

**PUTTING OUR TRUST IN THE NATIONAL
COLLEGIATE ATHLETIC ASSOCIATION (NCAA):
HOW CREATING TRUSTS FOR STUDENT-
ATHLETES CAN SAVE THE NCAA FROM ITSELF**

Comment

by Jonathan Strom *

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* B.A., Finance, Texas A&M University, May 2012; J.D./M.B.A. Candidate, Texas Tech University School of Law, May 2015.

I. INTRODUCTION: CAN AMATEURISM STATUS STILL BE PRESERVED IN THE FACE OF INEVITABLE CHANGE TO STUDENT-ATHLETE COMPENSATION?

An athlete is not exploited when he is fairly compensated in a business transaction outside of the institution. To the contrary, one could more persuasively argue that an athlete is exploited when he is expressly disallowed from realizing his value while his reputation and skill are being used to realize a profit for others. – Jay Bilas (2010), former Duke and [professional] basketball player¹

“[A]mateurism is not a moral issue; [rather,] it is an economic camouflage for monopoly practice.”² This is the harsh reality for the current state of college athletics.³ Finding the proper balance between maintaining amateurism status and compensating student-athletes is becoming a more controversial issue, with players like Johnny Manziel and Jadeveon Clowney bringing in millions of dollars in revenue for their respective schools.⁴ Recent lawsuits have forced the National Collegiate Athletic Association (NCAA) to go into full defense mode, in hopes to maintain its current status quo.⁵

This Comment addresses the recent issues facing the NCAA; specifically, it discusses the concern surrounding the *O’Bannon* lawsuit and its impact on player compensation.⁶ The *O’Bannon* lawsuit pertains to the use of student-athletes’ likeness in video games and massive television contracts for profit.⁷ Pulitzer Prize winner Taylor Branch ardently argues for compensating student-athletes.⁸ Branch asserts that student-athletes deserve compensation apart from college scholarships.⁹ Clearly, NCAA change is imminent whether it comes through restructuring or through the court system.¹⁰

1. *Introduction & Background*, NAT’L C. PLAYERS ASS’N I, at 5, http://www.ncpanow.org/research/body/Introduction_and_Background.pdf (last visited June 3, 2014).

2. WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 376 (1997).

3. *See id.*

4. *See* Patrick Rische, *Johnny Football, Texas A&M and Brand Penetration: The Power of One*, FORBES (Nov. 28, 2012, 11:01 AM), <http://www.forbes.com/sites/prische/2012/11/28/johnny-football-texas-am-and-brand-penetration-the-power-of-one>; Randy Harvey, *College Athletes Like Manziel Ought to be Part of Revenue Mix*, HOUS. CHRON. (Aug. 7, 2013), <http://www.houstonchronicle.com/sports/columnists/harvey/article/College-athletes-like-Manziel-ought-to-be-part-of-4716208.php>.

5. *See* Andy Baggot, *With Ed O’Bannon Lawsuit Looming, Movement Toward Monumental NCAA Change Readily Apparent*, WIS. ST. J. (Aug. 1, 2013) http://host.madison.com/sports/college/football/andy-baggot-with-ed-o-bannon-lawsuit-looming-movement-toward/article_e3e7f078-0116-5fb4-a633-9f3f2e17a17d.html.

6. *See infra* Part II.B.

7. *O’Bannon v. NCAA*, C 09-1967 CW, 2010 WL 445190, at *1-2 (N.D. Cal. Feb. 8, 2010).

8. Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sep. 7, 2011, 11:28 AM), http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/?single_page=true.

9. *Id.*

10. *See* Baggot, *supra* note 5.

This Comment presents a proposal for implementing trusts for student-athletes that will address the issue of compensation.¹¹ The proposal for the creation of trusts for student-athletes allows the NCAA to address the issue of compensation and still maintain its core objectives.¹² Part II will give background on the history of the NCAA, the evolution and challenges to the NCAA bylaws, and the revenue associated with college athletics.¹³ Part III explains the proposal in detail showing how the trust will work.¹⁴ Although each state has different trust laws, the Uniform Trust Code will be the framework for the student-athletes' trusts.¹⁵ Depending on the similarity of each state's trust code to the Uniform Trust Code, modifications to the proposal might be necessary.¹⁶ The Comment next addresses the NCAA's requirements, member institutions, and student-athletes.¹⁷ The proposal requires foundational changes to college athletics, specifically regarding the five major Football Bowl Subdivision Conferences.¹⁸ The Comment also discusses the major benefits of the trust.¹⁹ Finally, Part IV addresses two major issues with the proposal as well as preventative measures.²⁰

II. HISTORY OF THE NCAA: FROM ITS EARLY YEARS TO COMPLETE CONTROL

In 1906, President Theodore Roosevelt originally conceived the Intercollegiate Athletic Association of the United States in response to growing concerns over the safety of collegiate sports.²¹ The association addressed and regulated the safety concerns of college football.²² The organization changed its name to the National Collegiate Athletic Association in 1910 and initially organized to provide public goods.²³ The NCAA set out to regulate and supervise college athletic activities.²⁴ Its primary goal was to maintain ethics on the field and to focus on the dignity and the morals of education.²⁵ The NCAA's goals quickly expanded to include eligibility rules and to include

11. *See infra* Part III.

12. *See infra* Part III.C.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Part III.A.

16. *See infra* Part III.A.

17. *See infra* Part III.C.

18. *See infra* Part III.B.

19. *See infra* Part III.D.

20. *See infra* Part IV.

21. BYERS, *supra* note 2, at 38–40.

22. Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 675 (2003).

23. ARTHUR FLEISHER ET AL., THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR 40 (1st ed. 1992).

24. *Id.* at 41.

25. *Id.*

output restraints.²⁶ The NCAA's commercialization of college sports grew in the late 1920s and 1930s as the NCAA took a renewed interest in regulation.²⁷

It was common in the 1930s and 1940s "for an alumnus to adopt a local high school athlete and put him [or her] through college."²⁸ Most football spectators approved these actions because it helped the athlete attend school, even if it was the alumnus's alma mater.²⁹ Colleges banned this pay-for-play practice because of its inconsistency with the goals of amateurism.³⁰ It became clear that the NCAA needed full-time professional leadership when schools failed to follow the NCAA guidelines, NCAA lacked control over postseason football, and the NCAA's concerns over the impact of television on game attendance grew.³¹ Through an annual convention, the NCAA gained control over televised football games and became the delegator regarding enforcement power.³² The NCAA's control continued to grow, and by the mid-1950s, the NCAA gained the power to impose penalties just short of outright termination against its members.³³ In 1956, the NCAA and its colleges, acting in the name of amateurism, created the grant-in-aid—or athletics scholarship—ultimately creating the NCAA's own pay-for-play system.³⁴

The NCAA currently has over 450,000 participants—both men and women—among more than 1,200 member institutions.³⁵ According to NCAA president, Mark Emmert, the mission of the NCAA is to be "an integral part of higher education and to focus on the development of our student-athletes" while protecting a student-athlete's well-being as well as the collegiate model.³⁶

As this Comment will demonstrate, the goal of protecting a student-athlete's well-being could not be further from the truth.³⁷

A. NCAA in the Courtroom

The NCAA is the only entity in the United States with considerable power over college athletics.³⁸ The NCAA uses this power in a variety of ways.³⁹

26. *Id.*

27. *Id.*

28. See BYERS, *supra* note 2, at 65.

29. *Id.*

30. *Id.*

31. See BYERS, *supra* note 2, at 11–14, 357–58.

32. See *id.* at 81–83.

33. See FLEISHER ET AL., *supra* note 23, at 50.

34. See BYERS, *supra* note 2, at 65.

35. *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited June 26, 2014).

36. *Office of the President: On the Mark*, NCAA, <http://www.ncaa.org/about/who-we-are/office-president/office-president-mark> (explaining the purpose of the NCAA) (last visited June 26, 2014) [hereinafter *Office of the President*].

37. See *infra* Part II.A–C.

38. Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1222 (1993).

