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The Revised NCAA Division I Governance Structure After Three Years: A Scorecard

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ARTICLE

THE REVISED NCAA DIVISION I GOVERNANCE STRUCTURE AFTER THREE YEARS: A SCORECARD

By: *Brian D. Shannon**

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I. INTRODUCTION

On August 7, 2014, the NCAA Division I Board of Directors significantly restructured the governance system for Division I institutions.¹

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1. See Michelle B. Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure> [<https://perma.cc/E4GG-JQ4H>] (discussing the 16-2 vote in favor of adopting new governance model).

The NCAA is a private membership association of over 1,100 colleges and universities across three divisions.² In turn, Division I has 347 member institutions of higher education,³ and there are thirty-two conferences across Division I.⁴ Division I schools typically “have the biggest student bodies, manage the largest athletics budgets and offer the most generous number of scholarships.”⁵ Division I is further “subdivided based on football sponsorship” or lack thereof.⁶ The three subgroups within Division I include the Football Bowl Subdivision (“FBS”),⁷ the Football Championship Subdivision (“FCS”),⁸ and member schools that do not sponsor football.⁹ The FBS includes 129 member schools; 125 of these institutions are from ten conferences, and the remaining four schools are independents.¹⁰ In addition, the sixty-five schools from five FBS conferences (the Big Ten, Big 12, Pac-12, Southeastern Conference, and Atlantic Coast Conference) comprise the membership of the so-called Autonomy conferences or Autonomy 5.¹¹ As Professor Jo Potuto, the Faculty Athletics Representative (“FAR”) at the University of Nebraska has described:

2. There are 1,123 colleges and universities, ninety-eight athletics conferences, and thirty-nine affiliated organizations that comprise the NCAA. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [https://perma.cc/4EB7-6NQM] (last visited June 21, 2017).

3. *Our Three Divisions*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> [https://perma.cc/2H3S-RXPC] (last visited June 21, 2017).

4. See NCAA BYLAW § 4.3.4, NCAA DIVISION I MANUAL 2017–18 (Aug. 2017) [hereinafter NCAA Manual 2017–2018], <http://www.ncaapublications.com/product/downloads/D118.pdf> [https://perma.cc/48MT-4DH3] (delineating the thirty-two conferences).

5. *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=D1> [https://perma.cc/C5W8-QNGN] (last visited June 21, 2017).

6. *Id.*

7. As the name suggests, these schools (from ten different conferences and a handful of independents) participate in the wide array of post-season bowl games. *Id.* The most successful of the schools also have the opportunity to participate in the elite college football playoff games that annually crown a national champion. *Overview*, COLLEGE FOOTBALL PLAYOFF, <http://www.collegefootballplayoff.com/overview> [https://perma.cc/FK99-H5NN] (last visited June 21, 2017).

8. These schools from eleven different conferences are eligible to participate in an “NCAA-run football championship.” *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=D1> [https://perma.cc/9L5Q-C8FE] (last visited June 21, 2017).

9. See *id.* (observing that these non-football schools from eleven different conferences are simply identified as Division I).

10. See *FBS Football*, NCAA, <http://www.ncaa.com/standings/football/fbs> [https://perma.cc/V6SR-DQFT] (last visited June 23, 2017) (arranging the 129 member schools by conference or by status as independents).

11. Specifically, NCAA bylaws authorize members of the Big Ten Conference, Big 12 Conference, Pac-12 Conference, Southeastern Conference (“SEC”), and Atlantic Coast Conference (“ACC”) to “adopt or amend [NCAA] legislation that is identified as an area of autonomy.” See NCAA MANUAL 2017–18, *supra* note 4, § 5.3.2.1., (granting autonomous authority to the five conferences). These areas of legislative autonomy are intended “to permit the use of resources to advance the legitimate educations or athletics-related needs of student-athletes and for legislative changes that

FBS institutions are public and private, non-sectarian and religiously affiliated, large land grant universities with big budgets and big endowments, and small liberal arts colleges. Some FBS institutions offer extensive graduate and professional programs; others concentrate exclusively on undergraduate education.¹²

As part of the August 2014 Division I Governance re-design, the NCAA Division I Board of Directors, acting on the recommendation of a Board-appointed Steering Committee, granted certain autonomous decision-making powers to the Autonomy 5 conferences and their sixty-five member institutions.¹³ In effect, this recommendation by the Board's Steering Committee enabled the Autonomy 5 conferences to begin to adopt policy legislation independently from the rest of Division I. Accordingly, the Steering Committee developed and recommended a structure "designed to allow permissive use of resources or to otherwise enhance the well-being of student-athletes by any [Autonomy 5 institutional] member, [or] to advance the legitimate educational or athletics-related needs of student-athletes."¹⁴ Specifically, the Board delegated authority to the Autonomy 5 conferences to oversee policy development in the following areas: health and wellness, meals and nutrition, certain aspects of financial aid, expenses and benefits pertaining both to student-athlete support, and to pre-enrollment support, insurance and career transition, career pursuits, time demands, academic support, recruiting, and personnel.¹⁵ Under

will otherwise enhance student-athlete well-being." *Id.* § 5.3.2.1.2 (also specifying areas of autonomy).

12. Josephine (Jo) R. Potuto, *Two, Four, Six, Eight; What Can We Now Regulate? The Regulatory Mentality and NCAA Satellite Camps (Et al)*, 35 QUINNIPIAC L. REV. 287, 292 (2017) [hereinafter *Two, Four, Six, Eight*].

13. NCAA, DIVISION I STEERING COMMITTEE ON GOVERNANCE: RECOMMENDED GOVERNANCE MODEL 29 (July 18, 2014) [hereinafter RECOMMENDED MODEL], <http://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf> [https://perma.cc/5NJC-ZE3V]. In August 2013, the NCAA Division I Board of Directors began an initiative to redesign the "governance structure for Division I. Board Chair Nathan Hatch appointed a Steering Committee of the Board to guide this effort." *Id.* at 10. The Steering Committee included Dr. Hatch and seven other University Presidents or Chancellors. *Id.* at 2.

14. *Id.* at 29. In addition, under the new model, legislation adopted by the Autonomy conferences is permissive and "may also be applied by the rest of Division I at each conference's respective discretion, which may include delegation of such discretion to its member institutions." *Id.*

15. *Id.* at 29–32. In particular, the Board delegated authority to the Autonomy 5 conferences with regard to policy development pertaining to specific bylaws relating to these areas. These include the following: health and wellness, NCAA MANUAL 2017–18, *supra* note 4, § 16.4; meals and nutrition, *id.* § 16.5; certain aspects of financial aid, *id.* §§ 15.01.5–15.2.8.2, 15.3–15.3.5.2; expenses and benefits pertaining to student-athlete support, *id.* § 16; expenses and benefits relating to pre-enrollment support, *id.* § 13.2; insurance and career transition, *id.* §§ 12.2–12.3; career pursuits, *id.* § 12.5; time demands, *id.* § 17; academic support, *id.* § 16.3; recruiting, *id.* § 13.1; and personnel, *id.* § 11.7. *See also id.* § 5.3.2.1.2 (identifying and summarizing the eleven general "areas of autonomy").

the revised structure, the Autonomy 5 conferences have the exclusive autonomy to consider and adopt bylaw changes (i.e. NCAA legislation) in these designated areas.¹⁶ The remaining twenty-seven conferences that comprise Division I continue to have legislative authority, in conjunction with the Autonomy 5 conferences, to recommend changes to other portions of the NCAA Manual, but only “for matters other than autonomy legislation.”¹⁷

This Article will explore the development and certain key highlights of the redesigned governance process for NCAA Division I and discuss some of the early successes achieved via the new structure. In addition, the Article will also address certain challenges that remain in play with the new structure, and will include a particular focus on one specific area of concern—scholarship support in non-revenue sports.

II. THE EVOLUTION AND DEVELOPMENT OF THE NEW GOVERNANCE MODEL

Trying to manage and regulate almost 350 colleges and universities across the country that comprise Division I (“DI”), and which vary widely in terms of size and resources, is quite challenging.¹⁸ The NCAA has made several attempts over the years at reforming the management of the organization. This Section will explore highlights of the historical development of NCAA governance, followed by a description of both the process leading to the current model that was adopted in 2014 and key aspects of the current model’s structure.

A. *Evolution of NCAA DI Governance*

Historically, the NCAA has attempted many different approaches to the governance of its member institutions. For example, in 1973 the NCAA created its current “configuration of three divisions (DI, DII, and DIII), roughly divided along the lines of institutional demographics including mission, size, degrees offered, student profile, endowment, and operating budget.”¹⁹ In 1979, the NCAA split the

16. See RECOMMENDED MODEL, *supra* note 13, at 7 (summarizing that the Autonomy 5 “conferences and their 65 member institutions [were] granted autonomy in specific areas”).

17. *Id.* The Autonomy 5 conferences are also eligible to vote on shared governance issues, along with the other 27 conferences. See NCAA MANUAL 2017–18, *supra* note 4, § 4.3.1 (a)–(c), (identifying the level of weighted voting for each of the 32 conferences for shared governance issues overseen by the DI Council).

18. Division I has 347 member institutions spread across thirty-two conferences. *Our Three Divisions*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> [<https://perma.cc/97N8-82SA>]; NCAA MANUAL 2017–18, *supra* note 4, § 4.3.4 (listing the thirty-two conferences).

19. Josephine (Jo) R. Potuto, Connie Dillon, & David Clough, *What’s At Our Core? NCAA Division I Voting Patterns vs. Student-Athlete Well-Being, Academic Standards and the Amateur (Collegiate) Model*, KNIGHT COMMISSION 1 (2012), http://www.knightcommission.org/images/pdfs/2012research/2012kciareports_potuto_dillon_clough_report.pdf [<https://perma.cc/A6QR-8Y3X>].

football schools into Division I-A for larger, higher-resourced institutions who played “major college football” and Division I-AA for “schools that wanted to reduce resources or could not keep up financially.”²⁰ Governance within the full division was still driven by a one-school, one-vote process, however.²¹ That approach changed upon adoption of NCAA legislation in 1996 that created a new voting structure,²² and beginning in 1997, DI “adopted bylaws through representative governance by conferences.”²³

The last two decades saw several additional transitions. There was a DI Management Council, which along with the DI Board of Directors, adopted and amended bylaws from 1997-2008, and in August 2008 DI transitioned legislative authority to a Legislative Council.²⁴ In addition, in 2006 the NCAA re-named Divisions I-A and I-AA as the FBS and FCS subdivisions of Division I.²⁵ During the governance eras of both the DI Management Council and the DI Legislative Council, the NCAA employed weighted voting, and the FBS conferences collectively had “more votes than the combined votes” of the FCS and non-football conferences.²⁶ The use of weighted voting gave more power to the Division I-A/FBS conferences.²⁷

The Legislative Council process remained in force from 2008 until the August 2014 DI governance overhaul.²⁸ Under that process, each of the thirty-two DI conferences had a representative member on the Legislative Council.²⁹ There was also weighted voting.³⁰ Nonetheless, even with weighted voting, there were concerns about the structure,

20. Anthony G. Weaver, *New Policies, New Structure, New Problems? Reviewing the NCAA's Autonomy Model*, 7 ELON L. REV. 551, 556 (2015). Interestingly, one of the media reports at the time suggested that the larger schools had taken “a cautious step toward autonomy.” John Underwood, *The NCAA Splits Its Decision*, SPORTS ILLUSTRATED (Jan. 23, 1978), <https://www.si.com/vault/1978/01/23/106772446/the-ncaa-splits-its-decision> [<https://perma.cc/X5N9-BKQP>].

21. Weaver, *supra* note 20, at 556.

22. *Id.* at 557.

23. Potuto, Dillon, & Clough, *supra* note 19, at 2. Beginning in 1997, DI bylaws were “administered and enforced uniformly throughout DI” except for football-specific legislation that can vary between FBS and FCS institutions. *See id.* at 2, n.18 (describing football exception).

24. *Id.* at 7.

25. Jon Johnston, *NCAA College Football Classifications – FBS, FCS, Div IA, Div IAA – Still Confusing?*, CORNNATION (June 1, 2009), <https://www.cornnation.com/2009/6/1/894907/ncaa-college-football> [<https://perma.cc/RJ9A-NEAY>].

26. *See* Potuto, Dillon, & Clough, *supra* note 19, at 7 (detailing the weighted voting history).

27. Weaver, *supra* note 20, at 557.

28. *See* Potuto, Dillon, & Clough, *supra* note 19, at 7 (describing the transition of the Management Council’s legislative function to the Legislative Council in August 2008). In addition to the Legislative Council, other governance functions resided with the Leadership Council. *See* NCAA CONSTITUTION §§ 4.5.1, 4.6.1, NCAA DIVISION I MANUAL 2014–15 (Aug. 2014) [hereinafter NCAA MANUAL 2014–15], <http://www.ncaapublications.com/productdownloads/D115.pdf> [<https://perma.cc/YL6W-SATW>].

