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NCAA Deregulation and Reform: A Radical Shift of Governance Philosophy?

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INTRODUCTION

At its 2013 Annual Conference, the National Collegiate Athletic Association’s (NCAA) Division I Board of Directors (“Board of Directors”), an eighteen-member body consisting of college presidents, athletic conference commissioners, and athletic directors, considered twenty-six proposals recommended for adoption by the NCAA’s Rules Working Group. The Rules Working Group’s legislative proposals streamline NCAA rules governing recruiting, coaches and other athletics personnel, and awards and benefits. More than attempting to achieve simplification, the deregulation legislation submitted for approval also ushers in a new model of governance that reflects a controversial transformation in the NCAA’s governance philosophy— from an emphasis on maintaining competitive equity to achieving fairness of competition. This philosophical reorientation presents new opportunities, but also raises concerns that the competitive gap between lower-resource institutions and wealthier institutions will widen. The Rules Working Group’s legislative proposals were also an attempt to accomplish the fulfillment of the Board of Director’s charge to fashion rules that support NCAA fundamental principles. At the NCAA’s January 2013 Annual Conference, the Board of Directors considered twenty-six proposals recommended for adoption by the NCAA’s Rules Working Group. These proposals streamline NCAA rules governing recruiting, coaches and other athletics personnel, and awards and benefits.
Conference, the Board of Directors approved twenty-five of the Rules Working Group’s twenty-six legislative proposals.6

The Rules Working Group’s deregulation proposals constitute another phase in NCAA reform initiatives that are an outgrowth of a summit of approximately fifty presidents and chancellors of NCAA Division I institutions (the “Presidential Retreat”).7 According to NCAA President Mark Emmert, the Presidential Retreat was organized as a means of engaging the leadership of college presidents to actively address important issues confronting intercollegiate athletics.8 Following the Presidential Retreat, the Board of Directors established five working groups, each chaired by a college or university president, charged with developing legislation that would address these critical issues.9 In addition to the Rules Working Group, the working groups are the Enforcement Working Group, Student-Athlete Well-Being Working Group, Resource Allocation Working Group, and the Division I Committee on Academic Performance.10

As noted above, the Rules Working Group’s legislation was another stage of an ongoing process that resulted in the promulgation of significant legislation, which was adopted prior to the NCAA’s January 2013 Annual Meeting. Another outcome of the Presidential Retreat was a 2011 directive from the Board of Directors to the Committee on Academic Performance (CAP) to “create[] a package of proposals aimed at improving academic success.”11 The end result of CAP’s efforts were proposals, adopted by the Board of Directors, imposing more stringent Division I student-athlete initial and transfer eligibility rules, establishing academic redshirt status and increasing

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7 Casby, supra note 5.
8 Hosick, supra note 6.
10 See Harty, Richardson & Silver, supra note 9.
11 POST-PRESIDENTIAL RETREAT UPDATES, supra note 9.
the minimum Academic Progress Rate (APR) required for teams to qualify for post-season competition.\textsuperscript{12}

Acting on its charge from the Board of Directors, the Student-Athlete Well-Being Working Group promulgated legislation that included controversial true-cost-of-attendance legislation that would permit Division I student-athlete scholarship recipients to receive additional aid, up to $2000 above their full grant-in-aid.\textsuperscript{13} As discussed \textit{infra}, this legislation was adopted but has been suspended in light of strong opposition by Division I member institutions. Legislation crafted by the Student-Athlete Working Group and approved by the Board of Directors includes reform measures: (1) affording institutions the discretion to award multiyear grants-in-aid to student-athletes, (2) granting institutions the discretion to increase the amount of a scholarship award during the period of the reward, and (3) removing restrictions on institutions’ ability to provide financial aid to former student-athletes seeking to complete baccalaureate degree requirements.\textsuperscript{14} Finally, important reform legislation enacted by the Board of Directors prior to the January 2013 deregulation conference includes rules promulgated by the Enforcement Working Group, which substantially revamped the NCAA enforcement and infractions process.\textsuperscript{15}

This Article analyzes the Rules Working Group’s deregulation proposals submitted for Board of Directors approval in January 2013, as well as the academic and student-athlete welfare legislation promulgated by other working groups and adopted by the Board of Directors prior to 2013. Deregulation, academic, and student-athlete well-being legislation are evaluated in light of the justifications articulated in support of their adoption, the likelihood that they will achieve their stated objectives, and the extent to which deregulation and reform legislation conform to NCAA core principles. In addition, this Article explores the impact of deregulation and reforms in addressing tensions that reside with intercollegiate athletics—particularly concerns relating to economic and other disparities existing within Division I athletic programs. This Article argues that deregulation and academic reform legislation represent important and significant steps toward enhancing the legitimacy of the NCAA.
regulatory process, fostering student-athlete well-being, and giving
greater priority to academic values. Although deregulation and
academic reform represent genuine change, this Article cautions that
these efforts are only a starting point for achieving greater balance
between athletic and academic values and greater equity within
intercollegiate athletics.

As a necessary backdrop to our analysis of NCAA deregulation
and reforms, this Article begins with a brief description of the NCAA
legislative process. As discussed below, the legislation promulgated
by the Rules Working Group and other working groups departed from
the NCAA’s established legislative process.

I
THE NCAA LEGISLATIVE PROCESS

The Rules Working Group’s twenty-six legislative proposals and
legislation promulgated by other NCAA Division I working groups
departed from the legislative process established in the NCAA
Manual. As envisioned in the NCAA Manual, NCAA Division I
legislative proposals are initiated principally by the NCAA
Legislative Council, the NCAA’s primary legislative body. 16 The
NCAA Manual states that the Legislative Council shall “[s]erve as the
division’s primary legislative authority, subject to review by the
Board of Directors.” 17 In fulfilling its responsibilities, the Legislative
Council receives input from other bodies within the NCAA
governance structure, including Division I cabinets and committees.
For example, the Initial-Eligibility Waivers Committee reports to the
Academic Cabinet, which in turn may present potential legislation to
the Legislative Council. 18 The Council then evaluates and determines
whether to promulgate proposed legislation for consideration by the
Board of Directors. 19 Although the Legislative Council is the primary
NCAA legislative body, the Board of Directors can also initiate,
rather than merely adopt, legislation submitted by the Council. 20

In summary, the NCAA Manual establishes a legislative process
whereby the Legislative Council, with input from other bodies, is the
primary source of proposed legislation to be considered for adoption

16 NCAA MANUAL, supra note 1, § 4.6.2.
17 Id. § 4.6.2(a).
18 Id. § 6.9, at 25, fig. 4-1.
19 Id. § 5.3.2.2.2.
20 Id. § 5.3.2.1.
by the Board of Directors. If the Board of Directors votes to approve legislation adopted by the Legislative Council, such legislation becomes effective unless it is overridden by a five-eighths vote of voting active-member institutions.\textsuperscript{21}

Following the Presidential Retreat, the Board of Directors imposed a one-year suspension of the above-described legislative process.\textsuperscript{22} Integral to the suspension was a Board-imposed moratorium on the consideration of legislative proposals unless a nexus could be established between a proposal and the presidents’ reform agenda as articulated following the retreat.\textsuperscript{23} As envisioned by the presidents, legislation would be worthy of the Board of Directors’ consideration only if it connected to “the enduring values of student-athlete success, the collegiate model, amateurism or fairness/competitive equity and \[the legislation\] must support or advance a constitutional principle.”\textsuperscript{24} Specifically, Presidential Retreat participants delineated four “enduring values” associated with a collegiate mode of intercollegiate athletics:

- Student-athlete success is paramount, both academically and athletically. The collegiate model should embed the values of higher education, including shared responsibility and accountability; this model must be protected and sustained. In the collegiate model of athletics, amateurism is the student-participation model that guides the relationship between students and institutions. In the collegiate model of athletics, the guiding principles should be based on fair opportunities to compete among institutions with similar commitments to intercollegiate athletics.\textsuperscript{25}

To facilitate the development of legislation with a nexus to these values and NCAA core principles as articulated in its bylaws, the Board of Directors adopted a recommendation from the Presidential Retreat calling for the creation of the previously-described five

\textsuperscript{21} Id. § 5.3.2.3.6.
\textsuperscript{24} Id.
working groups. Working groups, each chaired by a college president or chancellor, act in concert with the above-described values and NCAA principles, consult with the Division I Legislative Council, and propose legislation for Board of Directors’ consideration.

From the presidents’ perspective, the establishment of working groups and the circumvention of the typical legislative process would hasten the development of legislation that addresses the pressing issues facing intercollegiate athletics. By imposing a moratorium on the normal legislative process, the presidents also impliedly recognized that past efforts to secure the development of such legislation were thwarted by a legislative process that had become too cumbersome. The legislative process also was imbued with proposals that focused on discrete issues often only championed by a single athletic conference. As discussed below in the context of the proposals from the Rules Working Group, retreat participants believed that the NCAA Manual-prescribed legislative process contributed to the proliferation of regulations that were often meaningless and unenforceable.

II
DEREGULATION OF THE DIVISION I MANUAL

A. Justifying Deregulation

At its January 19, 2013 conference, the NCAA Board of Directors adopted twenty-five of twenty-six proposals that sought to streamline
the NCAA Manual.30 Before examining the NCAA’s modification of many of its rules, we briefly review the justifications offered in support of the Rules Working Group’s deregulation legislation.

The justifications advanced in support of deregulation cannot be viewed apart from the fundamental reorientation in governance philosophy that deregulation both represents and supports. The Rules Working Group’s legislation reflects a fundamental shift from a competitive equity to a fair competition model of enforcement.31 A competitive equity model “sought to place all athletic programs on equal footing.”32 Deregulation proponents argue that a regulatory scheme premised on a competitive equity model led to the proliferation of rules that often defied common sense, were difficult to enforce, and failed to enhance student-athlete success.33 The most prominent example of questionable regulation often cited, even by NCAA officials, is the infamous “Fruit, Nuts and Bagels” bylaw.34 Under that bylaw, an institution could provide a student-athlete with fruit, nuts, and bagels, but providing cream cheese could amount to a rules violation.35 The legislation was intended to provide student-athletes with the ability to receive healthy snacks at their institution’s discretion, while placing reasonable limitations on the scope of the benefits that schools provide in an effort to maintain competitive equity. Notwithstanding the intent behind the rule, the NCAA’s past failure to take a common sense approach to the issue effectively makes the case for deregulation.

Another example of this philosophical shift is the recent proposal to eliminate the restrictions surrounding printed recruiting materials. For years, NCAA rules have regulated these items down to the most minute detail. Under un-amended rules, if a coach sends an informal note to a prospective student-athlete, the note card cannot exceed 8.5 by 11 inches when opened in full.36 In addition, the card can contain only the institution’s name and logo, but only on the outside of the card.37 Any text on the inside of the card must be handwritten.38

30 Hosick, supra note 6.
31 Id.
33 Breakdown of Division I Rules Changes, supra note 4.
34 NCAA MANUAL, supra note 1, § 16.5.2(h).
35 See Grasgreen, supra note 32.
36 NCAA MANUAL, supra note 1, § 13.4.1.1(i).
37 Id.
Similar restrictions are also imposed on institutional letterhead, envelopes, media guides, and camp brochures. These rules were promulgated to eliminate the competitive disadvantage to schools not in a financial position to produce the types of recruiting materials that might be produced if no restrictions were imposed.

