting "commercial activity". Section 1 of the Sherman Act is enforced by the Antitrust Division of the Department of Justice and by the Federal Trade Commission. Most states also have antitrust laws that are enforced by the Attorney General of the state. Also, private parties may bring claims of antitrust violation in federal or state court.

Application of the Sherman Act to Institutions of Higher Education and the *NCAA v. Alston* decision

In recent years, the Department of Justice has placed greater focus on the application of the Sherman Act to the commercial activities of higher education institutions. Most prominently, in 2018, the Department of Justice initiated an investigation into whether certain provisions of the Code of Ethics and Professional Practices of the National Association for College Admission Counseling (NACAC) were violative of federal antitrust law. The NACAC guidelines prohibited members from offering incentives to students who applied for early admission, from recruiting students who had committed to attend another institution, and from soliciting students from a previous applicant pool to transfer unless the student initiated the transfer request. The investigation also asked a number of small liberal arts schools about their practice of sharing information about students admitted through Early Decision. In response to the DOJ investigation the NACAC removed or placed a hold on enforcement of certain of its guidelines. In December, 2019 NACAC and the Justice Department reached a settlement and a consent decree was entered mandating that NACAC remove permanently certain guidelines and NACAC also agreed to increase its antitrust compliance training with employees and members. DOJ has also expressed interest in private law suits regarding so-called "no-poach" hiring agreements between schools, including a major settlement agreement that established a $54.5 million fund for certain faculty after claims that two major universities had an agreement not to compete for medical school faculty.

The June *NCAA v. Alston* Supreme Court decision is an important reminder that the Court views higher education organizations and institutions as subject to Sherman Act antitrust enforcement. The case originated in the United States District Court for the Northern District of California. There the lengthy District Court walked a middle ground. The District Court did not strike down NCAA restrictions on direct compensation of student athletes for participation in intercollegiate athletics (pay for play), giving credence to the NCAA argument that a distinction should remain between amateur athletics versus professional sports. The District Court, however, ruled against the NCAA in regard to its restrictions on education-related benefits for student athletes and imposed an injunction against such restrictions. The Ninth Circuit Court of Appeals upheld the lower court ruling and injunction. The NCAA appealed the Ninth Circuit ruling to the Supreme Court and sought immunity from the normal application of antitrust laws. The student athletes did not appeal the Ninth Circuit ruling in regard to NCAA restrictions on compensation for student athletes. The Supreme Court unanimously upheld the lower court ruling.

Justice Gorsuch wrote the opinion of the Court, providing an informative and entertaining historical review of compensation issues in collegiate athletics. The Court affirmed the lower court injunction against NCAA-wide restrictions on academically related benefits for student athletes as a violation of federal antitrust law. Conference level restrictions were not impacted by the decision. The Court rejected the NCAA argument that the NCAA and collegiate athletics should have broad immunity from the principles of antitrust review and reiterated that the three step antitrust "rule of reason" evaluation applies to restrictions on collegiate athletics as it does for

other potentially anticompetitive agreements. The Court also reminded the NCAA that it was invited to submit to the District Court its thoughts regarding the appropriate definition of academically related benefits.

Since the original plaintiffs did not appeal the Ninth Circuit ruling on the issue of compensation for student athletic activity, the Supreme Court opinion did not address that issue. The Court opinion also did not address the issue of name, image and likeness (NIL) restrictions that were in still in effect at the NCAA at the time of the Court hearing.

The Gorsuch opinion was measured in its comments about the NCAA and its past restrictions on benefits provided to student athletes. That was not the case with the concurring opinion of Justice Kavanaugh. His comments made clear his personal disdain for the NCAA position in seeking immunity from federal antitrust law. His comments were a clear indication that the environment at the Court is likely unfavorable to any continued NCAA restrictions subject to future antitrust challenges that are seen as anticompetitive and contrary to current interpretations of the Sherman Act.

NCAA Announcement on Name, Image and Likeness

On June 30, in response to passage of NIL legislation in several states, legislation pending in Congress and the *NCAA v. Alston* decision, the NCAA announced that the governing bodies of all three divisions of the NCAA were suspending their rules regarding NIL immediately. The NCAA advised that effective July 1st student athletes may engage in NIL activities consistent with the law of the state where their school is located. Students attending schools in states where there is no NIL law may engage in commercial arrangements for NIL without fear of violating any NCAA rules. Schools and conferences are free to require their student athletes to report any NIL agreements reached by the student. The NCAA press release references the continuing consideration of NIL legislation in Congress and reminds students that NCAA "pay for play" restrictions are still in place. Various high profile collegiate athletes have quickly signed NIL agreements.