29. *Id.* § 4.6.1.

particularly from FBS and Autonomy 5 institutions.³¹ In addition, research revealed that under the Legislative Council structure “the price tag associated with a legislative proposal . . . [was] statistically significant as to whether it . . . [was] adopted or defeated, . . . [was] significant to voting by DI subdivisions, and . . . [was] significant even when a proposal ha[d] negative impact on student-athlete well-being or academic standards.”³² Indeed, the Autonomy 5 conferences and member institutions began seeking greater “autonomy after a 2011 proposal to add a \$2,000 stipend to the value of a scholarship to help cover the cost of attendance for athletes was voted down by NCAA schools that were concerned about affording a stipend.”³³

B. Steps to Developing a New Model

In January 2013, the DI Board of Directors engaged an outside consultant, Jean Frankel of Ideas for Action, LLC, “to gather input from the Division I membership and other key stakeholders about the state of Division I governance.”³⁴ Ms. Frankel later described the 2013 situation she encountered at NCAA as follows:

The need for change was apparent. The NCAA was facing an urgent problem at its highest level—Division I—which had one membership, governance, and legislative rule-making system trying to accommodate all the different perspectives of its diverse member schools. Tensions ran high enough that the largest schools began to consider the possibility of breaking away to form their own organization. At the same time, the NCAA was dealing with outside pres-

30. Representatives of seven conferences had three votes each, representatives of four conferences had 1.5 votes each, and the remaining twenty-one conferences had 1.14 votes each. *Id.* § 4.6.1 (a)–(c).

31. *See, e.g.*, 1A FAR BOARD, PRINCIPLES AND MODEL FOR NEW GOVERNANCE STRUCTURE 5, https://www.insidehighered.com/sites/default/server_files/files/1A%20FAR%20Board%20Principles%20and%20Model%20for%20New%20NCAA%20Governance%20Structure.pdf [<https://perma.cc/8N9X-PZQL>] (recommending a governing council that combined the functions of the then-existing Leadership and Legislative Councils and suggesting that the division between the two councils had not worked particularly well).

32. *See* Potuto, Dillon, & Clough, *supra* note 19, at 3 (also noting that “price tag matters without regard to whether a proposal has positive, negative, or neutral impact on student-athlete welfare or academic standards”). *Id.* at 3 n.22.

33. Ron Clements & Joe Rodgers, *Power 5 NCAA Schools Pass New Scholarship, Concussion Proposals*, SPORTING NEWS (Jan. 18, 2015), <http://www.sportingnews.com/ncaa-football/news/power-5-ncaa-schools-vote-new-scholarship-concussion-proposals-autonomy/mdv2pvwbc6py1e6v16tsa0ew8> [<https://perma.cc/K57X-2MTG>]; Weaver, *supra* note 20, at 558 (asserting that the “push for this round of autonomy started after a 2011 proposal to provide stipends to student-athletes was rejected”).

34. Michelle B. Hosick, *Division I Structure and Process Review Continues*, NCAA (July 30, 2013), <http://www.ncaa.org/about/resources/media-center/news/division-i-structure-and-process-review-continues-0> [<https://perma.cc/J4LE-UDYD>]. Ms. Frankel held initial meetings with many NCAA constituency groups in January and February of 2013, and then sent an online survey to schools and conferences in April 2013. *Id.*

tures, such as schools switching conferences to chase money, lawsuits over students' likenesses being used in video games, and the ongoing debates over concussion protocols and whether student-athletes should be paid.³⁵

After receiving input from Ms. Frankel at its August 2013 meeting, the DI Board determined that the January 2014 NCAA Convention would include a two-day session to “engage the full range of Division I stakeholders in open and collaborative conversations about [the] Division I governance structure and processes”³⁶ In addition, later in 2013 and prior to the January 2014 convention, the DI Board of Directors invited representatives from nine different groups of DI stakeholders to provide their respective visions for the division.³⁷

The DI Board's Steering Committee presided at the ensuing two-day discussion session with convention delegates, entitled “Division I Governance Dialogue,” at the 2014 NCAA Convention in San Diego

35. Jean S. Frankel & Nancy Alexander, *Pumped-Up Governance: Lessons From the NCAA's Restructuring*, ASSOCIATIONS NOW (Feb. 1, 2015), <http://associationsnow.com/2015/02/pumped-up-governance-lessons-from-the-ncaas-restructuring/> [<https://perma.cc/95TR-Y2HX>]. Ms. Frankel added that during “the first six months of 2013, we listened to more than 200 stakeholders—university presidents, athletics directors, faculty, student-athletes, and conference commissioners and staff.” *Id.* In addition, although she found a broad lack of satisfaction with the then-existing governance structure, there was a surprising “level of agreement about basic issues . . . and a sense of urgency to finally tackle the big issues that would lead to fundamental change.” *Id.*

36. See Michelle B. Hosick, *Division I Board Asks Membership to Help Streamline Structure*, NCAA (Aug. 8, 2013), <http://www.ncaa.org/about/resources/media-center/news/division-i-board-asks-membership-help-streamline-structure-1> [<https://perma.cc/HC4R-YJXV>] (indicating that the DI Board wanted the membership to help them design “a more transparent, responsive, participative and streamlined governance structure”).

37. Michelle B. Hosick, *Groups to Discuss Governance Ideas with DI Board*, NCAA (Oct. 21, 2013), <http://www.ncaa.org/about/resources/media-center/news/groups-discuss-governance-ideas-di-board> [<https://perma.cc/EB35-J3Y5>]. The invitees included representative leaders from coaches' associations, the Collegiate Commissioners Association, athletics directors' groups, faculty groups, the Knight Commission, the National Association for Athletics Compliance, the Student-Athlete Advisory Committee, women's administrators, and ethnic minority administrators and faculty. *Id.* The sessions took place on October 29, 2013, at the NCAA headquarters in Indianapolis. *Id.* The Author of this Article made a presentation on behalf of the 1A FAR Association. *Id.* In addition, prior to this October 2013 meeting, 1A FAR urged that “both FARs and senior athletic administrators need to be fully involved in the development of proposals regarding the form that a new Division I governance structure might ultimately take.” Letter from Brian D. Shannon, President, 1A FAR Board, to Nathan O. Hatch, Chair, NCAA Division I Board of Directors (Aug. 8, 2013), http://www.oneafar.org/archive/2013_archive/Letter_from_Shannon_to_Hatch.pdf [<https://perma.cc/27A6-QZY8>]. Moreover, in September 2013, 1A FAR had submitted a detailed proposal recommending that the FBS conferences and member schools split off from the rest of Division I and become a new, separate division within the NCAA. See Letter from Brian D. Shannon, President, 1A FAR Board, to Nathan O. Hatch, Chair, NCAA Division I Board of Directors (Sept. 11, 2013) http://www.oneafar.org/archive/2013_archive/Governance_Proposal.pdf [<https://perma.cc/UD6H-J25F>] (forwarding the 1A FAR's proposed Principles and Model for a New Governance Structure; see *infra* notes 135–38 & accompanying text).

in January 2014.³⁸ In advance of the discussion forum, the Steering Committee released a draft governance model in order to seek feedback and generate dialogue at the convention sessions.³⁹ The draft model included “several areas of possible autonomy for the five largest conferences, designed to allow schools in those conferences to use additional resources to benefit student-athletes.”⁴⁰

At the January 2014 discussion forum, there was significant sentiment expressed that the new governance structure should seek representation from all the different groups involved in college athletics, including greater roles for student-athletes and athletics directors.⁴¹ The chair of the Student-Athlete Advisory Committee asked that the Steering Committee “not forget to include student-athlete voices throughout the structure.”⁴² Moreover, and of particular significance,

38. See Michelle B. Hosick, *Division I Members to Consider Structural Changes at Convention*, NCAA (Jan. 10, 2014), <http://www.ncaa.org/about/resources/media-center/news/division-i-members-consider-structural-changes-convention> [https://perma.cc/BCD4-4RJ7] (indicating that the discussion forum was part of the broader governance review process).

39. See *id.* (predicting that the two-day session would “help refine the model and identify areas of agreement—and disagreement—through polling of attendees”).

40. *Id.* The Steering Committee identified possible areas of autonomy including “the definition of a full scholarship, health and safety of student-athletes and agents and advisors.” *Id.*

41. See Michelle B. Hosick, *Members Want Diverse Voices in DI Governance*, NCAA (Jan. 16, 2014), <http://www.ncaa.org/about/resources/media-center/news/members-want-diverse-voices-di-governance> [https://perma.cc/76B6-A7CC] (describing the desire to include student-athletes at all levels in the new structure and “[p]roviding a greater role for athletics directors”). Some were less sanguine about the tenor of the discussions. See, e.g., Pete Volk, *The NCAA Is Falling Apart: Athletic Directors Growing Frustrated*, SB NATION (Jan. 17, 2014), <https://www.sbnation.com/college-football/2014/1/17/5318524/ncaa-governance-dialogue-meeting> [https://perma.cc/KFV7-5SMM] (reporting that during the two-day session “university athletic directors repeatedly expressed disapproval with the NCAA’s idea of change”); Allie Gragreen, *What About the Athletes?*, INSIDE HIGHER ED. (Jan. 17, 2014), <https://www.insidehighered.com/news/2014/01/17/division-i-questions-how-athletes-fit-new-governance-structure> [https://perma.cc/2YVW-HVQV] (discussing the Steering Committee’s not having previously contemplated inclusion of student-athletes in the revamped structure). The Author was present and participated in the two-day discussion forum. There were over 800 athletics directors, FARs, and university presidents in attendance. *Id.* Even members of the DI Board of Directors “noted some cynicism . . . among participants, but remained optimistic that they . . . [could] find a positive solution to the governance issues.” Michelle B. Hosick, *Board Assesses Dialogue, Looks at Next Steps for Restructuring*, NCAA (Jan. 18, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-assesses-dialogue-looks-next-steps-restructuring> [https://perma.cc/FFQ3-H9RZ].

42. See Michelle B. Hosick, *DI Members Provide Feedback on Restructuring Ideas*, NCAA (Jan. 18, 2014), <http://www.ncaa.org/about/resources/media-center/news/di-members-provide-feedback-restructuring-ideas> [https://perma.cc/2FUF-97ZQ] (quoting Maddie Salamone, who had been a lacrosse student-athlete at Duke). Ms. Salamone added, “My challenge to this committee is that the proof is in the pudding, and we are all hungry for some meaningful change. Part of that change must be to include student-athletes at the highest level of governance because we are the ones who are affected by the rules 365 days a year, 24 hours a day.” *Id.*

a strong majority of the attendees expressed support for granting autonomy to the Autonomy 5 conferences in certain areas of governance.⁴³

The DI Board's Steering Committee continued to gather input and work on a draft governance model throughout the winter and spring of 2014.⁴⁴ Then, in late April 2014, the Board endorsed a model for governance re-design and directed that the model be submitted to the DI membership for comment and feedback prior to the August 2014 DI Board meeting.⁴⁵ The restructured process was intended to allow "the division to be more nimble, streamlined and responsive to needs – particularly the needs of student-athletes."⁴⁶ As then drafted, the governance model set forth the expectation that the DI Board would be less operational and, instead, "focus chiefly on oversight and strategic issues, while leaving much of the day-to-day policy and legislative responsibility to the council."⁴⁷ In turn, the new governing Council was intended to "be the final voice on shared-governance rule-making decisions" and be "composed of at least 60 percent athletics direc-

43. See George Schroeder, *Analysis: At NCAA Convention, Div. I Path Becomes Clearer*, USA TODAY SPORTS (Jan. 17, 2014), <https://www.usatoday.com/story/sports/college/2014/01/17/ncaa-convention-division-i-governance-debate-autonomy/4594249/> [perma.cc/V25L-VEVY] (discussing the results of non-binding polling of the 800 delegates on the following question: "To what extent does the room support the concept of autonomy for the big five conferences in certain still-to-be-defined areas?").

44. See Michelle B. Hosick, *Steering Committee Working Toward New Governance Model*, NCAA (Mar. 4, 2014), <http://www.ncaa.org/about/resources/media-center/steering-committee-working-toward-new-governance-model> [https://perma.cc/7ZH6-GDXB] (discussing the state of the drafting effort as of March 2014 and indicating that a set of five conferences would have autonomy in specific areas); *Student-athlete, AD, Faculty Rep Would Have Votes on Proposed New Board*, NCAA (Mar. 25, 2014), <http://www.ncaa.org/about/resources/media-center/news/student-athlete-ad-faculty-rep-would-have-votes-proposed-new-board> [https://perma.cc/5HB4-BS2N] (indicating that the Steering Committee wanted to reconstitute the board of directors to include not only university presidents, but also one student-athlete, a FAR, and an athletics director, who would also serve as chair of a new governance group called the Council that would report to the DI Board); Michelle B. Hosick, *DI Board Endorses Restructuring, Seeks Feedback from Schools*, NCAA (Apr. 24, 2014), <http://www.ncaa.org/about/resources/media-center/news/di-board-endorses-restructuring-seeks-feedback-schools> [https://perma.cc/J47Z-RD8Z] (summarizing the DI Board's endorsement of the Steering Committee's draft governance model, and also noting that the Board would be seeking membership comment on the draft proposal).

