

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,¹ considered twenty-six proposals recommended for adoption by the NCAA's Rules Working Group.² The Rules Working Group's legislative proposals streamline NCAA rules governing recruiting, coaches and other athletics personnel, and awards and benefits.³ 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.⁴ 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.⁵ At the NCAA's January 2013 Annual

¹ NCAA, 2012–13 NCAA DIVISION I MANUAL § 4.2.1 (2012) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

² Michelle Brutlag Hosick, *Rules Working Group Makes Final Recommendations for First Phase*, NCAA.ORG (Dec. 20, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/December/Rules+Working+Group+makes+final+re+commendations+for+first+phase>.

³ *Id.*

⁴ *Breakdown of Division I Rules Changes*, NCAA.ORG (Jan. 2, 2013), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/January/Breakdown+of+Division+I+rules+changes>.

⁵ Matt Casby, *Daily Compliance Item—10/31/12—NCAA Enforcement Article: Board Adopts Tougher, More Efficient Enforcement Program*, DAILY COMPLIANCE ITEM (Oct. 30, 2012), <http://dailycomplianceitem.wordpress.com/2012/10/daily-compliance-item-103012-ncaa-enforcement-article/>.

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

⁶ Michelle Brutlag Hosick, *Division I Streamlines Rulebook*, NCAA.ORG (Jan. 19, 2013), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/January/division+i+streamlines+rulebook>.

⁷ Casby, *supra* note 5.

⁸ Hosick, *supra* note 6.

⁹ See Maureen Harty, Kris Richardson & Geoff Silver, 2013 Regional Rules Seminar, Division I Rules Working Group: Where We Are Now (May 10, 2013), *available at* <http://www.ncaa.org/wps/wcm/connect/17420b804f9b80f4a0a5e70bd28aa9b0/Division+I+Rules+Working+Group+-+Where+We+Are+Now.pdf?MOD=AJPERES&CACHEID=17420b804f9b80f4a0a5e70bd28aa9b0> (identifying the working groups and their charge); NCAA, POST-PRESIDENTIAL RETREAT UPDATES (2011) [hereinafter POST-PRESIDENTIAL RETREAT UPDATES], *available at* <http://www.nacwaa.org/sites/default/files/images/NCAA%20Post-Presidential%20Retreat%20Updates%2010.28.11.pdf> (identifying the presidents chairing each working group).

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.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.¹³ As discussed *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.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.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

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* A discussion of changes made to the NCAA enforcement process is beyond the scope of this article and will be addressed in a follow-up article drafted by the authors.

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.²¹

Following the Presidential Retreat, the Board of Directors imposed a one-year suspension of the above-described legislative process.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.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."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.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

²¹ *Id.* § 5.3.2.3.6.

²² John Infante, *Consolidation of Powers*, NCAA BYLAW BLOG (Jan. 16, 2012), <http://www.ncaa.org/blog/2012/01/consolidation-of-powers/>; Michelle Brutlag Hosick, *Board Won't Consider New Proposals Through 2013-14*, NCAA.ORG (Oct. 30, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/October/Board+wont+consider+new+proposals+through+2013+14>.

²³ Michelle Brutlag Hosick, *Convention Will Be Different Experience for DI Legislative Council*, NCAA.ORG (Jan. 10, 2012), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2012/january/convention+will+different+experience+for+di+legislative+council>.

²⁴ *Id.*

²⁵ NCAA WORKING GROUP ON COLLEGIATE MODEL – ENFORCEMENT, FINAL REPORT 2 (2012), available at http://www.nacwaa.org/sites/default/files/images/NCAA%20Final_Report_Oct%202012.pdf.

working groups.²⁶ 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.²⁷

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.²⁸ 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.²⁹ 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

²⁶ See 2012 NCAA Regional Rules Seminars, NCAA Division I Presidential Working Groups—Rules and Enforcement Working Groups Overview and Updates (May 2, 2012), available at http://fs.ncaa.org/docs/regional_seminars/2012/PowerPoint%20Presentations/Division%20I/Division%20I%20Presidential%20Working%20Groups%20-%20Rules%20and%20Enforcement%20Overview.pdf (discussing creation of working groups).

²⁷ See *id.* (describing legislative process for proposals recommended by working groups); POST-PRESIDENTIAL RETREAT UPDATES, *supra* note 9.