Rather than focus on discrete rules regulating behavior that is better reserved for regulation at the institutional and conference levels, a fair competition model, as envisioned by the Rules Working Group, focuses rulemaking on issues of association or nationwide concern—such as student-athlete eligibility, scholarships, the length of recruiting and playing seasons, and coach limitations. Rulemaking relating to these issues aligns more closely with the four values associated with a collegiate model of intercollegiate athletics, which in turn possess a close nexus to principles articulated in the NCAA’s constitution and bylaws. These include, among others, institutional control and responsibility, student-athlete well-being, ethical conduct, sound academic standards, amateurism, and financial aid. Operating from a charge emanating from the Presidential Retreat, the Rules Working Group set out to give greater priority to rules that possess such a nexus and to eliminate or severely modify rules without such a nexus.

As reflected in the rules revisions that we will discuss, a fair competition model also imbues campus officials with discretion and thus gives primacy to the notion of institutional control on matters perceived as being of local control. By vesting university officials with greater discretion, the Rules Working Group’s legislative proposals enhance the vision and perhaps the reality of shared responsibility for rules compliance between the NCAA and institutions. Another perceived benefit of deregulation is a reduction

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38 Id.
39 Id. §§ 13.4.1.1(a)–(c), 13.4.1.1.2.
40 Breakdown of Division I Rules Changes, supra note 4.
41 Id.
42 See supra text accompanying note 24.
43 NCAA MANUAL, supra note 1, § 2.1.
44 Id. § 2.2.
45 Id. § 2.4.
46 Id. § 2.5.
47 Id. § 2.9.
48 Id. § 2.13.
49 Breakdown of Division I Rules Changes, supra note 4.
50 Grasgreen, supra note 32.
of the administrative burden imposed on athletic compliance personnel and other university administrators, those who would no longer be required to devote resources when they attempt to secure compliance with a seemingly endless laundry list of often extraordinarily discrete and relatively unimportant provisions.

From a philosophical vantage, a regulatory structure premised on fair competition, rather than competitive equity, acknowledges the diversity of institutions within Division I athletics. A justification offered in support of the shift to a fair competition model is that schools should neither be penalized for natural advantages nor for the economic advantages that accrue from variables such as geography, facilities, and a larger resource base to support their intercollegiate athletics programs.51

The shift from a competitive equity to a fairness of competition model is not without its critics, who argue that the changes to the rules will afford additional advantages to the wealthiest athletics programs.52 Critics argue that certain rules are apt to expand the gap between what has been characterized as the “have” and “have-not” programs within Division I athletics.53 This issue has created differences of opinion, even within some campuses. Compliance personnel decry the cumbersome, time-consuming task of monitoring what many perceive as an ever-increasing list of inconsequential and unenforceable rules.54 On the other hand, many coaches view the deregulation effort with trepidation, as they fear the removal of the current restrictions will only exacerbate the recruiting “arms race” that has characterized college recruiting in recent decades.55 In fact,

51 Breakdown of Division I Rules Changes, supra note 4.
52 Grasgreen, supra note 32.
53 Id.
55 See Michelle Brutlag Hosick, Board Suspends Two Recruiting Proposals, NCAA.ORG (Mar. 18, 2013), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/March/Board+suspends+two+recruiting+proposals (observing that coaches’ opposition to some deregulation legislation was based on fear that the changes could exacerbate the athletic arms race).
momentum for a legislative override is growing. Since a legislative override requires a five-eighths majority, a critical mass of dissenters, spearheaded by the coaching community, could overturn deregulation proposals that have been adopted by the Board and are set to take effect in August 2013.

Finally, deregulation is perceived as a means of enhancing the legitimacy of the NCAA’s regulatory process. We now turn to a discussion of the Rules Working Group’s legislation.

B. Deregulation Legislation

The Rules Working Group’s deregulation legislation will be evaluated in the context of the justifications discussed above and, where appropriate, the tensions that reside within intercollegiate athletics. The Article first examines the Rules Working Group’s efforts to streamline NCAA rules that regulate the process whereby institutions recruit student-athletes. It then examines deregulation legislation relating to personnel and awards and benefits.

1. Recruiting

The Rules Working Group promulgated significant changes to NCAA recruiting rules, which govern the nature and frequency of the activities in which colleges can engage when recruiting prospective student-athletes to play intercollegiate athletics. The following discussion reveals that deregulation produced recruiting rules that are streamlined, more consistent from sport to sport (obviating the necessity for exceptions), attempt to conform to modern modes of communication, and vest institutions with greater discretion in determining the means, methods, and frequency of their recruiting-related communications with student-athletes. Although deregulation of recruiting rules is largely positive in that the rule modifications are consistent with the NCAA’s articulated underlying justifications for deregulation, the Article will explore the potentially negative consequences of changing recruiting rules.

a. Texting and Modes of Communication

Perhaps the most notable and controversial deregulation effort adopted by the Board is legislation that lifts restrictions on the mode
and frequency of recruiting communications.\textsuperscript{57} In most instances, current NCAA rules prohibit more than one telephone call per week to a prospective student-athlete or his or her family members.\textsuperscript{58} Additionally, electronic modes of communication (e.g., text message, Twitter, and Facebook) are generally prohibited under un-amended bylaws.\textsuperscript{59} A similar guideline, which eliminated these restrictions, was implemented in 2012 for men’s basketball.\textsuperscript{60}

While the basketball rule received positive feedback,\textsuperscript{61} objections were immediately raised when the Board of Directors adopted the broader proposal for all sports. Central among the objections voiced are concerns that permissive legislation will cause coaches to feel compelled to constantly communicate with high-school students in ways that are not conducive to an appropriate work-life balance for the staff members themselves.\textsuperscript{62} Student-athletes have also been voices of dissent. Some athletes argue that unlimited correspondence from coaches is intrusive, overwhelming, and unprofessional.\textsuperscript{63}

On the other hand, supporters of the proposal assert that text messaging has become a standard and universally acceptable mode of communication.\textsuperscript{64} They also argue that text messaging is virtually indistinguishable from an email in terms of its method of delivery (e.g., via smartphone) and level of intrusiveness.\textsuperscript{65} This is relevant


\textsuperscript{58} NCAA MANUAL, supra note 1, § 13.1.3.1.

\textsuperscript{59} Id. § 13.4.1.2.

\textsuperscript{60} Id. § 13.4.1.2.1.


\textsuperscript{64} See Brown, supra note 63 (discussing the widespread use of texting).

\textsuperscript{65} Hosick, supra note 61; Chris Smith, NCAA Deregulation of Recruiting Texts is Step in Right Direction But There is Plenty More to be Done, FORBES.COM (June 18, 2012,
because current NCAA rules already place no restrictions on the frequency with which email correspondence may occur. Other arguments in favor of the new rule are that it (1) alleviates problems associated with coaches and other institutional personnel avoiding accidental contact with student-athletes; (2) respects student-athlete choice because athletes can now better determine to which coaches they wish to respond, and the athletes can more freely communicate with those coaches they would most like to play for; and (3) arguably enables prospects and their parents to make more informed choices.66

Despite these arguments, there remains significant opposition to Rules Working Group Proposal (“RWG Proposal”) 13-3. Opponents argue that adopting these measures would increase the work pressure on coaches and thus disrupt any effort by them to lead balanced lives.67 Opponents also express concern that recruits could be overwhelmed by the communications.68 As of the end of the sixty-day override period, the proposal had received the requisite number (seventy-five) of override requests from member institutions.69 As a result, the Board of Directors formally reconsidered the legislation. In reconsidering the proposal, the Board’s options included resubmitting RWG Proposal 13-3 to the membership in its original form, modifying the proposal based on feedback from the membership, or rescinding the proposal altogether.70 At its May 2, 2013 meeting, the Board suspended RWG Proposal 13-3’s implementation until its effect can be assessed when considered in light of other recruiting rules changes.71

If RWG Proposal 13-3 is ultimately implemented in its present form, it will usher in a new era in which recruiting could potentially operate twenty-four hours a day. Phone calls, text messages and tweets could occur without cessation, raising the concerns mentioned above. Regardless of what form this legislation ultimately takes,

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66 Smith, supra note 65.
67 Hosick, supra note 62.
68 Id.
69 Id.
70 See Hosick, supra note 62 (discussing the options available to the Board of Directors).
perhaps a middle ground can be attained in regard to recruiting activities; standard modes of communication could be permitted (e.g., text messaging) with reasonable safeguards to ensure and protect the well-being of prospective student-athletes and recruiting coaches.

b. Printed Materials

RWG Proposal 13-5-a is a second, equally controversial proposal aimed at deregulation in the area of recruiting. This proposal lifts all restrictions on printed recruiting materials. As previously mentioned, institutions currently spend inordinate amounts of time ensuring that strict specifications regarding the dimensions, content, and design of printed recruiting materials comply with NCAA bylaws. Although institutions have encountered difficulties complying with restrictions on printed materials, removal of the restrictions concerns the membership. Detractors cite worst-case scenarios in which some institutions create life-sized personalized recruiting visuals and send poster-sized letters to recruits. Another source of consternation for opponents of RWG Proposal 13-5-a is the return of media guide publications, which the NCAA banned, primarily as a cost-saving measure. Coaches and administrators also express the concern that deregulation in this area might lead to a recruiting arms race that will overwhelm prospects, college coaches, and athletics department budgets. Cost concerns are not confined to schools with fewer resources to devote to their intercollegiate athletics programs. The Big Ten Conference, which includes schools with significant athletic budgets, such as Ohio State University, has expressed concerns that lifting restrictions would lead to an arms

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72 RWG PROPOSALS, supra note 57, at 58–63.
73 Id.
74 See supra text accompanying notes 34–36.
75 Mandel, supra note 28.
78 Hosick, supra note 61.
Although much of the anxiety is specific to football, it is not unique to football.\(^{80}\)

Thus, the revised rules, which remove barriers to these types of publications without any limitation, have presented a dilemma for many athletic directors. Their schools can either absorb the considerable expense associated with publications or run the risk of falling further behind in the recruiting arms race.

Membership concerns relating to amended legislation that removed restrictions on printed recruiting materials led the Rules Working Group to suspend the implementation of this legislation that had been adopted by the Board of Directors.\(^{81}\) Tulsa University President Steadman Upham, the co-chair of the Rules Working Group, offered the following explanation for suspension of the legislation.

The working group has taken seriously its commitment to listen and respond to the membership throughout this process. . . . We understand that reasonable minds differ on some of these challenging issues, and we hope that further discussion will benefit our student-athletes and their institutions [sic]. We believe that, with the help of the membership, we can reach an appropriate outcome.\(^{82}\)

2. Personnel

Institutional staff members have been governed by a strict set of NCAA bylaws that stipulate everything from the number of coaches on a particular staff to where they are allowed to stand during a team practice.\(^{83}\) While the number of non-coaching, sport-specific staff members has proliferated over the past several years, NCAA rules have primarily permitted only head and assistant coaches to engage in recruiting activities.\(^{84}\) As a case in point, routine tasks such as reviewing the video of a prospective student-athlete or making weekly telephone calls to prospects were required to be performed by a countable coach\(^{85}\) rather than other athletics personnel.\(^{86}\) The
administrative burden imposed on athletic compliance staff and other university administrators to ensure compliance with these strict guidelines, raises legitimate concerns as to whether the allocation of resources was not only unjustified, but also diverted those resources away from more serious compliance matters.