45. Michelle B. Hosick, *DI Board Endorses Restructuring, Seeks Feedback from Schools*, NCAA (Apr. 24, 2014), <http://www.ncaa.org/about/resources/media-center/news/di-board-endorses-restructuring-seeks-feedback-schools> [https://perma.cc/J47Z-RD8Z]. For a collection of subsequently submitted comments from constituent members and organizations from across NCAA Division I, see <http://www.ncaa.org/sites/default/files/Feedback%20from%20membership%20since%205%2014%20%282%29.pdf> [https://perma.cc/75Z4-C28Y].

46. Michelle B. Hosick, *DI Board Endorses Restructuring, Seeks Feedback from Schools*, NCAA (Apr. 24, 2014), <http://www.ncaa.org/about/resources/media-center/news/di-board-endorses-restructuring-seeks-feedback-schools> [https://perma.cc/EAN9-CBD4].

47. *Id.*

tors.”⁴⁸ The model also included language to grant autonomy to the Autonomy 5 conferences “to address their unique challenges [and] . . . make rules on specific matters affecting the interests of student-athletes.”⁴⁹

C. *The New Governance Structure—Highlights*

On August 7, 2014, the DI Board adopted an amended version of the previous drafts and significantly restructured the governance system for DI conferences and institutions.⁵⁰ Most notably, the revised structure provides autonomy to the Autonomy 5 “conferences to change rules for themselves in a list of specific areas within Division I.”⁵¹ In practical effect, the NCAA granted authority to the Autonomy 5 conferences to act independently from the rest of Division I in certain areas.⁵²

In addition to granting greater authority to the Autonomy 5 conferences and institutions, there were three additional highlights included in the revised structure. First, the restructuring expanded the DI Board to twenty-four members and, as revised, includes not only university presidents, but also a student-athlete, an athletics director, a FAR, and a senior woman athletics representative.⁵³ In addition, the governance redesign emphasized that the Board should focus “on oversight, policy and strategic issues” given that prior to the changes, the “Board focused too often on legislative matters.”⁵⁴ Second, for

48. *Id.*

49. *Id.* The areas of autonomy identified at that time included “cost of attendance and scholarship guarantees, insurance, [] academic support, [] and other [forms of] support, [including] travel for families and [even parking costs].” *Id.*

50. See Michelle B. Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure> [<https://perma.cc/Z6XH-YBCK>] (discussing 16-2 vote in favor of adopting new governance model).

51. *Id.* One commentator observed that the DI Board had “voted through a new—and potentially groundbreaking—measure . . . when it approved the ‘Big Five’ athletic conferences’ ability to govern themselves and push through rules changes as they see fit.” Kent Babb, *NCAA Board of Directors Approves Autonomy for “Big Five” Conference Schools*, WASHINGTON POST (Aug. 7, 2014), https://www.washingtonpost.com/sports/colleges/ncaa-board-of-directors-approves-autonomy-for-big-5-conference-schools/2014/08/07/807882b4-1e58-11e4-ab7b-696c295ddfd1_story.html?utm_term=.49684ce39cf3 [<https://perma.cc/E322-MHFQ>].

52. See *id.* (observing that the DI Board’s restructuring had put “an effective end to the suggestion that all 351 Division I programs operate on a level playing field”); Mark Tracy, *N.C.A.A. Votes to Give Richest Conferences More Autonomy*, NEW YORK TIMES (Aug. 7, 2014), https://www.nytimes.com/2014/08/08/sports/ncaafootball/ncaa-votes-to-give-greater-autonomy-to-richest-conferences.html?_r=1 [<https://perma.cc/TX6M-8VUB>] (describing the DI Board’s action as the “first step toward an aristocracy in college sports” and that the “result of the vote seemed to acknowledge that even within the nearly 350 institutions in the N.C.A.A.’s top division, universities and conferences are in markedly different situations”).

53. Hosick, *supra* note 50.

54. See RECOMMENDED MODEL, *supra* note 13, at 7 (comparing key shifts from the former governance model to the new model).

NCAA legislation and policy-development across DI in areas not ceded to the Autonomy 5 conferences, the new governance structure created a forty-member Council. The Council must include representatives from each of the thirty-two conferences, a minimum of 60% athletics directors, conference commissioners, FARs, senior woman administrators, and student-athletes.⁵⁵ The new DI Council replaced the former Leadership and the Legislative Council and was created to “make the day-to-day policy and legislative decisions for Division I.”⁵⁶ There was also a conscious effort to assure that practitioners were “represented and empowered within the governance system.”⁵⁷ Finally, the model created a new Committee on Academics to “manage all policy and regulation pertaining to academic matters.”⁵⁸ Prior to the governance re-design, authority for academic policy development was split between an Academic Cabinet, a Committee on Academic Performance, and the DI Board.⁵⁹ It made great sense to collapse these functions into a single committee to improve the former “awkward governance structure related to consideration of academic matters.”⁶⁰

The redesigned structure also includes differing mechanisms and processes for adopting DI policy changes depending on whether the issue falls under the purview of the Autonomy 5 conferences or is a matter of shared governance to be considered by the Council. First, with regard to autonomy matters, under the new governance structure the member institutions from the Autonomy 5 conferences have exclusive authority to adopt and revise policies in certain delineated portions of the NCAA Manual.⁶¹ A representative from each of the sixty-five member institutions in the Autonomy 5 conferences and three student-athletes from each of the five conferences are eligible to vote

55. See *id.* at 21 (identifying the breakdown of groups to be represented on the Council and also recommending that an athletics director serve as the chair).

56. Hosick, *supra* note 50.

57. See RECOMMENDED MODEL, *supra* note 13, at 7–8 (also finding that practitioners were not fully represented or involved in the former governance structure). Professor Potuto has pointed out, however, that the NCAA DI Manual does not include a definition of the term “practitioner.” See Potuto, *Two, Four, Six, Eight*, *supra* note 12, at 292 n.33 (adding that “[i]n theory, practitioners are both athletic administrators and faculty athletic representatives”). As part of the DI Board’s rationale statement for the governance redesign, although not defining “practitioner” per se, the Board stated, “Primary legislative responsibility will include directors of athletics, faculty athletics representatives and other *practitioners*, including student-athletes.” RECOMMENDED MODEL, *supra* note 13, at 8 (emphasis added).

58. See *id.* at 25–26 (also granting authority to the Committee on Academics “to approve routine, noncontroversial academic policy”).

59. *Id.* at 25.

60. *Id.* at 26.

61. See NCAA MANUAL 2017–18, *supra* note 4, § 5.02.1 (granting legislative flexibility and autonomy to the Autonomy 5 conferences in certain areas of autonomy “to permit the use of resources to advance the legitimate educational or athletics-related needs of student-athletes and for legislative changes that will otherwise enhance student-athlete well-being”).

on Autonomy legislation.⁶² Accordingly, at each autonomy business session, there are a total of eighty eligible voters.⁶³ In turn, approval of autonomy legislation requires the following vote totals:

(a) Approval of three of the five conferences based on a simple majority vote of the institutions within each conference and a 60 percent majority vote of the eligible institutions and student-athlete representatives; or

(b) Approval of four of the five conferences based on a simple majority vote of the institutions within each conference and a simple majority vote of the eligible [sic] institutions and student-athlete representatives.⁶⁴

By way of contrast, for shared governance (non-autonomy) issues and bylaws, the DI Board vested the Council with primary legislative authority.⁶⁵ Among the forty representatives on the Council, there is also weighted voting.⁶⁶ For non-football issues, the representatives from Autonomy 5 conferences have four votes each, the representatives from the remaining five FBS conferences have two votes each, and the representatives from the remaining twenty-two DI conferences have one vote each.⁶⁷ In addition, the two student-athlete representatives and the two FARs (representing the 1A Faculty Athletics Representatives and the Faculty Athletics Representatives Association, respectively) have one vote each.⁶⁸ For FBS football issues, only the individuals representing the ten FBS conferences may vote. Representatives from the Autonomy 5 conferences have two votes each, and members from the other five FBS conferences have one vote

62. See RECOMMENDED MODEL, *supra* note 13, at 6–7 (permitting “the five conferences and their 65 member institutions and 15 student-athlete representatives (80 total) to act on legislation” in the areas of autonomy); NCAA MANUAL 2017–18, *supra* note 4, § 5.3.2.1.7.1 (requiring that the “president or chancellor of each institution shall appoint one representative and each of the five conferences shall appoint three student-athlete representatives to cast votes on” autonomy measures). The Author of this Article has served as the duly appointed voting representative for Texas Tech University at past Autonomy 5 business sessions.

63. See RECOMMENDED MODEL, *supra* note 13, at 6–7 (describing that with each of the sixty-five schools having one vote, along with fifteen student-athlete representatives, it results in a total of eighty votes).

64. NCAA MANUAL 2017–18, *supra* note 4, § 5.3.2.1.7.2. Accordingly, there must be an affirmative vote by a majority of the institutions in at least three of the Autonomy 5 conferences and forty-eight or more of the eighty eligible voters (schools plus student-athletes), or an affirmative vote by a majority of the institutions in at least four of the Autonomy 5 conferences and forty-one or more of the eighty eligible voters.

65. NCAA MANUAL 2017–18, *supra* note 4, §§ 4.3.1, 4.3.2(a).

66. *Id.* § 4.3.4.

67. *Id.* § 4.3.4 (a)–(c).

68. *Id.* § 4.3.4 (d)–(e).

each.⁶⁹ Similarly, only the eleven representatives from the FCS conferences may vote on FCS football issues.⁷⁰

III. THE NEW GOVERNANCE STRUCTURE—THE FIRST THREE YEARS

Implementation of the revised governance structure that the DI Board approved in August 2014 commenced in January 2015.⁷¹ At the January 2015 NCAA Convention, the Autonomy 5 conferences conducted their first business session.⁷² In addition, the new forty-member DI Council met for the first time.⁷³ At that meeting, the full Council appointed an interim administrative committee to draft an outline of supporting-governance substructure bodies, and tasked the temporary committee with formulating a plan and recommendations prior to the February 2015 Council meeting.⁷⁴ Finally, at the end of the NCAA's January 2015 convention week, the new DI Board of Di-

69. *Id.* § 4.3.4.1 (a)–(b). That is, only ten of the thirty-two members of the Council may vote on FBS football issues. For example, the Author came from an FBS Conference (the Big 12), but his seat on the Council is as the 1A FAR Association representative—not as the Big 12 representative. Accordingly, the Author does not have a vote on football issues.

70. *Id.* § 4.3.5. For a further description of the DI Council legislative process, see Potuto, *Two, Four, Six, Eight*, *supra* note 12, at 293–94.

71. See RECOMMENDED MODEL, *supra* note 13, at 42–44 (discussing the transition from the former governance structure and the implementation schedule for the new governance system). In the meantime, although the August 2014 DI Board approval was subject to a possible override under the former bylaws, as of early October 2014 the override period expired with only twenty-seven schools having “requested an override of the legislation that finalized the restructuring plan, less than the 75 required.” Michelle B. Hosick, *Restructuring Moves Forward*, NCAA (Oct. 6, 2014), <http://www.ncaa.org/about/resources/media-center/news/restructuring-moves-forward> [https://perma.cc/ZZ8Q-23PD].

72. The first Autonomy 5 business meeting under the new structure took place on January 17, 2015. See Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY SPORTS (Jan. 17, 2015), <https://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student-athletes-scholarships/21921073/> [https://perma.cc/2VLG-YHSB]. The Author was a participant at the January 2015 Autonomy 5 session, both as the voting representative for Texas Tech University and as the Parliamentarian for the proceedings.

73. See Michelle B. Hosick, *New Division I Council Convenes for First Time*, NCAA (Jan. 17, 2015), <http://www.ncaa.org/about/resources/media-center/news/new-division-i-council-convenes-first-time> [https://perma.cc/LA93-WA7F] (describing the first Council meeting). As one of the appointees to the Council, the Author was also in attendance at this meeting.

74. See *id.* (describing the appointment of the temporary committee and listing its members, including the Author). At that ensuing February 2015 meeting, the Council adopted and forwarded to the DI Board of Directors a governance substructure that included seven key committees and an administrative coordination committee that would report to the full Council. *Report of the NCAA Division I Council Meeting*, NCAA, 1–3 (Feb. 3–4, 2015), https://www.ncaa.org/sites/default/files/DI%20Council%20Report%20February%202015%20Final_update.pdf [https://perma.cc/4GB4-QFBG]. The adopted substructure included a Legislative Committee, the Student-Athlete Experience Committee, a Strategic Vision and Planning Committee, the Council Coordination Committee, the Competition Oversight Committee, and three

rectors met for the first time and “began conversations about how it should operate moving forward, with an eye toward becoming a body more focused on the overall strategy of Division I.”⁷⁵

The revised governance structure facilitated several key successes, notably Autonomy 5 legislation to enhance athletics scholarships and to respond to concerns about the time demands expected of student-athletes.⁷⁶ The new governance structure has also been blessed with talented leaders. Despite these successes, there have been several challenges, with more potential challenges on the horizon. This Section will address selected successes and challenges.