²⁸ See NCAA, POST-PRESIDENTIAL RETREAT UPDATES 5 (2012) (discussing how suspending the usual legislative process will expedite the promulgation of legislation that focuses on the NCAA's core principles); Stewart Mandel, *Recruiting Deregulation Fiasco Underscores Deeper NCAA Disconnect*, SI.COM (Apr. 30, 2013, 1:01 PM), <http://sports.illustrated.cnn.com/college-football/news/20130430/ncaa-recruiting-regulations/> (noting intent behind working groups was to bypass NCAA's laborious legislative process); *Mark Emmert's Changes to Go Through?*, ESPN.COM (Oct. 26, 2011, 9:46 PM), http://espn.go.com/college-sports/story/_/id/7152603/ncaa-meeting-agenda-full-significant-votes (suggesting the NCAA's usual legislative process impeded efforts to effectuate meaningful bylaw reform).

²⁹ See *Mark Emmert's Changes to Go Through?*, *supra* note 28.

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.*

³² Allie Grasgreen, *A Recruiting Revolution?*, INSIDE HIGHER ED (Jan. 15, 2013), <http://www.insidehighered.com/news/2013/01/15/ncaa-division-i-rules-would-ease-recruiting-restrictions>.

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.³⁹ 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,⁴⁰ 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.⁴¹ Rulemaking relating to these issues aligns more closely with the four values associated with a collegiate model of intercollegiate athletics,⁴² 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,⁴³ student-athlete well-being,⁴⁴ ethical conduct,⁴⁵ sound academic standards,⁴⁶ amateurism,⁴⁷ and financial aid.⁴⁸ 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.⁴⁹

As reflected in the rules revisions that we will discuss, a fair competition model also imbues campus officials with discretion⁵⁰ 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

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 Gragreen, *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.*

⁵⁴ See Stewart Mandel, *Check the Sky for Pigs: NCAA's APR Ruling the Result of Common Sense*, SI.COM (Aug. 11, 2011), http://sportsillustrated.cnn.com/2011/writers/stewart_mandel/08/11/ncaa-apr/index.html (commenting on the irrelevant rules that consume an inordinate amount of compliance officers' time); Ronnie Ramos, *Division I Leaders Call for Sweeping Changes to College Athletics*, NCAA.ORG (Aug. 10, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/Division+I+leaders+call+for+sweeping+changes+to+college+athletics> (commenting on the many convoluted and enforceable rules deregulation sought to eliminate).

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.⁵⁶ 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

⁵⁶ See *infra* text accompanying notes 280–82.

and frequency of recruiting communications.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.⁵⁸ Additionally, electronic modes of communication (e.g., text message, Twitter, and Facebook) are generally prohibited under un-amended bylaws.⁵⁹ A similar guideline, which eliminated these restrictions, was implemented in 2012 for men's basketball.⁶⁰

While the basketball rule received positive feedback,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.⁶² Student-athletes have also been voices of dissent. Some athletes argue that unlimited correspondence from coaches is intrusive, overwhelming, and unprofessional.⁶³

On the other hand, supporters of the proposal assert that text messaging has become a standard and universally acceptable mode of communication.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.⁶⁵ This is relevant

⁵⁷ NCAA, NCAA PUBLICATION OF PROPOSED RULES WORKING GROUP LEGISLATION—DIVISION 1, at 49–54 (2012) [hereinafter RWG PROPOSALS], available at http://grfx.cstv.com/photos/schools/tex/sports/compliance/auto_pdf/2012-13/misc_non_event/compliance-publication.pdf.

⁵⁸ NCAA MANUAL, *supra* note 1, § 13.1.3.1.

⁵⁹ *Id.* § 13.4.1.2.

⁶⁰ *Id.* § 13.4.1.2.1.

⁶¹ Michelle Brutlag Hosick, *Rules Working Group Recommends Board Suspend Recruiting-Related Proposals*, NCAA.ORG (Mar. 3, 2013), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/March/Rules+Working+Group+recommends+Board+suspend+recruiting-related+proposals>.

⁶² Michelle Brutlag Hosick, *Board to Reconsider Texting, Scouting Rules*, NCAA.ORG (Mar. 20, 2013), <http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2013/march/board+to+reconsider+texting+scouting+rules>.

⁶³ Gary Brown, *NCAA Might Call an Audible on Texting*, NCAA.ORG (Sept. 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/September/NCAA+might+call+an+audible+on+texting> (discussing some athletes' perspective that texting is unprofessional); John Clay, *NCAA Suspends New Recruiting Rules*, JOHN CLAY'S SIDELINES (May 2, 2013, 7:03 PM), <http://johnclay.bloginky.com/2013/05/02/ncaa-suspends-new-recruiting-rules/#> (quoting athletes on the intrusiveness of texting).

⁶⁴ See Brown, *supra* note 63 (discussing the widespread use of texting).

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,

2:22 PM), <http://www.forbes.com/sites/chris-smith/2012/06/18/ncaa-deregulation-of-recruiting-texts-is-step-in-right-direction-but-there-is-plenty-more-to-be-done/>.

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).