This issue was brought to the forefront when a critical mass of head coaches began to make the case that their assistant coaches’ time could be better spent assisting current student-athletes rather than potential recruits. This influenced the Rules Working Group’s recommendation and the Board’s adoption of RWG Proposal 11-2, which removed the requirement that a head or assistant coach must perform recruiting coordination functions.87 Despite initially being adopted in January 2013, however, the proposal encountered resistance from a number of member institutions, particularly smaller, lesser-staffed programs. These institutions’ concerns stem from the fact that, in the absence of legislation imposing strict staff-size limitations, the legislation would result in further widening the gap between the “haves” and the “have-nots” within college athletics.

The concerns related to RWG Proposal 11-2 were exacerbated by the Board’s adoption of RWG Proposal 13-3, which removed restrictions on the mode and means of communications between coaches and prospects.88 The combined effect of these two proposals is that schools that have the means to do so would presumably hire considerable numbers of non-coaching staff whose sole responsibility would consist of calling, texting, tweeting, and otherwise using every conceivable opportunity to communicate with prospective student-athletes. Those institutions financially incapable of making the commitment to add staff to contact prospects could be placed at a significant competitive disadvantage. Assume that an institution elected to hire no additional staff to contact recruits and that only existing non-coaching staff members would take on these recruiting responsibilities. In such an instance, it is highly likely that other institutional personnel (e.g., academic advisors, strength coaches, and other athletic administrators) could become overly burdened by their newly assigned recruiting responsibilities.

off-campus recruitment of prospective student-athletes are considered countable coaches in that they count against coaching limits. Id. § 11.7.1.1.1.

86 Id. § 11.7.1.1.1.1.
87 RWG PROPOSALS, supra note 57, at 8–14.
88 See supra text accompanying notes 58–71.
As the number and variety of these non-coaching staff members has grown over the years, so too has the difficulty of monitoring their actions and ensuring that these individuals comport themselves in accordance with NCAA regulations. For this reason, this deregulation initiative is welcomed by individuals (i.e., campus compliance officers) responsible for monitoring compliance with the un-amended bylaws. Nevertheless, the substantial opposition to RWG Proposal 11-2 led the Board of Directors to delay implementing this legislation until it can be further evaluated. Following a review of RWG Proposal 11-2 at its May 2, 2013 meeting, the Board of Directors upheld its earlier suspension of the proposal.

A second issue specific to institutional personnel pertains to current NCAA Bylaw 11.7.4, which imposes limits on the number of coaches who may be employed by an institution. It also limits the number of coaches from a particular institution’s coaching staff who are allowed to engage in off-campus recruiting activities at any one time. In addition, NCAA Bylaw 11.7.4.3 requires that if a coach is replaced on the road by another member of the coaching staff, he or she is required to return to campus prior to resuming recruiting activities. This stipulation appeared to run counter to the NCAA’s stated cost-containment objectives. Rather than decreasing costs, the “baton rule” increased travel associated expenditures for coaches who were required to “touch base” on campus before immediately departing for the next recruiting venue. This is to say nothing of the time-cost involved with such an effort. The Rules Working Group sought to address this issue with the adoption of RWG Proposal 11-4, which eliminates the off-campus coaching limitation.

As discussed above, the primary issue that must be confronted is how the membership wishes to address staff limitations. This has been an on-going conversation in recent years. If significant

89 Hosick, supra note 61.
90 Hosick, supra note 71.
91 NCAA MANUAL, supra note 1, § 11.7.4.
92 Id.
93 Id. § 11.7.4.3.
95 RWG PROPOSALS, supra note 57, at 21–25.
deregulation is to occur with regard to the responsibilities of sport-specific staff members, reasonable staff limits must be imposed. How that is to be achieved is a much more challenging proposition. Past proposals, which sought to address this issue, were met with resistance often tied to disputes over how to set the appropriate number of staff members for a particular sport and which personnel should be counted within the established number. For example, should peripheral staff members who support specific sports (e.g., academic counselors and media relations) count against the coaching staff limitation? Should only staff who directly report to a head coach be counted? One version of a proposal excluded clerical staff from the limit.  

This was problematic because it introduced a potential loophole by which a coach could hire an “administrative assistant” who would presumably not count against the limit, but could be assigned “coaching” or “recruiting” responsibilities. At present, these pivotal issues remain unresolved. Yet, they must be resolved as the Board’s suspension of RWG Proposals 11-2 and 13-5-a and its reconsideration of RWG Proposal 13-3 are indicative of the membership’s reticence to move forward with these deregulation efforts until there exists a clearer road map for what deregulation will mean for institutions and their ability to remain competitive.

3. Awards and Benefits

The Board of Directors also adopted recommendations of the Rules Working Group that revised NCAA Bylaw 16, which regulates awards and benefits received by current student-athletes.  

The most significant deregulation efforts pertaining to Bylaw 16 were RWG Proposals 16-3 and 16-7.  

Currently, the NCAA provides considerable latitude with respect to an institution’s ability to provide academic support services for its student-athletes, with one notable exception. Pre-deregulation legislation permitted institutions to provide items such as institutional computers (e.g., laptops and ipads) only on a retrieval basis.  

The newly adopted rule permits institutions, at their discretion, to provide any student-athlete with a computer or any other item it deems necessary for student-athlete

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96 NCAA, PROPOSAL 2010-18-A (2010).
97 See NCAA MANUAL, supra note 1, § 16.
98 RWG PROPOSALS, supra note 57, at 90, 101–08.
99 NCAA MANUAL, supra note 1, § 16.3.1.1.
100 Id. § 16.3.1.1.1.
success and development.\textsuperscript{101} While this is a minor change in verbiage, it has a potentially significant impact on institutional budgets, and perhaps more importantly, recruiting. This is yet another example of the NCAA’s shift from a competitive equity to a fairness of competition model of governance. This is the platform from which detractors of this proposal have argued. Moreover, it reflects a goal of the deregulation process, which is to assess rules in part based on whether they support student-athlete well-being. This rule would appear to be consistent with this objective.

In contrast, RWG Proposal 16-7 has enjoyed considerable support. The adoption of this proposal overturns the windows of time in which teams were required to depart and return to campus in conjunction with an away-from-home contest (typically forty-eight hours prior to and thirty-six hours following an event).\textsuperscript{102} The limitation was originally intended to minimize class time student-athletes missed because of team travel. Under RWG Proposal 16-7, as adopted by the Board and endorsed by the membership, standards for the time athletes may spend away from campus because of team travel will be administered at the campus level. Because most institutions have missed-class policies with which their sports programs must comply, Bylaw 16.8, which imposed the limitations, was duplicative and unnecessary. Therefore, RWG Proposal 16-7 provides a very good example of the NCAA’s attempt to decentralize authority for the oversight of issues that pertain primarily to specific institutional policies.

On the whole, both RWG Proposals 16-3 and 16-7 appear to comport to the NCAA’s core principle of student-athlete well-being. To the extent that this legislation, particularly RWG Proposal 16-3, will further the academic aims of the NCAA and its member institutions, it appears to be a move in the appropriate direction. One could reasonably argue, however, that providing student-athletes with state-of-the-art technological gadgets under the guise of academic support is neither necessary for the academic success of student-athletes, nor is it a particularly responsible course of action for an association that has previously championed the virtue of cost-containment. The reality is that athletic departments have limited resources. Therefore, if funds are diverted to efforts such as those described above, the concern then becomes what other support

\textsuperscript{101} RWG PROPOSALS, supra note 57, at 90.

\textsuperscript{102} NCAA MANUAL, supra note 1, § 16.8.1.2.1.
mechanisms currently being funded (e.g., summer school) will be sacrificed, and what is the net benefit to student-athletes? With the passage of RWG Proposal 16-3, and the resultant decentralization that it has wrought, these are now decisions with which each athletic department will have to wrestle.

III

REFORM LEGISLATION

Over the past two years, the NCAA has unfolded a legislative agenda that has resulted in the adoption and implementation of rules aimed at enhancing student-athlete well-being while at the same time strengthening eligibility requirements for student-athlete participation in intercollegiate athletics.103 The Article next describes these reform measures and examines the reasons articulated in support of, as well as in opposition to, them. In regard to the latter, the Article will address the opposition that led to unsuccessful efforts to override reform measures, as well as membership opposition that resulted in reconsideration and delayed implementation of other legislation. One example is the suspension of a student-athlete well-being proposal that would have permitted student-athletes to receive payments of up to $2000 beyond their athletic grants-in-aid. We begin, however, with a discussion of a reform measure that survived a close membership override vote and displaced a longstanding rule, which for forty years had limited the duration of athletic scholarships.

A. Student-Athlete Welfare

1. Multiyear Scholarships

A discussion of the contractual nature of the athlete’s relationship with his or her college is a necessary predicate to our examination of the Board’s adoption of a proposal that grants institutions the discretion to award multiyear athletic scholarships. In this regard, the express contractual relationship between the student-athlete and his or her college or university arises out of the National Letter of Intent (NLI); the financial aid agreement; and university publications, including brochures, course offering bulletins, written polices, and

catalogues. By signing a NLI, a prospective student-athlete agrees to attend the college or university named therein for a minimum of one academic year. Thereafter, other institutions must cease all recruiting contacts with the student-athlete. Following the student-athlete’s signing of the NLI, the named institution may freely contact the student-athlete and publically announce that it has signed the student-athlete. In order for the NLI to take effect, however, a student-athlete must have received a written commitment from the named institution to provide athletic financial aid for a minimum of one year. Without an accompanying promise of financial aid from the signatory institution, the NLI does not bind a student-athlete to attend a particular institution, and other colleges and universities may recruit the athlete.

In exchange for the student-athlete’s commitment to attend a particular institution, the college or university promises to provide athletic financial aid. The financial aid agreement, which formalizes the institution’s promise, provides that a college or university will extend financial aid to the extent of tuition, required fees, room, board, and books. Although the precise wording of institutions’ financial aid agreements may differ, they all articulate the principle that the purpose of institutional aid is to enable student-athletes to pursue a program of study and to participate in the institution’s educational process.

In 2011, the NCAA Board of Directors, pursuant to legislation promulgated by the Student-Athlete Well-Being Working Group,
adopted legislation that modified its longstanding bylaw regulating
the duration of athletic scholarships. In 1973, the NCAA adopted
legislation that restricted institutions to awarding one-year renewable
scholarships to student-athletes. During the approximately twenty-
year period prior to 1973, the NCAA imposed no limits on the term of
athletic scholarships. Under such a regime, colleges that offered
extended-term athletic scholarships gained a recruiting advantage
over institutions that limited the term of athletic scholarships to one
year. In adopting the 1973 legislation, the NCAA reasoned that the
move was “a response to the actions of athletes who would accept
athletic scholarships but then refuse to compete.” The NCAA
membership’s 1973 adoption of the one-year scholarship limit has
also been justified on grounds that it sought to achieve uniformity in
the scholarship program, reduced the competition for athletes
based on the term of athletic scholarships, and reflected a desire by
coaches to assert power and increase their authority over student-
athletes.