A. Successes

1. Cost of Attendance Scholarships

As described above, following the NCAA Division I Board’s August 2014 adoption of the new governance model, the first business session for the Autonomy 5 conferences took place at the NCAA convention in Washington, D.C. in January 2015.⁷⁷ Chief among the measures considered and adopted at the meeting was legislation authorizing athletic scholarship limits to be expanded to cover the full cost of attendance at each institution.⁷⁸ The Autonomy 5 voted overwhelmingly to authorize cost of attendance scholarships by a 79-1

sport-specific oversight committees for football, men’s basketball, and women’s basketball. *Id.* attachment A, at 7.

75. Michelle B. Hosick, *New Board Starts Discussions on Future of Division I*, NCAA (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/new-board-starts-discussions-future-division-i> [<https://perma.cc/42ET-B6YE>] (discussing an identified need for establishing a decision-making “process that would be based on the core values of the division, such as integrating academics and athletics and prioritizing student-athlete well-being”).

76. See *infra* notes 77–127 & accompanying text.

77. The first Autonomy 5 business meeting under the new structure was held on January 17, 2015. See Berkowitz, *supra* note 72.

78. See Michelle B. Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> [<https://perma.cc/P67Y-7U29>] (discussing the adoption of full cost of attendance scholarships). Even when the new governance model was adopted in August 2014, there was anticipation that the Autonomy 5 would pursue raising scholarship limits to full cost of attendance. See Kent Babb, *NCAA Board of Directors Approves Autonomy for ‘Big Five’ Conference Schools*, WASHINGTON POST (Aug. 7, 2014), https://www.washingtonpost.com/sports/colleges/ncaa-board-of-directors-approves-autonomy-for-big-5-conference-schools/2014/08/07/807882b4-1e58-11e4-ab7b-696c295ddfd1_story.html?utm_term=.E3454eaa9307 [<https://perma.cc/2BAC-S9D4>] (anticipating that “[o]ne of the first topics expected to be addressed in the coming months is whether amateur athletes in the NCAA’s highest-revenue sports, namely football and men’s basketball, are entitled to additional benefits, including a stipend”).

vote.⁷⁹ At the same meeting, the Autonomy 5 conferences also voted that athletic scholarships could not be revoked for athletic reasons.⁸⁰

What does it mean that athletic scholarship limits were increased to permit grants for the full cost of attendance? Prior to the January 2015 adoption of the cost of attendance legislation, the NCAA bylaws limited scholarships to tuition, fees, room, board, and books.⁸¹ Although generous, these scholarships did not cover the full cost of attending a university and excluded “the incidental costs of attending college . . . [such as] transportation and miscellaneous personal expenses.”⁸² After the 2015 amendments, however, the relevant bylaw defining a “full grant-in-aid” athletics scholarship changed to “financial aid that consists of tuition and fees, room and board, books, *and other expenses related to attendance at the institution up to the cost of attendance*” as calculated for that institution.⁸³ As the NCAA explained: “[t]he additional funds are intended to cover the real costs of attending college not covered by the previous definition of a full scholarship.”⁸⁴ Specifically, the NCAA bylaws define “cost of attendance” by reference to federal financial aid rules and provide that: “[t]he ‘cost of attendance’ is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees,

79. See Berkowitz, *supra* note 72 (describing the “landmark action for major-college sports, schools and athlete representatives from the NCAA’s five wealthiest conferences . . . voted 79-1 to expand what Division I schools can provide under an athletic scholarship”). The one dissenting vote came from Boston College. *Id.*

80. See Hosick, *supra* note 78 (discussing actions by the Autonomy 5 conferences at the January 2015 business meeting).

81. Specifically, the former version of the bylaws defined a “full grant-in-aid” scholarship as “financial aid that consists of tuition and fees, room and board, and required course-related books.” NCAA MANUAL 2014–15, *supra* note 28, § 15.02.5.

82. See Berkowitz, *supra* note 72 (reporting about the NCAA’s redefinition of a full athletic scholarship). As part of the United States Department of Education’s online materials for completing the Free Application for Federal Student Aid (FAFSA), cost of attendance is explained as follows:

The cost of attendance (COA) is not the bill that you may get from your college; it is the total amount it will cost you to go to college each year. The COA includes tuition and fees; on-campus room and board (or a housing and food allowance for off-campus students); and allowances for books, supplies, transportation, loan fees, and, if applicable, dependent care. It can also include other expenses like an allowance for the rental or purchase of a personal computer, costs related to a disability, or costs for eligible study-abroad programs.

U.S. Dep’t of Educ., *Cost of Attendance*, FAFSA, <https://fafsa.ed.gov/help/costatt.htm> [<https://perma.cc/GD5P-U4G7>] (last visited July 28, 2017). Interestingly, from 1956 until 1975, the NCAA’s amateurism rules permitted a full scholarship to include not only tuition, fees, room, board, and books, but also “cash for incidental expenses such as laundry.” *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 974 (N.D. Cal. 2014), *aff’d in part, rev’d in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

83. NCAA MANUAL 2017–2018, *supra* note 4, § 15.02.5 (emphasis added).

84. *Cost of Attendance Q&A*, NCAA (Sept. 3, 2015), <http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> [<https://perma.cc/T76N-ZGRP>].

room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”⁸⁵

Just as tuition and fees vary by institution, there will be differences in the cost of attendance among the institutions that elect to award full cost of attendance scholarships.⁸⁶ There can also be variances among individual student-athletes depending on the institution’s policies on applying federal financial aid guidelines.⁸⁷ Some institutions are located in places that have a higher cost of living, and other schools are more geographically remote causing the average student to have higher transportation costs than students at other universities. The NCAA previously indicated that “there is an average difference of about \$2,500 between the value of . . . [the formerly allowable full scholarship] and the value of an athletic scholarship based on cost of attendance.”⁸⁸

Without the change in governance structure to allow the Autonomy 5 conferences the authority to vote separately and independently from the rest of Division I on certain autonomy subjects, it is likely that the cost of attendance measure would not have been adopted in January 2015. For example, in October 2011 the DI Board adopted legislation that would have provided authority to award \$2,000 above the former scholarship limits to student-athletes as payment toward covering the

85. NCAA MANUAL 2017–18, *supra* note 4, § 15.02.2. In addition, a university cannot “award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution.” *Id.* § 15.01.6.

86. See *Cost of Attendance Q&A*, NCAA (Sept. 3, 2015) <http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> [<https://perma.cc/T76N-ZGRP>] (responding “no” to a question regarding whether “all college athletes receive the same amount of money” and indicating that “[s]ubject to federal guidelines, financial aid officers at each school determine the cost of attendance”).

87. See *id.* (adding that “based on each school’s policies, a student’s cost of attendance can be adjusted based on his or her individual circumstances such as transportation, childcare needs and unusual medical expenses”). Universities can also have differing costs of attendance for factors such as whether the student lives on or off campus or is required to pay in-state versus out-of-state tuition. See Jon Solomon, *2015–16 CBS Sports FBS College Football Cost of Attendance Database*, CBSSPORTS.COM (Aug. 20, 2015), <https://www.cbssports.com/college-football/news/2015-16-cbs-sports-fbs-college-football-cost-of-attendance-database/> [<https://perma.cc/JZY5-BZAL>] (also setting forth tables showing the increase in costs of scholarships at many FBS institutions after the implementation of the cost of attendance legislation). For the eighty-two institutions (out of 129 FBS member schools) that replied to the survey, the figures ranged from less than \$1,000 in increased scholarship funds per student-athlete for some schools and greater than \$6,000 at others. Jon Solomon, *Cost of Attendance Results: The Chase to Pay College Players*, CBSSPORTS.COM (Aug. 20, 2015), <https://www.cbssports.com/college-football/news/cost-of-attendance-results-the-chase-to-pay-college-players/> [<https://perma.cc/SD47-NQBJ>].

88. See Berkowitz, *supra* note 72 (discussing the Autonomy 5 vote to permit cost of attendance scholarships).

full cost of attendance.⁸⁹ Notwithstanding the Board's adoption of the legislation, however, by mid-December 2011 more than 125 institutions within Division I voted to override the provision, and the measure was suspended.⁹⁰ The number of DI schools in favor of an override later grew to 160, almost half of the DI membership.⁹¹ As one commentator later reflected: "The proposal pitted big schools that could afford the extra money against smaller schools that couldn't, and there were enough of the latter to table the measure."⁹² Indeed, only two of the sixty-five Autonomy 5 institutions were among the large number of DI schools that voted to override.⁹³ The Autonomy 5 conferences and member schools needed greater and independent authority to adopt comparable legislation.⁹⁴

Accordingly, the January 2015 adoption of NCAA legislation authorizing full cost of attendance scholarships would not have been possible without the 2014 Division I governance redesign. In addition to changes in governance, however, then-pending federal litigation provided significant impetus for adopting the measure. In August 2014, United States District Judge Claudia Wilken held in *O'Bannon*

89. *NCAA Shelves \$2,000 Athlete Stipend*, ASSOCIATED PRESS (Dec. 16, 2011), http://www.espn.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold [https://perma.cc/JN7A-A59F].

90. *Id.* Then, by late December 2011, "160 schools had signed onto override [the] legislation" and the DI Board halted any further implementation. Michael Marot, *NCAA Asks for New Proposal on \$2,000 Stipend*, ASSOCIATED PRESS (Jan. 15, 2012), <http://lubbockonline.com/sports/2012-01-15/ncaa-asks-new-proposal-2000-stipend> [https://perma.cc/3HSE-QEEY].

91. *Id.*

92. Tom Goldman, *NCAA Vote Could Boost Student-Athletes' Benefits, Big Schools' Power*, NPR MORNING EDITION (Aug. 7, 2014), <http://www.npr.org/2014/08/07/338498091/ncaa-vote-could-give-student-athletes-enhanced-benefits> [https://perma.cc/65AB-LZMU]. See also Andy Staples, *Schools, Not NCAA, Standing in the Way of Positive Scholarship Change*, SPORTS ILLUSTRATED (Dec. 20, 2011), <https://www.si.com/more-sports/2011/12/20/ncaa-student-athletes> [https://perma.cc/AT8A-N43T] (analyzing override vote on the 2011 stipend legislation and concluding that it was reflective of a divide between the DI "haves" and "have-nots" in terms of available resources).

93. See Connor J. Bush, *The Legal Shift of the NCAA's "Big 5" Member Conferences to Independent Athletic Associations: Combining NFL and Conference Governance Principles to Maintain the Unique Product of College Athletics*, 16 DENVER SPORTS & ENT. L.J. 5, 17–18 (2014), <http://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/16/Volume-16.pdf> [https://perma.cc/6WK3-B93M] (also observing that approving the \$2,000 measure "would further separate the haves from the have-nots"). For additional discussion of the \$2,000 proposal, see Timothy Davis & Christopher T. Hairston, *NCAA Deregulation and Reform A Radical Shift of Governance Philosophy?*, 92 OREGON L. REV. 77, 110–12 (2013) (assessing the passage and eventual override of the measure).

94. Given the cost factor, it is not particularly surprising that a large number of DI schools voted to override the \$2,000 stipend legislation. Indeed, research has revealed that there has been a direct correlation between a proposal's price tag and its likelihood of adoption. See Potuto, Dillon, & Clough, *supra* note 19, at 3 (summarizing findings of research and correlation between price associated with NCAA legislative proposals and adoption or defeat).

v. NCAA that the NCAA's rules that prohibited "student-athletes from receiving any compensation for the use of their names, images, and likenesses" beyond the then-existing scholarship limitations violated federal antitrust law.⁹⁵ In *O'Bannon*, the plaintiffs were then-current and former student-athletes in the sports of football and men's basketball who asserted that NCAA bylaws barring "student-athletes from receiving a share of the revenue that the NCAA and its member schools earn from the sale of licenses to use the student-athletes' names, images, and likenesses in videogames, live game telecasts, and other footage . . . violate[d] the Sherman Antitrust Act."⁹⁶ After ruling in favor of the plaintiffs, Judge Wilken issued an injunction that precluded the NCAA from enforcing bylaws concerning football and men's basketball student-athletes that set a cap on "compensation" to the student-athletes below a full cost of attendance scholarship.⁹⁷ Judge Wilken also ruled that in connection with any licensing revenue received by member institutions, the NCAA could not set rules that would bar members from providing up to \$5,000 (in 2014 dollars) per student-athlete per year in the sports of football and men's basketball in trust for each year "that the student-athlete remains academically eligible to compete."⁹⁸

On appeal, a divided panel of the Ninth Circuit affirmed the district court's ruling that the NCAA violated the Sherman Act by not previ-

95. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016). The literature is replete with numerous articles discussing *O'Bannon*. For a sampling, see Roger M. Groves, *A Solution for the Pay for Play Dilemma of College Athletes: A Novel Compensation Structure Tethered to Amateurism and Education*, 17 TEX. REV. ENT. & SPORTS 101 (2016); Wayne M. Cox, *One Shining Moment to a Dark Unknown Future: How the Evolution of the Right of Publicity Hammers Home the Final Nail in the NCAA's Argument on Amateurism in Collegiate Athletics*, 80 ALB. L. REV. 195 (2016); David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223 (2016); William W. Berry, *Amending Amateurism Saving Intercollegiate Athletics through Conference-Athlete Revenue Sharing*, 68 ALA. L. REV. 551 (2016); Josephine (Jo) R. Potuto et al., *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879 (2014). It is also worth noting that in 2008 the NCAA settled a previous case involving allegations relating to antitrust concerns regarding limitations on scholarships. See Ron Zapata, *NCAA, Athletes End Antitrust Suit With \$18.9 Million Deal*, LAW360 (Jan. 30, 2008), <https://www.law360.com/articles/45673/ncaa-athletes-end-antitrust-suit-with-18-9m-deal> [<https://perma.cc/HMS9-8WJB>] (discussing \$10 million settlement, along with \$8.9 million in attorneys' fees, "to settle antitrust claims that the organization unfairly capped costs that can be covered under a student's athletic scholarship" in resolving *White v. NCAA*); Doug Lederman, *Settlement Raises Questions for NCAA*, INSIDE HIGHER ED. (Feb. 4, 2008), <https://www.insidehighered.com/news/2008/02/04/ncaa> [<https://perma.cc/7GYJ-X2X5>] (discussing terms of settlement, including a fund for class members to seek reimbursement for previous educational expenditures not covered by their scholarships).