⁷¹ Michelle Brutlag Hosick, *Board Suspends Changes to Recruiting Communications Rules*, NCAA.ORG (May 2, 2013), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/April/Board+suspends+changes+to+recruiting+communications+rules>.

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.⁷² This proposal lifts all restrictions on printed recruiting materials.⁷³ 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.⁷⁴ 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.⁷⁵ Another source of consternation for opponents of RWG Proposal 13-5-a is the return of media guide publications,⁷⁶ which the NCAA banned, primarily as a cost-saving measure.⁷⁷ 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.⁷⁸ 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

⁷² RWG PROPOSALS, *supra* note 57, at 58–63.

⁷³ *Id.*

⁷⁴ *See supra* text accompanying notes 34–36.

⁷⁵ Mandel, *supra* note 28.

⁷⁶ *See* Dennis Dodd, *NCAA is Just Embracing a Brutal Truth with New Recruiting Guidelines*, CBSSPORTS.COM (Mar. 5, 2013, 10:20 AM), <http://www.cbssports.com/collegefootball/story/21817110/ncaa-is-just-embracing-a-brutal-truth-with-new-recruiting-guidelines>.

⁷⁷ Leilana McKindra, *Media-Guide Proposals Affect More Than Bottom Line*, NCAA NEWS (Aug. 28, 2009, 10:07 AM), http://fs.ncaa.org/Docs/NCAANewsArchive/2009/Association-wide/media-guide%2Bproposals%2Bffect%2Bmore%2Bthan%2Bbottom%2Bline_08_28_09_ncaa_news.html.

⁷⁸ Hosick, *supra* note 61.

race.⁷⁹ 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 coach⁸⁵ rather than other athletics personnel.⁸⁶ The

⁷⁹ *NCAA to Reconsider Some Recruiting Deregulation*, YAHOO! NEWS (Mar. 7, 2013, 9:34 PM), <http://news.yahoo.com/ncaa-reconsider-recruiting-deregulation-235101250-spt.html>.

⁸⁰ Hosick, *supra* note 61.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See NCAA MANUAL, *supra* note 1, § 11.7.1.2.

⁸⁴ *Id.* § 11.7.1.2(a)–(b).

⁸⁵ NCAA bylaws impose limits on the number of coaches that an institution can employ. *Id.* § 11.7.4. Athletic department personnel who engage in coaching activities and

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.⁸⁹ 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.⁹⁰

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.⁹¹ 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.⁹² 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.⁹³ 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.⁹⁴ 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.⁹⁵

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.

⁹⁴ Scott Hood, *Axing Baton Rule Will Change Recruiting*, GAMECOCKCENTRAL (Jan. 30, 2013), <http://southcarolina.rivals.com/content.asp?CID=1466287>; NCAA, NCAA WORKING GROUP ON COLLEGIATE MODEL-RULES DISCUSSION DOCUMENT-NCAA BYLAW 11, at 5 (2012), available at http://media.al.com/sports_impact/other/NCAA-Work-group-Bylaw-11.pdf (stating baton rule did not accomplish its objective of containing costs).

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.⁹⁶ 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.⁹⁷ The most significant deregulation efforts pertaining to Bylaw 16 were RWG Proposals 16-3 and 16-7.⁹⁸ Currently, the NCAA provides considerable latitude with respect to an institution’s ability to provide academic support services for its student-athletes,⁹⁹ 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.¹⁰⁰ 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

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.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 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).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

¹⁰¹ RWG PROPOSALS, *supra* note 57, at 90.

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 policies, and

¹⁰³ NCAA Panel Approves Major Changes, ESPN.COM (Oct. 27, 2011, 11:03 PM), http://espn.go.com/college-sports/story/_/id/7156548/ncaa-panel-approves-major-scholarship-rules-changes (describing the reforms adopted by the NCAA Division I Board of Directors).

catalogues.¹⁰⁴ By signing a NLI, a prospective student-athlete agrees to attend the college or university named therein for a minimum of one academic year.¹⁰⁵ Thereafter, other institutions must cease all recruiting contacts with the student-athlete.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰ 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.¹¹¹

In 2011, the NCAA Board of Directors, pursuant to legislation promulgated by the Student-Athlete Well-Being Working Group,

¹⁰⁴ Timothy Davis, *College Athletics: Testing the Boundaries of Contract and Torts*, 29 U.C. DAVIS L. REV. 971, 981–82 (1996); *Agnew v. NCAA*, 683 F.3d 328, 338 (7th Cir. 2012) (explaining how the relationship between a student-athlete and his or her university is a transaction in which the athlete exchanges athletic skills for academic education, room and board); *McAdoo v. Univ. of N.C. at Chapel Hill*, 736 S.E.2d 811, 820–21 (N.C. Ct. App. 2013) (defining scholarship agreement between student-athlete and university as a contract).