One of the most notable platforms to show this power is in the courtroom.⁴⁰ The first true test of the NCAA's power was in *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma*, "which opened the floodgates of commercialism [in college sports] much wider than before."⁴¹ The Supreme Court ruled that the NCAA Football Television Plan (Plan) violated the Sherman Act.⁴² In its Plan, the NCAA tried to limit the number of each team's televised football games and to prevent schools from selling their television rights to games independent from the NCAA's rules.⁴³

In his dissent, Justice White argued that the Plan would prevent the professionalizing of college sports.⁴⁴ Having played both collegiately and professionally, Justice White knew that invalidating a television plan that limited the number of times a team could play on television would create a disadvantage to most colleges.⁴⁵ Justice White claimed that the majority's holding would lead to the decline of athletic competition within college sports.⁴⁶ Justice White's prediction of the effects of this ruling came true.⁴⁷ Specifically, there became a disparity among conferences, and the member institutions began to receive a massive influx of revenue streams.⁴⁸ This decision affected the NCAA's efforts to eliminate academic fraud and to improve graduation rates.⁴⁹ The NCAA saw an increase in commercialization as its members raised the financial stakes in college sports, and although the NCAA lost the case, the idea of raising the financial stakes in college sports became very attractive to the organization.⁵⁰

While still recovering from *Regents*, the NCAA's powers faced another challenge in *National Collegiate Athletic Association v. Tarkanian*.⁵¹ The suit developed from an NCAA investigation, which looked into the men's basketball program at the University of Nevada, Las Vegas.⁵² The NCAA not only found that Head Coach Jerry Tarkanian was directly involved with multiple NCAA violations but also threatened more sanctions on the school if the school did not suspend Tarkanian.⁵³ For fear of further sanctions, the

39. See generally, BRIAN L. PORTO, *THE SUPREME COURT AND THE NCAA: THE CASE FOR LESS COMMERCIALISM AND MORE DUE PROCESS IN COLLEGE SPORTS* 1–24 (Univ. of Mich. Press ed. 2012) (discussing the more famous Supreme Court cases involving the NCAA and the legal structure surrounding college sports).

40. See generally *id.* at 2–24 (discussing cases concerning the NCAA's policies).

41. *Id.* at 2 (quoting sports economist Andrew Zumbalist).

42. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984).

43. *Id.* at 124–25.

44. *Id.* at 123.

45. See PORTO, *supra* note 39, at 3.

46. *Id.*

47. *Id.* at 5–12.

48. *Id.*

49. *Id.*

50. *Id.* at 12.

51. See *NCAA v. Tarkanian*, 488 U.S. 179, 179 (1988).

52. *Id.* at 185–86.

53. *Id.* at 186.

University of Nevada, Las Vegas deferred to the NCAA even though the university doubted the NCAA's evidence.⁵⁴ Tarkanian sued and argued that the NCAA had deprived him of his "property and liberty without due process of law [as] guaranteed by the Fourteenth Amendment to the United States Constitution."⁵⁵ Ultimately, the Supreme Court found in favor of the NCAA, holding that the NCAA was not a state actor because it was a voluntary association and the suspension did not constitute state action prohibited under the Fourteenth Amendment.⁵⁶ The ruling established a precedent for the NCAA to follow its own due process policies when investigating and sanctioning its member institutions without fear of judicial restraints.⁵⁷

I. NCAA Bylaws

The NCAA first attempted to establish guidelines for college athletics with the Sanity Code, which laid out the rules for recruiting and financial aid.⁵⁸ This code was meant as a compromise between "two schools of thought: advocates, mostly in the South, [with] full athletic scholarships, and their opponents [(such as Yale, Harvard, and Princeton)] that insisted that athletes [should] be treated no differently than other students."⁵⁹ Ultimately, this code failed to curb the abuse of amateurism by the member institutions, and the NCAA continued to struggle with enforcement until it established the Committee on Infractions in 1954.⁶⁰ Over the next twenty years, the rules regarding amateurism changed from allowing colleges to offer athletes grants-in-aid to colleges recruiting high school athletes.⁶¹

Within the NCAA bylaws, Article 12 governs the amateurism of student-athletes.⁶² The bylaws are important for collegiate athletics to maintain amateurism, which "is crucial to preserving an academic environment in which acquiring a quality education is the first priority."⁶³ Article 12 explains how an athlete may lose his or her eligibility from various actions such as involvement with professional teams, agents, employment, promotional activities, and

54. *Id.* at 179.

55. *Id.* at 187.

56. *Id.* at 199.

57. See Sherry Young, *The NCAA Enforcement Program and Due Process: The Case for Internal Reform*, 43 SYRACUSE L. REV. 747, 749–51 (1992).

58. See BYERS, *supra* note 2, at 67.

59. ALLEN SACK & ELLEN STAUROWSKY, COLLEGE ATHLETES FOR HIRE: THE EVOLUTION AND LEGACY OF THE NCAA'S AMATEUR MYTH 43–44 (1998).

60. See Freedman, *supra* note 22, at 677.

61. Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS ARCHIVE, (Jan. 3, 2000, 4:07 PM), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateuism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html>.

62. NCAA DIVISION I MANUAL 2013–2014, at 52–73 (Oct. 2013) [hereinafter NCAA DRAFTING MANUAL], <http://www.ncaapublications.com/productdownloads/D114OCT.pdf>.

63. *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited June 26, 2014).

outside financial donations.⁶⁴ Recently, criticism surrounding the NCAA has focused on Article 12, but the NCAA has stood firm.⁶⁵

2. Challenges to the Bylaws

Andrew Oliver, then a senior in high school and whom colleges heavily recruited as a baseball player, violated NCAA bylaws when he retained an attorney to negotiate a potential contract with the Minnesota Twins.⁶⁶ Specifically, Oliver violated NCAA Bylaw 12.3.2.1, which prohibits a lawyer “from being present during contract negotiations with a professional organization if the student-athlete wishes to preserve his or her collegiate eligibility while deciding between accepting a professional contract or continuing as an amateur athlete.”⁶⁷ The NCAA rules required Oliver to negotiate a complex contract without the assistance of counsel.⁶⁸ This rule is counterintuitive. “If the NCAA s[ought] to protect the amateur athlete, it would seemingly be in the athlete’s best interest to have competent representation to deal with professional sports organizations and the complex business and legal issues that surround the world of professional sports.”⁶⁹ The judge in *Oliver v. National Collegiate Athletic Association* agreed, and ultimately ruled that the NCAA could not restrict a player’s right to have an attorney present during negotiations; this resulted in a small win against the NCAA.⁷⁰

Jeremy Bloom, a professional skier and aspiring college football player, was another athlete that challenged the NCAA bylaws.⁷¹ Bloom had accepted endorsement money to support his training as a professional skier.⁷² Even though use of these funds helped to continue Bloom’s skiing career, Bloom was in violation of the NCAA bylaws that prohibited NCAA athletes from receiving money from endorsements.⁷³ Had Bloom been receiving a salary for his skiing career, he would have been within NCAA bylaws; unfortunately, skiers earn little prize money and Bloom had to rely on endorsements to cover the costs to train and travel.⁷⁴ Although the judge in *Bloom v. National Collegiate Athletic*

64. See NCAA DRAFTING MANUAL, *supra* note 62, at 59–63.

65. Steve Weiberg, *Despite Criticism, NCAA Takes Firm Stance Against Professionalism*, USA TODAY, http://usatoday30.usatoday.com/sports/college/2011-01-03-ncaa-professionalism_N.htm (last updated Jan. 4, 2011, 1:41 AM).

66. Matthew Lockhart, *Oliver v. NCAA: Throwing a Contractual Curveball at the NCAA’s “Veil of Amateurism”*, 35 U. DAYTON L. REV. 175, 176–77 (2010).

67. *Id.* at 176.

68. *Id.* at 183.

69. Richard Karcher, *The NCAA’s Regulations Related to the Use of Agents in the Sport of Baseball: Are the Rules Detrimental to the Best Interest of the Amateur Athlete?*, 7 VAND. J. ENT. L. & PRAC. 215, 215 (2005).

70. *Oliver v. Nat’l Collegiate Athletic Ass’n*, 920 N.E.2d 203, 215 (2009) (vacating judgment pursuant to settlement).

