

Time to Reexamine Institutional Cooperation on Financial Aid



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Since top students are in high demand, colleges bid against each other, raising the aid offered these students to levels well beyond their financial need.

Many public and private colleges¹ give out substantial amounts of financial aid in excess of students' demonstrated financial need to attract the most talented students in a competitive marketplace. These colleges see merit aid as an investment in institutional quality. Since top students are in high demand, colleges may have to bid against each other, raising the aid offered these students to levels well beyond their financial need. In the past, some colleges cooperated on financial aid policies to restrain these "bidding wars" and free up more funds for other priorities such as need-based aid. However, following the U.S. Department of Justice's antitrust investigation of private colleges between 1989 and 1991 and subsequent court rulings and settlements, the legal environment around this type of cooperation has been uncertain. As a result, many colleges are reluctant to even discuss the possibility of cooperating on financial aid matters for fear of further government investigations or lawsuits from students and their families.

This paper reviews the history of this issue and analyzes the amount of grant aid that could potentially be redirected to needier students as a result of institutional cooperation. We also identify the legal issues related to facilitating such cooperation. An accompanying memo examines the legal issues in greater depth.

Financial aid for the non-needy

Both merit- and need-based financial aid have existed throughout the history of American higher education. In the 1960s and 1970s, the dominant focus of financial aid policies at the institutional, state, and federal levels was on increasing access and affordability by meeting calculated financial need. During the 1980s and 1990s, tuition and other costs of attending college increased, particularly at private institutions, and federal aid failed to keep pace with these increases. The size of high school graduating classes was decreasing over much of this same period, leading to increased competition for students. Additional competition occurred as some public institutions made efforts to compete directly with private institutions for top students by offering merit aid to both in-state and out-of-state students. In this competitive atmosphere, some institutions became increasingly concerned with their position in college rankings in guides and magazines, while others became concerned with their ability to fill enough seats to remain viable. All of these factors contributed to the increased use of institutional merit aid. Both merit and need-based aid continue to be important ways that colleges try to make themselves both attractive and affordable to a variety of students.

"Merit aid" consists of grants, scholarships, and discounts that are awarded without regard to financial need. This can include aid awarded on the basis of academic or athletic achievements, special talents (such as musical ability), geography, or other non-economic demographic characteristics. Merit aid may go to students with financial need as determined by financial aid formulas, as well as students without such financial need. Financial need is generally defined as the

¹ Unless otherwise noted, the term "college" refers to public and private-non-profit institutions within the 50 states and the District of Columbia that offer bachelor's degrees; private for-profit (proprietary) institutions are excluded.

difference between the cost of attending a college and the amount a student and her family is expected to pay based on their income and other factors.² Grants may also be awarded on a combination of factors including both need and merit. Colleges may also engage in “preferential packaging,” the practice of directing their limited need-based aid funds to the students the school is most interested in enrolling. Thus, the distribution of need-based aid can also have a merit component and vice versa. In addition, colleges can define “need” in ways that direct some need-based aid to students from relatively wealthy families. Recently a few colleges, mostly with large endowments, have announced initiatives to increase financial aid and lower the net cost after financial aid for families with incomes well into the six-figure range. This not only raises the question of whether all “need-based” aid goes to students who are truly “needy” but also signals further departures from past agreements on common methods of needs analysis.

The distribution of need-based aid can also have a merit component and vice versa.

“Tuition discounting” is another term used in describing institutional aid. Tuition discounting measures the percentage of the full price of tuition that students are actually asked to pay after subtracting institutional grant aid. It is possible to calculate discount rates for need-based aid, non-need-based aid, and all aid. “Enrollment management” is the increasingly sophisticated use of data to manage the size and characteristics of incoming classes while also meeting financial targets.³ “Financial aid leveraging” refers to the use of all types of financial aid, including need- and merit-based aid, as a tool in enrollment management. Both need-based and merit grant aid can be “funded” or “unfunded.” Aid is “funded” if it is covered by endowment income, annual fund donations, or another source. It is “unfunded” if it just represents foregone revenue for the institution. This distinction may make a difference in the effect on the institution’s finances or in its ability to shift aid resources from one student to another.

Colleges use merit aid to try to increase (1) enrollment, (2) net tuition revenue, (3) the “quality” of the student body, and/or (4) the diversity of the student body.⁴ Those with empty seats or tight budgets tend to use merit aid for the first two purposes. More selective colleges with larger endowments tend to use it for the third and fourth purposes.⁵

² Financial need is calculated using a “needs analysis” that examines the income and assets of a student and his or her family in detail. There are two standard needs analysis methodologies—Federal Methodology (FM) and Institutional Methodology (IM). FM is used to determine eligibility for federal aid, as well as aid distributed by many states and institutions. IM is used by some (mostly private) colleges to determine eligibility for institutional aid. Some colleges may use a non-standard needs analysis formula. In all cases, an “expected family contribution” (EFC) is calculated and need is defined as the total cost of attendance at a college minus the EFC.

³ Jerry Sheehan Davis, “Tuition Discounting: A Discussion of Non-Need-Based vs. Need-Based Aid at Independent Colleges and Universities,” Association of Independent Colleges and Universities of Pennsylvania (AICUP), 2006, p. 9.

⁴ Davis, 2006; Don Hossler, “The Role of Financial Aid in Enrollment Management,” *New Directions for Student Services*, no. 89, Spring 2000; Jerry Sheehan Davis, “Unintended Consequences of Tuition Discounting,” Lumina Foundation for Education, New Agenda Series, 2003; Kenneth E. Redd, “Discounting Toward Disaster: Tuition Discounting, College Finances, and Enrollments of Low-Income Undergraduates,” USA Group Foundation (Lumina Foundation for Education), New Agenda Series Volume 3 Number 2, December 2000.

⁵ Davis, 2006, p. 3

Overall, substantial use of merit aid helps some individual colleges achieve their desired results, while it may not work for others. Meanwhile, the effect on college access and opportunity across all college students is generally negative in terms of access and affordability.

The results for individual colleges appear to be mixed. These practices have helped some colleges increase enrollment and net tuition revenue.⁶ However, there is evidence that many colleges lose revenue, lose students, or experience a decline in the academic standing of their students as a result of extensive use of discounting.⁷ Ehrenberg, Zhang, and Levin (2005) found evidence that higher use of merit aid is associated with lower enrollment of low-income students, especially in institutions where enrollment is growing.⁸ Redd (2000) found evidence that discounting was associated with higher enrollment of low-income students.⁹

However, when looking at the effect on students across four-year colleges rather than at the results at individual colleges, the pattern seems clear. Increasing merit aid is associated with lower affordability for lower income students. The unintended consequences of using merit aid and non-need-based tuition discounting include “limiting affordability and choice for many low-income and some middle-income students and costing colleges precious dollars that might better have been spent to improve their institutional quality.”¹⁰ To the extent that merit aid is paid for from tuition revenue (or consists of unfunded discounts on tuition), increasing use of merit aid may contribute to increases in tuition, affecting even those at the top of the income spectrum.¹¹

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With competition for top students fierce, using merit aid to try to attract these students can lead to bidding wars, where colleges bid up the amount of merit aid offered. As a result, schools award considerable amounts of institutional aid in excess of any demonstrated need. The overall amount spent on merit aid of this type is greater than would be necessary to achieve their strategic enrollment goals in the absence of these bidding wars. Concerns about this type of bidding war are part of what led to the establishment of “overlap groups” of cooperating institutions in the past, as discussed below.

Several studies use data from the U.S. Department of Education’s National Postsecondary Student Aid Study (NPSAS) to examine merit aid and tuition discounting. NPSAS defines “merit aid” broadly, including any aid awarded without regard to need, even if the aid was used to meet need. Among other findings, Heller (2006) uses NPSAS data to show that between 1995-96 and 2003-04 institutional merit aid rose from \$668 million to \$2.1 billion for public

⁶ James Day, “The Future of Financial Aid Leveraging,” *New Directions for Student Services*, no. 89, Spring 2000; Redd, 2000; Davis, 2006.

⁷ Redd 2000, Davis, 2003

⁸ Ronald G. Ehrenberg, Liang Zhang, and Jared M. Levin, “Crafting a Class: The Trade-Off between Merit Scholarships and Enrolling Lower-Income Students,” *The Review of Higher Education*, Vol. 29 No. 2, Winter 2006, pp. 195-211.

⁹ Redd, 2000.

¹⁰ Davis, 2006, p. 10; Also see Davis, 2003.

¹¹ See, for example, Ronald G. Ehrenberg, *Tuition Rising: Why College Costs So Much*, Cambridge, MA: Harvard University Press, 2002, pp. 79-80.

four-year institutions and from \$1.6 billion to \$4.6 billion for private four-year institutions.¹²

Davis (2003) uses the NPSAS data to show that institutional grants were increasingly given to higher-income students between the late 1990s and early 2000s.¹³ Heller (2006) uses NPSAS to show that in 2003-04, not only did 30 percent of institutional merit aid go to students with family incomes in the top quartile (more than \$92,433), but 21 percent of *need-based* aid also went to these higher-income students.¹⁴

Surveys based on the Common Data Set (CDS), such as the College Board's Annual Survey of Colleges, are another source of data on institutional aid and discounting.¹⁵ The College Board survey collects data on "need-based" and "non-need-based" financial aid from federal, state, institutional, and other sources. Here "non-need-based" means any aid that goes to students who do not have financial need or aid that is in excess of demonstrated need.

