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Dear Texas Universities:

It has come to my attention that the College Sports Commission is asking Big 12 Conference, Atlantic Coast Conference, and Southeastern Conference members ("Participants") to sign the College Sports Commission's University Participation Agreement ("CSC Agreement" or "Agreement"). By signing, a Participant would become an "opt-in member" of the settlement agreement resolving claims in Case No. 4:20-cv-3919 in the Oakland Division of the United States District Court for the Northern District of California. As the chief legal officer for the State of Texas, whose duties include providing advice, counsel, and legal representation to Texas public universities, I am particularly interested and gravely concerned by the wide-ranging implications entering into such an agreement portends for our State and its institutions. Accordingly, I urge all Texas universities, whether public or private, to decline signing the Agreement for the reasons set forth below.

The Agreement illegitimately extends its reach well beyond the Participant signatories. Specifically, it imposes steep penalties if a Participant brings any suit, action, proceeding, or claim

against the CSC. Not only that, but Participants are penalized for merely encouraging or cooperating with legal actions brought by others, including representatives, student-athletes, or associated entities or individuals, or *any state, state official, or instrumentality of the state*. Determining whether a Participant has violated this prohibition is at the sole discretion of the CSC, with a negative determination resulting in the Participant forgoing all revenue from its conference and rendered ineligible for post-season competition in the sport involved. *See* Agreement Section 28. It is unthinkable that a Participant would agree to be penalized for actions undertaken by any state official, especially the Texas Attorney General.

The rest of the Agreement fares no better. It is replete with one-sided measures, including CSC's sole discretion to impose fines, penalties, and sanctions on Participants with virtually no option for appeal. *See* Agreement Sections 5 and 10. The Agreement requires Participants to prospectively acquiesce to unnamed policies and procedures CSC may adopt in the future, potentially incurring liability for fines, penalties, and sanctions for taking actions the Participant is unaware even constitute a violation. *See* Agreement Section 3. And to make matters worse, the fines, penalties, or sanctions are for an unspecified amount to be determined by CSC with no prior notice of the amount of debt the Participant may incur. Indeed, state universities are constitutionally prohibited against creating a state debt and must not enter into contractual indemnity obligations. "A contractually imposed obligation of indemnity creates a 'debt' in the constitutional sense unless at the time of the agreement it is within the lawful and reasonable contemplation of the parties that it will be satisfied out of current revenues or some currently available fund." Tex. Att'y Gen. Op. MW-475 (1982) at 1. "The opinion went on to state that because of constitutional restrictions on the creation of 'debt' by the state, a state agency would 'ordinarily be unable to execute an enforceable indemnity agreement in favor of another party.'" Tex. Att'y Gen. LO-90-107 (1990) at 1.

Further, the Agreement not only prohibits Participants from filing suit against CSC, but sets forth that Participants may neither "support, advocate for or lobby for any change in federal, state or local law that would alters its obligations under" the Agreement nor bring, encourage, assist, or support any parties bringing a suit or claim. *See* Agreement Section 27. With its broad definition of "representatives," this incredibly broad provision This could prohibit even legislators or other state officials from performing their official duties, which could include lobbying or advocating for change in federal or state law. Even jury trials are waived. *See* Agreement Section 26. It also mandates that Participants agree to binding arbitration. *See* Agreement Sections 23 and 25. But Texas public universities are prohibited by state law from agreeing to binding arbitration. CSC clearly seeks to coerce compliance with its rules and limit a Participant's means of redress if dissatisfaction arises for any reason.

While the Agreement restricts litigation against CSC, it perversely encourages litigation against the Participants themselves. It mandates obligatory language in employment contracts requiring employee compliance with all membership rules. *See* Agreement Section 11. The potential for suits from coaches and other employees would rise exponentially, particularly in response to violations of new CSC policies and procedures implemented without the need for a

contract amendment. The Agreement mandates a litany of individuals—the President or Chancellor, Director of Athletics, head coach of each team, general manager of each team, and indeed “any other individual the CSC deems necessary”—must complete a certification confirming that each Participant fully complied with the membership rules following each academic year. Any “failure or refusal” to provide the certification may result in penalties. *See* Agreement Section 14. This presents two causes for concern: (1) the provision requires certifications from multiple people, some of whom would lack authority to sign on behalf of the Participant; and (2) the inclusion of the phrase “any other individual the CSC deems necessary” risks Participants unknowing failure to submit all necessary certifications.

The Agreement mandates that any agreement between the Participant and a third party require the third party to cooperate with CSC investigations. *See* Agreement Section 19. The Agreement cannot legally bind these third parties itself, thus imposing a burden on Participants to amend all third-party contracts. Third parties may or may not be amenable to such amendments. The Agreement also allows CSC sole discretion to penalize the Participant “or its Representatives” for failure to cooperate in investigations of possible violations of membership rules. *See* Agreement Section 18. More egregious still, this section purports to supersede a Participant’s own disciplinary procedures and contractual terms by mandating that “upon notification from the CSC, [the Participant] shall suspend the involvement of any school official from participating in athletics activity” if the official does not cooperate with the CSC during an investigation. And as currently written, the Agreement is unclear whether violations by third parties for failure to cooperate with an investigation would be imputed to Participants as well.

Finally, the Agreement purports to limit each Participant’s compliance with state law. Because every State has different laws, consistent enforcement across all Participants is unlikely, rendering individual application of the Agreement’s various terms little more than a high stakes guessing game. Even to the extent that some private universities may argue that the analysis of some of these provisions is not applicable to their institutions, the uncertainty of the propriety of these terms as applied to some member institutions should be equally concerning to all member institutions.

As you know, each and every board member has a fiduciary duty to the university it serves. It is that most important duty that mandates not signing the College Sports Commission’s University Participation Agreement that is replete with problems.

For Texas,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style with a large, prominent "K" and "P".

Ken Paxton
Attorney General of Texas