71. See Freedman, *supra* note 22, at 677.

72. See *id.* at 680.

73. See *id.* at 679.

74. See *id.* at 679–80.

Association felt that Bloom should be able to live out his dream of playing college football without abandoning his future opportunities with skiing, the court held the NCAA's bylaws rationally related to their purpose and not arbitrarily applied.⁷⁵ Left with a choice between two dreams, Bloom ultimately chose to play football for Colorado University.⁷⁶ Not surprisingly, two years later, Bloom accepted endorsements in skiing to help prepare for the Olympics, thus ending his football career.⁷⁷

Although not as publicized as Oliver or Bloom, Jonathan Benjamin's issue with the NCAA might be the most frustrating.⁷⁸ Benjamin was a walk-on for the University of Richmond's men's basketball team.⁷⁹ He was also an aspiring entrepreneur.⁸⁰ The NCAA ruled Benjamin ineligible to play for the basketball team for turning a class project into a clothing line.⁸¹ By posting photos on Facebook of himself wearing his company's t-shirts, Benjamin violated rule 12.4.4 of the NCAA bylaws, which allows a student-athlete to "establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business."⁸² Benjamin participated in the kind of activity the NCAA claims to encourage.⁸³ Additionally, under NCAA bylaw 12.5.1.1, a university has permission to use a student-athlete's name, likeness, and identity for commercial purposes.⁸⁴ Stated another way, the NCAA has written into its manual a rule that allows its member institutions to exploit the student-athlete, while preventing the student-athlete from doing the same.⁸⁵ To be reinstated by the NCAA, Benjamin was forced to take down any pictures of himself.⁸⁶ Benjamin's company struggled because he was unable to use his image—or his other friends who played sports to advertise for the company.⁸⁷ "Maintaining amateurism is crucial—to preserving an academic environment in which acquiring a quality education is the first priority."⁸⁸ Unfortunately for Benjamin, starting your own business at the age of twenty does not fall under a quality education.⁸⁹

75. Bloom v. NCAA, No. 02-CV-1249, slip op. at 5 (20th Dist. Ct. Colo. Aug. 15, 2002).

76. *Id.*

77. *Id.*

78. See Patrick Hruby, *The Worst Fit*, SPORTS ON EARTH (Aug. 21, 2013), <http://www.sportsonearth.com/article/57680744>.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.*; see also NCAA DRAFTING MANUAL, *supra* note 62, at 68.

83. *See* Hruby, *supra* note 78.

84. *See* NCAA DRAFTING MANUAL, *supra* note 62, at 68.

85. *See* Freedman, *supra* note 22, at 695.

86. *See* Hruby, *supra* note 78.

87. *See id.*

88. *See Amateurism*, *supra* note 63.

89. *See* Hruby, *supra* note 78.

B. Ed O'Bannon

Ed O'Bannon decided that he had enough of this hypocrisy, and he sued, claiming that the actions of the NCAA and Collegiate Licensing Company (CLC) excluded him and other former student-athletes from the collegiate licensing market.⁹⁰ Similarly, Sam Keller claimed that the NCAA and Electronic Arts, Inc. (EA) used Keller's likeness and name in video games without Keller's consent and without providing compensation.⁹¹ The level of similarity between the video games and the student-athletes went all the way to physical appearance and jersey number.⁹² When more athletes joined the lawsuit, these two cases consolidated under the style *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*.⁹³ The suit alleges a conspiracy between the NCAA, EA, and CLC to require student-athletes to forgo their identity rights and use the athletes' likeness to profit from video games without consent or compensation.⁹⁴

In late September 2013, EA and CLC announced a settlement for all claims brought against them.⁹⁵ Additionally, the U.S. Supreme Court denied a motion by the NCAA to intervene in settlement talks between the plaintiffs and EA and CLC.⁹⁶ The Court's decision effectively removed the potential for the NCAA to undo the settlement between the plaintiffs and EA and CLC.⁹⁷ In addition, EA announced that it would not produce the 2014 version of the college football video game for fear of ongoing lawsuits over the use of student-athletes' name and likeness.⁹⁸ On the other hand, the NCAA has said, "it will fight all the way to the U.S. Supreme Court if necessary."⁹⁹ Thus, the NCAA will not compromise on this case, and it will likely become the defining moment for NCAA's power over college sports, for better or worse.¹⁰⁰ The plaintiffs are also seeking a 50-50 share of TV revenue, and if successful, the revenue could cripple the NCAA's monopoly.¹⁰¹ With just the NCAA remaining as the lone defendant, pressure will continue to mount for fundamental changes to college athletics.¹⁰²

90. O'Bannon v. NCAA, No. C-09-1967 CW, 2010 WL 445190, at *1-2 (N.D. Cal. Feb. 8, 2010).

91. Keller v. Elec. Arts, Inc., No. C-09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

92. *Id.*

93. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

94. *Id.*

95. Jon Solomon, *EA Sports and CLC Settle Lawsuit by Ed O'Bannon Plaintiffs; NCAA Remains as Lone Defendant*, AL.COM, http://www.al.com/sports/index.ssf/2013/09/ea_will_not_make_college_footb.html (last updated Sept. 28, 2013, 9:51 AM).

96. Mike Singer, *Supreme Court Denies NCAA's Attempt to Halt 'Likeness' Settlement*, CBS SPORTS (Jan. 14, 2014, 11:38 AM ET), <http://www.cbssports.com/general/eye-on-sports/24408975/supreme-court-denies-ncaas-attempt-to-halt-likeness-settlement>.

97. *Id.*

98. See Solomon, *supra* note 95.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

In October 2013, the federal judge in the case declared that the NCAA's "principle of amateurism is subject to scrutiny under Section One of the Sherman Act."¹⁰³ Unfortunately, the judge barred the plaintiffs from suing on behalf of former and current men's basketball and football players.¹⁰⁴ However, this ruling did not prevent the former and current players from filing new lawsuits against the NCAA.¹⁰⁵ Judge Wilken, the presiding United States District Judge, explained that some players, in the class of tens of thousands, would not have been in the video games because those rosters were smaller than actual rosters.¹⁰⁶ If student-athletes began filing new and individual lawsuits against the NCAA, the suit would avoid this criticism.¹⁰⁷ Additionally, Judge Wilken stressed that some former student-athletes benefited from amateurism rules while other student-athletes might have delayed turning professional if the NCAA allowed for just compensation.¹⁰⁸ This delay in going professional could lead student-athletes to continue seeking a degree, something the NCAA insists is more important than athletics.¹⁰⁹ Additionally, the fact that individual players can now sue the NCAA could lead to well-known college players filing suit.¹¹⁰ Whether these issues will come up in the near future, the decision did grant class certification for the twenty-five players presently involved in the lawsuit, which puts the players one step closer to challenging the NCAA's no pay rules.¹¹¹

The case is far from over, but this decision will likely shift the no pay rules to the conference level, where these rules are less vulnerable to antitrust violations.¹¹² Although the total impact of the *O'Bannon* lawsuit is still unknown, monumental changes have already begun. Lawyers involved in the *O'Bannon* lawsuit have discussed the possibility of a trade association for student-athletes.¹¹³ This trade association would negotiate contracts on behalf of student-athletes, effectively acting as a union.¹¹⁴ A trade association would make a strong economic case for student-athletes through its arrangement of

103. Mark Edelman, *Federal Court Ruling Paves Way For Class Action Antitrust Challenge to NCAA Amateurism Rules*, FORBES (Oct. 28, 2013, 8:13 AM), <http://www.forbes.com/sites/marcedelman/2013/10/28/federal-court-ruling-paves-the-way-for-class-action-challenge-to-ncaa-amateurism-rules/?partner=yahootix>.

104. Michael McCann, *Two Potentially Game-Changing Developments in O'Bannon v. NCAA*, SPORTS ILLUSTRATED (Dec. 17, 2013) [hereinafter McCann, *Developments in O'Bannon*], <http://www.si.com/college-football/2013/12/17/obannon-case-ncaa-latest-developments>.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Office of the President*, *supra* note 36.

110. See McCann, *Developments in O'Bannon*, *supra* note 104.

111. See Edelman, *supra* note 103.

112. *Id.*

113. Michael McCann, *O'Bannon Suit May Open Doors For a Players' Trade Association*, SPORTS ILLUSTRATED, <http://sportsillustrated.cnn.com/college-football/news/2013/11/11/ncaa-obannon-case-next-steps> (last updated June 16, 2014).

114. See McCann, *Developments in O'Bannon*, *supra* note 104.

group marketing and licensing agreements.¹¹⁵ No matter what ultimately is decided in the *O'Bannon* suit, it is safe to say that college athletics will never be the same.¹¹⁶

C. NCAA Gets Caught with Its Pants Down

Until recently, the NCAA marketed apparel and memorabilia from schools on a website devoted to NCAA merchandise sales.¹¹⁷ The website, ShopNCAASports.com, allowed a customer to use the search function to find memorabilia and apparel for specific athletes.¹¹⁸ To find a Texas A&M No. 2 jersey worn by Heisman trophy winner Johnny Manziel, the customer would simply type "Johnny Manziel" into the search function.¹¹⁹ The site also put No. 2 jerseys with "Football" on the back, in reference to Johnny Manziel's nickname, Johnny Football.¹²⁰ Although the NCAA still maintains it does not profit from student-likeness, through its former website, this is likely false.¹²¹ Whether it is fiction or not, the NCAA decided to shut down the website and stop selling individual jerseys and other memorabilia.¹²² While the NCAA acknowledged the hypocrisy in the website, the NCAA remains firm on their overall objectives.¹²³

D. Is the NCAA Losing Control?

The NCAA, the most powerful and recognizable governing body for amateur athletics, has lost its ability to govern intercollegiate sports.¹²⁴ The decline in power is a result of the NCAA's inherently faulty structure, fundamental hypocrisy, and a pattern of selective enforcement of its rules.¹²⁵ As a single organization, the NCAA is structured to further academic integrity

115. *Id.*

116. Josh Kendall, *Kendall's Morning Meeting: College Athletics Will Never be the Same*, GO GAMECOCKS (Sep. 12, 2013), <http://www.gogamecocks.com/2013/09/12/420375/kendalls-morning-meeting-college.html>.