Baum and Lapovsky (2006) use this data to look at tuition discounting and merit aid in public and private institutions. They find that the discount rate rose in the late 1990s in both public and private four-year institutions, but has since leveled off in the public sector while continuing to rise slowly in the private sector. In addition, the proportion of institutional aid awarded in excess of need is higher for public four-year institutions than for private four-year institutions.¹⁶

Aid in excess of need: by the numbers

In this paper, we will be focusing on "aid in excess of need," and following CDS in defining this as any aid awarded to those without calculated need or awarded in excess of calculated need. Unless otherwise noted, we use this term to refer only to grant aid of this type. We did our own calculations of aid that met need and aid in excess of need distributed by public and private four-year colleges in 2005-06, using data from the College Board's Annual Survey of Colleges. There were 946 public and private four-year colleges in the U.S. who reported data about institutional aid and unmet need, representing about 40 percent of all four-

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¹² Donald E. Heller, "Merit Aid and College Access," paper presented at Symposium on the Consequences of Merit-Based Student Aid, Wisconsin Center for the Advancement of Postsecondary Education, University of Wisconsin, Madison, March 2006, Table 1.

¹³ Davis, 2003.

¹⁴ Heller, 2006.

¹⁵ Common Data Set Initiative, www.commondataset.org; Annual Survey of Colleges, College Board, <http://professionals.collegeboard.com/higher-ed/recruitment/annual-survey>

¹⁶ Sandy Baum and Lucie Lapovsky, "Tuition Discounting: Not Just a Private College Practice," The College Board, 2006.

year institutions and 50 percent of the students attending four-year institutions.¹⁷ These colleges distributed \$11.2 billion in institutional grant aid in 2005-06, representing over half of all grant aid received by students.¹⁸ (See Table 1)

Table 1: Sources of Grant Aid at Public and Private Four-Year Colleges in 2005-06		
Source	Grant aid	Percentage of total grant aid
Federal	\$3.990 billion	20%
State	\$3.796 billion	19%
Institutional	\$11.191 billion	55%
External	\$1.442 billion	7%
Total	\$20.420 billion	- -

Note: Calculations by authors on data from Annual Survey of Colleges 2007 and Annual Survey of Colleges 2006-2007, College Board.
Figures are rounded to the nearest million and may not add to the totals shown due to rounding.

Most of this aid went to meet need, but \$3.3 billion was aid in excess of need. The 330 public institutions reporting data awarded about \$1.2 billion of this aid and the 616 private institutions awarded about \$2.2 billion. This represented 49 percent of institutional grant aid for the public institutions and 25 percent for the private institutions. Since this is based on less than half of the four-year colleges in the U.S., this represents a lower bound on the total amount of institutional grant aid in excess of need that year, and the total may be much higher.¹⁹ (See Table 2)

Table 2: Institutional Need- and Non-Need-Based Aid at Four-Year Colleges in 2005-06			
Sector	Need-based	Non-need-based	Percentage non-need based
Public four-year	\$1.240 billion	\$1.178 billion	49%
Private non-profit four-year	\$6.602 billion	\$2.171 billion	25%
All four-year	\$7.842 billion	\$3.349 billion	30%

Note: Calculations by authors on data from Annual Survey of Colleges 2007 and Annual Survey of Colleges 2006-2007, College Board.
Figures are rounded to the nearest million and may not add to the totals shown due to rounding.

¹⁷ There are 1899 public and private not-for-profit institutions in the 50 states plus DC that were surveyed by the College Board in its Annual Survey of Colleges (ASC) 2006-2007 and/or Annual Survey of Colleges (ASC) 2007. 1366 of the 1899 reported financial aid data for academic year 2005-2006 on ASC 2006-2007 or ASC 2007. 946 of the 1366 reported any data regarding grants in question H1 and reported data for first-time full-time freshmen in questions H2b, H2i, and H2j and were included in our calculations. These 946 institutions have approximately 4.4 million full-time equivalent students. Data from IPEDS indicates that there were 2332 public and private four-year institutions in 2005-2006 with a total of 8.8 million full-time equivalent students. This means that about 433 colleges are not included in our calculations because they were not surveyed by the College Board and another 953 were not included because they did not report the relevant data on the survey. Calculations by authors on data from Annual Survey of Colleges 2007 and Annual Survey of Colleges 2006-2007, College Board, and Integrated Postsecondary Education Data System (IPEDS), National Center for Education Statistics (NCES), U.S. Department of Education, 2005-2006.

¹⁸ Calculations by authors on data from Annual Survey of Colleges 2007 and Annual Survey of Colleges 2006-2007, College Board.

¹⁹ *ibid.*

To provide some context for these amounts, we calculated the amount of financial need of incoming full-time freshmen that was not covered by financial aid grants, work study, or subsidized loans in 2005-06. For the same group of 946 colleges, this unmet need totaled approximately \$2.4 billion, or 28 percent of the need of incoming freshmen. For the public institutions, this total was about \$1.3 billion, or 35 percent of total need. For the private institutions, it was \$1.1 billion, or 23 percent of total need.²⁰ (See Table 3) Again, since these figures include only about half of the colleges in the U.S., the actual total amount of unmet need is much higher. It is also important to note that these figures are for full-time freshmen only and are therefore not directly comparable to the figures given above for grant aid to all undergraduates. The figures for unmet need for all undergraduates would likely be at least four times the figures for first-time full-time freshmen. Still, this comparison demonstrates that colleges are distributing large sums of grant aid in excess of need without meeting the full need of other lower-income students.

Table 3: Unmet Need for First-Time Full-Time Freshmen at Public and Private Four-year Colleges in 2005-06		
Sector	Unmet need	Percentage of Need that is unmet
Public four-year	\$1.321 billion	35%
Private non-profit four-year	\$1.077 billion	23%
All four-year	\$2.399 billion	28%

Note: Calculations by authors on data from Annual Survey of Colleges 2007 and Annual Survey of Colleges 2006-2007, College Board.
Figures are rounded to the nearest million and may not add to the totals shown due to rounding.

Shifting resources currently used to award aid in excess of need to students with unmet need would arguably be a better use of institutional aid dollars. However, there are several reasons why it may not be possible to shift these resources on a dollar-for-dollar basis. Aid in excess of need may be used to attract students who can afford to pay a high percentage of full tuition and fees, freeing up more resources for aid that meets need. Donors may restrict funds to be used for specific purposes, such as aid based on certain non-need-based characteristics. In addition, unfunded discounts of tuition cannot easily be converted into funded grants to cover books, transportation, or off-campus living expenses. Even with these limitations, increased institutional cooperation could reduce the amount of aid in excess of need that is directed to talented students without financial need as a result of bidding wars.

Institutional cooperation on financial aid: past and present

At one time, as many as 150 colleges belonged to 24 overlap groups, created in part to focus aid on those with financial need and prevent bidding wars for other students. The groups engaged in informal or formal cooperation and coordination on financial aid policies, and sometimes on the calculation of “expected family

²⁰ Calculations by authors on data from Annual Survey of Colleges 2007 and Annual Survey of Colleges 2006-2007, College Board.

contributions” for individual applicants, that is, the amount the student and the student’s family are expected to pay before receiving financial aid loans and grants. The Ivy Overlap Group, which included the eight Ivy League colleges plus MIT, met annually starting in the late 1950s.²¹

In 1992 Congress carved out an exemption that explicitly protects colleges— in certain circumstances— from the application of antitrust laws.

From 1989 to 1991, the federal Department of Justice investigated 57 private four-year colleges to determine if they were engaged in price-fixing in violation of antitrust laws. The department ended up bringing a suit against the members of the Ivy Overlap Group. The eight Ivy League colleges quickly settled with the department and ended meetings of the Ivy Overlap Group. Other similar groups discontinued their meetings out of concern that they might also become targets of Justice Department action. MIT, however, felt that the Justice Department had gone too far in its interpretation of antitrust law and pursued the case in court, eventually reaching a more favorable settlement with the department following district and appeals courts rulings. The appeals court ruling said that the district court should have taken into account MIT’s arguments that the social and economic benefits of institutional cooperation on financial aid might outweigh any harm from this cooperation. However, MIT settled with the department before the case went back to the district court, so the question of the correct application of antitrust law to the overlap group activities was not clearly resolved. MIT’s settlement gave it wider latitude in cooperating with other institutions regarding financial aid than the earlier Ivy League settlement gave those schools. (See the accompanying legal brief for a more detailed description of the legal issues.)

In 1992 Congress carved out an exemption that explicitly protects colleges – in certain circumstances – from the application of antitrust laws. This exemption applies only to colleges that are “need-blind,” which means they admit students without considering their financial situation or need for financial aid. The exemption allows these colleges to form groups to agree or attempt to agree to:

1. Award to students financial aid only on the basis of demonstrated financial need;
2. Use common principles for needs analysis;
3. Use a common aid application; or
4. Exchange family financial data with regard to commonly admitted students.²²

Many college officials say they only *reluctantly* give a lot of aid in excess of need because their competitors do the same. If they lose talented students because of aid offers by other institutions, their rankings suffer and they have an even tougher time recruiting star students the next time around. McPherson and Shapiro (2002) point out:

It is important to understand [...] that most universities and colleges have very little ability to influence this situation by their individual actions. [...] If a single individual institution were to depart sharply from its competitors’ practices, say, by cutting

²¹ Rupert Wilkinson, *Aiding Students, Buying Students: Financial Aid in America*, Nashville: Vanderbilt University Press, 2005, p. 131-132.