Although the one-year scholarship afforded student-athletes limited
flexibility, proponents of multiyear scholarships argued that any
advantage derived from such flexibility was substantially outweighed
by the disadvantages of the one-year limit. A one-year scholarship
enabled student-athletes to transfer to another college or to
discontinue participating in intercollegiate athletics without breaching
his or her contract with an institution. On the other hand, the one-
year limit vested colleges and universities with virtually unlimited
discretion to refuse to renew a student-athlete’s scholarship after the
end of the one-year term.

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112 NCAA, 2010–11 NCAA DIVISION I MANUAL § 15.3.3.1 [hereinafter 2010–11
NCAA MANUAL], available at http://www.ncaapublications.com/productdownloads
.D111.pdf (limiting scholarships to a one-year term).
113 Louis Hakim, The Student-Athlete vs. the Athlete Student: Has the Time Arrived for
114 id.
115 See id.
116 Neil Gibson, NCAA Scholarship Restrictions as Anticompetitive Measures: The
One-Year Rule and Scholarship Caps as Avenues for Antitrust Scrutiny, 3 WM. & MARY
117 Hakim, supra note 113, at 158.
118 id.
119 Ray Yasser, The Case for Reviving the Four-Year Deal, 86 TUL. L. REV. 987, 1002
(2012).
120 Hakim, supra note 113, at 148.
121 id. at 164.
the circumstances under which a student-athlete’s scholarship can be reduced or cancelled during the one-year term, the organization’s bylaws imposed no limits on a college’s discretion to refuse to renew scholarships at the conclusion of the one-year term.

Critics argue that institutions’ discretion not to renew the one-year scholarship elevates athletics over academics. In a practice that has become known as “running off,” it is not uncommon for a coach to replace a student-athlete viewed as a mediocre athletic talent with an athlete believed to have superior athletic skills. Unless a particular college or university had adopted a policy to the contrary, the one-year scholarship limit also permitted schools to refuse to renew the scholarship of a student-athlete whose athletic injuries precluded him or her from continuing to participate in sports. The one-year durational limit was also considered inconsistent with the reasonable expectations of many athletes and their parents who assumed that a scholarship would be renewed so long as the athlete remained academically eligible to engage in intercollegiate competition.

Finally, commentators argued that limiting the duration of an athletic scholarship to one year constitutes anti-competitive behavior subjecting the NCAA to antitrust liability.

In October 2011, the NCAA Board of Directors adopted legislation heralded as shifting the balance of power between coaches and players. The new legislation, which was effective immediately, permits but does not require institutions to award multiyear athletic

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122 Institutional financial aid can only be reduced during the term of the award if the athlete: (a) becomes ineligible to participate in intercollegiate competition; (b) entered fraudulent information on his or her application for admission, the NLI, or financial aid agreement; (c) is subjected to substantial disciplinary action resulting from having engaged in serious misconduct; or (d) voluntarily withdraws from a sport for personal reasons. NCAA MANUAL, supra note 1, § 15.3.4.2. During the term of an award, institutional financial aid may not be reduced or cancelled on account of any athletics-related reason, including the student-athlete’s athletics ability and an injury. Id. § 15.3.4.3.


124 Hakim, supra note 113, at 172–73; Joel A. Erickson, Multi-Year Scholarships Offer Security to Football Recruits, CHARLESTON GAZETTE, Feb. 3, 2012, at 5B (stating most recruits believe athletic scholarships are for four years).

125 See generally Yasser, supra note 119; Gibson, supra note 116; Alicia Jessop, Should Division I Schools Vote to Overturn the NCAA’s Multi-Year Scholarship Measure?, BUS. OF C. SPORTS.COM (Feb. 13, 2012), http://businessofcollegesports.com/2012/02/13/should-division-i-schools-vote-to-overturn-the-ncaas-multi-year-scholarship-measure/.
scholarships for up to five years. 126 Several universities notable for their athletic success, including Ohio State, Auburn, Michigan, Michigan State, Florida, and Nebraska announced that they would offer multiyear scholarships. 127

Although adopted by the Board of Directors, multiyear scholarship legislation barely survived an override vote by NCAA members. Critics of the legislation argued multiyear scholarships would (1) force new coaches, for what could be several years, to keep athletes on their roster who failed to fit the new coaches’ systems of play; 128 (2) give wealthier schools a built-in competitive advantage in recruiting student-athletes, given that athletes are more likely to sign a NLI with a school that offers a multiyear scholarship than one that only offers a one-year renewable scholarship; 129 (3) bind institutions to honor the scholarship of student-athletes whose athletics-related injuries preclude them from playing; 130 and (4) provide student-athletes with little “incentive to work hard and compete year in and year out.” 131

An official at Boise State University, an opponent of multiyear scholarships, reportedly characterized the legislation as:

[A] “recruiting disaster” that would encourage a “culture of brokering” and pit wealthy schools with larger recruiting budgets against their less well-heeled brethren, while also obligating schools to long-term commitments that might not make competitive sense. “There is never a guarantee that the incoming student-athlete will be a good fit for the program and the institution.” 132

126 NCAA MANUAL, supra note 1, §15.02.7. See also Michelle Brutlag Hosick, Multiyear Scholarship Rule Narrowly Upheld, NCAA.ORG (Feb. 17, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/February/Multiyear+scholarship+rule+narrowly+upheld.


128 Id.

129 Jessop, supra note 125.


Despite considerable opposition, a membership override vote failed by two votes to obtain the required five-eighths majority to prevent implementation of the legislation.\(^\text{133}\) Noting the strength of the opposition, NCAA President Mark Emmert struck a conciliatory tone:

> I am pleased that student-athletes will continue to benefit from the ability of institutions to offer athletics aid for more than one year, but it’s clear that there are significant portions of the membership with legitimate concerns . . . . As we continue to examine implementation of the rule, we want to work with the membership to address those concerns.\(^\text{134}\)

Notwithstanding valid criticism of multiyear scholarships, the new legislation enhances student-athlete welfare by affording athletes increased security. This in turn will stymie highly questionable practices, such as “running off,” that are particularly prevalent in football, the sport in which most multiyear scholarships will likely be offered.\(^\text{135}\)

With the adoption of this legislation, some coaches and administrators believe that the balance of power with respect to athletic-related financial aid is now weighted too heavily in favor of student-athletes.\(^\text{136}\) As a result, many institutions have sought to strengthen their position by incorporating a myriad of non-athletic related conditions into the financial aid agreement (e.g., compliance with departmental rules and policies). Such stipulations would allow institutions to impose higher standards for conduct and academic performance. This in turn would afford them more opportunities to extricate themselves from financial commitments made to potentially underperforming student-athletes, even during the period of the award.\(^\text{137}\)

\(^{133}\) Wolverton, supra note 130.

\(^{134}\) Multiyear Scholarships Plan Moves On, supra note 127.

\(^{135}\) Mike DeCourcy, Proposed NCAA Reforms a Mixed Bag of Genius, Idiocy, SPORTINGNEWS.COM (Aug. 11, 2011, 4:45 PM), http://aol.sportingnews.com/ncaa-basketball/story/2011-08-11/proposed-ncaa-reforms-a-mixed-bag-of-genius-idiocy (warning that multiyear scholarships are not a complete panacea to the “chicanery” that occurs in college sports as colleges may adopt new practices such as attempting to terminate athletes’ scholarships for disciplinary reasons).

\(^{136}\) For example, coaches cite to a lack of reciprocity in that institutions are bound for the term of the financial aid agreement (e.g., four years), but no such obligation is imposed on student-athletes who can leave their schools at any time. Thomas Bright, NCAA Institutes Multi-Year Scholarships, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 179, 180 (2012).

\(^{137}\) An alternative perspective would suggest, however, that the paradigm currently employed with regard to athletic financial aid is inherently flawed—the assumption that the duration of a scholarship award, even if for a one-year term, is presumptively for four
Preliminary indications suggest that institutions have attempted to restore what some coaches perceive as an appropriate balance of power by not offering multiyear scholarships. A 2013 survey of eighty-two Division I institutions revealed that “only [sixteen] have offered more than [ten] multiyear scholarships. Thirty-two of the universities have offered between one and [ten], and thirty-four have not offered any.”138 According to the report, the Big Ten Conference offered the most multiyear scholarships.139 In contrast, the Big 12 Conference, which was the only Bowl Championship Series (BCS) conference to formally support an override of the multiyear scholarship proposal, offered the fewest.140 Officials of prominent athletic programs, such as the University of Texas, who have been reluctant to offer multiyear scholarships, cite to their unwillingness to make long-term commitments rather than financial considerations.141 On the other hand, prominent programs, including the University of Florida, and mid-major programs, including Fresno State University, have offered multiyear scholarships as a recruiting inducement or as a means of differentiating their program from other athletic programs.142 Lack of knowledge by recruits and high school coaches that multiyear scholarships are available and the failure of some institutions to publicize their availability have also contributed to the slow pace of the awarding of multiyear scholarships.143 It is likely, however, that as awareness of multiyear scholarships increases and athletes negotiate for them, market pressures will force more institutions to offer multiyear scholarships.

years. Proponents of this viewpoint advocate for more of a merit-based approach to the renewal of athletic aid, such as exists with most academic award programs in which renewal of the award is predicated on preestablished performance benchmarks. Such an approach would undoubtedly invite criticism as being overly punitive and not in line with the principle of student-athlete well-being.


139 Id.

140 Id.


142 Id.

143 Brad Wolverton, I’m Not Sure Why the NCAA and the Coaches Are Keeping This Secret, CHRON. OF HIGHER EDUC. (May 20, 2013), http://chronicle.com/blogs/players/category/multiyear-scholarships.
2. Over-Signing

a. The Recruitment Process

Over the past century, the emergence of highly commercialized college athletics has been accompanied by an intense pursuit by colleges of high school athletes.\(^{144}\) As described by one commentator:

The pressure to produce winning teams increases efforts to recruit for athletic purposes. “Recruiting is the name of the game” is the cliché reflecting the necessity to have a team of superior athletic ability to win. The important variable is likely to be the ability of team members rather than the quality of the coaching or the desire to win. The coach’s desire to excel, to do a superior job in training, to have players who achieve distinction, all can incline him to recruit. Yet, the primary pressure is usually external, from the institution or its alumni or supporters, in a “job-is-on-the-line” manner.\(^{145}\)

During the forty-plus years since the foregoing view was expressed, the athlete recruiting process has not only intensified, but has also become more costly as it devours substantial amounts of athletic department resources, including a head coach’s attention.\(^{146}\) As expressed by a sports journalist, coaches’ “jobs depend mainly on convincing high school seniors to sign on the dotted line the first Wednesday in February.”\(^{147}\)

b. Revoking Scholarship Offers

Two types of coach conduct during recruitment of prospective student-athletes have been scrutinized. One involves a coach’s withdrawal of an oral scholarship offer to a high school student-athlete under circumstances where it is unlikely the recruit will be able to obtain an offer from another college or university. The second situation involves the phenomenon of over-signing, where a coach signs more prospective student-athletes to NLIs or scholarship offers

\(^{144}\) Timothy Davis, *Student-Athlete Prospective Economic Interests: Contractual Dimensions*, 19 T. MARSHALL L. REV. 585, 599 (1994); Libby Sander, *For Coaches, a Race with No Finish Line*, CHRON. HIGHER EDUC. (May 9, 2008), http://chronicle.com/article/For-Coaches-a-Race-With-no/35721 (discussing the factors that fuel the competition in the recruiting process and the negative consequences of such competition).