117. Dennis Dodd, *NCAA to 'Exit' Business of Selling School-Related Online Items*, CBS SPORTS (Aug. 8, 2013, 3:54 PM ET), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/23070728/ncaa-to-exit-business-of-selling-schoolrelated-online-items>.

118. Laken Litman & Steve Berkowitz, *NCAA Apparel Sales Site Used Athletes' Name in Search*, USA TODAY (Aug. 7, 2013, 12:55 PM EDT), <http://www.usatoday.com/story/sports/ncaaf/2013/08/06/ncaa-shop-search-football-jerseys-johnny-manziel/2625119>.

119. *Id.*

120. *Id.*

121. See Branch, *supra* note 8 (quoting NCAA spokesperson Erik Christianson, in response to the Ed O'Bannon lawsuit).

122. Mark Schlabach, *NCAA Puts End to Jersey Sales*, ESPN (Aug. 9, 2013, 1:10 PM ET), http://espn.go.com/college-sports/story/_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical.

123. *Id.*

124. JOSEPH HYLTON & PAUL ANDERSON, SPORTS LAW AND REGULATION, 399 (Nat'l Sports L. Inst. 1999).

125. *Id.*

as well as economic interests—two very different goals that are difficult to reconcile.¹²⁶ With a budget of over \$850 million, the NCAA retains only 4% (\$34 million) for central services.¹²⁷ The enforcement committee must not only compete with the other NCAA services for a share of the \$34 million, but must also attempt to enforce a 400-page rulebook.¹²⁸ Additionally, with a conflict of interest within the Committee on Infractions—as member institutions basically judge one another—and a lack of subpoena power, the NCAA’s enforcement power is becoming increasingly weak.¹²⁹

To enhance the argument for paying student-athletes, three National Football League (NFL) agents and a financial advisor acknowledged in September of 2013 that they provided extra benefits to Southeastern Conference (SEC) football players.¹³⁰ In an effort to sign football players as clients after they had declared their intent to be a part of the NFL draft, these agents provided extra benefits in direct violation of NCAA bylaws.¹³¹ With a lack of subpoena power, the NCAA is likely unable to bring sanctions against any of the players—who have already left their schools—or the member institutions.¹³² Similarly, the NCAA faced an uphill battle in obtaining cooperation from people when reports surfaced that Texas A&M University’s quarterback and Heisman Trophy winner, Johnny Manziel, accepted money in exchange for his autograph.¹³³ Under NCAA bylaw 12.5.2.2, a student-athlete is required to take steps to stop someone from using their picture or likeness without their knowledge.¹³⁴ Never mind that both the NCAA and Texas A&M were profiting from Manziel, it was Manziel’s responsibility to stop others from doing the same.¹³⁵ While admitting that it did not have evidence of Manziel actually accepting money, the NCAA claimed that Manziel inadvertently committed a violation and suspended him for half of a game.¹³⁶ If this scenario seems circular, that is because it is.

126. See John C. Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 177 (1983).

127. Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, THE ATLANTIC, (Oct. 23, 2012, 4:16 PM ET), <http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012>.

128. *Id.*

129. *Id.*

130. Charles Robinson & Rand Getlin, *Ties Between Former Alabama Player and Agents Documented by Text Messages*, YAHOO! SPORTS (Sep. 11, 2013, 4:31 PM), <http://sports.yahoo.com/news/ncaaf-ties-between-former-alabama-player-and-agents-documented-by-text-messages-203153323.html>.

131. *Id.*

132. *Id.*

133. Jason Belzer, *NCAA Continues Circular Logic With Suspension of Texas A&M’s Johnny Manziel*, FORBES (Aug. 29, 2013, 8:10 AM) <http://www.forbes.com/sites/jasonbelzer/2013/08/29/ncaa-continues-circular-logic-with-suspension-of-texas-ams-johnny-manziel>.

134. See NCAA DRAFTING MANUAL, *supra* note 62, at 12.5.2.2.

135. See Belzer, *supra* note 133.

136. *Id.*

E. Follow the Money

Justice White could not have been more accurate in his prediction of the effects of the decision in *NCAA v. Board of Regents*.¹³⁷ The ruling created equity conferences, which dominate regular season telecasts as well as postseason bowl games.¹³⁸ The disparity amongst conferences has continued.¹³⁹ For example, in 2008, the SEC signed a fifteen-year \$2.25 billion guaranteed television deal with ESPN.¹⁴⁰ ESPN extended the deal in 2013 for another ten years, which now gives the SEC its own TV network.¹⁴¹ Similarly, in 2011, ESPN announced a \$300 million television contract with the University of Texas to create its own TV network.¹⁴² The NCAA and its members operate based on commercial motives, in which preserving educational integrity is “simply not reconcilable with maximizing consumer welfare in the sports entertainment marketplace.”¹⁴³

With the large sums of money poured into college athletics, student-athletes on full athletic scholarships do not even receive the full ride that colleges promise.¹⁴⁴ In the 2011–2012 academic year, the average scholarship shortfall for a Football Bowl Series full scholarship athlete was \$3,285.¹⁴⁵ Therefore, while colleges and conferences are negotiating multi-million dollar television contracts, student-athletes, who play a big role in the reason for those contracts, are stuck with footing the bill.¹⁴⁶ In *White v. National Collegiate Athletic Association*, the NCAA and former athletes reached a settlement agreement for the athletes to receive an increase in funds to compensate those athletes who had been denied the full cost of attendance.¹⁴⁷ Unfortunately, the NCAA was not compelled to reveal how much it exactly paid the former athletes.¹⁴⁸ In fact, \$4.3 million of the \$10 million settlement was instead placed in a short-term grant program to aid low revenue schools.¹⁴⁹ So even

137. See PORTO, *supra* note 39, at 5–12.

138. See *id.*

139. See Richard Sandomir, *SEC Will Start TV Network in 2014*, NY TIMES (May 2, 2013), http://www.nytimes.com/2013/05/03/sports/ncaafootball/sec-will-have-own-tv-network-starting-in-2014.html?_r=0; see also Texas, *ESPN Announce New Network*, ESPN (Jan. 19, 2011m 5:51 PM ET), <http://sports.espn.go.com/espn/news/story?id=6037857> (noting the creation of both the SEC and University of Texas television networks).

140. See *id.*

141. *Id.*

142. Texas, *supra* note 139.

143. Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. R. 2631, 2673 (1996).

144. Ramogi Huma & Ellen Staurowsky, *The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateuism*, NCPA, at 12 (2012), http://www.ncpanow.org/news/articles/body/6-Billion-Heist-Study_Full.pdf.

145. *Id.*

146. *Id.*

147. *Id.*

148. Marta Lawrence, *Six Schools Selected for Pilot Grant Program*, NCAA NEWS ARCHIVE (Dec. 2012), <http://fs.ncaa.org/Docs/NCAANewsArchive/2012/december/six%2Binstitutions%2Bselected%2Bfor%2Blimited-resource%2Binstitutions%2Bgrant%2Bprogram%2Bpilotdf30.html>.

149. *Id.*

when student-athletes win, they still lose. Fortunately, the NCAA president, Mark Emmert, recently noted that there was a reasonable chance that the five power conferences would begin to offer the full cost of attendance to athletes.¹⁵⁰ Although this decision will not be final anytime soon, the NCAA is beginning to address some of the issues raised recently by its member institutions.¹⁵¹

F. “Student-Athlete” and its Propaganda

The creation of the term “student-athlete” was a response to the potential threat of NCAA athletes being identified as employees by the state industrial commissions, and more importantly, the courts.¹⁵² The NCAA forced the term on college publicists as a mandated substitute for words like “players” and “athletes.”¹⁵³ “We told college publicists to speak of ‘college teams,’ not football or basketball ‘clubs,’ a word common to the pros.”¹⁵⁴ Former NCAA President Myles Brand discussed the rationale behind amateurism in college athletics with Sports Illustrated columnist Michael Rosenberg:

Brand: They can’t be paid.
 Rosenberg: Why?
 Brand: Because they’re amateurs.
 Rosenberg: What makes them amateurs?
 Brand: Well, they can’t be paid.
 Rosenberg: Why not?
 Brand: Because they’re amateurs.
 Rosenberg: Who decided they are amateurs?
 Brand: We did
 Rosenberg: Why?
 Brand: Because we don’t pay them.¹⁵⁵

Rosenberg attacks the NCAA’s two main defenses of amateurism: (1) paying players would cause the appeal of college athletics to decrease and (2) amateurism rules act as a salary cap in order for smaller schools to compete.¹⁵⁶ Rosenberg argues against the NCAA’s defenses by showing that the Olympics have gotten bigger since allowing professional athletes to

150. Joe Schad, *Move to Cost of Attendance Closer*, ESPN, http://espn.go.com/college-sports/story/_/id/10287431/schools-closer-giving-athletes-full-cost-attendance-ncaa-president-says (last updated Jan. 13, 2014, 7:06 PM ET) (showing the push towards full cost of attendance for student-athletes).