²² See Improving America’s Schools Act of 1994, §568, (15 U.S.C. 1 note); a previous version of the exemption was passed in 1992; this version was extended in 1997 and 2001 and currently expires September 30, 2008.

back on aid offers to more affluent students and expanding its aid to high-need students, it would quickly lose enrollment and tuition revenue.²³

This situation cries out for cooperation to focus on aid that meets need. Yet despite the common assertion that the growth of aid in excess of need is the result of a bidding war problem, and the acknowledgement that it can negatively affect both institutions and students, there is only one group, consisting of 27 elite institutions, that is taking advantage of the antitrust exemption enacted by Congress.²⁴

In a recent study, the Government Accountability Office (GAO) found that the few schools taking advantage of the current antitrust exemption limit their use primarily to having common principles for needs analysis. GAO found that their use of the exemption did not have a significant impact on affordability or the likelihood of enrollment at the colleges using it.²⁵ This suggests that the relatively limited cooperation this group engages in at least does no harm. In a similarly detailed statistical study, Hoxby (2000) looked at financial aid at Ivy Overlap Group institutions before and after the Department of Justice’s antitrust investigation. She found that the cessation of overlap group meetings resulted in “aid that was less progressive with respect to parents’ income and slightly more sensitive to merit.”²⁶ This suggests that broader institutional cooperation may help institutions target more aid to low-income students.

Why don’t more institutions take advantage of the exemption?

One possible explanation for the small number of institutions using the current exemption is that the requirement that institutions be need-blind in their admissions is too restrictive, too vague, or both. The exemption is available only to “institutions of higher education at which all students admitted are admitted on a need-blind basis.” The statute defines need-blind as “without regard to the financial circumstances of the student involved or the student’s family.”²⁷

It is difficult to tell how many colleges beyond the 27 currently using the exemption might also be eligible to use it because there is little data about “need-blind” admissions. On the College Board’s Annual Survey of Colleges conducted during 2005-06, more than 700 colleges answered “yes” to the question “Do you practice need-blind admissions?”²⁸ However, it is unclear if this means these colleges admit *all* students without regard to need, or that they generally practice need-blind admissions, subject to certain exceptions, such as for students

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²³ Michael S. McPherson and Morton O. Shapiro, “Changing Patterns of Institutional Aid: Impact on Access and Education Policy,” in Donald Heller, ed., *Condition of Access: Higher Education for Lower Income Students*, Westport, CT: American Council on Education and Praeger Publishers, 2002.

²⁴ A list of members and other information about the “568 Presidents’ Group” (named for the section of the 1994 legislation that contains the antitrust exemption) can be found at www.568group.org.

²⁵ U.S. Government Accountability Office (GAO), “Schools’ Use of the Antitrust Exemption Has Not Significantly Affected College Affordability or Likelihood of Student Enrollment to Date,” GAO 06-963, September 2006.

²⁶ Caroline M. Hoxby, “Benevolent Colluders? The Effects of Antitrust Action on College Financial Aid and Tuition,” National Bureau of Economic Research (NBER) Working Paper 7754, June 2000.

²⁷ Improving America’s Schools Act of 1994, §568, (15 U.S.C. 1 note).

²⁸ 748 of the 946 colleges who reported data about institutional aid and unmet need (see footnote 16) answered yes; the others either answered no or are marked as unknown. Calculations by authors from Annual Survey of Colleges 2006-2007.

admitted from the waitlist or international students. A recent news story about college financial aid policies explains that at the start of the admissions process a college may admit students without regard to need, providing the students with institutional grants if applicable. But once the aid budget is used up, the college only admits students who can pay full freight. Furthermore, some colleges *operate* need-blind in a given year, and perhaps in most years, but may be unwilling to make a public commitment to do so in all years.²⁹

One reason that some colleges prefer being need-aware is that being need-blind without being able to meet full need may hurt both the college and students. Failing to meet full need can lead to students turning down offers of admission, hurting the institution's "selectivity," a major component of popular college rankings reports. Furthermore, for students, inadequate aid can lead to lower retention and completion rates and higher debt at graduation.³⁰

A second factor may be misconceptions about the eligibility requirements for the exemption. Some colleges have been under the mistaken impression that they must commit to meeting the *full* financial need of *all* admitted students in order to qualify for the exemption. Very few institutions would meet that criterion.³¹ Another misconception is that colleges would not only have to be need-blind, but would also have to award all aid on the basis of demonstrated need.³² The only eligibility requirement in the current exemption is that colleges be need-blind. Therefore, a need-blind college that awards aid in excess of need to some students would still be eligible.

Third, institutions may find the activities that are allowed under the exemption to be inadequate to make their use of the exemption worth the effort. For example, a college may be interested in working with other colleges to limit, but not eliminate aid in excess of need. Under the present statutory exemption, if this college is need-blind and therefore eligible to use the exemption, it would be allowed to agree with other eligible colleges to eliminate aid in excess of need entirely, but they would not be allowed to try to limit it. Colleges that think they would not likely be able to reach that type of agreement would not bother to form a group to try. Rather than eliminating aid in excess of need entirely, colleges might be more inclined to cooperate if they could reach an agreement to increase aid meeting need by limiting the percentage of institutional grant aid that is awarded in excess of need or capping the number or size of aid awards in excess of need.

Finally, it is possible that colleges do not want to focus their aid on students with financial need, and that they use the "bidding war" and the antitrust laws as a rationale to continue their current practices. However, there is evidence that

²⁹ Scott Jaschik, "Shifting Gold Standard for Aid Policy," Inside Higher Ed, March 24, 2008, <http://www.insidehighered.com/news/2008/03/24/aid>.

³⁰ Davis, 2006.

³¹ For 2005-06, only 40 of 946 colleges reporting this data reported being both need-blind and meeting full need for all first-time full-time freshmen. Calculation by authors from Annual Survey of Colleges 2006-2007 and Annual Survey of Colleges 2007, College Board.

³² See GAO Report, p. 11 on the misconception about awarding all aid on the basis of need; awarding only need-based aid was historically the practice of the Ivy Overlap Group and the Pentagon/Sisters Overlap Group (see House Report 110-577, p. 2) and continues at most of these colleges. Only 67 of 946 colleges reporting this data reported being need-blind and distributing no institutional grant aid in excess of need in 2005-06. Calculation by authors from Annual Survey of Colleges 2006-2007 and Annual Survey of Colleges 2007, College Board.

colleges are concerned about these problems and interested in cooperating to alleviate them.³³

Opening the door to more cooperation

With billions of dollars of institutional grant aid going to students with no calculated need or in excess of calculated need, it is worth exploring whether a better-utilized exemption could divert at least some of that funding into covering some of the unmet need for low-and moderate-income students. We asked a respected antitrust law firm whether the current state of the law, either under the exemption or the case law, allows for more cooperation than is currently occurring. As they explain in detail in the attached memo, the answer is, essentially: *there is arguably some room under current law, but it is too dangerous for a group of colleges to enter it. More cooperation will only get the approval of a college's lawyers if there is a clearer, broader exemption in statute.*

More cooperation will only get the approval of a college's lawyers if there is a clearer, broader exemption in statute.

Congress could make the current exemption, which has proved at least harmless, permanent. In addition, Congress could carve out additional temporary exemptions to see whether they yield positive results. Two areas to consider are the eligibility criteria for the exemption and the activities allowed under the exemption. By maintaining the exemption's clear prohibition on the coordination of individual student financial aid packages, Congress can continue to ensure that consumers are protected from attempts to misuse the exemption by collaborating to set unfair prices for individual students. In this section, we suggest some ideas for what these additional temporary exemptions might look like.

Eligibility for the exemption

Getting beyond eligibility based solely on need-blind admissions would allow more colleges to participate without risking the possible negative effects of being need-blind without meeting full need. The stipulation that colleges need to be "need-blind" to engage in cooperation on financial aid first appeared in the MIT settlement in January 1994 and was added by Congress to the existing exemption later that year. It appears that in both cases, the adoption of this eligibility criterion was meant to ensure that only institutions committed to socially beneficial financial aid policies would be able to cooperate on financial aid matters.³⁴

It is worth considering whether there is a need for any eligibility criteria for additional temporary exemptions. An alternative to up-front eligibility criteria might be monitoring any agreements reached to see if they are resulting in increased access and affordability. Colleges that fail to improve their performance on such measures as the number of low-income students or the cumulative debt of graduating seniors within a specified time period might lose their eligibility to engage in further cooperation on financial aid. If any additional temporary exemptions did have eligibility criteria, these should be minimum thresholds that establish the institution's commitment to need-based aid as a means of making

³³ See for example Davis, 2006. In addition, the authors' personal conversations with officials of colleges and associations of colleges also suggest that colleges are interested in cooperating to alleviate the problems caused by "bidding wars."

³⁴ See Wilkinson, 2005, p. 199.