\(^{146}\) Davis, *supra* note 144, at 600.

than the coach’s college or university can accommodate under NCAA-imposed limitations.

Although a detailed discussion of the revocation of scholarship offers is beyond the scope of this Article, a brief examination of this practice helps to place over-signing into context. In regard to the revocation of scholarship offers, NCAA rules designate specific periods, based on the sport involved, during which a prospective student-athlete can sign a NLI and accept a scholarship offer from a college or university. As noted above, the NLI, when combined with an offer of financial assistance, creates a binding contractual commitment between the athlete and the institution. During a coach’s recruitment of a prospective student-athlete, it is common for coaches and athletes to make verbal commitments to each other. The recruit will orally commit to attend a particular college, and a coach will orally promise a scholarship to the recruit. Given that a binding express contractual relationship does not arise until the student-athlete and an institution’s representative sign a NLI and an offer of financial assistance or an offer of financial assistance, it is not uncommon for either or both parties to fail to honor a verbal commitment.148

The recruitment process is a world in which prospects and coaches anticipate that one or the other may not honor a verbal commitment. A coach may revoke a scholarship offer because the coach receives an oral commitment from an athlete who the coach believes has more promising athletic potential.149 A coach may also revoke a scholarship if the coach believes a recruit is not committed, because the recruit may have expressed interest in another program.150 Often a recruit will express such an interest as a safeguard against the possibility that his or her scholarship offer might be withdrawn.151

Coaches argue that institutions are disadvantaged when recruits fail to honor verbal commitments.152 They assert that oftentimes an institution will cease recruitment of other prospects with comparable skills based on their belief that the prospect will honor his or her commitment and sign with the institution.153 Coaches also argue that

148 See supra text accompanying notes 104–08.
150 Id. at 605–06.
151 Id.
152 Id. at 604 (noting broken promises impose meaningful costs on both institutions and recruits).
although it is likely that a coach will have the opportunity to sign other prospects, there may be great disparities in talent if coaches are forced to rely on secondary and tertiary options in recruiting.\textsuperscript{154} 

On the other hand, institutions’ revocation of scholarship offers has been criticized as placing a recruit in a more precarious situation than a university when he or she reneges on an oral commitment to sign a NLI.

A school that loses a recruit can usually replace him or her with another recruit, someone from the existing roster, or even a recruit from a future year.

In short, to use the jargon of risk aversion, recruits suffer more than schools from the possibility of broken early commitments because recruits cannot effectively manage the risk of disappointment through diversification. Recruits are one-time players in the early commitment game, and those who try to court multiple prospects actually damage their chances of keeping commitments they have. By contrast, schools are repeat players who easily diversify risk over multiple recruits and multiple recruiting years. Accordingly, coaches may worry that early recruits will break their commitments, but they know that they will not suffer catastrophic consequences because alternate plans will have been made. Recruits have no such luxury.\textsuperscript{155}

Sentiments similar to the foregoing have prompted commentators to urge the NCAA to take action to regulate oral scholarship offers, the time when athletes can sign NLIs, and the revocation of scholarship offers.\textsuperscript{156} Nevertheless, the NCAA has failed to enact legislation to directly or indirectly regulate this aspect of the recruiting process.

c. Over-Signing Student-Athletes

The NCAA has, however, taken action to regulate another aspect of recruiting: over-signing, which also provokes concerns relating to the vulnerability of prospective student-athletes in the recruiting process. Over-signing, which historically occurred principally in college football, occurs when a college or university signs more student-athletes to NLIs or offers of financial assistance than the institution can honor and still remain in compliance with NCAA rules. For Football Bowl Subdivision Schools (FBS), NCAA rules

\textsuperscript{154} See Jaime Y. Nomura, Refereeing the Recruiting Game: Applying Contract Law to Make the Intercollegiate Recruiting Process Fair, 32 U. HAW. L. REV. 275, 281–82 (2009) (noting the difficulty an institution may encounter in trying to find a comparable talent when a recruited athlete de-commits late in the recruiting season).

\textsuperscript{155} Yen, supra note 149, at 606 (footnotes omitted).

\textsuperscript{156} Id. at 585–616; Nomura, supra note 154, at 304.
impose an annual limit of twenty-five on the number of scholarships that can be awarded to incoming student-athletes.\textsuperscript{157} This limitation operates in concert with the NCAA’s limitation on the total number of football scholarships, eighty-five, that can be awarded per year.\textsuperscript{158}

Prior to the NCAA’s enactment of legislation discussed later in this section,\textsuperscript{159} coaches willingly ran the risk of signing prospective student-athletes to more NLIs or offers of financial aid than a college possessed because doing so served the interests of coaches in that over-signing (1) provided coaches with a safeguard against a recruited prospect who could not sign a NLI because he or she was academically ineligible to receive an athletic scholarship under NCAA rules;\textsuperscript{160} (2) gave coaches a form of insurance, protecting them against the possibility that a recruited athlete might forfeit his or her amateur status by having committed a violation of NCAA amateurism rules;\textsuperscript{161} (3) facilitated a coach’s ability to have players in reserve if a highly desired recruit elected to attend another college; and (4) afforded coaches a supply of incoming student-athletes to replace other athletes whose athletic scholarship a coach had decided not to renew because the coach believed the athlete had underperformed athletically.\textsuperscript{162} The quest for a competitive advantage also prompted over-signing. “Coaches love oversigning because it gives them more talent to choose from, [and] keeps [recruits] out of the hands of competitors . . . .”\textsuperscript{163} Another commentator suggests, “[t]he coaches who signed more players ha[ve] a chance to erase their mistakes. The coaches who signed fewer ha[ve] to live with their mistakes. That certainly seems like a competitive advantage.”\textsuperscript{164} In short, coaches over-signed in order to have backup student-athletes available to guard against the occurrence of one of the above scenarios.

\textsuperscript{157} NCAA MANUAL, supra note 1, § 15.5.6.1.
\textsuperscript{158} Id. See generally Jonathan D. Bateman, When the Numbers Don’t Add Up: Oversigning in College Football, 22 MARQ. SPORTS L. REV. 7 (2011) (providing a detailed discussion of over-signing).
\textsuperscript{159} See infra text accompanying notes 176–82.
\textsuperscript{160} Bateman, supra note 158, at 11.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
87357370.html.
_staples/01/24/oversigning/index.html.
Prior to the NCAA’s over-signing legislation, if the anticipated attrition failed to occur, over-signed recruits as well as student-athletes already on the roster from the previous season were placed in precarious positions. If none of the above-described scenarios occurred, the coach had to get rid of players. A coach can get rid of players in various ways. A coach could release a recruit from his or her NLI. However, a more likely scenario is “grayshirting,” which occurs when a coach requests that a recruit delay his or her enrollment with the hope that a scholarship would become available.165 Similarly, coaches can request that recruits matriculate at the college or university and absorb the costs of attendance in anticipation that recruits would be awarded a scholarship in the future. This practice often occurs in tandem with coaches requesting that players walk-on to the team without receiving the scholarship the coach promised when the athlete was recruited. Another tactic is to encourage athletes already on the team to take a medical redshirt; this practice frees up the injured athlete’s scholarship while allowing the school to grant him or her a medical scholarship, which does not count against the NCAA scholarship limits.166 Finally, the coach might refuse to renew the scholarship of roster players to encourage them to transfer to other institutions.167

Over-signing has been criticized as being immoral and a possible violation of athletes’ legal rights.168 University of Florida President J. Bernard Machen condemned the practice as follows:

The universities, with full knowledge of what they are doing, extend more athletic scholarships than they have. These schools play


166 Hannah Karp & Darren Everson, Alabama’s Unhappy Castoffs, WALL ST. J. (Sept. 24, 2010), http://online.wsj.com/article/SB10001424052748703384204575509901468451306.html (reporting that some athletes have complained that they were forced to take medical redshirts even though the athletes were not so incapacitated that they could not compete); Hannah Karp, Former Players Say Saban Twisted the Truth, WALL ST. J. (Nov. 25, 2010), http://online.wsj.com/article/SB10001424052748704243904575630593438793612.html (discussing the negative repercussions of over-signing for athletes).


168 John Infante, Oversigning and NCAA Federalism, NCAA BYLAW BLOG (June 13, 2011), www.ncaa.org/blog/2011/06/oversigning-and-ncaa-federalism (describing over-signing as an unethical practice, in part, because a coach is making a promise that he can’t keep).
roulette with the lives of talented young people. If they run out of scholarships, too bad. The letter-of-intent signed by the university the previous February is voided. Technically, it’s legal to do this. Morally, it is reprehensible.169

Commenting on the knowledge gap, one writer observed that in the past, “when top high-school seniors [made] their college commitments, dozens of signees headed to some of the nation’s most chronically over-signed schools were either unconcerned, or unaware, that these schools may have to cut some players to balance their lopsided books.”170 As is true when scholarship offers are revoked, an over-signed recruit is particularly vulnerable when he or she receives news from a coach that roster limitations would prevent the recruit from making the team. Often, opportunities for an athlete to sign a NLI with another school have evaporated. Finally, over-signing jeopardized the interest of student-athletes who were cut to make room for a new recruit.171 These concerns and the perceived unfairness of over-signing led certain athletic conferences to ban the practice, a step taken by the Big Ten Athletic Conference in 1956.172

Legal recourse was not a realistic option for the over-signed recruit. If an institution and athlete had only signed a NLI without a financial aid commitment, the athlete would have no legal cause of action, such as a breach of contract claim, against his institution.173 On the other hand, if an athlete signed an offer of financial aid and the school refused to honor it because of over-signing, the athlete would have a breach of contract action.174 The odds of an athlete pursuing such an action, however, would have been remote for reasons including (1) a lack of awareness by athletes of their legal rights; (2) the time investment involved in pursuing a cause of action; (3) the recovery from such an action, which would more than likely be limited to the value of a one-year scholarship (this of course would not be the case under a regime that allows for multiyear scholarships); and (4) the stigma attached to an athlete who challenged the

170 Karp & Everson, supra note 163.
172 Staples, supra note 164.
173 See supra text accompanying notes 104–08.
174 See Bateman, supra note 158.
system. Thus, from an athlete’s perspective, it might be wiser to either accept an offer from another school or to simply wait and hope to get a scholarship from the team that subjected him or her to over-signing.

To address concerns relating to over-signing, the NCAA modified its recruiting rules. The NCAA initially adopted a rule that was applicable to FBS institutions. The rule imposed a yearly limit of twenty-eight on the number of prospective student-athletes with whom an institution could sign a NLI or an offer of financial aid. Responding to criticism that this rule was ineffective in circumscribing over-signing and the harm caused by it, the NCAA, in 2012, approved more restrictive legislation intended to curb the practice of over-signing. It provides as follows: In bowl subdivision football, there shall be an annual limit of twenty-five on the number of prospective student-athletes who may sign a NLI or an institutional offer of financial aid from December 1 through May 31. Additionally, a prospective student-athlete who signs a NLI or an institutional offer of financial aid and becomes an initial counter for the same academic year in which the signing occurred (e.g., midyear enrollee) shall not count toward the annual limit on signings.