151. *Id.*

152. *See* BYERS, *supra* note 2, at 69.

153. *Id.* at 65.

154. *Id.* (noting that Walter Byer, the first full time executive director of the NCAA, discusses the propaganda that went into the NCAA’s push to maintain the title of amateurs in college sports).

155. Michael Rosenberg, *Change is Long Overdue: College Football Players Should be Paid*, SPORTS ILLUSTRATED (Aug. 26, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_rosenberg/08/26/pay.college (discussing the flaws of the rules related to amateurism).

156. *See id.*

compete.¹⁵⁷ Although Rosenberg believes the NCAA's salary cap defense has merit, he thinks there needs to be a middle ground where the NCAA and its member institutions compensate players for work that goes beyond an athletic scholarship.¹⁵⁸ The creation of trust funds for student-athletes would be that middle ground.¹⁵⁹

III. IMPLEMENTATION OF THE TRUST

The purpose behind the creation of trusts for student-athletes is to address the growing concern over treatment of student-athletes in relation to compensation.¹⁶⁰ The trust, created by the NCAA and its member institutions, would financially compensate student-athletes after their playing career while maintaining the spirit of amateurism within college athletics.¹⁶¹ Under the Uniform Trust Code, creation of a trust happens in three ways:

- (1) [T]ransfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (2) declaration by the owner of property that the owner holds identifiable property as trustee; or
- (3) exercise of a power of appointment in favor of a trustee.¹⁶²

For the purposes of this proposal, the NCAA should create the trust through the third option: the exercise of a power of appointment.¹⁶³ The creation of a trust does not occur until the trust receives property.¹⁶⁴ The initial property interest would not need to be substantial and likely would not be at the beginning of the student-athlete's playing career.¹⁶⁵ This proposal uses the Uniform Trust Code as the foundation for implementation; however, certain states have their own trust codes, which the member institutions would need to abide by.

A. The Trust

Created trusts must be lawful and in line with public policy.¹⁶⁶ Additionally, the NCAA, its member institutions, and each student-athlete must

157. *See id.*

158. *See id.*

159. *See supra* Part II.E.

160. *See supra* Part II.E.

161. Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 154 (1996).

162. UNIF. TRUST CODE § 401 (2005).

163. *See id.*

164. *See id.*

165. *See id.*

166. *Id.* § 404.

meet the trust requirements in order for the student-athlete to benefit.¹⁶⁷ Property is anything subject to ownership.¹⁶⁸ This includes “real or personal, legal or equitable, or any interest therein.”¹⁶⁹ The property placed in the trust for each athlete would be a percentage of revenue from ticket sales, television contracts, merchandise, and conference payouts.¹⁷⁰ Additionally, some student-athletes would get an additional percentage of merchandise that was directly tied to that student-athlete.¹⁷¹ Revenue from college football alone has increased over 150% over the last decade.¹⁷² The college football playoff, which begins in 2014, projects to generate over \$400 million in revenue.¹⁷³ This new revenue stream, along with the traditional revenue streams, would help cover the cost of the trust.

A spendthrift provision would prevent the student-athlete from accessing the property in the trust while still competing.¹⁷⁴ “A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a ‘spendthrift trust’ is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted.”¹⁷⁵ This spendthrift provision makes a legally binding transfer by the student-athlete impossible, except with the approval of the trustee.¹⁷⁶ The NCAA member institutions, as trustees, would use their discretion to allow a transfer of the fund to, for example, a college fund for the student-athlete’s children.¹⁷⁷

Through this proposal, a revocable trust would be created that would allow revocation and amendments to the trust.¹⁷⁸ A revocable trust allows the NCAA and its member institutions to amend and revoke a student-athlete’s trust if the student-athlete does not follow the requirements of the trust.¹⁷⁹ The NCAA would allow a student-athlete to appeal any decision by the NCAA that would reduce or revoke the student-athlete’s trust.¹⁸⁰ The money from a revoked or

167. *Id.* § 402. “A trust is created only if: (1) the settlor has capacity to create a trust; (2) the settlor indicates an intention to create the trust (3) the trust has a definite beneficiary [;] (4) the trustee has duties to perform; and (5) the same person is not the sole trustee and sole beneficiary.” *Id.* Additionally, “[a] beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.” *Id.*

168. *Id.* § 103(12).

169. *Id.*

170. *See id.*

171. *See id.*

172. Eric Chemi, *The Amazing Growth in College Football Revenue*, BLOOMBERG BUSINESSWEEK (Sep. 26, 2013), <http://www.businessweek.com/articles/2013-09-26/the-amazing-growth-in-college-football-revenues>.

173. Brett McMurphy, *Power Conferences Likely to Receive Most of Playoff Revenue*, CBS SPORTS (June 18, 2012, 7:57 PM ET) <http://www.cbssports.com/collegefootball/story/19378895/power-conferences-likely-to-receive-most-of-playoff-revenue>.

174. UNIF. TRUST CODE § 502.

175. TEX. PROP. CODE ANN. § 112.035(b) (West 2007).

176. UNIF. TRUST CODE § 502.

177. *See id.*

178. *Id.* § 602.

179. *Id.* § 502.

180. *See id.*

amended trust would go into a general fund to assist former student-athletes.¹⁸¹ While the student-athlete is still in school, the rights of the beneficiary (student-athlete) are subject to the control of the settlor (the NCAA).¹⁸²

Another option for the NCAA would be to create a support trust, commonly referred to as a health, education, maintenance, and support trust or HEMS.¹⁸³ Courts have treated support trusts as having a spendthrift nature to the trust, even if no spendthrift clause is in the trust.¹⁸⁴ There are multiple stories of student-athletes going broke after leaving school, many times after a long and stellar professional career.¹⁸⁵ The support trust would act as an allowance for student-athletes upon graduation, whether mandatory or discretionary in nature.¹⁸⁶ Learning to maintain a budget early on could be beneficial to these student-athletes as they begin a career and start a family. By offering different types of trusts to the student-athletes, the NCAA can address the individual needs of each student-athlete.

The NCAA and its member institutions first offered the Student Assistance Fund in 1999.¹⁸⁷ The Fund provided financial support to student-athletes who needed money for things not covered under an athletic scholarship, like a flight home for a funeral or summer school tuition.¹⁸⁸ While this fund helped to assist student-athletes in school, the trust fund would assist the student-athletes after their college career has ended.¹⁸⁹ The Student Assistance Fund's purpose is to assist during times of despair; the trust fund focuses on compensation for student-athletes after their career is over.¹⁹⁰ As mentioned previously, with the new playoff system in college football, coupled with the already large stream of revenue in college athletics, funding for the trusts would be relatively easy.¹⁹¹

B. The Five Major FBS Conferences and Autonomy

Five FBS Conferences have constituted the major conferences for the Bowl Championship Series: (1) SEC, (2) ACC, (3) Big Ten, (4) Big 12, and

181. *See id.*

182. *Id.* § 603(a).

183. GERRY W. BEYER, TEXAS TRUST LAW: CASES AND MATERIALS 96 (2d. ed. 2009).

184. *See id.*

185. *Broke*, RAKONTUR (2012), <http://www.rakontur.com/Broke>.

186. *See* BEYER, *supra* note 183.

187. Brian Burnsed, *Meeting the Needs of Student-Athletes: NCAA Provides \$53 Million Directly to 81,000 Players In Need*, NCAA, <http://www.ncaa.com/news/ncaa/article/2012-08-20/meeting-needs-student-athletes> (last updated Aug. 22, 2012, 9:33 EDT) (explaining the formation of the Student Assistance Fund, which assists student-athletes in basic needs such as paying for trips home, tutoring, clothing, health insurance, and other costs not covered by an athletic scholarship).

188. *Id.*

189. *See id.*

190. *See id.*

191. *See supra* Part II.E.