Providing an expanded menu of possible ways to cooperate – using ideas from throughout the higher education community – will increase the likelihood of colleges using the exemption.

opportunity affordable for students from diverse economic backgrounds. For example, colleges might qualify by demonstrating that they are need-blind for most students, meet full need for most students with only grants, work-study and subsidized loans, limit annual increases in net tuition, or enroll a substantial number of students from low-income backgrounds.

Allowed activities

Institutions that meet the eligibility criteria, if any, set forth in the new exemptions would then be given the option of entering into agreements with other colleges that would help them maintain or even increase their commitment to access and affordability. Providing an expanded menu of possible ways to cooperate to promote these goals, using ideas from throughout the higher education community, will increase the likelihood of colleges using the exemption. Carefully crafting these options gives Congress the chance to send a strong signal in support of institutional policies for need-based aid and the enrollment of low-income students.

Colleges actually might benefit from the ability to agree to maintain or improve upon the minimum thresholds required by the eligibility requirements. For example, a group of colleges in a local area might be eligible for the exemption because they have at least 25 percent of their students receiving Pell grants, but they might want to increase this percentage to 30 percent. By doing so together, they lower the risk that making this commitment will harm them competitively. Another group of colleges might be eligible because they meet full need for most students, but want to work towards meeting full need for all students by agreeing to limits on aid awarded in excess of need. In the absence of these types of agreements, it might be difficult for individual colleges to maintain the minimum threshold commitments through changing economic and fiscal circumstances. Colleges might also benefit from the ability to agree to limit non-need-based aid to a specified percentage of institutional grant aid, or to set common self-help expectations (loans, work-study, and summer earnings) for students who receive financial aid.

Even just the ability to exchange data on financial aid outcomes for prior years could help a group of colleges shift more resources from aid in excess of need to aid that meets need. In the past, arrangements of this sort have helped curb excessive use of aid in excess of need to “bid” for students simply because institutions know their peers will see the results.³⁵

All of these activities would make it possible for colleges to avoid risking their financial well-being and position in the marketplace when adopting bold new initiatives to strengthen need-based aid and increase low-income enrollment.

³⁵ See Wilkinson, 2005. p. 127.

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Memorandum To: Robert Shireman, TICAS
Matthew Reed, TICAS

From: Wayne D. Collins
Vittorio E. Cottafavi

Antitrust and Financial Aid in Higher Education

This memorandum analyzes the current state of antitrust law as it applies to the exchange of financial aid information among institutions of higher education.

The memorandum begins with a brief description of the antitrust concerns expressed by the Department of Justice (“DOJ”) during its investigation of the Overlap Group in the early 1990s, followed by a detailed look at the DOJ litigation challenging the activities of the Overlap Group and the consent decree and legislation that resulted from the challenge. The memorandum concludes with an analysis of the alternatives available to institutions of higher education for the continuation, and possible expansion, of the Overlap-like¹ activities currently exempted from the antitrust laws under the Need-Based Education Aid Act of 2001.

As set out in more detail below, while there is no surviving judicial finding of illegality as to any of the Overlap activities, nor a still active consent decree barring any of these activities, we believe that there remains substantial antitrust risk in engaging in activities beyond the scope of the current legislative exemption. As a result, we believe the more prudent approach would be to ask Congress to broaden the current exemption by expanding the activities specifically allowed under the exemption and/or altering the eligibility requirements to allow more schools to take advantage of the exemption.

I. Background: The Overlap Group and the DOJ Challenge

In 1958, the eight Ivy League colleges and the Massachusetts Institute of Technology (“MIT”) formed the Ivy Overlap Group in order to collectively determine the financial aid packages offered to commonly-admitted students. The Overlap agreement contained three primary provisions.

- First, members agreed to award all financial aid solely on the basis of financial need, thereby eliminating merit-based scholarships.

¹ By “Overlap-like,” we mean any sharing of information or agreements between colleges or universities related to financial aid determinations.

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- Second, members agreed to develop and employ a common methodology for family financial contributions.
- Third, members agreed to meet each spring to exchange financial information for individual students admitted to two or more member schools in order to enable these schools to jointly determine a common number for each family's contribution.

As a result of these activities, aid applicants would receive aid packages containing the same expected family contribution regardless of which Overlap school a student decided to attend. As stated in the Manual of the Council of Ivy League Presidents, the objective of this program was to “neutralize the effect of financial aid” so that students would be free to choose among Overlap institutions for non-financial reasons.

In 1989, the DOJ opened an investigation to determine whether the Overlap Group agreements constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.² On May 22, 1991, after over two years of investigation, the DOJ filed suit against the Overlap members, alleging that, by agreeing on the amount of money that families of admitted students were expected to pay towards their child's education, the Overlap schools were engaging in per se illegal price-fixing.³ On the same day, all eight Ivy League Overlap members entered into a consent decree with the DOJ, with only MIT deciding to defend its participation in the Overlap Group on the merits and proceed to trial.

II. The Applicable Law: Section 1 of the Sherman Act

Section 1 of the Sherman Act provides, in pertinent part, that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, is declared to be illegal.”⁴ Courts long ago realized that all contracts restrain trade in some way,⁵ and therefore have interpreted Section 1 to prohibit only those contracts or conspiracies that “unreasonably” restrain trade.⁶ Notably, the courts have interpreted

² 15 U.S.C. § 1.

³ Another group of schools, called the “Pentagonal/Sisters group” and consisting of Amherst, Barnard, Bowdoin, Bryn Mawr, Colby, Mount Holyoke, Middlebury, Smith, Trinity, Tufts, Vassar, Wellesley, Wesleyan, and Williams, also participated in parallel Overlap activities. The Pentagonal/Sisters group met at the same location and at the same time as the Ivy Overlap group, but met and “compared notes” as a separate group. Gary Putka, *Do Colleges Collude on Financial Aid?—Elite Schools Compare Notes on Applicants*, WALL ST. J., May 2, 1989, at B1. However, the DOJ never filed suit against the Pentagonal/Sisters group for any antitrust violations.

⁴ *Id.*

⁵ *See* Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”).

⁶ Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

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the reach of the Sherman Act to be coextensive with the constitutional power of Congress under the Commerce Clause.⁷

As a result, a violation of Section 1 requires a showing of four distinct elements:

1. A plurality of actors with the legal capacity to conspire with one another.
2. An agreement among these actors.
3. A restraint of trade or commerce as the object of the agreement.
4. The restraint must be unreasonable within the meaning of the antitrust laws.

Courts have developed three general standards to determine what constitutes an unreasonable restraint of trade: the per se rule, the rule of reason analysis, and the “quick-look.”

The “per se rule” is a conclusive presumption of unreasonableness flowing from the nature and likely effects of the challenged conduct. The Supreme Court has held that a restraint that “facially appears to be one that would always or almost always tend to restrict competition and decrease output,” rather than one designed to “increase economic efficiency and render markets more, rather than less, competitive,” may be deemed to be illegal per se and may be condemned without further analysis.⁸ Per se illegal restraints are “plainly” or “manifestly” anticompetitive⁹ and have a “pernicious effect on competition and lack...any redeeming virtue.”¹⁰ Per se rules permit courts to avoid the “significant costs” in “business certainty and litigation efficiency” that a full-fledged factual inquiry would entail.¹¹ The Supreme Court has

⁷ See, e.g., *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 241-42 (1980).

⁸ *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979) (citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 14 (1978)); accord *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); see *NCAA v. Board of Regents*, 468 U.S. 85, 103-104 (1984) (“Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (noting that per se illegal restraints are unlawful “without elaborate inquiry as to the precise harm they have caused or the business excuse for their use”).

⁹ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *Broadcast Music*, 441 U.S. at 8; *National Soc’y of Prof’l Eng’ers v. United States*, 435 U.S. 679, 692 (1978); *Sylvania*, 433 U.S. at 50.

¹⁰ *Northern Pac.*, 356 U.S. at 518 (1958); accord *Northwest Wholesale*, 472 U.S. at 289; *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 & n.9 (1980); *United States v. Topco Assocs.*, 405 U.S. 596, 607 (1972); *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 498 (1969); *United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966); *White Motor Co. v. United States*, 372 U.S. 253, 262 (1963).

¹¹ *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 343-344 (1982); accord *Northwest Wholesale*, 472 U.S. at 289; see *Sylvania*, 433 U.S. at 50 n.16 (“Per se rules thus require the Court to make broad generalizations about

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warned that “[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations.”¹² The Court has narrowly confined the application of the per se rule to only certain well-defined categories of conduct, which today include horizontal price-fixing, horizontal market allocation and certain tying and group boycott arrangements.

The “rule of reason” is the standard that generally applies to categories of conduct that do not fall within a per se illegal category. Under the rule of reason, the plaintiff bears the burden of proof of showing the unreasonableness of the challenged restraint. Modern antitrust law holds that an unreasonable restraint is a restraint that is anticompetitive, that is, a restraint that creates or facilitates the exercise of market power to the detriment of the consumer. Anticompetitive restraints typically are proven by showing that the restraint increased market prices, decreased market output or reduced the rate of product improvement or technological innovation in the market when compared to what would have happened absent the restraint. Some courts allow a plaintiff to make a prima facie rule of reason case by showing that the defendant has imposed or participated in some restraint of trade and has market power, that is, the ability to adversely affect market price or market output.¹³ If the plaintiff meets this burden, then the burden shifts to the defendant to come forward with evidence that the challenged conduct has at least some procompetitive virtues.¹⁴ If the defendant meets its burden, the plaintiff can rebut by showing that the restraint was not “reasonably necessary to achieve the stated objective” or that “those objectives can be achieved in a substantially less restrictive manner.”¹⁵ Otherwise, the harms

the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials”); *Northern Pac. Ry.*, 356 U.S. at 518 (“This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.”).