96. *O'Bannon*, 7 F. Supp. 3d, at 962–63.

97. *Id.* at 1007–08.

98. *Id.* at 1008.

ously allowing member schools to provide full cost of attendance scholarships.⁹⁹ The Ninth Circuit, however, “vacate[d] the district court’s judgment and permanent injunction insofar as they require[d] the NCAA to allow its member schools to pay student-athletes up to \$5,000 per year in deferred compensation.”¹⁰⁰ In rejecting that portion of the lower court’s injunction that required the potential creation of \$5,000 per year trust accounts, the Ninth Circuit determined that the district court had “clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses.”¹⁰¹

99. *O’Bannon v. NCAA*, 802 F.3d 1049, 1075–76 (9th Cir. 2015) (also determining that the district court’s “injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance was proper”).

100. *Id.* at 1079.

101. *Id.* at 1076. The court’s use of “NIL” refers to use of a student-athlete’s “name, image, and likeness.” *Id.* at 1055. The Plaintiffs sought full en banc review of this aspect of the Ninth Circuit’s decision, which was denied. Order Denying Rehearing En Banc, *O’Bannon v. NCAA*, No. 14-16601 (9th Cir. Dec. 16, 2015), https://www.nacua.org/docs/default-source/new-cases-and-developments/new-documents/new-cases-december-2015/obannon_v_ncaa_rehearing_enbanc_order.pdf?sfvrsn=4 [<https://perma.cc/BV5F-EJQZ>]. Thereafter, both the plaintiffs and the NCAA separately sought review by the United States Supreme Court, but the Court denied both petitions for certiorari. See *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied* 137 S. Ct. 277 (Oct. 3, 2016) (denying the plaintiffs’ petition for certiorari); *NCAA v. O’Bannon*, 137 S. Ct. 277 (Oct. 3, 2016) (denying the NCAA’s petition for certiorari).

The Ninth Circuit’s affirmance of the holding that the NCAA violated antitrust law in limiting scholarships at an amount below the full cost of attendance has become relevant in other litigation. In another case also pending before United States District Judge Claudia Wilken, the plaintiffs in *Jenkins v. NCAA* have claimed that the NCAA and member institutions violated antitrust law by conspiring to cap so-called compensation to student-athletes at the value of full scholarships. See *Jenkins v. NCAA*, No. 4:14-cv-02758, 2016 U.S. Dist. LEXIS 103703, at *19 (N.D. Cal., Aug. 5, 2016) (indicating that the plaintiffs have claimed “that, without the NCAA’s cap on compensation, schools would compete in recruiting student-athletes by providing more generous compensation”). In August 2016, Judge Wilken rejected an NCAA motion on the pleadings to dismiss the case based on the NCAA’s contention that *O’Bannon* held that any remedy must be tethered to educational expenses. *Id.* at *22. Judge Wilken acknowledged that *O’Bannon* limits the types of relief that the *Jenkins* plaintiffs may seek, but ruled that the pleadings were not limited to claims related to cash compensation, and also included “other ‘benefits’ and ‘in-kind’ compensation.” *Id.* at *22–23. As Professor Potuto has observed:

Jenkins claims that the antitrust laws forbid any NCAA limit on what schools may pay an athlete to attend and compete. In other words, athletes are entitled to receive whatever a free market for their services (or deep-pocket big boosters) provides. The Jenkins litigation is a full-bore court fight on the future of college sports. Jenkins believes that fundamental fairness dictates that athletes share in the revenue pie they produce. Colleges and the NCAA see such a result as creating a wild west for college recruiting, jeopardizing the ability of schools to offer athletic opportunities to athletes who compete in Olympic and other non-revenue sports, and, fundamentally, to eliminate the line of demarcation that separates college from professional sports. Jenkins, then, is the potential game-changer.

The timing of the district court opinion in *O'Bannon* is significant for appreciating its relevance to the Autonomy 5 conferences' adoption of cost of attendance scholarships in January 2015. Judge Wilken issued her opinion in *O'Bannon* on August 8, 2014.¹⁰² As clarified by an order dated August 19, 2014, the injunction in the case did not "take effect until the start of [the] next FBS football and Division I basketball recruiting cycle, which means August 1, 2015, the date on which written offer letters can first be sent to student-athletes enrolling in college after July 1, 2016."¹⁰³ In other words, the injunction was set to apply prospectively beginning with scholarship offers made on or after August 1, 2015 for student-athletes who would be enrolling at NCAA member institutions in the sports of football and men's basketball after July 1, 2016.¹⁰⁴ Accordingly, when the Autonomy 5 conferences convened in the first ever Autonomy 5 business session in Washington, D.C. in January 2015, the *O'Bannon* injunction was pending, but was not yet in effect.¹⁰⁵ Nonetheless, the pendency of the injunction and the portion of its remedy pertaining to cost of attendance scholarships for football and men's basketball was looming decidedly in the background during the lead-up to the January 2015 vote. Moreover, although the NCAA had appealed the district court's decision in *O'Bannon*, the Ninth Circuit did not hear oral arguments until March 17, 2015, and did not release an opinion until September 30, 2015.¹⁰⁶ Thus, the prospect of court-mandated cost of attendance

Josephine (Jo) R. Potuto, *The Alston/NCAA Settlement*, JURIST (Mar. 10, 2017) [hereinafter *The Alston/NCAA Settlement*], <http://www.jurist.org/forum/2017/03/Josephine-Potuto-alston-ncaa.php> [<https://perma.cc/WAX4-XV92>]. Given *O'Bannon*, however, as the *Jenkins* case proceeds the "plaintiffs must demonstrate a relationship between the relief requested and educational expenses." William W. Berry, *Employee-Athletes, Antitrust, and the Future of College Sports*, 28 STAN. L. & POL'Y REV. 245, 279 (2017).

102. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014), *aff'd in part, rev'd in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016). Coincidentally, the NCAA DI Board of Directors approved the new governance model for Division I on August 7, 2014, just a day prior to the trial court's decision in *O'Bannon*. See Michelle B. Hosick, *Board Adopts New Division I Structure*, NCAA (Aug. 7, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-new-division-i-structure> [<https://perma.cc/VLA7-36CR>] (discussing 16-2 vote in favor of adopting new governance model).

103. *O'Bannon v. NCAA*, Order Granting Defendant NCAA's Administrative Motion for Clarification of Timing of Injunction, No. 09-cv-3329-CW, at 2 (Aug. 19, 2014), <https://www.ncaa.org/sites/default/files/CF%20298%20-%202014-08-19%20Order%20Granting%20NCAA%20Motion%20for%20Clarification%20of%20Timi.pdf> [<https://perma.cc/F89V-KWC8>].

104. *Id.*

105. The first Autonomy 5 business meeting under the new structure was January 17, 2015, at which time legislation was adopted to authorize cost of attendance scholarships. See Berkowitz, *supra* note 72 (discussing the first Autonomy 5 business meeting and actions); Hosick, *supra* note 78 (discussing the first Autonomy 5 session).

106. *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015). Because the district court's injunction was set to become effective on August 1, 2015, while the appeal was still pending, the NCAA sought an order from the Ninth Circuit to stay the injunction, which the court of appeals granted on July 31, 2015. *O'Bannon v. NCAA*, Order

scholarships for football and men's basketball was decidedly a possibility in January 2015 when the Autonomy 5 conferences held their first business session.¹⁰⁷

It is also important to note that the scope of the *O'Bannon* injunction was limited to the class of plaintiffs who participated in that litigation—namely football and men's basketball student-athletes.¹⁰⁸ Focusing solely on scholarship student-athletes in these sports (and excluding walk-ons) meant that the class included a total of ninety-eight scholarship student-athletes each year—eighty-five in football and thirteen in men's basketball.¹⁰⁹ Obviously, these are all scholarships established for male student-athletes. The NCAA could not have realistically—or lawfully—adopted legislation authorizing full cost of attendance scholarships only in these two sports because of Title IX.¹¹⁰ Accordingly, when the Autonomy 5 conferences adopted

Granting Stay, No. 14-16601, at 2 (9th Cir. July 31, 2015), <http://cdn.ca9.uscourts.gov/datastore/general/2015/07/31/14-16601%207-31%20Order.pdf> [<https://perma.cc/4WMQ-52YR>]. The Author of this Article was a member of an Ad Hoc Subcommittee of the Division Council that explored various possible recommendations for the DI Board of Directors to consider had the stay not been granted.

107. In contrast, there was never any concerted effort to consider legislation to adopt the other aspect of Judge Wilken's remedy in *O'Bannon* to permit student-athletes to earn \$5,000 per year in trust for each year in which they were academically eligible. *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014). Ultimately, of course, the Ninth Circuit vacated this aspect of the district court's injunction. *O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015).

108. See *id.* at 1055–56 (describing the class).

109. See NCAA MANUAL 2017–18, *supra* note 4, §§ 15.5.6.1, 15.5.5.1 (authorizing an annual limit of 85 total counters in football and 13 in men's basketball).

110. See 20 U.S.C.A. § 1681 (2017) (requiring institutions to provide an equality of opportunities for both sexes in intercollegiate sports). See also *Title IX Legal Manual*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/title-ix> [<https://perma.cc/S97S-DM4P>] (last visited July 26, 2017); *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [<https://perma.cc/5CB5-9XKZ>] (last visited July 26, 2017) (providing general overviews of Title IX and its application to most educational programs). As an example, assume that the amount necessary to increase a full scholarship award to Institution X's cost of attendance over Institution X's former level of allowable athletics grant in aid is \$5,000. If Institution X were to comply with the *O'Bannon* injunction and award ninety-eight full cost of attendance scholarships to all football and men's basketball counters, that would increase the amount spent on male student-athletes by almost a half-million dollars per year (98 X \$5,000 = \$490,000). To comply with Title IX, Institution X would need to spend a proportionate additional amount of resources on its women's athletics programs. See generally Lisa M. Scott, Comment, *The NCAA's Losing Battle: What Happens when Paying Student-Athletes Meets Title IX?*, 41 S. ILL. U. L.J. 285 (2017); *Guidance on Cost of Attendance Title IX Compliance*, WOMEN'S SPORTS FOUND. (July 23, 2015), <https://www.womenssportsfoundation.org/advocate/title-ix-issues/coa-title-ix/> [<https://perma.cc/5FTT-WX4A>]; Jane McManus, *Pressure to Pay Student-Athletes Carries Question of Title IX*, ESPNW.COM (Apr. 19, 2016), <http://www.espn.com/espnw/culture/feature/article/15201865/pressure-pay-student-athletes-carries-question-title-ix> [<https://perma.cc/UM7W-SU2T>].

the bylaw change to permit institutions to award full cost of attendance scholarships in January 2015, the measure applied to all sports.¹¹¹

111. Under the former version of bylaw § 15.02.5, a “full grant-in-aid” was defined as “financial aid that consists of tuition and fees, room and board, and required course-related books.” NCAA MANUAL 2014–15, *supra* note 28, § 15.02.5. After the 2015 amendments, however, the text of bylaw § 15.02.5 changed to define a “full grant-in-aid” as “financial aid that consists of tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance” as calculated for that institution. NCAA MANUAL 2017–18, *supra* note 4, § 15.02.5. *See also* Hosick, *supra* note 78 (describing the Autonomy 5 conferences’ adoption of cost of attendance legislation).