(5) Pac 12.¹⁹² Although the BCS ended in 2014, the sixty-five schools, which make up the five conferences, will still generate a majority of the revenue in college athletics.¹⁹³ A new governance structure that places these five conferences into a new and separate FBS division has gained traction.¹⁹⁴ At the most recent NCAA annual convention, nearly 60% of the roughly 800 college presidents and athletic officials in attendance showed support for giving these five conferences more freedom to meet the financial needs of the players in addition to more favorable rule adoptions.¹⁹⁵ This trust proposal would address the growing pressure the NCAA faces over compensating players in the larger conferences.¹⁹⁶ The trust would be available to all student-athletes who compete in the five conferences, with each student-athlete receiving a base dollar amount each year.¹⁹⁷ If a player's name, image, and likeness are used directly for commercial purposes, either through merchandise sales of the student-athlete's jersey or a commercial promoting an athletic event, then a percentage of those proceeds would go into the student-athlete's trust fund.¹⁹⁸ This way, each student-athlete's compensation amount is the same in the beginning and earns additional funds based on the student-athlete's popularity or success.¹⁹⁹

After Johnny Manziel's Heisman year, Texas A&M launched a six-figure advertising campaign.²⁰⁰ Additionally, the Heisman carried a \$37 million value in exposure, and Texas A&M received \$740 million in donations.²⁰¹ However, Texas A&M claims that only \$20,000 was directly attributed to Johnny Manziel, which came from a football fundraiser where donors paid to sit at Manziel's table.²⁰² It is impossible to ignore the financial impact of Manziel; from these numbers alone, the argument that only \$20,000 was directly attributable to Manziel is impossible to accept.²⁰³ Through the trust proposal,

192. 1A FACULTY ATHLETICS REPRESENTATIVES (FAR), PROPOSED PRINCIPLES AND MODEL FOR A NEW GOVERNANCE STRUCTURE (Sept. 11, 2013) [hereinafter PROPOSED NEW GOVERNANCE STRUCTURE], http://www.oneafar.org/Governance_Proposal.pdf (explaining the proposal for a new division in college athletics).

193. See *infra* Part IV.A.

194. See PROPOSED NEW GOVERNANCE STRUCTURE, *supra* note 192 (The proposal goes into detail on the reasons why a separate FBS division would be better for the NCAA than a fourth Division).

195. See Brad Wolverton, *Tensions Over Big-Conference Autonomy Could Slow NCAA Progress*, CHRON. OF HIGHER EDUC. (Jan. 19, 2014), <http://chronicle.com/blogs/players/tensions-over-big-conference-autonomy-could-slow-progress-for-ncaa/34205>.

196. See Lestor Munson, *Events Ratchet Up NCAA Pressure*, ESPN, http://espn.go.com/espn/otl/story/_/id/9491666/latest-developments-ncaa-electronic-arts-lawsuit-significantly-change-case (last updated July 19, 2013, 4:41 PM ET).

197. See BEYER, *supra* note 183.

198. See *id.*

199. See *id.*

200. Tim Polzer, *Texas A&M: Johnny Manziel's financial impact on the school has been overstated*, SPORTS ILLUSTRATED (Nov. 5, 2013), <http://tracking.si.com/2013/11/05/johnny-manziel-financial-impact>.

201. *Id.*

202. *Id.*

203. *Id.*; see also BEYER, *supra* note 183.

Manziel's trust would receive a percentage of this amount.²⁰⁴ Although the donations would likely not be included, a percentage of the \$37 million in exposure would be.²⁰⁵ Not every student-athlete would have the same results as Manziel; however, through academic incentives, athletes could distinguish themselves through different means.²⁰⁶ As discussed in the next Section, academic success will not only be an incentive, but also a requirement.²⁰⁷

The only costs that these conferences cap are those involving student athletes. There are multiple restrictions such as limits on recruiting visits, on financial aid, and even on indirect expenditures that involve the student-athletes.²⁰⁸ In contrast, Division I-A football head coaches' salaries in 2007 made up 3.5% of total revenues, while NFL head coaches' salaries only made up 1.5% of the NFL's total revenue.²⁰⁹ The difference is even larger in men's college basketball, where head coach salaries made up more than 11% of total revenue, compared to 3.2% of revenue in the NBA.²¹⁰ By establishing a separate FBS division comprising these five major conferences, the NCAA would be able to maintain governance over the remaining divisions, while allowing these five major conferences to have more autonomy.

C. NCAA Compliance and Requirements

Although this Comment is a proposal to amend the NCAA bylaws, maintaining amateur status would still be important to the NCAA. "NCAA rules should be upheld if they increase economic marketplace competition by preserving the distinct product of college sports."²¹¹ While amending the NCAA bylaws, it is important to show that this proposal does not defeat the NCAA policies but rather addresses the issue of student-athlete compensation in a way that still protects the status of amateurism.²¹²

This proposal would require the NCAA to make some changes to their bylaws. Specifically, the NCAA would need to make an amendment to bylaw 12.1.2.1.4, which deals with expenses, awards, and benefits.²¹³ In the

204. See Polzer, *supra* note 200.

205. See *id.*

206. See *id.*

207. See *infra* Part III.C.

208. Roger G. Noll, *The Antitrust Economics of NCAA Restrictions on Athletic Scholarships*, WINTHROP (2013), <http://winthropintelligence.com/wp-content/uploads/2013/02/Noll-Report-NCAA-The-Antitrust-Economics-of-NCAA-Restrictions-on-Athletic-Scholarships.pdf>.

209. See Reply Expert Report of Daniel A. Rascher at exhibit 5, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-1967 CW (N.D. Cal. Nov. 5, 2013).

210. *Id.*

211. Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1300 (1992) (discussing the decision in *NCAA v. Bd. of Regents*). "[T]he Court indicated that the limited compensation bylaw enhances competition because it purportedly advances the noble tradition of amateurism—the notion that college athletes should participate in sports for the love of the game and not for compensation." *Id.*

212. *Id.*

213. See NCAA DRAFTING MANUAL, *supra* note 62, at 12.1.2.1.4.

amendment, the NCAA would need to explain the process of the trust, as well as the requirements of the association, the member institutions, and the student-athletes.²¹⁴ Rather than defeating the NCAA policies, this amendment addresses the growing support for change.²¹⁵ The NCAA would act as settlor, while its member institutions would act as the trustee for the student-athlete, the beneficiary.²¹⁶ As settlor, the NCAA would place property in the trust. The property would come from the different streams of revenue made by both the NCAA and its member institutions.²¹⁷ The member institutions would contribute to the trust, specifically money from merchandise sales and television revenue.²¹⁸ The member institutions would not be settlors because the NCAA would have the power to revoke or withdraw the contribution.²¹⁹ From the billions of dollars made through different revenue streams, the NCAA and its member institutions would have a sufficient amount of income to contribute to the trust.²²⁰ Under NCAA bylaw 12.02.7, “[p]ay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.”²²¹ Said differently, the NCAA is not opposed to paying the student-athletes, just opposed to paying student-athletes under terms and conditions that the NCAA cannot control.²²²

Acting as the trustee, the member institutions would be responsible for managing the property according to the instructions of the NCAA, who would control the terms and conditions of the trust.²²³ Student-athletes would have many different requirements to meet to maintain their trust.²²⁴ The trust would create an incentive to succeed academically because the trust would require student-athletes to remain eligible throughout their career.²²⁵ The trust would also reward student-athletes who achieve academic honor roll each year similar to a bonus from an employer.²²⁶ The potential reduction of the trust, because of poor academic standings, would create an incentive for student-athletes to succeed both on and off the field.²²⁷

Additionally, student-athletes would have to take incoming and outgoing counseling focused on their trusts.²²⁸ As a freshman, the student-athlete would

214. *See supra* Part II.E.

215. *See supra* Part II.E.

216. *See supra* Part II.E.

217. *See supra* Part II.E.

218. *See supra* Part II.E.

219. UNIF. TRUST CODE § 103(15) (2005).

220. *See supra* Part II.C.

221. *See NCAA DRAFTING MANUAL, supra* note 62, at 12.02.7.

222. Ellen Staurowsky, *Piercing the Veil of Amateuism: Commercialization, Corruption, and U.S. College Sport*, in COMMERCIALIZATION OF SPORT 148 (Trevor Slack ed., 2004).

223. *See supra* Part III.A.

224. *See supra* Part III.A.

225. *See supra* Part III.A.

226. *See supra* Part III.A.

227. *See supra* Part III.A.