¹² *Topco Assocs.*, 405 U.S. at 607-08; *accord Broadcast Music*, 441 U.S. at 9; *Sylvania*, 433 U.S. at 47-59 (1977); *White Motor*, 372 U.S. at 263; *see Maricopa County*, 457 U.S. at 349-51 n.19 (“a new per se rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged”).

¹³ *NCAA*, 468 U.S. at 110.

¹⁴ *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) [hereinafter *Brown Univ. II*].

¹⁵ *See, e.g.*, *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 385 (2d Cir. 2005); *Care Heating & Cooling, Inc. v. American Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1064-65 (11th Cir. 2005); *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 506-07 (2d Cir. 2004); *Nat’l Hockey League Players’ Ass’n v. Plymouth Whalers Hockey Club*, 325 F.3d 712, 718 (6th Cir. 2003); *Brown Univ. II*, 5 F.3d at 669; *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

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and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.¹⁶ The plaintiff should bear the burden of persuasion in this weighing, but the courts have not been clear on this point.¹⁷

A third standard, called the “abbreviated rule of reason” or, more commonly, the “quick-look,” has recently emerged.¹⁸ The “quick look” raises a rebuttable presumption of unreasonableness for restraints that are very likely to be anticompetitive (especially in raising market prices or lowering market output) but which do not trigger the conclusive presumption of unreasonableness of the *per se* rule.¹⁹ However, the defendant can rebut the presumption by establishing some legitimate procompetitive justifications, which would then require the challenged arrangement to be subject to a full rule of reason analysis.

III. Judicial Application to College Financial Aid

In 1991, the DOJ filed suit in the Eastern District of Pennsylvania to commence *United States v. Brown University*.²⁰ The government’s one-count complaint charged that the defendants—the eight Ivy League schools plus MIT—unlawfully conspired to restrain trade in violation of Section 1 of the Sherman Act by collectively determining the amount of financial assistance they would award students. The eight Ivy League schools settled at the time of the filing of the complaint; only MIT proceeded to trial. The district court found for the government, but the Third Circuit reversed because the lower court had applied an incorrect legal standard to determine the reasonableness of MIT’s conduct under the Sherman Act. Before the district court could resolve the case on remand, MIT and the DOJ settled and the case was dismissed.

As far as we can determine, the district court and Third Circuit opinions in *United States v. Brown University* contain all of the Overlap-related substantive antitrust case law. In *Kingsepp v. Wesleyan Univ.*,²¹ a then-recent graduate of Wesleyan University brought an

¹⁶ See, e.g., *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998).

¹⁷ From a reading of the cases, it appears that some courts may require the defendant in the second step to prove that the procompetitive benefits of the restraint outweigh its anticompetitive costs. If the defendant satisfies this burden, then the plaintiff may prove a Section 1 violation even if the restraint is, on balance, procompetitive if there was a less competitively restrictive means of achieving the same procompetitive objective.

¹⁸ See, e.g., *California Dental Ass’n v. FTC*, 526 U.S. 756 (1999); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *NCAA*, 468 U.S. at 109-10; see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n.3 (2006) (recognizing “quick look” as a mode of analysis).

¹⁹ See *NCAA*, 468 U.S. at 109.

²⁰ *United States v. Brown University*, 805 F. Supp. 288 (E.D. Pa. 1992) (*Brown I*), *rev’d and remanded*, 5 F.3d 658 (3d Cir. 1993) (*Brown II*).

²¹ 142 F.R.D. 597 (S.D.N.Y. 1992).

antitrust treble damages class action against the eight Ivy League colleges plus Wesleyan, Amherst, Stanford and Williams. The plaintiff's lawyers, and not the named plaintiffs, are often the moving force in these types of litigations. After the plaintiff's motion for class certification was denied on the grounds that his lawyer was inadequate to represent the class, the action was abandoned without any judicial decision on the merits.

A. The District Court Opinion

MIT contended, as a threshold matter, that the activities of the Overlap Group were not commercial activities in "trade or commerce" and hence were not subject to scrutiny under the Sherman Act. MIT argued that the Overlap Group had a non-commercial impact, was not commercially motivated, and was revenue neutral.²² Instead, MIT portrayed the Overlap Group as charitable and directed toward advancing educational and socio-economic diversity within the student body of member schools and maximizing the effective use of privately donated funds.²³ The district court disagreed. The district court noted that MIT "is a significant commercial entity is beyond peradventure."²⁴ The court noted that MIT provides educational services to its students in exchange for tuition payments, calling this a most common form of "commerce."²⁵ The court rejected MIT's characterization of financial aid as "charity," and recharacterized it as a "discount" off the price of college offered to financial aid recipients. The court concluded: "Not only did the effects of Overlap fall within the 'sphere of commerce,' but its existence struck at the heart of the commercial relationship between school and student."²⁶

Turning to the merits, there was no argument that the members of the Overlap Group had the legal capacity to conspire, that the members had agreed among themselves, and that these agreements restricted their freedom of action and hence were "restraints" within the meaning of Section 1. Therefore, the only question was whether the challenged restraints were unreasonable for Sherman Act purposes.

The DOJ urged that the per se rule be applied, since the challenged activities restrained prices charged by schools that competed against one another for students. The district court agreed that the Overlap agreements fit literally within the per se illegal category of horizontal price-fixing:

²² *Brown I*, 805 F. Supp. at 297-98.

²³ *Id.*

²⁴ *Id.* at 298.

²⁵ *Id.*

²⁶ *Id.*

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The Ivy Overlap Group members, which are horizontal competitors, agreed upon the price which aid applicants and their families would have to pay to attend a member institution to which that student had been accepted. Further, the Ivy Overlap Group's agreed-upon ban on merit scholarships foreclosed the possibility that non-aid applicants could receive a discount based on any type of meritorious achievement.²⁷

The court also noted that the Supreme Court had found horizontal agreements on discounts to be a variant of per se illegal horizontal price-fixing.²⁸ However, the court also recognized that the Supreme Court had cautioned against the rote application of the per se rule to professional associations, which like the Overlap members may have public interest as well as commercial motivations, and instead elected to apply the "quick look."²⁹ A "quick look," and not a full rule of reason analysis, was appropriate, the court said, because the horizontal price-fixing nature of the Overlap agreements made them "plainly" anticompetitive on their face without any need for an elaborate analysis, and the "quick look" properly shifted the burden to the defendants to justify "this apparent deviation from the operations of a free market."³⁰

MIT offered three procompetitive economic justifications:

1. The challenged Overlap agreements enhanced competition in that they resulted in opportunities for needy students who otherwise would not have been able to attend the Ivy Overlap Group institutions, without limiting the choices available to non-needy students who did not require financial assistance.
2. The challenged Overlap agreements enhanced competition among students for limited enrollment opportunities and competition among the member schools in areas such as the curriculum, campus life, vocational opportunities and reputation.
3. The challenged Overlap agreements enhanced competition by improving the quality of education at the member schools by exposing classmates of needy students to a greater diversity of viewpoints and ideas.³¹

²⁷ *Id.* at 301.

²⁸ *Id.* (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980)).

²⁹ *Id.* The court was careful to note, however, that it had rejected MIT's argument that the per se rule could not be applied because of lack of judicial experience with the Overlap agreements: "The challenged conduct in the present case involves price fixing, which is hardly a new type of restraint." *Id.* n.7.

³⁰ *Id.* at 304 (quoting *NCAA*, 468 U.S. at 113)).

³¹ *Id.* at 304-05.

MIT also advanced a social welfare justification: the challenged Overlap agreements were justified since they furthered the national education policy of advancing equality of educational access and opportunity.

If the challenged agreements were prohibited, MIT argued, the member schools would find themselves compelled to bid for the most qualified students, regardless of need, through merit scholarships and grant awards, and that the resulting bidding war “would undermine efforts to maintain educational access and opportunity and impede socio-economic diversity, which would lessen the overall quality of education.”³²

The district court rejected MIT’s proffered justifications on three grounds.

First, the court found that MIT’s three economic justifications were not cognizable under the Sherman Act. Far from enhancing competition as MIT argued, the court found that the agreements suppressed competition because they interfered with the price-setting mechanism of the market. In effect, the court found that the Overlap members had determined that price competition was bad and coordinated action needed to be substituted for it. The court noted that the Supreme Court had rejected an analogous argument in *Professional Engineers*, when it nullified an engineering association’s canon of ethics prohibiting its member from engaging in competitive bidding for engineering services. The association had argued that, without a ban on competitive bidding, engineers would engage in bidding wars and offer lower prices that would result in inferior work, leading to reduced public safety, health and welfare. The Supreme Court held that, whatever the risk that competition may lead to inferior engineering services, the law did not permit the association to substitute its view that society would be better without competition.³³

Second, the court rejected MIT’s three economic justifications on the merits. That is, it rejected MIT’s argument that the prohibition of the Overlap agreements would lead to the end of need-blind admissions or need-based aid, and with them, a reduction in the equality of education. The court noted that almost every witness testifying on MIT’s behalf noted how the schools benefited from a culturally and economically diverse student body. The court concluded that in light of the professed benefits, the schools would individually pursue policies that promoted student diversity through financial aid to needy students. The court acknowledged that this might require the schools to commit additional resources to financial aid than they do under the

³² *Id.* at 305.