There has been an interesting post-script to the *O’Bannon* litigation. On March 21, 2017, Judge Claudia Wilken granted preliminary approval of a settlement in the Alston litigation against the NCAA. *See* Steve Berkowitz, *Preliminary Settlement Approval Given in NCAA Cost of Attendance Case*, USA TODAY SPORTS (Mar. 22, 2017), <https://www.usatoday.com/story/sports/college/2017/03/21/ncaa-full-cost-of-attendance-athletic-scholarship-case/99477648/> [<https://perma.cc/7GZ8-4FXN>] (describing the NCAA’s \$209 million settlement). For the full order giving preliminary approval to the settlement, see Amended Order Granting Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement, In Re: NCAA Grant-in-Aid Cap Antitrust Litig., No. 4:14-md-2541-CW (Mar. 29, 2017), http://www.grantinaidsettlement.com/media/882368/03-29-17_amended_order_granting_plaintiffs_unopposed_motion_for_preliminary_approval_of_class_actio.pdf [<https://perma.cc/32P3-NA DK>]. Shawne Alston was a former West Virginia football student-athlete who, along with other former student-athletes, brought an antitrust action on behalf of a class of DI FBS football, DI men’s basketball, and DI women’s basketball student-athletes against the NCAA and eleven conferences seeking, in part, damages for the difference between the previously capped amounts of full athletic grants-in-aid (scholarships) and the full cost of attendance at their respective institutions. *See* Consolidated Amended Complaint, In Re: NCAA Grant-in-Aid Cap Antitrust Litig., No. 4:14-md-2541-CW (July 11, 2014), https://www.hbslaw.com/uploads/case_downloads/files/case_pdfs/NCAA%20Scholarships/Consolidated%20Amended%20Complaint%20-%20Web.pdf [<https://perma.cc/LSH6-34TN>]. The case had been consolidated with *Jenkins v. NCAA*, No. 4:14-cv-02758-CW (N.D. Cal. Mar. 17, 2014) and assigned to Judge Wilken (who had also presided over *O’Bannon*). The March 2017 preliminary settlement related only to the *Alston* case, however.

In brief, the *Alston* plaintiffs contended that because the NCAA (and the conference defendants) had violated the antitrust laws in setting scholarships at an amount less than full cost of attendance (as had been determined by *O’Bannon v. NCAA*, 802 F.3d 1049, 1075–76 (9th Cir. 2015)), these antitrust violations also occurred *prior* to the effective date of Judge Wilken’s injunction in *O’Bannon* and prior to the NCAA’s adoption of cost of attendance legislation in 2015. Accordingly, Alston challenged the former “Division I rule that capped athletics scholarships at tuition, fees, room, board, and books . . . and sought the difference between such a capped scholarship and full cost of attendance for any year from 2010 forward in which he and other class members received a capped scholarship.” Josephine (Jo) R. Potuto, *The Alston/NCAA Settlement*, *supra* note 101. Professor Potuto further commented: “It could be said that the Alston settlement simply extended to athletes from 2010 to 2015 a scholarship award that they would have received had the cap been eliminated sooner.” *Id.* In addition, “[b]ecause cost of attendance varies from school to school, the amount paid also depends on the school the athlete attended. It is expected that on average, the settlement will pay out \$7,000 to each athlete in the class.” *Id.*

The NCAA agreed to provide the \$208.7 million settlement fund in *Alston* “to settle the monetary claims portion of the grant-in-aid class-action lawsuit. Although the lawsuit included conference defendants, the NCAA Board of Governors determined the settlement will be funded entirely from NCAA reserves, and no conference or member schools will be required to contribute.” *NCAA Establishes Fund for Student-*

2. Time Demands

When the DI Board adopted the new governance structure, one of the identified areas of autonomy ceded to the Autonomy 5 conferences pertained to time demands faced by student-athletes.¹¹² The DI Board Steering Committee's report stated the following:

Given the visibility and demands associated with meeting expectations existing for highly-competitive intercollegiate athletics programs, the five conferences and their 65 member institutions would be granted autonomy to update rules and policies governing time demands in order to permit a more appropriate balance between athletics and other student-athlete activities.¹¹³

Although several time demands proposals were on the agenda at the second annual Autonomy 5 business session in January 2016, there was not a consensus to adopt any particular substantive measure at that time.¹¹⁴ Instead, the Autonomy 5 schools adopted "a resolution vowing to create new proposals addressing the issue" that would be

Athletes, NCAA (Feb. 3, 2017), <http://www.ncaa.org/about/resources/media-center/news/ncaa-establishes-fund-student-athletes> [https://perma.cc/4LYZ-NVJM]. The NCAA indicated that the "settlement class members include Division I men's and women's basketball and FBS football student-athletes from the 2009–10 academic year through the 2016–17 academic year who did not receive cost of attendance as a part of their scholarship[s]." *Id.* The NCAA also contended that "the agreement maintains cost of attendance as an appropriate dividing line between collegiate and professional sports. In fact, the NCAA and conferences only settled this case because the terms are consistent with Division I financial aid rules, which allow athletics-based aid up to the full cost of obtaining a college education." *Id.* This is an important point. Scholarships pegged to the full cost of attendance at a member university relate directly to the expenses of a college education. The Alston settlement "does not change the NCAA's stance that college athletes are students, not employees, of their universities." Potuto, *The Alston/NCAA Settlement*, *supra* note 101. As Professor Potuto observed, "The Alston settlement is grounded in educational values, therefore, and capped at the total amount of . . . expenses [for cost of attendance]. Paying the full cost of educational expenses does not constitute pay for play any more than paying any lesser scholarship amount did." *Id.*

It is noteworthy, however, that the settlement in *Alston* pertains only to the class members involved in that litigation—student-athletes in the sports of FBS football and DI men's and women's basketball. It does not extend to student-athletes in other sports. For a full copy of the settlement agreement, see Settlement Agreement, In Re: NCAA Grant-in-Aid Cap Antitrust Litig., No. 4:14-md-2541-CW (Feb. 3, 2017), <http://www.ncaa.org/sites/default/files/2017-02-03%20-%20Dkt%20560.1%20-%20Exhibit%20A.PDF> [https://perma.cc/N39Y-68LC].

112. See RECOMMENDED MODEL, *supra* note 13, at 31 (describing time demands as an autonomy area).

113. *Id.*

114. See Karen Gross, *Time Demands on Student-Athletes, Part 2: Listen, Understand and Lead*, COLLEGEAD (Jan. 28, 2016), <http://collegead.com/time-demands-on-student-athletes-part-2-listen-understand-and-lead/> [https://perma.cc/4C8V-T36N] (observing that the prospect of "significant recommendations" regarding time demands on student-athletes was deferred for a year, and that the submitted "legislative proposals were not discussed publicly in depth, were not voted upon substantively and were essentially . . . not considered sufficiently well-thought through to be ready for adoption").

considered at the January 2017 NCAA Convention Autonomy 5 meeting.¹¹⁵ Accordingly, three specific concepts were referred for further review and development including a “prohibition of athletics activity for a consecutive eight-hour period overnight,” a limitation on athletics activities for “at least two weeks at the end of a season,” and assuring that “[a] full day off during the week that addresses the impact of travel time.”¹¹⁶ Some of the student-athlete representatives at the 2016 Autonomy session expressed frustration and disappointment with the failure to act.¹¹⁷

The year’s delay, however, contributed to the successful development of a set of time demands proposals that were subsequently adopted at the January 2017 NCAA convention.¹¹⁸ In particular, the Autonomy 5 conferences adopted legislation that would preclude required athletics activities overnight for a continuous eight-hour period, require at least seven days off at the end of a season and an additional fourteen days off during the regular academic year, generally prohibit a travel day as counting as a day off, and require that institutions develop an annual time-management plan for each sport.¹¹⁹ The 2017 Autonomy 5 legislation also created a definition of “required athletically related activities” which goes beyond already countable activities—such as practice time—to include other activities that create demands on student-athletes’ time, such as participation in team promotions, recruiting, media events, fundraising, and more.¹²⁰

115. Michelle B. Hosick, *NCAA, Conferences Refer Time Demands Proposals for Further Study* (Jan. 15, 2016), <http://www.ncaa.org/about/resources/media-center/news/conferences-refer-time-demands-proposals-further-study> [<https://perma.cc/CZ4T-5ANA>].

116. *Id.*

117. *Id.*; see also Jake New, *Kicking the Can?*, INSIDE HIGHER ED. (Jan. 18, 2016), <https://www.insidehighered.com/news/2016/01/18/athletes-express-frustration-lack-significant-legislation-ncaa-meeting> [<https://perma.cc/ZS9H-S8CM>] (indicating that many of the student-athlete representatives at the Autonomy session “were vocal critics of the decision to table the proposals” and lacked a sense of urgency). As an example of these time demands, NCAA study results that were released in January 2016 indicated that football student-athletes at FBS schools self-reported “spending 42 hours per week on their sport.” *Id.* See also NCAA *GOALS Study of the Student-Athlete Experience—Initial Summary of Findings*, NCAA (Jan. 2016), http://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final_20160627.pdf [<https://perma.cc/UZ3S-KGKM>] (summarizing survey data from over 21,000 student-athletes).

118. See Jake New, *A True Day Off*, INSIDE HIGHER ED. (Jan. 23, 2017), <https://www.insidehighered.com/news/2017/01/23/power-five-leagues-adopt-new-rules-lessering-time-demands> [<https://perma.cc/RJ25-4LQZ>] (summarizing the time demands measures adopted by the Autonomy 5 conferences).

119. See *id.* (summarizing the votes on the various proposals); see also Michelle B. Hosick, *2017 NCAA Convention Legislation: Division I*, NCAA (Jan. 13, 2017), <http://www.ncaa.org/about/resources/media-center/news/2017-ncaa-convention-legislation-division-i> [<https://perma.cc/3XTX-G6WQ>] (listing the rules changes set forth in the Autonomy 5 proposals).

120. See NCAA MANUAL 2017–18, *supra* note 4, § 17.02.14 (setting forth definition of “required athletically related activities”). The new time demands legislation then

As one of the Big 12 student-athlete representatives, Ty Darlington summarized on the convention floor: “It doesn’t matter what it is, whether it’s constructive or not constructive. There should be time [off] in every week where a student-athlete can use that time as they see fit.”¹²¹

Although it took an extra year and was not without its critics, the adopted time demands legislation represented a key success for the new governance structure.¹²² The Autonomy 5 membership responded to student-athlete challenges to provide some relief from the time demands expected by their coaches. One particular portion of the new legislation that will be interesting to see evolve is the requirement that each sport create an annual time management plan.¹²³ In particular, these plans must provide student-athletes with a schedule for, and adequate notice of, countable athletically related activities such as practice.¹²⁴ Institutions must also provide adequate notice when the previously provided schedule for practice or other activities changes.¹²⁵ Importantly, at the end of each academic year, the head coach, the athletics director, the FAR, and at least one student-athlete representative will review and evaluate compliance with the sport’s plan over the preceding year.¹²⁶ In addition, the university’s president must review the findings for each annual review.¹²⁷ These annual reviews will also no doubt be very time-consuming, but they should provide an important check on whether each sport has provided the expected time off and appropriate notice of practice schedules and schedule changes.

utilizes this term in precluding such activities on student-athletes’ days off. *See id.* §§ 17.1.7.6–17.1.7.8.

121. *See* New, *supra* note 118 (quoting Ty Darlington, a former football student-athlete from the University of Oklahoma).

122. For criticism of the new measures, see Jon Solomon, *NCAA Time Demands Rules Ignore the Biggest Problem in the Situation: the Games*, CBSSPORTS.COM (Jan. 20, 2017), <https://www.cbssports.com/college-football/news/ncaa-time-demands-rules-ignore-the-biggest-problem-in-the-situation-the-games/> [<https://perma.cc/4Q9F-GDJY>] (arguing that the proposals had not addressed the problem of too many games during a season in some sports); B. David Ridpath, *Lessening Time Demands on College Athletes Is Not Rocket Science*, FORBES (Nov. 10, 2016), <https://www.forbes.com/sites/bdavidridpath/2016/11/10/lessening-time-demands-on-college-athletes-is-not-rocket-science-but-we-make-it-too-complicated/#61b60b26159a> [<https://perma.cc/AT6B-TQAL>] (suggesting that the rules setting limits on countable athletically related activities, such as practice time, “be drastically reduced and better managed”).

123. *See* NCAA MANUAL 2017–18, *supra* note 4, § 17.1.8 (requiring institutions to develop a student-athlete time-management plan for each varsity sport).

124. *Id.* §§ 17.1.8 (a)–(b).

125. *Id.* § 17.1.8 (c). Presumably, the sport’s coaches will provide such notice.

126. *Id.* § 17.1.8.1.