¹⁰⁵ *Provisions of Letter Satisfied*, NAT'L LETTER OF INTENT, <http://www.ncaa.org/wps/wcm/connect/nli/nli/nli+provisions/provisions+of+letter> (last visited July 21, 2013).

¹⁰⁶ *Recruiting Ban After Signing*, NAT'L LETTER OF INTENT, <http://www.ncaa.org/wps/wcm/connect/nli/nli/nli+provisions/recruiting+ban> (last visited July 21, 2013).

¹⁰⁷ NCAA MANUAL, *supra* note 1, § 13.10.9.

¹⁰⁸ *Financial Aid Requirement*, NAT'L LETTER OF INTENT, <http://www.ncaa.org/wps/wcm/connect/nli/nli/nli+provisions/financial+aid> (last visited July 21, 2013).

¹⁰⁹ *Id.*

¹¹⁰ NCAA MANUAL, *supra* note 1, §§ 15.02.2, 15.02.4, 15.3.2.3.

¹¹¹ Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 772–73 (1991).

adopted legislation that modified its longstanding bylaw regulating the duration of athletic scholarships.¹¹² In 1973, the NCAA adopted legislation that restricted institutions to awarding one-year renewable scholarships to student-athletes.¹¹³ During the approximately twenty-year period prior to 1973, the NCAA imposed no limits on the term of athletic scholarships.¹¹⁴ 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.¹¹⁵ 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.”¹¹⁶ 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,¹¹⁷ reduced the competition for athletes based on the term of athletic scholarships,¹¹⁸ and reflected a desire by coaches to assert power and increase their authority over student-athletes.¹¹⁹

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.¹²⁰ 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.¹²¹ Although the NCAA severely restricts

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 an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 158 (2000).

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 BUS. L. REV. 203, 220 (2012).

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,¹²² 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.¹²³ 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.¹²⁴ Finally, commentators argued that limiting the duration of an athletic scholarship to one year constitutes anti-competitive behavior subjecting the NCAA to antitrust liability.¹²⁵

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

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.

¹²³ Doug Segrest, *College Athletes' Rights: Some Athletes Lose Their Single-Year Scholarships to Better Players*, BIRMINGHAM NEWS (Oct. 24, 2011, 10:32 AM), http://www.al.com/sports/index.ssf/2011/10/college_athletes_rights_some_a.html.

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>.

¹²⁷ *Multiyear Scholarships Plan Moves On*, ESPN.COM (Feb. 17, 2012, 7:37 PM), http://espn.go.com/college-sports/story/_/id/7587582/challenge-ncaa-multiyear-scholarship-plan-falls-short.

¹²⁸ *Id.*

¹²⁹ Jessop, *supra* note 125.

¹³⁰ Brad Wolverton, *Who Opposed Multiyear Athletics Aid? You Might be Surprised*, CHRON. OF HIGHER EDUC. (Feb. 22, 2012, 2:51 PM), <http://chronicle.com/blogs/players/who-opposed-multiyear-athletics-aid-you-might-be-surprised/29639>.

¹³¹ David Frank, *Multiyear Scholarships: Why it May Affect You Differently Than You Think*, ATHLETICSCHOLARSHIPS.NET (Apr. 9, 2012), <http://www.athleticscholarships.net/2012/04/09/multiyear-scholarships-why-it-may-affect-you-differently-than-you-think.htm>.

¹³² *Schools Object to NCAA Multiyear Scholarship Plan*, USATODAY (Dec. 28, 2011, 12:25 AM), <http://usatoday30.usatoday.com/sports/college/story/2011-12-27/schools-objecting-to-ncaa-scholarship-plan/52247594/1>.

Despite considerable opposition, a membership override vote failed by two votes to obtain the required five-eighths majority to prevent implementation of the legislation.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.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.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.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.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-bad-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.

¹³⁸ Mark Dent, *Colleges, Universities Slow to Offer Multiyear Athletic Scholarships*, POST-GAZETTE.COM (May 19, 2013, 12:09 AM), <http://www.post-gazette.com/stories/sports/pitt-big-east/colleges-universities-slow-to-offer-multiyear-athletic-scholarships-688205/>.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Brad Wolverton & Jonah Newman, *Few Athletes Benefit from Move to Multiyear Scholarships*, CHRON. OF HIGHER EDUC. (Apr. 19, 2013), <https://chronicle.com/article/Few-Athletes-Benefit-From-Move/138643/>.

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 forgoing 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 NLI 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).

¹⁴⁵ Harry M. Cross, *The College Athlete and the Institution*, 38 LAW & CONTEMP. PROBS. 151, 155 (1973) (footnote omitted).

¹⁴⁶ Davis, *supra* note 144, at 600.