³³ *Id.*

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Overlap agreements to obtain the same result, but that this was a part of the normal budgetary balancing and not a justification for supplanting price competition.³⁴

Third, as to MIT's proffered social welfare justification, the Third Circuit held it was not cognizable under the Sherman Act. The district court held that even if the challenged Overlap agreements furthered the national education policy of advancing equality of educational access and opportunity, that policy could not outweigh or even be balanced against the policy of preserving competition that lies behind the Sherman Act. Only Congress, not private institutions or the courts, could make that judgment.³⁵

Finding that the Overlap agreements were within the subject matter coverage of the Sherman Act, that the agreements were facially anticompetitive, and that MIT's justifications were either not cognizable under the Sherman Act or unmeritorious, the court held that the agreements were unlawful. The district court entered a broad permanent injunction prohibiting MIT from

entering into, being a party to, maintaining or participating in—directly or indirectly, on a case-by-case-basis or otherwise—any combination or conspiracy which has the effect, or the tendency to affect, the determination of the price, or any adjustment thereof, expected to be paid by, or on behalf of, a prospective student, whether identified as tuition, family contribution, financial aid awards, or some other component of the cost of providing the student's education by the institutions to which the student has been admitted.³⁶

B. The Third Circuit Opinion

On appeal, MIT restated its view that financial aid determinations are not within “trade or commerce” and hence outside of the coverage of the Sherman Act. MIT also argued that the district court should have applied the full-scale rule of reason analysis instead of the quick-look version. In the alternative, MIT argued that even if the quick-look rule was the proper standard, the district court had not adequately considered the proffered procompetitive and social welfare justifications. The DOJ cross-appealed, arguing that the per se rule should have been applied by the district court.

The Third Circuit rejected MIT's subject matter argument and upheld the district court's conclusion that the challenged agreements were part of “trade or commerce.” The Third Circuit

³⁴ *Id.* at 306-07.

³⁵ *Id.* at 307.

³⁶ The language of the injunction is reported in the Third Circuit's opinion. See *Brown II*, 5 F.3d at 665.

observed that while non-profit organizations do not enjoy a class exemption from the Sherman Act, when they “perform activities that are the antithesis of commercial activities, they are immune from antitrust regulation.”³⁷ The court continued, however, that this immunity is “narrowly circumscribed” and does not exempt activity that could be described as “commercial transactions with a ‘public-service aspect.’”³⁸ As did the district court, the Third Circuit characterized the payment of tuition as the “exchange of money for services, [which,] even by a nonprofit organization, is a quintessentially commercial transaction.”³⁹ Since students are not free to take an award package offered by one institution and use it at another school, financial aid is simply a discount on the price of education services and “part of the commercial process of setting tuition.”⁴⁰ In addition, the Third Circuit pointed out that MIT did in fact receive a tangible benefit from offering financial aid—namely, the “enhanced prestige” that comes with the ability to enroll many exceptional students who otherwise could not afford to attend.⁴¹ For these reasons, the Third Circuit agreed with the district court that the Overlap activities fell within the “trade or commerce” requirement of Section 1.⁴²

Turning to the proper standard of review for the Overlap agreement, the Third Circuit also agreed with the district court that the Overlap activities should not be scrutinized under the per se rule as urged by the DOJ in its cross-appeal. The court of appeals court reasoned that even though the Overlap agreement technically fell within the category of horizontal price-fixing, the decision to apply the per se rule was “one of substance, not semantics.”⁴³ Citing to Supreme Court cases dealing with professional associations, the court cautioned against “applying traditional antitrust rules outside of conventional business contexts.”⁴⁴ The court noted that “antitrust analysis is based largely on price theory, which ‘assures us that economic behavior . . . is *primarily* directed toward the maximization of profits’”⁴⁵ and that “[t]he rationale for treating

³⁷ *Brown II*, 5 F.3d at 665.

³⁸ *Id.* at 666 (quoting *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975) (examination of land title by lawyer is a business service; “public-service aspect of professional [law] practice [is not] controlling in determining whether § 1 includes professions”).

³⁹ *Brown Univ. II*, 5 F.3d at 666.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 668.

⁴³ *Id.* at 670.

⁴⁴ *Id.* (citing *Goldfarb*, 421 U.S. at 773 (1975)).

⁴⁵ *Id.* (quoting R. Bork, *The Antitrust Paradox* 116 (1978) (emphasis in original)).

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professional organizations differently is that they tend to vary somewhat from this economic model.”⁴⁶

Specifically, while professional organizations aim to enhance the profits of their members, they and the professionals they represent may have greater incentives to pursue ethical, charitable, or other non-economic objectives that conflict with the goal of pure profit maximization. While it is well settled that good motives themselves “will not validate an otherwise anticompetitive practice,” courts often look at a party's intent to help it judge the likely effects of challenged conduct. Thus, when bona fide, non-profit professional associations adopt a restraint which they claim is motivated by “public service or ethical norms,” economic harm to consumers may be viewed as less predictable and certain. In such circumstances, it is proper to entertain and weigh procompetitive justifications proffered in defense of an alleged restraint before declaring it to be unreasonable.⁴⁷

The court of appeals further noted that the Overlap members deviated even further from the profit-maximizing business model than professional associations. The court concluded that “alleged altruistic motive and alleged absence of revenue-maximizing purpose” created uncertainty regarding the competitive impact of the Overlap agreement and therefore precluded application of the per se rule.⁴⁸

Although not per se illegal, the Third Circuit noted that MIT did not dispute that the purpose of the Overlap agreements was to “eliminate price competition for talented students among member schools.”⁴⁹ The court of appeals therefore agreed with the district court that the Overlap arrangement was “anticompetitive ‘on its face,’” because it aimed to “restrain ‘competitive bidding’ and deprive prospective students of ‘the ability to utilize and compare prices’ in selecting among schools.”⁵⁰ The Third Circuit concluded that the quick look was the proper standard, since the Overlap arrangement “require[d] some competitive justification even in the absence of a detailed market analysis.”⁵¹ Rejecting MIT’s argument that a full rule of reason analysis was necessary, the court of appeals found that it was enough to invoke the quick

⁴⁶ *Id.* (citing *Professional Engineers*, 435 U.S. at 696).

⁴⁷ *Id.* at 672 (internal citations omitted).

⁴⁸ *Id.* at 672.

⁴⁹ *Id.* at 673.

⁵⁰ *Id.* (quoting *Professional Engineers*, 435 U.S. at 693).

⁵¹ *Id.* (quoting *Indiana Dentists*, 476 U.S. at 460).

look where the challenged arrangement fit the definition of horizontal price-fixing even though it may be justifiable.⁵²

The Third Circuit then turned to MIT's proffered justifications, separately analyzing the procompetitive economic justifications from the social welfare justification.

First, the Third Circuit held that two of MIT's three proffered economic justifications were cognizable under the Sherman Act, rejecting the district court's view that none of them were cognizable. Recall that MIT had argued that the Overlap agreements increased competition by (1) increasing diversity at Overlap schools and thereby improving education quality; (2) increasing accessibility to an Overlap education for needy students; and (3) increasing non-price competition among Overlap schools.⁵³ The court of appeals agreed with MIT that increased diversity and accessibility, while non-commercial factors, nonetheless properly could be viewed as procompetitive benefits from the Overlap arrangement. The court noted that increased diversity in the classroom and on campus resulted in an improved educational experience, and asserted that the Supreme Court "has recognized improvement in the quality of a product or service . . . as one possible procompetitive virtue."⁵⁴ Agreeing that the Overlap arrangements resulted in increased accessibility to an Overlap education for needy students, the court of appeals noted approvingly that "[e]nhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit."⁵⁵ The court, however, rejected increased non-price competition as possible justification, because it was not cognizable under the Sherman Act: "[A]ny competition that survives a horizontal price restraint naturally will focus on attributes other than price. This is not the kind of procompetitive virtue contemplated under the Act, but rather one mere consequence of limiting price competition."⁵⁶

Second, the Third Circuit rejected the district court's view that MIT's proffered social welfare justification was not cognizable in a Sherman Act analysis, and held instead that the lower court should have considered MIT's argument that the Overlap agreements enabled member schools to maintain a policy of need-blind admissions and full need-based aid, and so promoted the social goal of equality of educational access and opportunity. The court of appeals noted that Congress has sought to promote equality of educational access and opportunity for over 25 years.⁵⁷ Hence, this was unlike the situation in *Professional Engineers*, for example,

⁵² *Id.* at 673-74 (citing *Professional Engineers*, 435 U.S. at 692, and *NCAA*, 468 U.S. at 107).

⁵³ *Id.* at 674.

⁵⁴ *Id.* (citing *NCAA*, 468 U.S. at 114-15).

⁵⁵ *Id.* at 675 (citing *NCAA*, 468 U.S. at 104).