In articulating the rationale for the rule, which became effective August 1, 2012, the NCAA stated:

This proposal seeks to address concerns regarding the practice of “over-signing” football prospective student-athletes to National Letters of Intent or financial aid agreements. Reducing the signing limit from 28 to 25 is an appropriate step to focus recruitment and signing of prospective student-athletes to the Football Bowl Subdivision limit on initial counters. By limiting the number of signees, institutions will be encouraged to focus their recruiting

175 See id.
176 To be classified as an NCAA Division I FBS institution, a school must play varsity football, offer up to eighty-five football scholarships, and participate in postseason play outside the auspices of the NCAA. NCAA, About the NCAA: Membership, NCAA.ORG, http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+EW (last updated Aug. 13, 2012).
177 2010-11 NCAA MANUAL, supra note 112, § 13.9.2.3.
178 Staples, supra note 164 (describing how a loophole related to the dates during which colleges could sign recruits to NLIs allowed the practice of over-signing to continue after the promulgation of the NCAA’s initial rule, and noting that the NCAA’s initial effort to curb over-signing was the result of legislation proposed by the SEC, which is identified as the conference with institutions that most frequently engaged in the practice).
179 NCAA MANUAL, supra note 1, § 13.9.2.3. (“The legislation’s effective date was August 1, 2012.”).
180 Id. § 13.9.2.3.1.
efforts on prospective student-athletes with the necessary academic and athletic credentials to succeed at the certifying institution.\textsuperscript{181}

The limitation imposed on offers enhances student-athlete well-being. Although limited in scope, the legislation recognizes one of the harsh realities of college recruiting, which harmed not only prospective players, but also roster players whose scholarships would not be renewed to make room for new recruits.\textsuperscript{182} As such, the limitation on the number of offers that an institution can extend to players affords a layer of protection that ameliorates a pernicious recruiting practice. The limits imposed on over-signing are also consonant with a multiyear scholarship, which when offered will preclude a college from revoking the scholarship of a roster athlete in order to make room for an athlete who was over-signed.

3. Financial Aid

In 2011, the Student-Athlete Well-Being Working Group submitted for Board approval controversial legislation that would have permitted student-athletes, who had been awarded a full scholarship (i.e., tuition, fees, room and board, and books), to receive additional athletic aid equal to the lesser of the institution’s true cost of attendance or up to $2000.\textsuperscript{183} At the NCAA’s January 2012 Annual Meeting, the Board of Directors unanimously approved the proposal.\textsuperscript{184} The impetus for the plan was a desire to provide scholarship student-athletes with funds to pay for miscellaneous expenses not covered by scholarships such as laundry, computers, and occasional travel to home.\textsuperscript{185} The chair of the Student-Athlete Well-Being Working Group explained:

We understand the situation of our student-athletes. This isn’t about paying student-athletes, but it is about being fair and recognizing that in Division I it ought to be important to meet this need . . . . We


\textsuperscript{182} See Staples, supra note 164 (arguing that over-signing is harmful to recruits and roster athletes).

\textsuperscript{183} POST-PRESIDENTIAL RETREAT UPDATES, supra note 9, at 3–4.


all have lots of different choices to make, but we felt that these proposals are right for our student-athletes.\textsuperscript{186} The notion that athletic aid does not cover the full costs of attendance for many student-athletes comports with research conducted by the National College Players Association, which found that “the NCAA restricts the value of the full scholarship to a level of compensation that is at or below the poverty level for the vast majority of athletes.”\textsuperscript{187}

The Board of Directors suspended the original legislation following strong opposition by NCAA Division I membership, which manifested in an override vote supported by 160 Division I institutions.\textsuperscript{188} Member institutions complained that giving student-athletes additional non-need based aid would cause institutions to incur unjustified costs.\textsuperscript{189} Critics of the legislation also complained that it amounted to pay-for-play, which is antithetical to the amateurism principle, a core NCAA principle.\textsuperscript{190} Opponents also


\textsuperscript{189} Id.

argued the legislation gave rise to gender equity concerns, was adopted too quickly to allow thoughtful consideration and comment, and would allow wealthier schools that could offer the additional scholarship money to stockpile student-athletes, leading to a competitive advantage.  

In response to these concerns, the Student-Athlete Well-Being Working Group drafted a proposal that would allow up to $2000 of additional aid but only if student-athletes demonstrated need. The new plan also allows student-athletes on partial scholarships to receive additional aid. The NCAA sought comment from members on a plan that offers three options, which includes the need-based component.

**B. Academic Reforms**

1. **Overview**

In 2011, the Board of Directors approved proposals submitted by the Committee on Academic Performance (CAP) that sought to enhance student-athlete academic performance. The legislation imposes more stringent academic requirements relating to initial and junior college transfer eligibility and academic progress rates (APR). The Board’s adoption of more stringent academic standards

191 Wolverton, *supra* note 188.
192 *Id.*
193 *Id.*
194 The Board sought comments on these three options:

Allow each school to give student-athletes up to $2,000 of additional aid (not to exceed cost of attendance). In this model, financial need is not part of the criteria and student-athletes could receive the additional funding whether they were on full scholarship or received some portion of a scholarship. Alternately, those receiving partial scholarships could be limited to receiving a proportional amount of the $2,000 (for example, if they receive a twenty-five percent scholarship, they could receive $500 of the additional funding).

Base the eligibility for the miscellaneous expense allowance on a student-athlete’s demonstrated “need” as detailed through the Free Application for Student Financial Assistance (FAFSA). To be eligible for the funding, student-athletes must fill out the FAFSA.

Allow each school to use Student-Athlete Opportunity Funds, up to $2,000 per student-athlete, up to the cost of attendance. Each school would be allowed to supplement their SAOF funds by up to $2,000 for each of the total number of grants-in-aid.

Hosick, *supra* note 185.
196 *Id.*
represents another phase of NCAA academic initiatives, since the 1980s, aimed at ensuring a modicum of academic integrity within major intercollegiate athletics programs.197

Before examining the new standards, we discuss a scenario that provides a backdrop to the Board’s academic reform efforts. In 1978, a highly-recruited high-school basketball player, Kevin Ross, enrolled at Creighton University.198 During his time at Creighton, Ross earned 96 of the 128 hours he needed to graduate and enrolled in many classes (e.g., marksmanship and the theory of basketball) that did not count toward his major.199 In 1982, Ross departed Creighton without earning a degree, with a “D” grade average, and the “overall language skills of a fourth grader and the reading skills of a seventh grader.”200

Stories of student-athletes like Kevin Ross, who competed in intercollegiate athletics on behalf of their institutions but who failed to develop academically, led to charges that student-athletes were being exploited for their athletic prowess. In response to such criticism and the public perception that academic values had become subordinated to athletic interests, the NCAA enacted what would become the first in a series of academic reform initiatives.201 The NCAA’s ever evolving academic standards legislation consists of several strands including (1) initial eligibility rules (a combination of minimum standardized test scores and grade point averages that entering student-athletes must attain in order to receive athletic-based financial aid and to participate in intercollegiate competition),202 (2) daily and weekly limits on the maximum number of hours that student-athletes can participate in organized-sports-related activity,203 (3) progress-toward-degree requirements (student-athletes must take a curriculum that allows them to earn a certain percentage of credit hours in their declared major field of study at different junctures in

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197 Elisia J.P. Gatmen, Academic Exploitation: The Adverse Impact of College Athletics on the Educational Success of Minority Student-Athletes, 10 SEATTLE J. FOR SOC. JUST. 509 (2011) (providing an overview of NCAA academic reform legislation); Timothy Davis, supra note 111, at 759–64 (discussing NCAA efforts initiated during the 1980s to restore academic legitimacy).


199 Id. at 412.

200 Id.

201 See Timothy Davis, supra note 111, at 759–64 (discussing factors leading to NCAA academic reform measures).

202 NCAA MANUAL, supra note 1, § 14.3.1.

203 Id. § 17.1.6.1 (imposing four-hour daily and twenty-hour weekly maximum limits on countable athletically related activities in which student-athletes may participate).
their academic careers), and (4) the APR (a metric developed by the NCAA that is tied to a fifty percent projected graduation rate that each intercollegiate team must obtain in order to avoid penalties including a ban on post-season play).

Graduation rates have become the de facto metric for assessing whether the foregoing and other academic legislation have coalesced to improve student-athlete academic performance. Commenting on the importance of graduation rates, two authors state:

To achieve academic integrity colleges and universities involved in highly-commercialized athletics, particularly big-time football, must ensure that three academic values are maintained. The first is a college degree. Earning a degree is the primary measure of student-athletes’ academic achievement. Graduation rates provide evidence that institutions are fulfilling the promise of a college education in exchange for athletic performance. It also evidences that institutions are recruiting students who are likely to succeed and not just athletes.

Based on graduation rates, NCAA academic reforms have produced measurable academic progress.

Even assuming that graduation rates are an indicative measure of student-athlete academic achievement, concerns persist regarding the balance between academics and athletics in intercollegiate athletics. For example, the gap in the graduation rates of African American and Caucasian student-athletes manifests deep-seated and troubling racial dynamics within college sports and may illustrate the prioritization of

204 Id. §§ 14.4.1, 14.4.3.2.
205 See infra text accompanying notes 239–42.
207 Id. at 51. The two other values identified are student-athlete welfare, including a safe environment where steps are taken to minimize athletic injuries, and racial equity. Id.
208 A 2012 study commissioned by the NCAA shows that the graduation rates for the 2004 and 2005 cohorts were eighty-two and eighty-one percent respectively. NCAA RESEARCH, TRENDS IN GRADUATION-SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I INSTITUTIONS, NCAA 2012 [hereinafter TRENDS], available at http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/2012+gsr+and+fed+trends. The study further indicates that the graduation rate of the 2005 cohorts was seven percentage points higher than that of the 1995 cohorts as a result of changes made to the initial eligibility rules in 1996 and 2003. Id. Walter Harrison, chair of the NCAA Committee on Academic Performance, attributes the upward trend of graduation rates to “the implementation of the yearly Academic Progress Rate; increased initial eligibility standards, and more stringent progress-toward-degree requirements.” Grad Rates Hit High Marks, NCAA.ORG (Oct. 27, 2010), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/October/Grad+rates+hit+high+marks.
This concern is illustrated by an examination of the graduation gap between African American and Caucasian athletes who played on the teams that participated in the 2010–2011 BCS football championship:

The University of Oregon football team’s graduation rate was 54 percent last year, but only 41 percent of its African American football players graduated. Meanwhile, 67 percent of its white players graduated. Auburn University’s graduation rate was 54 percent, with only 49 percent of its African American football players graduating and 100 percent of its white players graduating. All the more disturbing is the fact that the University of Oregon had the sixth-lowest African American graduation rate and Auburn University had the largest racial disparity in graduation rates of all seventy bowl teams this season. What makes these statistics even more shocking is that of the 114 players on the Auburn football team in 2010–2011, eighty were African American. Of the 105 football players on the University of Oregon’s football team, fifty-seven were African American. Texas Christian University, which ended the year undefeated on the field, also had a respectable graduation rate of 71 percent, graduating 63 percent of their African American players and 85 percent of their white players, making a strong case for it being the best college football program in the country. While Auburn ended the year ranked number one in all of college football, they were eighty-fifth among all bowl eligible teams in the ranking that should matter most to participating institutions and their student-athletes—the graduation rates of its players.