¹⁴⁷ Barry Temkin, *Suit Could Chill Recruiters’ Pledges*, CHICAGO TRIBUNE (Sept. 5, 1993), http://articles.chicagotribune.com/1993-09-05/sports/9309050387_1_bryan-fortay-promises-recruiting.

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.

¹⁴⁹ Alfred C. Yen, *Early Scholarship Offers and the NCAA*, 52 B.C. L. REV. 585, 589–90 (2011).

¹⁵⁰ *Id.* at 605–06.

¹⁵¹ *Id.*

¹⁵² *Id.* at 604 (noting broken promises impose meaningful costs on both institutions and recruits).

¹⁵³ Randy Rodgers, *Inside the Verbal Commitment Circle*, RIVALDS.COM (Jan. 23, 2006), <http://studentsports.rivals.com/content.asp?CID=504616>.

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.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.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.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

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).

¹⁵⁵ Yen, *supra* note 149, at 606 (footnotes omitted).

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.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.¹⁵⁸

Prior to the NCAA's enactment of legislation discussed later in this section,¹⁵⁹ coaches willingly ran the risk of signing prospective student-athletes to more NLI's 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;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;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.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"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."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.

¹⁵⁷ NCAA MANUAL, *supra* note 1, § 15.5.6.1.

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).

¹⁵⁹ See *infra* text accompanying notes 176–82.

¹⁶⁰ Bateman, *supra* note 158, at 11.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Hannah Karp & Darren Everson, *SEC Coaches Defend 'Oversigning,'* WALL ST. J. (Mar. 1, 2011), <http://online.wsj.com/article/SB10001424052748704444604576172954187357370.html>.

¹⁶⁴ Andy Staples, *Oversigning Offenders Won't Be Curbed by NCAA's Toothless Rule*, SI.COM (Jan. 24, 2011, 5:29 PM), http://sportsillustrated.cnn.com/2011/writers/andy_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

¹⁶⁵ Greg Johnson, *Football Issues Committee to Monitor Oversigning*, NCAA.ORG (Mar. 3, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/March/Football+Issues+Committee+to+monitor+oversigning> (discussing grayshirting).

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).

¹⁶⁷ Kelly Whiteside, *New Rule Fails to Curb Oversigning*, USATODAY (Feb. 1, 2011, 9:34 AM), http://usatoday30.usatoday.com/SPORTS/usaedition/2011-02-01-oversign01_ST_U.htm.

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

¹⁶⁹ J. Bernard Machen, *Florida President: Grayshirting is Morally Reprehensible Practice*, SI.COM (Feb. 1, 2011, 11:10 AM), <http://sportsillustrated.cnn.com/2011/football/ncaa/01/31/bernard.machen.letter/index.html>.

¹⁷⁰ Karp & Everson, *supra* note 163.

¹⁷¹ Gregg Doyel, *Bad Guys Utilize Over-Signing, and it Has to Stop*, CBSSPORTS.COM (April 8, 2010), <http://fantasynews.cbssports.com/columns/story/13727507>.

¹⁷² Staples, *supra* note 164.

¹⁷³ See *supra* text accompanying notes 104–08.

¹⁷⁴ See Bateman, *supra* note 158.

system.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ Responding to criticism that this rule was ineffective in circumscribing over-signing and the harm caused by it,¹⁷⁸ 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 31.¹⁷⁹ 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.¹⁸⁰

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+NEW> (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.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.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 \$2000.¹⁸³ At the NCAA's January 2012 Annual Meeting, the Board of Directors unanimously approved the proposal.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.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

¹⁸¹ NCAA, NCAA DI LEGISLATIVE PROPOSALS: PROPOSAL NUMBER: 2011-43 (2011).

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

¹⁸³ POST-PRESIDENTIAL RETREAT UPDATES, *supra* note 9, at 3–4.

¹⁸⁴ Bryan Fischer, *NCAA Board Nixes Scholarship Cuts, Supports Athlete Allowance*, CBSSPORTS.COM (Jan. 14, 2012, 6:18 PM), <http://www.cbssports.com/collegefootball/story/16873382/ncaa-board-nixes-scholarship-cuts-supports-athlete-allowance>.

¹⁸⁵ Michelle Brutlag Hosick, *DI Board Pledges to Move Forward with Feedback from the Membership*, NCAA.ORG (Apr. 26, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/April/DI+Board+pledges+to+move+forward+with+feedback+from+the+membership>.

all have lots of different choices to make, but we felt that these proposals are right for our student-athletes.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.”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.¹⁸⁸ Member institutions complained that giving student-athletes additional non-need based aid would cause institutions to incur unjustified costs.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.¹⁹⁰ Opponents also

¹⁸⁶ Michelle Brutlag Hosick, *DI Board Adopts Improvements in Academic Standards and Student-Athlete Support*, NCAA.ORG (Oct. 27, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/October/DI+Board+of+Directors+adopt+changes+to+academic+and+student-athlete+welfare>.