228. *See supra* Part III.A.

learn the fundamentals of the trust fund, the different revenue streams, and the requirements as a student-athlete.²²⁹ Athletic departments would have to provide a trust advisor to whom student-athletes could go with questions or concerns regarding their trusts.²³⁰ For an outgoing student-athlete, the advisor would discuss the different options for the student-athlete.²³¹ The different options, laid out in the next Section, would focus on what plan for disbursement of the trust fund would be the most financially beneficial to the student-athlete.²³²

D. Benefits of the Trust Proposal

This proposal creates multiple benefits, from promoting continued education to educating student-athletes on financial responsibility. Injuries in college athletics have always been an issue, and if a student-athlete is injured, the coach could arbitrarily withdraw the student-athlete's scholarship, leaving the athlete to pay the medical bills.²³³ The trust would allow the athlete to have access to funds that could cover lingering injuries that resulted from the athlete's playing career.²³⁴ Student-athletes come from various economic backgrounds, and some are even getting suspended for accepting a meager \$200 from an old coach to provide for his or her family.²³⁵ Through the trust, student-athletes would have some financial security upon graduation.²³⁶ Furthermore, the NCAA's ability to revoke a student-athlete's trust would decrease the likelihood that an athlete would accept impermissible benefits.

Most student-athletes "will go pro in something other than sports."²³⁷ This has been NCAA's tagline, and yet the tendency has been for athletes "to play the sport and major in eligibility."²³⁸ A 2012 NCAA study revealed that high school athletes' probability to play professional sports is less than one percent.²³⁹ By providing a trust for college-athletes, there would be more of an

229. See *supra* Part III.A.

230. See *supra* Part III.A.

231. See *supra* Part III.A.

232. See *infra* Part III.D.

233. David Casillo, *For College Scholarship Athletes, Injury Can Spell Financial Disaster*, DAILY CALLER (Nov. 9, 2011, 11:44 PM), <http://dailycaller.com/2011/11/09/for-college-scholarship-athletes-injury-can-spell-financial-disaster>.

234. See *id.*

235. Jeff Goodman, *Kansas State's Samuels Suspended For \$200 Wire From Summer-League Coach*, CBS SPORTS (Mar. 17, 2012, 6:24 PM ET), <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/17869425/kansas-states-samuels-suspended-for-200-wire-from-summer-league-coach>.

236. See *id.*

237. *Investing Where It Matters*, NCAA, <http://www.ncaa.org/about/resources/media-center/investing-where-it-matters> (last visited June 26, 2014).

238. Shaun Hittle, *Athletes' Tendencies to 'Cluster' In Certain Academic Fields Problematic, Some Say*, LAWRENCE J.-WORLD (June 15, 2012), <http://www2.ljworld.com/news/2012/jun/15/athletes-tendencies-cluster-certain-academic-field>.

239. *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NCAA, http://www.ncaa.org/sites/default/files/Probability-of-going-pro-methodology_Update20123_0.pdf

incentive to further their education without the fear of debt lingering over the athletes' head.²⁴⁰ Similar programs are already in place at some universities—University of Michigan has a Degree Completion Scholarship—that help finance former athletes' return to school to complete their degree.²⁴¹ Without programs like these, some student-athletes would be unable to finish their degree.²⁴²

As mentioned earlier, a support trust can introduce student-athletes to the concept of managing a budget.²⁴³ Learning how to manage the trust's budget, would teach the athlete valuable, real world skills that would help when the athlete budgets other sources of income like a paycheck. In a survey of sports agents, 69.1% said their clients live luxurious lifestyles with only 26.4% actually worrying about paying for that lifestyle.²⁴⁴ Student-athlete trusts would not only compensate student-athletes while maintaining amateur status but would also teach valuable sound financial tools that could potentially reduce these two daunting numbers.

E. What Does This Mean for Attorneys?

The majority of student-athletes playing football in Division I are minorities with low socio-economic backgrounds.²⁴⁵ This background could have an impact on where the athlete decides to go to school.²⁴⁶ With the trust creating an incentive to perform well in school, student-athletes would be more likely to put forth a better effort in their studies.²⁴⁷ “[T]hey tell you, you a

(last updated Sept. 17, 2012). Specifically, 3.3% of men's high school basketball players will go on to play college basketball, and of that, only 1.3% will play professionally. *Id.* For football, 6.4% of high school athletes will play in college, with 1.6% of those athletes playing professionally. *Id.*

240. Courtney Ratkowiak, *Back to School: Fund Helps Former Student-Athletes Finish Degree*, MGOBLUE.COM (Apr. 29, 2013), <http://support.mgoblue.com/features/back-to-school-fund-helps-former-student-athletes-finish-degrees>.

241. *Id.*

242. *Id.*

243. *See supra* Part III.A.

244. Andrew Farrell, *Sports Stars' Money Meltdowns*, FORBES (Nov. 25, 2008, 6:00 PM) http://www.forbes.com/2008/11/25/units-borg-money-biz-sports-cx_af_1125athletefinances.html.

245. Landon T. Huffman & Coyte G. Cooper, *I'm Taking my Talents to... An Examination of Hometown Socio-Economic Status in the College-Choice Factors of Football Student-Athletes at a Southeastern University*, 5 JOURNAL OF ISSUES IN INTERCOLLEGIATE ATHLETICS 225 (2012) (discussing the idea of Corporate Social Responsibility and the issue with a perceived lack of due process in the NCAA). When student-athletes break an NCAA rule, they must defend themselves, and they become liabilities and are alienated from the university. *Id.* By implementing the trust in college athletics, this injustice is avoided. *Id.*

246. *Id.* The study determined the most influential factors in making a college choice for student-athletes. *Id.* The student-athletes were divided into three socio-economic categories based on hometown environments with median annual household incomes of \$22,204 to \$34,707, \$34,707 to \$47,150, and \$47,150 to \$120,075. The “opportunity to begin a good career other than playing professional football” was the highest rated degree of influence, showing that student-athletes do take into account academics. *Id.* Unfortunately, once the student-athlete enrolls in school, the athlete is encouraged, directly or indirectly, to take easy classes in order to focus on athletics. *Id.* It is important to note that the middle range ranked the “opportunity to begin a good career other than playing professional football” as the eighth most influential factor out of ten. *Id.*

247. *See supra* Part III.C.

student first and an athlete next, but really you an athlete first and a student second . . . [a]s long as they get them four years out of you, they could[n't] care less if you get a degree or not."²⁴⁸ Athletic scholarships hinge primarily on athletic performance rather than academic performance, something that this proposal would work to fix.²⁴⁹

For attorneys, determining the right path for your client, the student-athlete, would be very important.²⁵⁰ Although the NCAA and its member institutions would provide resources to assist the student-athletes in making the best decision for their trust, many student-athletes might seek outside help.²⁵¹ It would be important to gather as much information from the student-athlete during two important stages: (1) the beginning of the student-athlete's career and (2) the ending of the student-athlete's career. Although the athlete would receive incoming counseling from the school, some athletes might seek additional advice.²⁵² Practitioners should ask very detailed questions about the athlete's background.²⁵³ Questions pertaining to the athlete's socio-economics, familial status, goals for the future, and general inquiries would help establish a framework for how best to manage the trust fund in the coming years.²⁵⁴

During the second stage, an attorney must determine the athlete's next step, whether the student-athlete intended on pursuing a professional career or if he or she has opted join the workforce.²⁵⁵ As mentioned above, the likelihood that the athlete continues professionally would be small.²⁵⁶ Attorneys should consider asking about the financial needs of the athlete, the athlete's employment status, familial status, and most importantly, the athlete's future goals.²⁵⁷ With a majority of Division I athletes coming from low socio-economic backgrounds, it will be imperative to discuss the importance of being financially responsible with the trust.²⁵⁸ Many professional athletes declare bankruptcy, and mismanaging the trust at such an early age could result in the same fate.²⁵⁹

The student-athlete would have many different options once he or she has access to the trust fund. The student-athlete could choose to withdraw all of the funds from the account, leave the funds in the account to gain interest, or take

248. Krystal Beamon, *Used Goods: African-American Student-Athletes: Perception of Exploitation by Division I Universities*, 77 J. OF NEGRO EDUC. 4 (2008).

249. Ramogi Huma & Ellen Staurowsky, *The Price of Poverty In Big Time College Sport*, NCPA, at 7 (2014), <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf><http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

250. *See supra* notes 231–32.

251. *See supra* note 231.

252. *See supra* Part III.B.

253. *See supra* Part III.C.

254. *See supra* Part III.C.

255. *Id.*

256. *See supra* Part III.C.

257. *Id.*

258. *See Huffman & Cooper, supra* note 245.