Noerr-Pennington Doctrine

The Noerr-Pennington Doctrine is a judicially created defense against accusations of antitrust violation that arose out of two Supreme Court cases in the 1960's. In recent years, the federal judiciary has generally interpreted the doctrine as flowing from the First Amendment right to Petition the Government for a Redress of Grievances. Thus, the right of any industry group to come together to discuss and seek legislative or regulatory action is seen as a First Amendment right that outweighs any concern about violation of the Sherman Act antitrust provisions. In effect, the First Amendment right "trumps" the statute. The courts have said this is true even if the result of the legislation would have an anticompetitive outcome.

The CGA Ad Hoc Task Force on Athletics therefore remains on solid footing in coming together to discuss legislative strategy regarding pending NIL legislation in Congress or other legislation impacting higher education institutions.

Best Practices for CGA to Ensure Compliance with Sherman Act

The purpose of the Council on Government Affairs and its various committees is to advance the common federal legislative and regulatory goals of its members. Often the CGA meetings includes outside speakers sharing information about legislative initiatives or executive agency policy developments. Discussions held at CGA meetings are focused heavily on sharing information about proposed appropriations and authorizing legislation in Congress or regulatory actions being taken at federal agencies. The typical CGA strategy discussions and information sharing sessions would rarely if ever be of concern in regard to Sherman Act implications.

Participants in CGA meetings would rarely if ever be the decision maker for their institution on any issues (admission goals and procedures, financial aid packages, faculty hiring and salaries, benefits provided to student athletes) that might be considered "commercial activity" and subject to antitrust rules. Nonetheless, CGA members should remain mindful that sharing information via email or in person about potential actions of your individual school with other schools on such topics could been seen as anticompetitive by some observers. Publicly available information that your school has already announced, or information that has already been decided by your school, particularly if historical information, is not of concern. Sharing what your school may have decided, even if another school then later adopted the same approach would not likely be viewed in conflict with antitrust principles since there was no "agreement" or "collusion" to make a common agreement.

CGA Do's and Don'ts for Compliance with Federal Antitrust Law

- Adopt a standard Antitrust Statement to be the CGA Ad Hoc Taskforce on Athletics. An example is as follows:

The CGA Ad Hoc Taskforce on Athletics is aware of the requirements of the Sherman Act and conducts its meetings in full compliance with federal antitrust principles. The APLU works to ensure that its members do not engage in any discussions or sharing of information from individual institutions that might be viewed as anticompetitive in regard to commercial activity. The primary purpose of CGA is to share information and advance the legislative and regulatory agenda of APLU and its member institutions. CGA conducts such activities within the framework of the Noerr-Pennington doctrine that protects common efforts to pursue legislative or regulatory action under the protection of the First Amendment right to Petition the Government. This statement will be read at the beginning of all meetings of the CGA Ad Hoc Taskforce on Athletics.

- Have a written agenda for each CGA meeting AND stick to the agenda.

- Feel free to discuss any actions or decisions made by your individual institution when such information has been made available to the media and/or the general public.

- Be cautious about discussing or sharing information about any potential decisions your institution might be contemplating in such sensitive areas as tuition, faculty salaries, costs, budget figures, admission formulas, scholarships, education-related benefits, or NIL restrictions for athletes. For example, out of an abundance of caution, it is best if participants in the CGA Ad Hoc Task Force on Athletics do not discuss or share information about what their respective school may be contemplating in regard to education- related benefits or NIL for intercollegiate athletes. Discussing such issues in the context of proposed legislation or compliance with existing state law would be acceptable.

- Feel free to share information or seek information from another institution about financial topics that have already been decided and are not subject to change. For example, asking another institution about the current salaries paid to faculty, or education-related benefits provided to athletes in the previous academic year would not be of concern.

- A higher education organization sharing with its institutional members a list of best practices for financial interactions with a vendor would be acceptable, whereas a group of institutions coming together and agreeing only to accept certain contract terms with an outside vendor or party would raise antitrust red flags.

- Collecting data or conducting surveys of institutions should be requested in writing and should follow the general federal antitrust guidelines.

- Remain mindful of emerging scrutiny on higher education institutions in the area of antitrust enforcement, and when in doubt about the appropriateness of any specific discussions or information requests or exchange, seek guidance from individual institution internal or outside legal counsel.