¹⁸⁷ RAMOGI HUMA & ELLEN J. STAUROWSKY, NAT’L COLL. PLAYERS ASSOC., *THE PRICE OF POVERTY IN BIG TIME COLLEGE SPORT* 3 (2011).

¹⁸⁸ Brad Wolverton, *NCAA Weighs Changes to \$2,000 Stipend Based on Financial Need*, CHRON. OF HIGHER EDUC. (Feb. 9, 2012), <http://chronicle.com/blogs/players/ncaa-weighs-changes-to-2000-stipend-based-on-financial-need/29578>.

¹⁸⁹ *Id.*

¹⁹⁰ Anthony Caruso, *What’s Next? NCAA’s \$2000 Athlete Stipend in Limbo*, SPORTSENTERTAINMENTATTORNEY.COM (Jan. 11, 2012), <http://sportsentertainmentattorney.com/whats-next-ncaas-2000-athlete-stipend-in-limbo/>. For differing perspectives on whether student-athletes should receive cash payments for their services, see Mary G. Miller, Comment, *The NCAA and the Student Athlete: Reform Is on the Horizon*, 46 U. RICH. L. REV. 1141 (May 2012) (advocating the implementation of a pay scheme for student-athletes emulous of the Olympic model); Taylor Branch, *The Shame of College Sports*, ATLANTIC MAG. (Sept. 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/2/?single_page=true (arguing that despite prevailing concerns regarding the preservation of amateurism, student-athletes are being taken advantage of and the commercialization of intercollegiate athletics requires compensation for these athletes); Seth Davis, *Should College Athletes Be Paid? Why, They Already Are*, SI.COM (Sept. 21 2011, 1:23 PM), http://sportsillustrated.cnn.com/2011/writers/seth_davis/09/21/Branch.rebuttal/index.html (opining that payment for tuition, room and board, books, and so forth is payment enough for student-athletes, and they need not be compensated more than they are); Kristi Dosh, *The Problems with Paying College Athletes*, FORBES (June 9, 2011, 6:34 PM), <http://www.forbes.com/sites/sportsmoney/2011/06/09/the-problems-with-paying-college-athletes/> (identifying concerns related to paying student-athletes, including which athletes will be paid, how will they be paid, how much will they be paid, and Title IX implications of paying college athletes).

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.¹⁹¹

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.¹⁹² The new plan also allows student-athletes on partial scholarships to receive additional aid.¹⁹³ The NCAA sought comment from members on a plan that offers three options, which includes the need-based component.¹⁹⁴

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.¹⁹⁵ The legislation imposes more stringent academic requirements relating to initial and junior college transfer eligibility and academic progress rates (APR).¹⁹⁶ 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.

¹⁹⁵ See Hosick, *supra* note 186.

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

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).

¹⁹⁸ *Ross v. Creighton Univ.*, 957 F.2d 410, 411 (7th Cir. 1992).

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),²⁰⁴ 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).²⁰⁵

Graduation rates have become the de facto metric for assessing whether the forgoing and other academic legislation have coalesced to improve student-athlete academic performance.²⁰⁶ 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.²⁰⁷

Based on graduation rates, NCAA academic reforms have produced measurable academic progress.²⁰⁸

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.

²⁰⁶ Rodney K. Smith & Neil Millhiser, *The BCS and Big-Time Intercollegiate Football Receive an "F": Reforming a Failed System*, 2 WAKE FOREST J.L. & POL'Y 45 (2012).

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>.

athletics over academics.²⁰⁹ 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.²¹⁰

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.”²¹¹ 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.

²¹¹ Welch Suggs, *Jock Majors*, CHRON. HIGHER EDUC. (Jan. 17, 2003), <http://chronicle.com/article/Jock-Majors/32843>.

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

²¹² *Id.* For an examination of clustering of majors by football players see Paul Newberry, *Examining Football Player Majors*, USATODAY (Sept. 5, 2011, 2:26 PM), http://usatoday30.usatoday.com/sports/college/football/2011-09-05-1085948273_x.htm.

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

²¹⁴ NCAA, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT 1 (2012), available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/university+of+north+carolina,+chapel+hill+public+infractions+report+march+12,+2012>.