259. *See Broke, supra* note 185.

out only a portion of the fund and leave the remaining funds for future use. Another option for the student-athlete would be to donate the fund back to the school or athletic department. Additionally, if the student-athlete has a family, or kids, the student-athlete could transfer the fund into another trust, possibly a college fund for the student-athlete's future children. The member institutions, as trustee, would have the power to allow for a voluntary transfer of the trust to other funds like a college fund.²⁶⁰ Since accessing the trust fund would irrevocably end the student-athlete's eligibility, graduation would not be the only event that would grant the student-athlete access to the trust fund.²⁶¹ In the event that a student-athlete's playing career ends early due to injury, the student-athlete would have access to the trust fund. With so many different options for the student-athlete, it would be important as an attorney to obtain as much information from the student-athlete as possible.

IV. ISSUES INVOLVING TRUST IMPLEMENTATION

With this proposal requiring monumental changes to how to compensate student-athletes, there inevitably would be some issues involved with the implementation. Specifically, the NCAA would need to address two important issues. First, the issue of whether this proposal would be financially possible. Second, for the proposal to work, it would have to meet the requirements of Title IX.

A. *Show Me the Money*

Just "23 of 228 athletic departments at NCAA Division 1 public schools generated enough money on their own to cover their expenses in 2012."²⁶² According to a report by Dr. Daniel Rascher and filed on behalf of the plaintiffs in the *O'Bannon* case, these numbers are drastically inaccurate and a result of clever accounting by the NCAA member institutions.²⁶³ Dr. Rascher looked at public data by 66 members of the major conferences in 2011 and found that over 90% of the schools turned a profit, with the total profit being well over one billion dollars and an average profit of eighteen million per school.²⁶⁴ "Under generally accepted accounting principles, I can turn a \$4 million profit into a \$2

260. See UNIF. TRUST CODE § 502, cmts. (2005).

261. Josephine Potuto et al., *What's in a Name? The Collegiate Mark, The Collegiate Model, and the Treatment of Student-Athletes*, at 65, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364284 (last modified Mar. 20, 2014).

262. Steve Berkowitz et al., *Most NCAA Division 1 Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013, 12:48 PM EDT), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443>.

263. See Declaration of Daniel A. Rascher in Support of Motion By Antitrust Plaintiffs for Class Certification at 73, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-1967 CW (N.D. Cal. Apr. 25, 2013), Doc. No. 748-4.

264. *Id.*

million loss and I can get every national accounting firm to agree with me.”²⁶⁵ Another review, done by a professor with the department of economics at Western Kentucky University, revealed the daunting reality of some member institution’s accounting practices:

At most universities, all, or some of, merchandise sales, concession revenues, parking receipts, and related revenues, are attributed to the general fund or to a non-athletic unit of the university. Such revenues can be substantial. In many cases, even the revenues paid by athletic foundations for athlete tuition is credited directly to the general fund so that grant-in-aids deliver a “double blow” to athletics—overvaluation on the expense side and undervaluation on the revenue side.²⁶⁶

After adjusting for these accounting problems, 70% of universities from the major conferences turn a profit from their athletic department.²⁶⁷ Even if only merchandise sales, where a student-athlete’s image and likeness is most likely used, are taken into account, the retail marketplace for licensed college merchandise in 2012-2013 was estimated at \$4.62 billion.²⁶⁸ With royalties going back to the member institutions, can the NCAA really say that they are not profiting off the likeness of their student-athletes? The idea that a majority of college athletic departments do not return a profit is false; the truth is athletic departments return a profit and a significant one, at that.²⁶⁹ The argument that the implementation of trust funds for student-athletes would financially cripple athletic departments has no merit.²⁷⁰

B. Title IX Compliance

Title IX became a law in 1972 and requires gender equality in educational programs that receive government funding.²⁷¹ “A non-exclusive list of ten criteria is used to determine if there is equal treatment between men and women student-athletes and their teams.”²⁷² No criterion addresses equality of

265. ANDREW ZIMBALIST, *MAY THE BEST TEAM WIN: BASEBALL ECONOMICS AND PUBLIC POLICY* 56–57, (2003).

266. Brian Goff, *Effects of University Athletics on the University: A Review and Extension of Empirical Assessment*, 2 J. SPORT MGMT. 14, 87 (2000).

267. *Id.* at 89, tbl. 2.

268. *Collegiate Licensing Company Names Top Selling Universities and Manufacturers for 2012–13*, CLC.COM (Aug. 12, 2013) [hereinafter *Collegiate Licensing Company*], <http://www.clc.com/News/Archived-Rankings/Rankings-Annual-2012-13-rankings-section.aspx>.

269. See Declaration of Daniel A. Rascher in Support of Motion By Antitrust Plaintiffs for Class Certification at 80, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-1967 CW (N.D. Cal. Apr. 25, 2013), Doc. No. 748-4; see also Goff, *supra* note 266, at 89, tbl. 2.

270. See Goff, *supra* note 266, at 89, tbl. 2.

271. *History of Title IX*, TITLE IX, <http://www.titleix.info/history/history-overview.aspx> (last visited June 26, 2014) (detailing the history of Title IX).

272. See Potuto et al., *supra* note 261. The following ten factors are considered when determining whether there are equal opportunities available to both sexes:

payment, because student-athletes currently are not paid.²⁷³ Thus, in order to comply with Title IX, all student-athletes within the five conferences would receive a minimum amount for each trust fund, regardless of gender.²⁷⁴ To ensure compliance with the Title IX criteria, and specifically the publicity criterion, members of the five conferences should place conditions on the use of certain student-athletes.²⁷⁵ Since the athletic department could control the commercial and promotional ventures, requiring the use of a women's team as a condition to use a men's team would uphold the publicity criterion.²⁷⁶

Of the \$4.62 billion from the retail marketplace for licensed college merchandise, women's apparel was one of the top apparel categories.²⁷⁷ Similar to the football player who receives additional funds in the trust because of the sale of his jersey, a women's basketball player would receive a similar percentage based off sales related to her name, image, and likeness.²⁷⁸ Despite some concern that compensating student-athletes might be discriminative towards women's sports, this trust proposal would be available for every male and female athlete within the five major conferences.²⁷⁹ This proposal would help maintain Title IX as one of the most significant gender equality laws ever enacted.²⁸⁰

V. CONCLUSION

For the NCAA to rely on a model for amateurism based on a 1906 collegiate athletic world would be for the NCAA to attempt to prevent change.²⁸¹ No matter how hard the NCAA tries, the college landscape is

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- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
 - (2) The provision of equipment and supplies;
 - (3) Scheduling of games and practice time;
 - (4) Travel and per diem allowance;
 - (5) Opportunity to receive coaching and academic tutoring;
 - (6) Assignment and compensation of coaches and tutors;
 - (7) Provision of locker rooms, practice and competitive facilities;
 - (8) Provision of medical and training facilities and services;
 - (9) Provision of housing and dining facilities and services; [and]
 - (10) Publicity.

45 C.F.R. § 86.41(c) (2007).

273. See Potuto et al., *supra* note 261.

274. See *supra* Part III.B.

275. See Potuto et al., *supra* note 261.

276. *Id.*

277. *Collegiate Licensing Company*, *supra* note 268.

278. See *infra* Part III.B.

279. See, e.g., Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics (discussing the legal restrictions on pay for play).

280. Steve Wulf, *Title IX: 37 Words Ghat Changed Everything*, ESPN (Apr. 29, 2012), <http://espn.go.com/espnw/title-ix/article/7722632/37-words-changed-everything>.

281. See *supra* Part II.

drastically changing, and the NCAA and its governance must change as well.²⁸² With the result of the *O'Bannon* lawsuit near, change is imminent.²⁸³ Both EA and CLC have already settled the claims against them, creating even more pressure for the NCAA.²⁸⁴ This trust proposal would be the first step towards adapting to the changing landscape of college athletics. Through the trust fund, a student-athlete would receive compensation while still maintaining the NCAA's golden boy term "amateurism."²⁸⁵ By establishing a new FBS division for the five major conferences, the NCAA would make this proposal a very plausible and beneficial solution to compensation for student-athletes.²⁸⁶ With the new division, the NCAA would be able to focus on the overall college landscape, while giving the large conferences the autonomy needed.²⁸⁷ With endless possibilities for the fund's use, these student-athletes could go on to start a business, help his or her family, give back to the school, or even help student-athletes just like themselves.²⁸⁸ By implementing this proposal, the NCAA would be able to maintain its cherished amateurism status, while compensating the student-athletes who continue to bring in revenue for college athletics.²⁸⁹

282. See Baggot, *supra* note 5.

283. See *supra* Part II.B.2.

284. See Solomon, *supra* note 95.

285. See *supra* Part III.

286. See *supra* Part III.B.

287. *Id.*

288. See *supra* Part III.D.

289. See *supra* Part III.B.