⁵⁶ *Id.*

⁵⁷ *Id.* at 675.

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where the defendants based their justification on their own premise that competition produced socially undesirable results. To the extent that the Overlap agreements furthered a long-standing congressional policy, it should have been considered in the analysis, even if the goal was in conflict with the competition goal of the Sherman Act.

The Third Circuit concluded that “[t]he nature of higher education, and the asserted procompetitive and pro-consumer features” of the Overlap agreement meant that the arrangement should receive a full-scale rule of reason analysis.⁵⁸ The case was therefore reversed and remanded to the district court, but before the district court could act on remand, MIT and the DOJ settled the litigation through a letter agreement. The case was voluntarily dismissed without the entry of any consent decree.

IV. The Ivy Consent Decree, the MIT Letter, and Legislative Exemptions

As noted above, although MIT pursued a defense through a trial and an appeal, all of the Ivy League members of the Overlap Group stipulated to a consent decree on the same day that the DOJ filed its complaint. This is a common practice in civil cases brought by the Department of Justice Antitrust Division. Prior to the filing of the complaint, the DOJ and the settling parties negotiate a consent settlement, which relieves the settling defendants of the burdens and uncertainty of a trial and allows them some room to bargain for more lenient restrictions than might be attainable in an adjudicated order entered by the court. Importantly, these types of consent decrees are accepted by the court without the defendants admitting any liability. Once entered by the court, however, the consent decree has the full force of a court order.

In their consent decree, which was entered by the court on September 20, 1991, the Ivy League schools agreed, for a period of 10 years, not to engage in any of the following activities:⁵⁹

1. agreeing directly or indirectly with any other college or university on all or any part of financial aid, including the grant or self-help, awarded to any student, or on any student’s family or parental contribution;
2. agreeing directly or indirectly with any other college or university on how family or parental contribution will be calculated;

⁵⁸ *Id.* at 679.

⁵⁹ United States v. Brown Univ., Civ. A. No. 91-3274, 1991 WL 536896 (E.D. Pa. Sept. 20, 1991) (final order approving consent decree).

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3. agreeing directly or indirectly with any other college or university to apply a similar or common needs analysis formula;
4. requesting from, communicating to, or exchanging with any college or university the application of a needs analysis formula to, or how family or parental contribution will be calculated for, a specific financial aid applicant;
5. agreeing directly or indirectly with any other college or university whether or not to offer merit aid as either a matter of general application or to any particular student;
6. requesting from, communicating to, or exchanging with any other college or university its plans or projections regarding summer savings requirements or self-help for students receiving financial aid; and
7. requesting from, communicating to, or exchanging with any other college or university, the financial aid awarded or proposed to be awarded any Financial Aid applicant except as required by federal law.⁶⁰

The consent decree also required the settling defendants to institute an antitrust compliance program to monitor and ensure compliance with the restrictions in the consent decree.⁶¹ As noted above, the consent decree contained a ten-year sunset provision. Consequently, the consent decree expired on September 20, 2001.⁶²

The Ivy consent decree also contained a number of limiting conditions, including a provision that nothing in the consent decree would prohibit activities that were subsequently authorized by federal legislation.⁶³ This avoided the need to go through the procedures to obtain a modification of the consent decree in the event the law was changed or clarified.

In 1992, during the time when MIT and the DOJ were litigating the *Brown University* case, Congress passed the Higher Education Amendments of 1992.⁶⁴ In a section entitled “Need-Based Aid,” the legislation exempted from the antitrust laws for a period of two years: (1) agreements not to award merit-based aid, and (2) the discussion and adoption of common principles for determining expected family contributions.⁶⁵ This represented a significant

⁶⁰ *Id.* (§ IV).

⁶¹ *Id.* (§ V).

⁶² *Id.* (§ X(A)).

⁶³ *Id.* (§ IX(E)).

⁶⁴ Pub. L. No. 102-325, 106 Stat. 448.

⁶⁵ *Id.* § 1544, 106 Stat. at 837.

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cutback in the restrictions of the Ivy consent decree. Discussions or agreements related to “the prospective financial aid award to a specific common applicant,” however, were explicitly excluded from the exemption,⁶⁶ so that many of the Ivy consent decree restrictions remained in place. This legislation also did not alter the course of the DOJ’s on-going litigation with MIT, since the statute explicitly stated that “nothing in this section shall . . . affect any antitrust litigation pending.”⁶⁷

In 1993, following the Third Circuit’s decision reversing the judgment against MIT and remanding the case to the district court for further proceedings, MIT and the DOJ settled the litigation. Interestingly, in a departure from normal DOJ practice, the Antitrust Division was willing to agree to dismiss the case against MIT on the receipt of a negotiated letter from MIT and did not require the settlement to be embodied in a judicially ordered consent decree or even a settlement contract.⁶⁸ The letter represented that MIT understood that, under prevailing law, it would be subject to contempt sanctions if it acted in concert with any of the settling Ivy institutions in violation of their obligations in the Ivy consent decree.⁶⁹ Moreover, and more importantly, the MIT letter set forth a list of “Standards of Conduct” that the DOJ had agreed would be acceptable conduct.⁷⁰ These standards included all of the exempted activities in the Higher Education Amendments of 1992, and also added the ability for schools to

1. exchange financial information submitted by individual students and their families through a third party computer facility;
2. after financial award letters were sent, submit financial aid data to an independent third party for analysis that could be shared with all participating schools; and
3. agree upon and use a common aid application.⁷¹

⁶⁶ *Id.* It is worth noting that a version of the legislation that would have exempted all Overlap activities, including the discussion of individual awards, was introduced but never enacted. See H.R. 5391, 102d Cong. (1992).

⁶⁷ Higher Education Amendments of 1992 § 1544(a).

⁶⁸ A copy of the MIT letter appears on the MIT website. See *Letter from MIT Lawyer Thane D. Scott about Overlap Settlement*, THE TECH, <http://www-tech.mit.edu/Bulletins/ovrlp-ts.html> (last visited May 5, 2008).

⁶⁹ As a result of this construction, although the Ivy defendants were prohibited by the terms of the Ivy consent decree from engaging in the restricted activities with any college or university, MIT was restricted only in the restricted activities with a settling Ivy defendant.

⁷⁰ The MIT letter provided that, at the request of an Ivy defendant, the DOJ and that defendant would move jointly for any modification of the Ivy consent decree to ensure that all activities under the Standards of Conduct would be permissible under the consent decree. It does not appear that any motion to modify was ever made.

⁷¹ *Id.*

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The Standards of Conduct letter specifically prohibited discussion or agreement concerning expected family contribution for individual applicants, as well as discussion or agreement on “the mix of grants and self-help to be awarded individual aid applicants.”⁷² Only schools that practiced need-blind admissions and were able to meet the full need of all admitted students were eligible for the protection offered by the Standards of Conduct.

Upon renewal in 1994, the legislative exemption was expanded to permit the exchange of financial information submitted by students and agreements on a common aid application, both of which were included in the Standards of Conduct in the MIT letter.⁷³ The MIT letter also permitted a third party to analyze financial aid data after financial award letters had been sent, but this was not included in the 1994 legislation. The legislation also adopted one of the eligibility requirements of the Standards—need-blind admissions—as a requirement for qualifying for the statutory exemption.⁷⁴ The expanded 1994 exemption was renewed in 1997⁷⁵ and again in 2001.⁷⁶ Each time there was an attempt to make the exemption permanent,⁷⁷ but these attempts did not succeed. The current exemption expires in September 2008.

In summary, schools that admit students without regard to ability to pay (i.e., need-blind admissions), may agree with one another

1. to award financial aid only on the basis of demonstrated financial need;
2. to use common principles of analysis for determining financial need;
3. to use a common aid application form; and
4. to exchange, through an independent third party, certain financial information submitted by students and their families.

Notably, according to the Government Accountability Office, of the four collaborative activities allowed, schools have engaged in only one: development of a common methodology for

⁷² *Id.*

⁷³ Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 568, 108 Stat. 3518, 4060.

⁷⁴ *Id.*

⁷⁵ Need-Based Educational Aid Antitrust Protection Act of 1997, Pub. L. No. 105-43, 111 Stat. 1140.

⁷⁶ Need-Based Educational Aid Act of 2001, Pub. L. No. 107-72, 115 Stat. 648.

⁷⁷ *See* 147 CONG. REC. 152, H7730-32 (2001) (House of Representatives unanimously passed a version of the legislation making the exemption permanent, but the Senate only approved a 7-year extension).

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assessing financial need. Schools either have chosen not to engage in the other three activities or have piloted them only on a limited basis.⁷⁸

V. Implications and Possible Approaches

There has been no final judicial finding of illegality of the Overlap activities. Although the district court found that MIT had violated the antitrust laws after a trial on the merits, that decision was reversed by the Third Circuit and the case was settled before the merits could be readjudicated. Also, as far as we can determine, there are no other substantive antitrust decisions analyzing any Overlap-like activities. Finally, the Ivy League consent decree (and the MIT letter) expired in 2001. As a result, there is also no existing consent decree or settlement agreement that bars any of the Overlap activities. In the absence of a statutory exemption, any agreements among schools regarding financial aid will be judged according to the principles of antitrust law as articulated by the courts, which, as we have seen, do not provide anything close to a clear guide to help schools distinguish agreements that are permissible from those that are not.