²¹⁵ *Id.*

material.²¹⁶ Additionally, the former tutor committed a violation of NCAA ethical conduct standards by refusing to cooperate with the NCAA investigation of her activities.²¹⁷ The NCAA imposed substantial penalties on UNC's football program as a result of these and other rules violations.²¹⁸

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.²¹⁹ Prior to the Board's action, the minimum core GPA required was 2.0.²²⁰ 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:

1. Public reprimand and censure.
2. Three years of probation from March 12, 2012, through March 11, 2015. . . .
4. Postseason ban for the 2012 football season.
5. Reduction of football scholarships by a total of 15 during three academic years. . . .
6. Vacation of wins during the 2008 and 2009 seasons (self-imposed by the University). . . .
8. Disassociation of [] the former tutor

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.²²¹ The previous minimum required a student who entered college with a 2.0 GPA to have a minimum SAT score of 1010.²²² 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.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.²²⁴ The revised standards also require student-athletes to have completed ten of sixteen core courses prior to the beginning of their senior year.²²⁵ In May 2013, the Board modified the 2012 changes to the initial eligibility standards. For reasons discussed *infra*,²²⁶ the Board affirmed the increased GPA of 2.3 but restored the minimum SAT score of 1010.²²⁷

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.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.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.²³⁰ This roughly correlates to the minimum eligibility standards for qualifier status prior to the

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* § 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. See also Dana O'Neil, *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.

²²⁶ See *infra* text accompanying notes 250–52.

²²⁷ Michelle Brutlag Hosick, *DI Board Retains Current Initial Eligibility Sliding Scale*, NCAA.ORG (May 2, 2013), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2013/April/DI+Board+retains+current+initial-eligibility+sliding+scale>.

²²⁸ NCAA, 2011–12 NCAA DIVISION I MANUAL (2011) §§ 14.3.2.1, 14.3.2.1.1.

²²⁹ NCAA MANUAL, *supra* note 1, § 14.3.1.2.

²³⁰ *Id.* § 14.3.1.2.1.

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

²³¹ Michelle Brutlag Hosick, *Inside the tougher academic requirements for freshmen*, NCAA.ORG (Nov. 10, 2011), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/November/Inside+the+tougher+academic+requirements+for+freshmen>.

²³² POST-PRESIDENTIAL RETREAT UPDATES, *supra* note 9, at 8.

²³³ NCAA MANUAL, *supra* note 1, §§ 14.3.1.1.2, 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.*

²³⁹ Gary T. Brown, *Division I Board of Directors Implements Historic Reforms*, NCAA.ORG (May 10, 2004, 4:34 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2004/Division+I/division%2Bi%2Bboard%2Bof%2Bdirectors%2Bimplements%2Bhistoric%2B reforms%2B-%2B5-10-04.html>.

²⁴⁰ See NCAA, *How is the Academic Progress Rate Calculated?*, NCAA.ORG, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Academics+OLD/Division+I/How+is+APR+calculated> (last updated June 15, 2010).

²⁴¹ *Id.*

²⁴² Rob Dauster, *NCAA’s APR Changes Could Cause Uptick in Fraud, More Problems*, SI.COM (June 22, 2012, 7:29 AM), http://sportsillustrated.cnn.com/2012/writers/rob_dauster/06/22/NCAA-APR-changes/index.html; Hosick, *supra* note 186 (providing a detailed discussion of all of the changes to the APR).

champion, the University of Connecticut, from participating in post-season play.²⁴³

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;²⁴⁴ (2) the NCAA has overstepped in attempting to legislate preparedness, which is something that cannot be legislated;²⁴⁵ (3) the NCAA standards mandate a one-size-fits-all model notwithstanding a secondary-school system that lacks uniformity in course offerings and quality;²⁴⁶ (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;²⁴⁷ 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).²⁴⁸ 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.²⁴⁹

²⁴³ Nicole Auerbach & Steve Wieberg, *UConn Among Teams Banned From Postseason Play Due to APR*, USATODAY (June 20, 2012, 3:08 PM), <http://usatoday30.usatoday.com/sports/college/story/2012-06-20/ncaa-apr-connecticut-ban/55713412/1>.

²⁴⁴ Eamonn Brennan, *Faculty concerned about new NCAA standards*, ESPN.COM (Sept. 24, 2012, 2:30 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/64417/faculty-concerned-about-new-ncaa-standards.

²⁴⁵ O'Neil, *supra* note 225.

²⁴⁶ *Id.*

²⁴⁷ Matt Brown, *The NCAA's New Math: Academic Standards & Their Impact On College Football/Basketball*, LAND-GRANT HOLY LAND (Aug. 7, 2012, 6:00 AM), <http://www.landgrantholyland.com/2012/8/7/3224506/ncaa-academic-standards-college-football-basketball>.

²⁴⁸ Dana O'Neil, *NCAA Again Tackles Academic Reform*, ESPN.COM (Apr. 17, 2012), http://espn.go.com/mens-college-basketball/story/_/id/7823800/ncaa-takes-academic-reform-again-college-basketball.