Advocates for improving the academic success of student-athletes also caution that graduation rates can be misleading indicators of meaningful academic achievement because of practices that mask student-athlete academic deficiencies. One such practice involves academic counselors steering student-athletes toward “jock majors”—fields of study that allow student-athletes to “maneuver through the maze of academic requirements and remain eligible to compete.” As expressed by one commentator, “[t]he march toward tougher standards and, the NCAA hopes, higher graduation rates begs a crucial question, however: What do numbers matter if players are

209 See TRENDS, supra note 208.
210 Smith & Millhiser, supra note 206, at 54–55.
being sent into academic programs that won’t give them a meaningful education or marketable skills? 212

Of course, the question of clustering is not as simple as is perhaps suggested above and raises questions that warrant a more detailed examination. For example, does the acceptance of “jock majors” as a reality necessarily suggest that existing within our institutions of higher education are illegitimate academic programs that lack the degree of academic rigor consistent with the educational missions of colleges and universities? On the other hand, if a particular degree program has been vetted through established institutional procedures (e.g., curriculum committee, faculty senate), should a reasonable measure of legitimacy be assumed? Does the presence of a disproportionate number of student-athletes clustered in a particular major necessarily translate into athletes receiving a sub-par education compared to their non-student-athlete counterparts who chose the same major, or might other variables be relevant? Again, these are just a few of the questions that not only relate to clustering but also give primacy to the educational value as it relates to student-athletes.

More stringent academic requirements, when combined with the economic benefits derived from successful Division I football and men’s basketball teams, may entice academic advisors, often because of pressure applied by coaches, to provide student-athletes with improper academic assistance that violates NCAA rules. 213 Academic improprieties at the University of North Carolina at Chapel Hill (UNC) provide a recent example of academic fraud. From 2008-2010, a former UNC academic tutor committed major NCAA rules violations by providing impermissible academic assistance to student-athletes. 214 The tutor engaged in academic fraud by composing substantial sections of writing assignments for three student-athletes who submitted the assignments for academic credit. 215 The former tutor also revised electronic drafts, composed works-cited pages, and provided outlines including thesis statements and substantive


213 See Smith & Millhiser, supra note 206, at 52.


215 Id.
material. Additionally, the former tutor committed a violation of NCAA ethical conduct standards by refusing to cooperate with the NCAA investigation of her activities. The NCAA imposed substantial penalties on UNC’s football program as a result of these and other rules violations.

Whether the most recently revised NCAA academic reforms will contribute to clustering or academic related NCAA rules violations is uncertain. What is clear, however, is that academic reform measures place a higher priority on academic achievement. We now turn to a discussion of this legislation.

2. Initial Eligibility and Junior College Transfer Legislation

a. Initial Eligibility Legislation

In 2012, the Board of Directors approved changes to the eligibility requirements for entering first-year student-athletes and junior-college transfers. Under the new standards, in order for an entering first-year student to receive institutional-athletic financial aid and to engage in intercollegiate competition during his or her first year of academic residency, the athlete must have attained a minimum 2.3 grade point average (GPA) in sixteen high school core courses. Prior to the Board’s action, the minimum core GPA required was 2.0. The Board also increased the minimum standardized test score requirement. Based on the NCAA’s sliding scale formula that evaluates initial eligibility based on a combination of high school GPA and standardized test scores, the heightened eligibility standards require an entering student-athlete with a 2.3 core course GPA to have

216 Id.
217 Id.
218 UNC Receives Postseason Ban, Scholarship Reductions, NCAA.ORG (Mar. 12, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/March/UNC+receives+postseason+ban+scholarship+reductions. The penalties include:
Id. Additional details concerning these sanctions are set forth in the UNC Infractions Report. Id.
219 NCAA MANUAL, supra note 1, § 14.3.1.1. Core courses are academic courses that include English, mathematics, natural or physical science, and social science.
220 Id.
scored at least a 1080 on the Standardized Admissions Test (SAT) in order to qualify.\textsuperscript{221} The previous minimum required a student who entered college with a 2.0 GPA to have a minimum SAT score of 1010.\textsuperscript{222} Similarly, under the new eligibility standards, an entering student-athlete with a 3.5 GPA must have a 600 SAT score in order to qualify.\textsuperscript{223} Previously, qualifier status could have been attained by a student-athlete entering college with a 3.5 core course GPA and a 420 SAT score.\textsuperscript{224} The revised standards also require student-athletes to have completed ten of sixteen core courses prior to the beginning of their senior year.\textsuperscript{225} In May 2013, the Board modified the 2012 changes to the initial eligibility standards. For reasons discussed \textit{infra},\textsuperscript{226} the Board affirmed the increased GPA of 2.3 but restored the minimum SAT score of 1010.\textsuperscript{227}

In a significant change, the Board also adopted legislation allowing for academic redshirts. Previously, students who failed to meet the minimum initial eligibility requirements were deemed non-qualifiers. As such they were not permitted to receive athletic financial aid and compete in intercollegiate competition during their first academic year in residence.\textsuperscript{228} Under the legislation adopted in 2012, student-athletes who fail to achieve qualifier status may not compete but may, if they meet certain eligibility requirements, receive athletics financial aid and practice with a team during his or her first semester.\textsuperscript{229} Again using the NCAA sliding scale formula, a prospective student-athlete would acquire academic redshirt status if he or she achieves a minimum 2.0 GPA and 1020 SAT score.\textsuperscript{230} This roughly correlates to the minimum eligibility standards for qualifier status prior to the

\begin{footnotes}
\footnote{221 Id.}
\footnote{222 Id.}
\footnote{223 Id.}
\footnote{224 Id.}
\footnote{225 Id. \textsection 14.3.1.1(c). The intent behind this legislation is to prevent athletes from back-loading their curriculum and encourage taking courses in the typical fashion so as to allow them to build on academic prerequisites. \textit{See also} Dana O’Neil, \textit{Eligibility vs. Academic Preparedness}, ESPN.COM (Aug. 6, 2012), http://espn.go.com/college-sports/story/_/id/8236949/ncaa-increases-minimum-eligibility-standards-division-student-athletes.}
\footnote{226 \textit{See infra} text accompanying notes 250–52.}
\footnote{228 NCAA, 2011–12 NCAA DIVISION I MANUAL (2011) \textsection 14.3.2.1, 14.3.2.1.1.}
\footnote{229 NCAA MANUAL, supra note 1, \textsection 14.3.1.2.}
\footnote{230 Id. \textsection 14.3.1.2.1.}
\end{footnotes}
Board’s adoption of the rule changes in 2012. Therefore, student-athletes who comply with the pre-amended standards will not be denied athletics financial aid; however, they will not be permitted to compete.

In justifying creating an academic redshirt status, one NCAA official stated “[t]he changes adopted by our presidents acknowledge that some incoming student-athletes need more time and assistance to be academically successful in college . . . . We believe the new standards will give more student-athletes the opportunity to thrive in the classroom.”231 Similarly, the NCAA’s Committee on Academic Performance, in proposing the recommendation to the Board, explained that “[s]tudent-athletes who need more time to acclimate to college life in order to ensure academic success will be provided an academic redshirt year without the pressure of competition.”232 The new initial eligibility standards for both qualifiers and academic redshirts will take effect for student-athletes who initially enroll in college after August 1, 2016.233

b. Junior College Transfer Legislation

Data demonstrates that junior college transfers often encounter academic difficulties after they enroll in four-year institutions.234 In an effort to enhance the academic preparedness of junior college transfers, the Board adopted legislation recommended by CAP that increases the minimum transferrable GPA from 2.0 to 2.5.235 The new legislation also limits the number of physical education classes that may be included in determining whether a junior college transfer has achieved the required 2.5 GPA.236 Finally, a junior college transfer who would not have been a qualifier out of high school must complete a core curriculum that includes English, math, and natural or physical science classes in order to qualify for athletics financial aid and compete after he or she transfers to a four-year institution.237 The

232 POST-PRESIDENTIAL RETREAT UPDATES, supra note 9, at 8.
233 NCAA MANUAL, supra note 1, §§ 14.3.1.2, 14.3.1.2.1.
234 Thomas S. Paskus, A Summary and Commentary on the Quantitative Results of Current NCAA Academic Reforms, 5 J. INTERCOLLEGIATE SPORT 41, 45 (2012).
235 NCAA MANUAL, supra note 1, § 14.5.4.1.
236 Id. § 14.5.4.5.4.
237 Id. § 14.5.4.2.1.
new standards took effect for junior college transfers after August 1, 2012.238

3. Academic Progress Rate

In May 2004, the NCAA adopted legislation that instituted the APR. In commenting on the APR, then NCAA President, the late Myles Brand, stated “[f]or the first time, the NCAA will have the ability to hold institutions and teams accountable for the academic progress of their student athletes.”239 The NCAA calculates a team’s APR by examining each scholarship student-athlete on an intercollegiate team and determining whether the player has remained academically eligible to participate in intercollegiate athletics and whether the student has chosen to remain enrolled at the school. Teams are awarded one point for meeting each of these standards during a given semester, resulting in each athlete earning the school a maximum of two points per semester and four points per year if the institution uses a two-semester calendar.240 After determining each athlete’s individual score, each team gets a final APR score; 1000 is the maximum APR a team can earn.241

In 2011, the NCAA Board of Directors adopted a measure that requires teams to meet a minimum four-year APR average of 930 (which corresponds to a fifty percent graduation rate) rather than an average of 900, in order to be eligible for post-season competition.242 Although the new legislation takes effect in the 2015–2016 season, the impact of the current APR was vividly illustrated when a low APR average precluded 2011 NCAA men’s national basketball

238 Id.


241 Id.

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champion, the University of Connecticut, from participating in post-season play.  

a. Assessing Academic Reform Legislation

As in the past, legitimate concerns have been expressed regarding the NCAA’s most recent academic reform measures. In regard to initial eligibility rules, these concerns include whether (1) the first wave of high school students subject to the heightened requirements will be given sufficient notice to allow high school athletes and their parents to make the adjustments that will facilitate prospective student-athletes’ compliance; (2) the NCAA has overstated in attempting to legislate preparedness, which is something that cannot be legislated; (3) the NCAA standards mandate a one-size-fits-all model notwithstanding a secondary-school system that lacks uniformity in course offerings and quality; (4) the new rules will prevent educational opportunity for student-athletes who, with careful guidance in college, overcome their academic deficiencies and earn a degree; and (5) practices will develop that enable prospective student-athletes to circumvent the new rules (e.g., enrolling students in high schools of questionable academic rigor). The changes to NCAA junior transfer rules have also been criticized as foreclosing on too many junior college student-athletes’ opportunity of transferring to a Division I institution. Critics also contend that transfer rules favor wealthier junior colleges that can provide the academic support services that will allow their student-athletes to meet the heightened transfer eligibility standards.

243 Nicole Auerbach & Steve Wieberg, UConn Among Teams Banned From Postseason Play Due to APR, USA TODAY (June 20, 2012, 3:08 PM), http://usatoday30.usatoday.com/sports/college/story/2012-06-20/ncaa-apr-connecticut-ban/55713412/1.
245 O’Neil, supra note 225.
246 Id.
Responding to these concerns, in May 2013, the Board jettisoned the increased minimum SAT score of 1080 and restored the current minimum SAT score of 1010. In reversing course, the Board expressed concern about the disparate impact of its increased test score requirement on ethnic minorities. It also reasoned that the increase in the minimum GPA, along with more stringent core course requirements and an increased APR for post-season play, should be sufficient to improve the graduation rates of student-athletes.