127. *Id.*

3. Good Leadership

A governance structure, no matter how well crafted, is only as good as its leaders. In early 2015, the DI Council elected Jim Phillips, the athletics director at Northwestern University, as the new Council's first chair.¹²⁸ Phillips proved to be an exceptional choice. The Author has served on the Council since its formation in January 2015 and can attest to the fact that Jim Phillips was a tremendous first leader for the Council. In particular, Phillips was adept at facilitating the Council's creation of a functioning and effective substructure for the new Council's governance model. He also successfully and capably managed the disparities and occasional tensions among the representatives of thirty-two different conferences representing all segments of DI. The Council and all of DI benefited from his leadership. After Phillips served in the role for two-plus years, his term ended. Blake James, the athletics director from the University of Miami, was then elected to chair the Council beginning in June 2017.¹²⁹ James served on the Council since its inception in January 2015, and he "is a tremendous fit to lead the group moving forward."¹³⁰

B. Challenges

Although there have been notable successes following the January 2015 roll-out of the new NCAA DI governance structure, there have been and will continue to be several challenges. This Section will address a few of these challenges. First, the Author will discuss the continuing concern about the lack of any significant faculty presence on the new DI governing Council. Then, the Author will describe some tension points and potential tension points with regard to the, at times, uneasy alliance among the thirty-two conferences in DI as it pertains to student-athlete scholarships. Finally, the Author will comment on whether the new structure will be sufficiently nimble to address challenges in an efficient and expedited manner.

1. Dearth of FARS

In late 2014, the NCAA DI Board named the forty initial appointees to the Council. The 1A FAR Board of Directors publicly expressed extreme disappointment that the Board appointed only three

128. Michelle B. Hosick, *Phillips to Chair DI Council*, NCAA (Feb. 2, 2015), <http://www.ncaa.org/about/resources/media-center/news/phillips-chair-di-council> [<https://perma.cc/H2UB-JNTR>]. As the Council chair, Phillips also filled a newly created athletics director seat on the DI Board of Directors. *Id.*

129. See Michelle B. Hosick, *New DI Council Chair Brings Strong Experience, Vision*, NCAA (June 27, 2017), <http://www.ncaa.org/about/resources/media-center/news/new-di-council-chair-brings-strong-experience-vision> [<https://perma.cc/7J79-E7YP>] (discussing James and his election as Council chair).

130. See *id.* (quoting Jim Phillips).

FARs to the initial slate of forty members.¹³¹ In its release, the 1A FAR Board questioned whether the configuration reflected “a commitment to the collegiate model,” and observed that “[i]f academic values are to have significant relevance in intercollegiate athletics, it strikes us as inconsistent to include only minor representation by faculty.”¹³² Sally Jenkins, a sportswriter for the Washington Post, echoed this sentiment: “That’s right. The body in charge of reform, of curing the NCAA of its academic scandals and overseeing sports on college campuses, will have just three actual professors — you know, teachers, that sort of person.”¹³³ In a similar vein, in the Author’s role as President of 1A FAR, the Author communicated the following to NCAA President Mark Emmert and David Berst, who was then the Vice President for Division I, shortly after the appointments were announced:

While I am personally excited about the opportunity to serve on the new Council, my board and other FARs are quite disappointed by the overall dearth of FARs on the new Council. The outcome reflects a regression from our inclusion in the former governance structure and runs counter to the many assurances that we received from the leadership throughout the governance redesign process.¹³⁴

During the course of the NCAA DI governance redesign, the DI Board had sought input from across the membership.¹³⁵ In response, the 1A FAR Board initially advocated that the FBS conferences and member schools split off from the rest of Division I and become a new, separate division within the NCAA.¹³⁶ The 1A FAR Board rec-

131. News Release, 1A Faculty Athletics Representatives (FAR), Where is the Faculty Voice?, NCAA DI Board Needs to Address the Issue (Dec. 5, 2014) (on file with author). By way of contrast, the initial slate included twenty-seven athletics directors. *Id.*

132. *Id.* For a listing of all of the initial appointments to the forty-member Council by both name and position, see Michelle B. Hosick, *Board Appoints Council Members*, NCAA (Dec. 2, 2014), <http://www.ncaa.org/about/resources/media-center/news/board-appoints-council-members> [<https://perma.cc/F4ZM-4UBX>] (delineating full initial roster).

133. Sally Jenkins, *Who Can Fix College Sports? NCAA Seems to Think the Same People Who Broke Them*, WASHINGTON POST (Dec. 5, 2014), https://www.washingtonpost.com/sports/colleges/who-can-fix-college-sports-ncaa-seems-to-think-the-same-people-who-broke-them/2014/12/05/c2798800-7ca6-11e4-9a27-6fdb6c12bff8_story.html?utm_term=.84b9cc3dd467 [<https://perma.cc/8SXV-E92M>].

134. E-mail from Brian Shannon, President, 1A FAR, to Mark Emmert, President, NCAA, and David Berst, Vice President for Division I, NCAA (Dec. 5, 2014, 9:01 AM CST) (on file with author). The Author was one of the three FARs initially appointed to the Council. See Michelle B. Hosick, *supra* note 132 (noting that Brian Shannon is representing “the Division 1A FARs on the Council”).

135. See Michelle B. Hosick, *Division I Board Asks Membership to Help Streamline Structure*, NCAA (Aug. 8, 2013), <http://www.ncaa.org/about/resources/media-center/news/division-i-board-asks-membership-help-streamline-structure-1> [<https://perma.cc/2698-CP5U>] (discussing Board’s request for input).

136. See Allie Grasgreen, *Faculty on the NCAA’s Future*, INSIDE HIGHER ED. (Oct. 4, 2013), <https://www.insidehighered.com/news/2013/10/04/faculty-advocate-new-ncaa>

commended the formation of this fourth division to allow the FBS to be able to “group together institutions that are more closely aligned in resources dedicated to athletics programs and in the types of issues faced.”¹³⁷ The detailed proposal identified several potential enhancements to the then-existing NCAA governmental process, including creating the ability to utilize smaller, more-focused governance groups, an opportunity to include more senior level athletics administrators and FARs within those groups, and the means to permit the groups to focus more directly on FBS issues.¹³⁸

A primary focus for the FARs is education. Indeed, member institutions of the NCAA share a commitment that intercollegiate athletics be a vital part of the college educational experience.¹³⁹ The participants are identified as student-athletes, and the NCAA has identified a “basic purpose” of the organization is a commitment “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, [to] retain a clear line of demarcation between intercollegiate athletics and professional sports.”¹⁴⁰ In turn, the NCAA’s list of seven “core values” includes three specific commitments to the successful overlap between college athletics and academics.¹⁴¹ These athletic/academic tenets include a shared belief in the “collegiate model of athletics,” the “supporting role that intercollegiate athletics plays in the higher education mission,” and the “pursuit of excellence in both academics and athletics.”¹⁴²

division-far-governance-plan [<https://perma.cc/6YSV-EE22>] (reporting that the 1A FAR Board advocated “for a new, separate division (as opposed to a subset of Division 1) for FBS programs”).

137. 1A FAR BOARD, PRINCIPLES AND MODEL FOR NEW GOVERNANCE STRUCTURE 3, https://www.insidehighered.com/sites/default/server_files/files/1A%20FAR%20Board%20Principles%20and%20Model%20for%20New%20NCAA%20Governance%20Structure.pdf [<https://perma.cc/8N9X-PZQL>].

138. *Id.* Although advocating for a separate FBS division for purposes of NCAA governance, the FARs urged that the overall structure would “leave intact the Division I championship structure in which FBS institutions compete.” *Id.* at 4. *See also* Bush, *supra* note 93, at 5–6 (advocating that the Autonomy 5 conferences “should separate from the NCAA and form independent athletic associations . . . [that] should contract with other associations and third party entities for inter-association and post-season competitions.”).

139. *See* NCAA MANUAL 2017–18, *supra* note 4, § 1.3.1 (specifying that the “competitive athletics programs of member institutions are designed to be a vital part of the educational system”).

140. *Id.*

141. NCAA Core Values, NCAA, <http://www.ncaa.org/about/ncaa-core-values> [<https://perma.cc/HL2T-QLJ2>] (last visited June 29, 2017).

142. *Id.* The NCAA’s full list of core values provides the following:

The Association – through its member institutions, conferences and national office staff – shares a belief in and commitment to:

- **The collegiate model of athletics** in which students participate as an avocation, balancing their academic, social and athletics experiences.
- **The highest levels of integrity and sportsmanship.**
- **The pursuit of excellence in both academics and athletics.**

Given this shared emphasis on both athletics and academics, during the NCAA governance redesign process, the 1A FAR Board of Directors initially urged that the new governance model include an equal number of both FARs and senior athletics administrators.¹⁴³ The 1A FAR Board reasoned:

Our universities, and the NCAA as an association, continually espouse a commitment to the collegiate model, with its focus on overall student-athlete well-being. Policy for intercollegiate athletics should be adopted and problems should be solved in a manner that not only embodies – but, equally, is seen to embody – the values of higher education and the enhancement of all facets of the collegiate student experience, including those directly related to the student-athlete experience.¹⁴⁴

In addition, the 1A FAR Board tried to persuade the NCAA DI Board that the national governing structure should be reflective of typical campus approaches in which the Presidents and Chancellors regularly seek and rely on the input of both athletics directors and FARs.¹⁴⁵ The 1A FAR Board added:

In sum, if the collegiate model means anything, it must mean that college athletic issues need to be considered and resolved in a manner consistent with the campus ethos and campus values. Few, if any, college athletic issues are either exclusively athletic or exclusively academic. Our governance model should be structured to reflect that reality. If we do so, we will have positioned our governance design to better address and resolve college athletic issues within a collegiate model framework. Moreover, doing so will

-
- **The supporting role that intercollegiate athletics plays** in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions.
 - **An inclusive culture** that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds.
 - **Respect** for institutional autonomy and philosophical differences.
 - **Presidential leadership** of intercollegiate athletics at the campus, conference and national levels.

Id. (emphasis in original). The NCAA staff provides this list of core values as part of the meeting materials for all Division I Council meetings.

143. See Letter from Brian D. Shannon, President, 1A FAR Board, to Nathan O. Hatch, Chair, NCAA Division I Board of Directors, Feb. 4, 2014, http://www.oneafar.org/archive/2014_archive/letter_to_President_Hatch.pdf [<https://perma.cc/9Q58-Y8HC>] (urging that “[h]aving an *equal* number of FARs to work hand-in-hand with senior athletics administrators at the Council level will assure that issues are vetted and considered through both an athletics and a campus/academic lens”) (emphasis in original).

144. See *id.* (emphasis omitted) (also arguing that the “goals and ethos of our colleges and universities must be front and center in the consideration and adoption of policies and bylaws that govern intercollegiate athletics”).

145. See *id.* (adding that “[n]o FAR disputes that ADs are, and must be, the ones directly charged with administering athletics departments . . . [and] that ADs have such responsibilities on a 24/7 basis” but pointing out that “college athletics also has a 24/7 college/academic component”) (emphasis omitted).

also allow the NCAA to be best positioned to respond to what we believe will be continuing external criticism that the “college” part of collegiate athletics is no longer relevant.¹⁴⁶

The 1A FAR Board was not the only group urging the inclusion of a significant population of FARs on the new DI Council. The Faculty Athletics Representative Association (“FARA”), which represents the FARs at all three divisions of the NCAA, argued that, in addition to “a strong athletic director presence” on the Council, it was also “necessary to have a strong FAR presence on the Council.”¹⁴⁷ FARA provided the following rationale:

FARs have practical daily experience in all aspects of the academic endeavors of athletes and they also understand the importance of the athletic component of their education. Inclusion of the on-campus perspectives of both FARs and ADs ensures the best possible likelihood of maintaining and promoting the collegiate model for athletics.¹⁴⁸

These arguments, however, were ultimately unsuccessful in persuading the DI Board to appoint a significant number of FARs to the Council. Instead, the final Council design designated only two slots specifically for FARs, and the initial make-up of the forty-member Council, as seated in January 2015, included only three FARs.¹⁴⁹ In response to the concerns raised by 1A FAR and others, the DI Board appeared to be troubled with regard to the diversity of the Council and expressed “the need for a wider range of viewpoints on the body.”¹⁵⁰ As one approach to expanding the diversity of nominees (in terms not only of race and gender, but also with regard to positional

146. *Id.*

147. Memorandum from Frank Webbe, President, FARA, to Nathan O. Hatch, Chair, NCAA Division I Board of Directors, Mar. 14, 2014, http://farawebsite.org/wp-content/uploads/2014/03/EC_ltr_to-Steering_Committee_0314_final.pdf [<https://perma.cc/C4M5-LNNQ>].

148. *Id.* In an additional letter commenting on the NCAA governance redesign, FARA cautioned, “If FARs are not well represented in the new governance structure at the Council level and below, the FARA Executive Committee’s concern is that the collegiate model’s credibility will be severely weakened or lost.” Letter from Frank Webbe, President, FARA, to Nathan O. Hatch, Chair, NCAA Division I Board of Directors, May 15, 2014, http://farawebsite.org/wp-content/uploads/2014/05/Hatch_ltr_05152014_FARA-D1-governance-position-statement.pdf [<https://perma.cc/WF5U-5YV6>].