²⁴⁹ Dana O'Neil, *NCAA Reform Will Have Big Effect on Jucos*, ESPN.COM (Apr. 17, 2012, 1:15 PM), http://espn.go.com/blog/collegebasketballnation/post/_/id/58001/ncaa-reform-will-have-big-effect-on-jc-level.

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 1010.²⁵⁰ In reversing course, the Board expressed concern about the disparate impact of its increased test score requirement on ethnic minorities.²⁵¹ 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.²⁵²

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."²⁵³ 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.²⁵⁴ Additionally, only 35.2% of football players and 15.3% of all student-athletes would have met the standards.²⁵⁵

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.²⁵⁶ Moreover, as was true of Propositions 48 and 16,²⁵⁷ student-athletes are likely to make the necessary adjustments to comply with the minimum standards.

²⁵⁰ Hosick, *supra* note 227.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 118 (2008).

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.

²⁵⁹ Andy Glockner, *NCAA's Well-Intentioned APR Increase Still Has Major Flaw*, SI.COM (Aug. 12, 2011, 5:23 PM), http://sportsillustrated.cnn.com/2011/writers/andy_glockner/08/12/NCAA.APR.increase/index.html.

²⁶⁰ David Moltz, *NCAA Academic Metric Hits HBCUs*, INSIDE HIGHER ED (May 25, 2011), http://www.insidehighered.com/news/2011/05/25/hbcus_affected_most_by_ncaa_apr_penalties; see generally Phillip C. Blackman, *The NCAA's Academic Performance Program: Academic Reform or Academic Racism*, 15 UCLA ENT. L. REV. 225 (2008) (discussing the impact of the APR on HBCUs).

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.²⁶⁵ 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.²⁶⁶ 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."²⁶⁷

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 2012.²⁶⁸ Overall graduation rates for African American male basketball players on these teams increased from fifty-nine percent in 2012 to sixty-five percent in 2013.²⁶⁹ 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 2013,²⁷⁰ 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 2013.²⁷¹ Nevertheless, the report reflects positive academic trends. For example, eighty-seven percent of the

²⁶⁵ Dauster, *supra* note 242.

²⁶⁶ *Most Division I Teams Deliver Top Grades*, *supra* note 261. For detailed analysis of 2012 APR scores by sport, see NCAA RESEARCH, NATIONAL AND SPORT-GROUP APR AVERAGE, TRENDS AND PENALTIES (2012), available at <http://www.ncaa.org/wps/wcm/connect/public/ncaa/pdfs/2012/apr+2012+trends>.

²⁶⁷ MATTHEW J. MITTEN, TIMOTHY DAVIS, RODNEY K. SMITH & N. JEREMI DURU, *SPORTS LAW AND REGULATION: CASES, MATERIALS AND PROBLEMS* 125 (3d ed. 2013).

²⁶⁸ RICHARD LAPCHICK, CORY BERNSTINE & ANDREW HIPPERT, INSTITUTE FOR DIVERSITY AND ETHICS IN SPORT, *KEEPING SCORE WHEN IT COUNTS: GRADUATION SUCCESS AND ACADEMIC PROGRESS RATES FOR THE 2013 NCAA DIVISION I MEN'S BASKETBALL TOURNAMENT TEAMS 1* (Mar. 18, 2013), available at <http://www.tidesport.org/Grad%20Rates/2013%20Men's%20Basketball%20Tournament%20Teams%20Study.pdf>.

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.²⁷² 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 2013.²⁷³

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.²⁷⁴

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,²⁷⁵ 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.²⁷⁶ Moreover, student-athletes must contend with the ever-increasing demands that athletics place on their time, often to the detriment of academic pursuits.

²⁷² *Id.*

²⁷³ *Id.* at 1.

²⁷⁴ *Id.* at 2.

²⁷⁵ See Smith & Millhiser, *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, *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).

²⁷⁶ See *supra* text accompanying notes 211–12.

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.”²⁷⁹ 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.²⁸⁰ 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.”²⁸¹ 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

²⁷⁹ Kristina Murphy, Tom R. Tyler & Amy Curtis, *Nurturing regulatory compliance: Is procedural justice effective when people question the legitimacy of the law?*, 3 REG. & GOVERNANCE 1, 19 (2009).

²⁸⁰ See EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 119 (2002).

²⁸¹ Robert M. Sellers, *Black Student-Athletes: Reaping the Benefits or Recovering from the Exploitation*, in *RACISM IN COLLEGE ATHLETICS: THE AFRICAN-AMERICAN ATHLETE’S EXPERIENCE* 143, 157 (Dana D. Brooks & Ronald C. Althouse eds., 1993).

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

²⁸² Arne Duncan & Tom McMillen, *Secretary of Education: Hit'em in the Wallet*, USATODAY, Mar. 21, 2013, at 2C.