Notwithstanding legitimate concerns regarding the impact of academic reforms and the Board’s restoration of the current minimum test score requirement, heightened eligibility standards represent a significant step toward promoting meaningful student-athlete academic success. Indeed, initial eligibility rules are a subset of NCAA eligibility rules “designed to maintain academic integrity, the ‘amateur’ nature of intercollegiate athletics and/or competitive balance among its member schools and participants.” The potential impact of the most recent academic reforms is illustrated by the results of a study, which estimates that if the new initial eligibility rules had been in effect for men’s basketball players who enrolled in college in 2009, 43.1% of them would not have met the standards. Additionally, only 35.2% of football players and 15.3% of all student-athletes would have met the standards.

Although the full impact of heightened eligibility standards will not be realized until after they have been fully implemented and can be assessed, tougher academic standards are likely to diminish the deleterious effect of one barrier—inferior academic preparation—to student-athlete academic achievement. Moreover, as was true of Propositions 48 and 16, student-athletes are likely to make the necessary adjustments to comply with the minimum standards.

250 Hosick, supra note 227.
251 Id.
252 Id.
254 Brennan, supra note 244.
255 O’Neil, supra note 225.
256 Timothy Davis, A Model of Institutional Governance for Intercollegiate Athletics, 1995 WIS. L. REV. 599, 617 (“Student-athletes’ opportunities to achieve academically face several barriers . . . [including] the demands which athletics places on their time [and] inferior academic preparation prior to college.”).
257 Effective in 1986, Proposition 48 was NCAA academic reform legislation that required a minimum GPA of 2.0 and a minimum SAT score of 700 in order for an
Like other measures to enhance academic standards, the increase in the APR baseline has been criticized as leading to the increased potential for unsavory practices, such as academic fraud, as the competitive pressures of big-time intercollegiate athletics may influence athletes, coaches, and university personnel to do whatever is necessary to assist student-athletes in remaining in good academic standing.258 In addition, fairness concerns have been raised as the impact of the APR has fallen disproportionately on low-resources institutions, particularly historically black colleges and universities (HBCU).259 HBCUs accounted for thirty-three of the 103 teams penalized for low APRs in 2011.260 HBCUs also disproportionately represented teams that faced post-season bans for APRs falling below the minimum in 2012.261 Many of these institutions lack the financial resources to provide academic support services that will enable many athletes to succeed academically and thus to remain in good academic standing.262 The NCAA established a fund earmarked for assisting these institutions with their academic needs263 and has made special allowances for them.264 Along these same lines, factors such as limited financial resources and institutional missions, which tend to be more inclusive of underrepresented students, have been viewed as mitigating factors in appeals of APR-related penalties. Nevertheless, because of limited financial resources, teams at these institutions are likely to continue to disproportionately represent teams subject to a post-season ban and other penalties resulting from low APRs.

incoming student-athlete to be eligible to play intercollegiate sports and receive an athletic scholarship. Pryor v. NCAA, 288 F.3d 548, 553 (3rd Cir. 2002). Proposition 16 heightened Proposition 48’s standards by increasing the core course requirements and developing a sliding scale that required a minimum GPA of 2.0 accompanied by a minimum SAT score of 1010. Id.

258 See supra text accompanying notes 213–17.
261 See NCAA, Most Division I teams deliver top grades, NCAA.ORG (June 20, 2012), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/June /Most+Division+I+teams+deliver+top+grades.
262 Glockner, supra note 259; Moltz, supra note 260.
263 Moltz, supra note 260.
264 Hosick, supra note 186.
Notwithstanding such reservations, critics laud the goal of the enhanced standards and the promotion of education. Figures released in 2012 are illustrative of the positive trends. The overall four-year APR rose to 973, which represented a three-point increase over 2011 figures. Apart from student-athletes’ improved academic performance, the APR’s success can be measured by the way in which it has become a part of the fabric of success of Division I institutions. APR clauses are being incorporated into coaching contracts, “which give monetary incentives and disincentives for coaches who achieve or fail to achieve APR benchmarks.”

Graduation rates for student-athletes participating in the 2013 NCAA Men’s Basketball Tournament strongly suggest that NCAA academic reforms adopted over the past several years are having a positive impact. A report released in March 2013 revealed that the overall graduation rate for male student-athletes participating on 2013 NCAA basketball tournament teams increased to seventy percent from sixty-seven percent in 2012. Overall graduation rates for African American male basketball players on these teams increased from fifty-nine percent in 2012 to sixty-five percent in 2013. Although this is welcome progress and there has been a narrowing of the gap in graduation rates between African American and Caucasian players on the tournament teams, from twenty-eight percent in 2012 to twenty-five percent in 2013, a large gap persists. Moreover, forty percent of the men’s teams had a Graduation Success Rate disparity in excess of thirty percent between Caucasian and African American student-athletes in 2013. Nevertheless, the report reflects positive academic trends. For example, eighty-seven percent of the

265 Dauster, supra note 242.
269 Id.
270 Id.
271 Id. at 2.
teams graduated more than fifty percent or more of their men’s basketball student-athletes and fifty-three percent graduated seventy percent or more.\footnote{272}{\textit{Id.}} Another notable area of improvement relates to the APRs of tournament teams. Only three of the 2013 men’s tournament teams had an APR that fell below the current 925 minimum standard compared to eight teams in 2013.\footnote{273}{\textit{Id.} at 1.}

Dr. Richard Lapchick, the director of the institute that prepared the report, noted the remaining challenges, such as the racial gap in graduation rates, but emphasized the positive impact of NCAA academic reform measures.

We are doing better each year. The academic reforms instituted in the past have worked. We need to raise the bar and move toward 60 percent being the acceptable standard for the APR. Two thirds of this year’s team(s) in the men’s tournament are already there. The NCAA has started to do this by raising the APR minimum score to 930 this year.\footnote{274}{\textit{Id.} at 2.}

Neither heightened eligibility rules nor increased APR standards will, however, be a panacea for the academic tensions residing in college sports. To achieve their desired goal of affording student-athletes a meaningful educational opportunity, these standards must be accompanied by measures that attempt to hold at bay other impediments to academic success,\footnote{275}{See Smith & Millhiser, \textit{supra} note 206, at 51–52 (commenting on practices that limit academic achievement, including advisors instructing student-athletes to take classes of little academic value in order to maintain their athletic eligibility and the demands coaches place on athletes’ time which detracts from academic pursuits); David Moltz, \textit{How Athletes Spend Their Time}, INSIDE HIGHER ED (Feb. 14, 2011), http://www.insidehighered.com/news/2011/02/14/ncaa_survey_details_athletes_missed_class_time (discussing the amount of class time student-athletes miss because of athletic activities).} such as efforts by institutions to circumvent NCAA rules that limit the amount of time athletes can devote to athletic related activities. As noted above, once they arrive at college, student-athletes may continue to be clustered into majors where over-friendly professors may not provide them with the academic rigor necessary for them to take full advantage of the academic opportunities an athletic scholarship affords.\footnote{276}{See \textit{supra} text accompanying notes 211–12.} Moreover, student-athletes must contend with the ever-increasing demands that athletics place on their time, often to the detriment of academic pursuits.
CONCLUSION

In a world of highly commercialized intercollegiate athletics replete with academic and other scandals, cynicism abounds. And it is easy to perceive any effort by the NCAA to improve student-athlete well-being as merely a means of safeguarding the organization’s public image rather than promoting the interests of student-athletes. Understandably, NCAA reform measures are met with skepticism. Moreover, persistent issues relating to alleged inequities within intercollegiate athletics that deregulation and academic legislation have not fully tackled will likely contribute to the cynicism.277 In addition, new issues are likely to emerge from the legislative changes discussed in this Article. For example, economic and other issues may be spawned by the shift of deregulation from a competitive equity to a fairness of competition model. Increased levels of academic fraud and disproportionate impact on low-resource institutions may not only emerge from, but also be exacerbated by, enhanced academic standards.

Nevertheless, the Board of Directors’ deregulation and academic reform legislation represents the beginning of a process that holds the potential to give rise to genuine change. With respect to deregulation, the Board must be commended for adopting proposals that are consonant with student-athlete well-being. In addition, the Board’s elimination or modification of rules viewed as inconsequential or unreasonable is also likely to enhance the legitimacy of the NCAA’s regulatory regimes.278 One construct through which to view the “legitimacy of laws refers to whether or not one agrees with the values that are supposed to be implemented and complied with. It is about agreement with those values, the perception that the values are

277 See e.g., Richard T. Karcher, Broadcast Rights, Unjust Enrichment, and the Student-Athlete, 34 CARDOZO L. REV. 107 (2012) (asserting that failure of universities to share with student-athletes some portion of broadcast, media, and licensing revenues generated by intercollegiate athletics constitutes unjust enrichment); Amy Christian McCormick & Robert A. McCormick, Race and Interest Convergence in NCAA Sports, 2 WAKE FOREST J.L. & POL’Y 17 (2012) (arguing benefits derived by colleges and universities from highly commercialized, revenue-producing sports create a severe imbalance in their relationship with student-athletes that operates to the detriment of the latter).

278 Tom R. Tyler, Psychological Perspectives on Legitimacy and Legitimation, 57 ANN. REV. PSYCHOL. 375, 377 (2006) (“Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions.”).
appropriate, right, and ethical. Moreover, the attempted enforcement of unreasonable rules leads to adverse consequences, including resistance to compliance and the diversion of energy and resources from enforcing rules that truly matter. Thus, deregulation may enhance both compliance with NCAA rules and the overall legitimacy of its regulations and the organization. In so doing, deregulation may contribute toward a collaborative trust in the NCAA’s regulatory process by all intercollegiate athletics constituents, including student-athletes, athletics personnel, university administrators, and the public.

As it relates to the NCAA’s academic reforms, student-athlete well-being is fostered if measures are embraced that contribute to successful academic experiences at the institutions for which they play sports. Empowering student-athletes to effectively access educational opportunities facilitates their acquisition of the elements of a college education critical to student-athletes, such as “(a) the refinement of personal competence, (b) the upward social mobility, and (c) the earning of a degree.” Viewed through this prism, the NCAA’s recently adopted academic legislation codifies measures that are consonant with both the NCAA’s education principle and student-athlete well-being. Thus, academic reform legislation represents progress in attempting to lessen the pernicious intrusion of commercialized intercollegiate athletics on educational values. But the NCAA’s academic reform measures are only a starting point for achieving greater balance between athletic and academic values. Significant movement toward greater balance is ultimately a function of institutional commitment to foster student-athlete educational achievement and well-being, as reflected in the policies and practices implemented at each college and university with Division I intercollegiate athletics programs. In short, NCAA academic reforms are commendable, but ultimate responsibility resides with college...

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presidents and governing boards to adopt measures that “reinforce the educational missions” of their colleges and universities.\textsuperscript{282}

\textsuperscript{282} Arne Duncan & Tom McMillen, \textit{Secretary of Education: Hit’em in the Wallet}, \textit{USATODAY}, Mar. 21, 2013, at 2C.