On the legislative front, the current exemption, the Need-Based Education Aid Act of 2001, expires in September 2008. It allows schools that meet the eligibility requirement—that is, those that practice need-blind admissions—to engage in almost all of the activities that were conducted under the original Overlap agreement, with the exception of the comparison of individual aid awards.

From our recent discussions, we understand that Congress is considering a bill that would make the current exemption permanent. Given this development, you have asked us to analyze the alternatives available to colleges and universities for the possible expansion of Overlap-like activities.

Risk in engaging in activities beyond the current exemption

We believe that schools engaging in activities beyond what is allowed under the current exemption would entail meaningful antitrust risk. Antitrust risk can be broken down into two components: challenge risk and liability risk.

Challenge risk looks to the likelihood that an investigation or a law suit will be commenced that requires the school to defend its conduct. There are three possible categories of

⁷⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, HIGHER EDUCATION: SCHOOLS' USE OF THE ANTITRUST EXEMPTION HAS NOT SIGNIFICANTLY AFFECTED COLLEGE AFFORDABILITY OR LIKELIHOOD OF STUDENT ENROLLMENT TO DATE 4 (2006), <http://www.gao.gov/new.items/d06963.pdf>.

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challengers: the DOJ, the state attorneys general, and potentially harmed students. Although it is always difficult to predict enforcement intentions, we believe that it is unlikely that the DOJ is looking to bring a challenge in this area again. Still, if the activity is sufficiently beyond the scope of the current exemption, it is possible that the DOJ would open an investigation and possibly initiate litigation. State Attorneys General are also unlikely to challenge conduct in this area, since a challenge here would likely be politically unpopular.

Potentially harmed students, however, present a meaningful challenge threat. These students would argue that they were harmed in a way remediable by the antitrust laws in that they would have received more aid money if the schools they are challenging had not engaged in the non-exempt activity. Although only a small fraction of the total number of students may be interested in challenging non-exempt activities, given the large number of students this still yields a significant number of potential plaintiffs. Moreover, an individual plaintiff likely would bring her law suit as a class action. Although the plaintiff would have to overcome significant hurdles to obtain certification of a damages class, the possibility still exists that a court would certify the class and the class damages—which under the antitrust laws are three times the amount of actual damages—could be very sizeable. In addition, the plaintiffs would also certainly seek injunctive relief, and here class certification would be much easier to obtain. A successful class action for injunctive relief could result in intrusive and burdensome restrictions on the defendant institutions and, under the cost-shifting provisions of the antitrust laws, the defendants would be responsible for the attorneys’ fees and costs for the prevailing plaintiffs. Finally, as MIT’s experience demonstrated, defending an antitrust action can be very expensive and burdensome even if at the end of the process there is no finding of liability. The combination of the trebled damages exposure, injunctive relief exposure, the cost-shifting provisions of the antitrust laws, and the costs and burdens of defending a private action gives rise to the very real possibility of a “strike” suit, that is, a law suit brought solely with the idea that the defendant schools would be willing to pay a substantial amount of money to the plaintiffs and their counsel simply to get rid of the action without regard to the merits.

Liability risk looks to the likelihood that an action challenging an activity will be successful, and, if so, what form the relief will take. As described above, the most likely plaintiffs would be a class of potentially harmed students, and the most likely form of the action would be an injunctive class action. Assessing liability risk for engaging in non-exempt activities is very difficult, as the absence of case law following the Third Circuit decision means that there is very little guidance on how to balance the procompetitive and social welfare justifications with the alleged anticompetitive effects of a given activity in this area. However, to the extent that Congress considered an activity but ultimately did not include it in the statutory exemption—such as the direct sharing of individual aid information in the 1992 exemption⁷⁹—a

⁷⁹ See H.R. 5391, 102d Cong. (1992).

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plaintiff could argue with some force that Congress made a judgment that the social costs of this activity outweighed the social benefits and so should be held to be unlawful.

Specific activities beyond the current exemption

From our recent discussions with you, we understand that some colleges and universities may be interested in engaging in certain agreements that are not protected by the current exemption. Specifically, some analysts have suggested that schools might be interested in agreements

- to meet a specified percentage of need of those students with demonstrated need;
- to limit non-need-based aid to a specified percentage of institutional grant aid;
- on targets for increasing low-income students in incoming classes; and/or
- on self-help expectations (loan/work study/summer earning) for students on financial aid.

As our discussion above indicates, we believe that any sharing of information or any agreement between colleges related to financial aid determinations that are beyond the current exemption would entail meaningful antitrust risk. As a result, we would not recommend any school to engage in proposed expanded activities absent a broadened exemption.

To illustrate the potential risk of engaging in one of the currently exempted activities, consider what might happen if colleges were to engage in the first proposed expanded activity mentioned above—agreeing to meet a specified percentage of need of those students with demonstrated need. A student admitted to College A, which had agreed with some other colleges to meet 75% of need (for example), could potentially bring an antitrust suit against College A.⁸⁰ *Brown* establishes that financial aid falls within the trade or commerce requirement of Section 1. Again citing *Brown*, the student would say that financial aid is simply a discount on the price of education, and that an agreement to meet a certain percentage of financial need is an agreement to set a discount level and therefore a naked restraint on price. Finally, the student would argue that, in the absence of the aid agreement in which College A joined, College A would have had more unrestricted funds available for financial aid and would have provided

⁸⁰ Significantly, the student need not have applied to or been accepted by any other colleges or universities involved in the agreement and may have been accepted by other institutions that were not part of the agreement.

more financial aid to the complaining student (perhaps in the form of merit aid).⁸¹ The plaintiff would now have successfully met her burden to show a prima facie violation of the antitrust laws. The burden would then shift to College A to show that it had a valid justification for the agreement. However, as discussed above, the absence of case law applying the *Brown* principles makes it difficult to determine what courts would consider to be a valid procompetitive or social welfare justification. In sum, the college faces the prospect that a potential plaintiff could meet the burden of laying out a prima facie showing of price-fixing—although such a plaintiff would face a substantial hurdle in proving the she would have received more aid in the absence of College A’s participation in the agreement—while facing very substantial uncertainty in whether it could establish a justification defense.

The second proposed expanded activity—agreeing to limit non-need-based aid to a specified percentage of institutional grant aid—would involve the same type of liability risk. While limiting merit aid, rather than eliminating it, may be a tempting intermediate step for colleges, such a half measure would remove the activity from the statutory exemption. The analysis would proceed as in the above paragraph; a potential plaintiff could be a student who received a small merit scholarship due to the agreement who would argue that she would have received a larger merit scholarship if College A had not participated in the agreement. As noted above, however, a plaintiff might have problems proving that her injury actually arose from the agreement.

The third proposed expanded activity—agreeing on targets for increasing low-income students—might be less problematic because this is merely an agreement on targets and is more attenuated from an agreement limiting the discretion of the school to give tuition discounts. In a sense, this type of agreement does not set a threshold number of low-income students, but only contemplates schools agreeing on goals. But there are many antitrust cases where the finder of fact concluded that agreement on a “goal” was really an agreement on a level.

The fourth proposed expanded activity—agreeing on self-help expectations—would probably implicate some of the same problems as the first two proposed expanded activities. A plaintiff could claim that she would have received a higher amount of grant aid absent the agreement to set the amount of loans and/or work-study.

⁸¹ There might be some difficulty in proving that a particular plaintiff would have actually gotten a higher percentage of her need met in the absence of the agreement, but some qualified potential plaintiffs would likely exist.

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Expanding the current eligibility requirements

From our recent discussions with you we understand that a number of colleges and universities may also be interested in expanding the eligibility requirements of the current exemption. Some analysts have suggested that some schools desire an expanded set of eligibility criteria, such as allowing schools to qualify for the exemption that

- are need-blind except for admissions from a waitlist;
- are need-blind for a specified percentage of admitted students;
- meet a specified percentage of need of those students with demonstrated need; and/or
- meet full need for a specified percentage of admitted students.

In the absence of a statutory exemption establishing such eligibility criteria, schools entering into agreements that would be exempt under current law if the schools were completely need-blind could face meaningful antitrust risk. As the analysis in the prior subsection illustrates, whenever an agreement alters the distribution of financial aid among the student body, any student who believes that she has been harmed by the agreement is a potential antitrust plaintiff. Since the whole point of a financial aid agreement among schools is to alter the distribution of financial aid from what it would have been in the absence of the agreement, there will necessarily be some antitrust risk from any agreement that is not covered by a statutory exemption.

Lobbying Congress to expand exempted activities and/or eligibility

Given the considerable antitrust risk associated with engaging in activities beyond the current exemption, we believe a more prudent approach would be for colleges and universities interested in going beyond the current exemption to lobby Congress to expand the current exemption by increasing the activities specifically allowed and/or expanding the eligibility requirements to allow more schools to take advantage of the exemption.

In this regard, we should note that there is no antitrust issue with interested schools working together to formulate legislative proposals and to lobby Congress to expand the current exemption. The Supreme Court has long recognized that private efforts to influence the legislative process enjoy immunity from antitrust challenge.⁸²

⁸² See *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). *Noerr* involved an effort to influence the legislative process. The Court extended the immunity to the administrative process in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and to the adjudicatory process in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).