149. See RECOMMENDED MODEL, *supra* note 13, at 6 (identifying the addition of two positions designated solely for faculty); Hosick, *supra* note 132 (identifying the full initial roster by name and position). Separate from the two designated positions, the Board appointed only one FAR as a conference representative—Tim Day, the Iowa State University FAR from the Big 12 Conference. *Id.*

150. Michelle B. Hosick, *New Board Starts Discussion on Future of Division I*, NCAA (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/news/new-board-starts-discussions-future-division-i> [<https://perma.cc/6DYW-VE4Z>]. The DI Board had rejected the initial slate of nominees in October 2014 and asked for the submission of a new slate because it was dissatisfied “with the lack of diversity in ethnicity, gender and experience offered by the conferences in October.” *Id.*

experience), the DI Board adopted a policy that required conferences to submit multiple nominees “to contribute to preset diversity objectives and to include at least one person who isn’t an athletics director.”¹⁵¹ The proof remains in the pudding, however. As of this writing in August 2017, there are four FARs among the forty members of the DI Council.¹⁵² This means that only 10% of the members of the primary policy-setting body for Division I shared governance issues (non-autonomy) are faculty members, despite the importance of education to the enterprise. The DI Board should rectify this shortcoming. Indeed, “FARs comprised 20 percent of the members of the precursor Division I governance structure.”¹⁵³

2. Athletics Scholarships

Despite the legislation adopted by the Autonomy 5 conferences to provide cost of attendance scholarships, there are issues remaining pertaining to athletics scholarships. Only certain NCAA sports have requirements that all athletics scholarships awarded by institutions be full scholarships, identified in the NCAA Bylaws as “full grant[s]-in-

151. *Id.*

152. See *Division I Council*, NCAA, <http://web1.ncaa.org/committees/committees/roster.jsp?CommitteeName=1COUNCIL> [<https://perma.cc/Y2F2-LNVV>] (last visited Aug. 3, 2017) (providing the roster of the forty Council members). The Author will add, however, that nothing in this critique regarding the limited number of FARs in the Council structure should be viewed as criticism of the initial or current membership of the Council. It has been the Author’s experience as a Council member that the athletics directors, conference commissioners, other athletics administrators, FARs, and student-athletes who serve or have served on the Council have been exceptionally hard-working, experienced, and dedicated leaders. Moreover, the NCAA has a talented array of accomplished senior staff who go above and beyond in supporting the work of the Council and its substructure.

153. See Potuto, *Two, Four, Six, Eight*, *supra* note 12, at 292 n.33 (adding, “Ironically, the reduction of the faculty role coincided with increasingly vocal and strident claims that there is no longer a collegiate model of athletics, and that those who compete in football and men’s basketball are professionals, not students.”). This is more than just a matter of quotas or counting noses. As Professor Potuto has reasoned:

Faculty by training and inclination are skeptical. They rely on research and validated data to drive decisions. Their skill set runs to measured analysis and considered evaluation. FAR status outside the athletic department distances them from athletic pressures, including those that head coaches bring to bear.

Id. at 312. See also AM. COUNCIL ON EDUC., *THE STUDENT-ATHLETE, ACADEMIC INTEGRITY, AND INTERCOLLEGIATE ATHLETICS* 4 (2016), <http://www.acenet.edu/news-room/Documents/ACE-Academic-Integrity-Athletics.pdf> [<https://perma.cc/689E-WVZB>] (describing “the important ‘connective tissue’ and watchdog role FARs can play on campus when it comes to academic integrity and intercollegiate athletics”); Josephine (Jo) R. Potuto, *Professors Need Not Apply*, *INSIDE HIGHER ED.* (May 19, 2014), <https://www.insidehighered.com/views/2014/05/19/new-ncaa-governance-structure-marginalizes-faculty-members-essay> [<https://perma.cc/C54X-E6FJ>] (criticizing the DI Board’s Steering Committee for failing to include a greater number of FARs in the structure and prompting readers to “[t]ry defining a university without mentioning faculty. It can’t be done.”).

aid.”¹⁵⁴ These sports include football, men’s and women’s basketball, women’s volleyball, women’s gymnastics, and women’s tennis.¹⁵⁵ In addition, the bylaws place limits on the total number of full grants-in-aid that can be awarded in each of these “head count” sports. For example, at FBS institutions there is an “annual limit of 25 on the number of initial counters . . . and an annual limit of 85 on the total number of counters (including initial counters) for football.”¹⁵⁶ In turn, men’s basketball and women’s basketball are both “head count” sports and are limited to thirteen and fifteen full scholarships, respectively.¹⁵⁷

It is important to note, however, that for the majority of NCAA sports, student-athletes do not typically earn full athletics scholarships. These sports, ranging from baseball to track and field to golf, soccer, lacrosse, and even fencing and bowling, are identified as “equivalency” sports.¹⁵⁸ That is, for each equivalency sport, an institution may award full or fractional scholarships to members of the team, but there is a cap tied to an equivalent number of full scholarships.¹⁵⁹ In addition, for these sports, the cap on the number of allowed scholarships per team tends to be much smaller than the total number of student-athletes on the team’s roster. For example, in men’s baseball, there is an annual cap of 11.7 scholarship equivalencies that can be awarded to no more than twenty-seven student-athletes who are identified as “counters”—i.e., recipients of institutional financial aid.¹⁶⁰ Similarly, ice hockey has a cap of eighteen scholarships that can be awarded to no more than thirty student-athletes on the squad.¹⁶¹

154. See NCAA MANUAL 2017–18, *supra* note 4, § 15.02.5 (defining a “full grant-in-aid” as “financial aid that consists of tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance” as calculated for that institution).

155. *Id.* §§ 15.5.5, 15.5.6, 15.5.2.1.

156. *Id.* § 15.5.6.1. In turn, a “counter” is defined as “an individual who is receiving institutional financial aid that is countable against the aid limitations in a sport.” *Id.* § 15.02.3.

157. *Id.* §§ 15.5.5.1, 15.5.5.2. Correspondingly, women’s gymnastics, women’s volleyball, and women’s tennis have caps of twelve, twelve, and eight full scholarships, respectively. *Id.* § 15.5.2.1. Institutions may have team rosters that exceed the cap limits in these head count sports, but additional student-athletes are not eligible for any athletics financial aid and are considered to be “walk-ons.” For example, although FBS football has a cap of eighty-five total scholarship counters, as many as “105 student-athletes . . . may engage in practice activities prior to the institution’s first day of classes or the institution’s first contest, whichever occurs earlier.” *Id.* § 17.10.2.1.2.

158. See *id.* §§ 15.5.3, 15.5.4, 15.5.7, 15.5.8 (defining and describing limits on scholarships in numerous sports).

159. See *id.* §§ 15.5.3.1, 15.5.3.2 (listing maximum scholarship equivalency limits for an array of sports, and describing the method of calculating the equivalencies).

160. See *id.* § 15.5.4 (providing for “an annual limit of 11.7 on the value of financial aid awards (equivalencies) to counters and an annual limit of 27 on the total number of counters in baseball”). In addition, in the sport of baseball there is a minimum floor requirement that each financial aid package must be at least “25 percent of an equivalency.” *Id.* § 15.5.4.1.

161. *Id.* § 15.5.7.

Unlike baseball and ice hockey, other equivalency sports do not have a cap on the total number of student-athlete counters who may receive institutional financial aid, but there are strict caps on the number of equivalency scholarships available per sport.¹⁶² For example, women's softball has a cap of twelve scholarship equivalencies, which is the value of twelve full scholarships.¹⁶³ A softball roster, however, will typically include significantly more than twelve student-athletes (particularly given that nine student-athletes are on the field at any one time). Although an institution has the discretion to award a full scholarship to a particular student-athlete in an equivalency sport such as softball, the total amount of aid awarded to the members of the team cannot exceed the cap for the sport. Accordingly, fractional (partial) scholarships are typically the norm in equivalency sports.¹⁶⁴

In 2017, the NCAA settled the *Alston* litigation. The settlement addressed the shortfall between the former limits on athletics scholarships and full cost of attendance for "Division I men's and women's basketball and FBS football student-athletes from the 2009–10 academic year through the 2016–17 academic year who did not receive cost of attendance as a part of their scholarship."¹⁶⁵ The settlement, however, did not extend to student-athletes in other head-count sports, or to student-athletes in any of the equivalency sports.¹⁶⁶ Whether student-athletes in other head-count sports for the years covered by the *Alston* settlement pursue any form of action remains to be seen.

The DI governance structure must confront two distinct scholarship issues regarding equivalency sports. First, after adoption of the cost of

162. The caps for the total number of financial aid awards for an array of additional men's sports include the following:

Cross Country/Track and Field (12.6), Fencing (4.5), Golf (4.5), Gymnastics (6.3), Lacrosse (12.6), Rifle (3.6), Skiing (6.3), Soccer (9.9), Swimming and Diving (9.9), Tennis (4.5), Volleyball (4.5), Water Polo (4.5), and Wrestling (9.9).

Id. § 15.5.3.1.1. Correspondingly, the caps for the total number of financial aid awards for the remaining women's sports include the following:

Bowling (5), Cross Country/Track and Field (18), Equestrian (15), Fencing (5), Field Hockey (12), Golf (6), Lacrosse (12), Rowing (20), Rugby (12), Skiing (7), Soccer (14), Softball (12), Swimming and Diving (14), Triathlon (6.5), and Water Polo (8).

Id. § 15.5.3.1.2.

163. *Id.* § 15.5.3.1.2.

164. The bylaws further define an equivalency calculation as a fractional amount of a full scholarship, and specify that the "sum of all fractional and maximum awards received by counters shall not exceed the total limit for the sport in question for the academic year as a whole." *Id.* § 15.5.3.2(b)–(c).

165. *NCAA Establishes Fund for Student-Athletes*, NCAA (Feb. 3, 2017), <http://www.ncaa.org/about/resources/media-center/news/ncaa-establishes-fund-student-athletes> [<https://perma.cc/DX3E-6QP8>].

166. See generally Potuto, *The Alston/NCAA Settlement*, *supra* note 101 (observing that "[w]hat the Alston settlement (and the O'Bannon case before it) does not address is scholarship limits for athletes in other sports.").

attendance legislation, some institutions questioned how it might be applied to equivalency sports.¹⁶⁷ As summarized by an Ad Hoc Financial Aid Issues Working Group appointed by the Council, “[T]he expansion of the legislation [was] intended to provide student-athletes with additional funds to cover cost of attendance; however, as written, the legislation allows schools to provide additional funds to student-athletes who previously did not receive athletically related financial aid.”¹⁶⁸ If an institution were to take the latter path, to use new cost of attendance funds for additional student-athletes, then “an increase in roster sizes may result, or at least an increase in the number of counters within the roster.”¹⁶⁹ Many institutions within DI were concerned that schools with greater resources that elect to provide cost of attendance scholarships across all sports would use those funds not to enhance existing student-athletes’ financial aid awards, but to “stockpile” additional student-athletes via “roster creep” or “counter creep.”¹⁷⁰

The foregoing concern can best be illustrated by an example. Suppose that Big State University opts to provide cost of attendance scholarships in all sports. In addition, one of the school’s sponsored sports is women’s softball, an equivalency sport with a cap of twelve total scholarship equivalencies.¹⁷¹ Suppose further that it would cost \$4,000 to increase the total amount of the formerly allowed scholarship limit to the full cost of attendance at Big State, and that Big State had twenty-four student-athletes on the softball roster who received partial or full athletic scholarships when the cost of attendance rules became effective. Accordingly, once cost of attendance scholarships became permissible, the softball scholarship budget would increase by \$48,000.¹⁷² If Big State opted not to increase its roster, that \$48,000

167. See NCAA DIVISION I COUNCIL AD HOC FINANCIAL AID ISSUES WORKING GROUP, RECOMMENDATIONS FOR NCAA DIVISION I STUDENT-ATHLETE EXPERIENCE COMMITTEE & DIVISION I COUNCIL 2 (Feb. 2016) [hereinafter AD HOC FINANCIAL AID ISSUES COMMITTEE REPORT], https://www.ncaa.org/sites/default/files/DIFAIWG_Rec_DICouncil_Student-Athlete-Experience_Com_20160215.pdf [https://perma.cc/QB6G-FRTG] (observing that after the adoption of cost of attendance, many schools questioned “whether unintended consequences existed and should be addressed”).

168. *Id.*

169. *Id.*

170. See *id.* at 3 (expressing fears that such student-athletes would “otherwise choose to attend and participate at a different school if not for access to additional financial aid” at the higher-resourced school).

171. See NCAA MANUAL 2017–18, *supra* note 4, § 15.5.3.1.2 (capping the number of equivalent financial aid awards in the sport of women’s softball at 12).

172. \$4,000 per scholarship X 12 total scholarship equivalencies = \$48,000. In effect, a total of \$48,000 will be added to the scholarship “pot” for the school’s softball program, and there are no limits on the total number of potential scholarship recipients, or counters, for the sport. For a general discussion of scholarships in equivalency sports, see Danny Belch, *Belch: NCAA Scholarship System is Unjust*, THE STANFORD DAILY (Feb. 5, 2010), <http://www.stanforddaily.com/2010/02/05/belch-ncaa-scholar>

could then be distributed to the previous roster (or an equal number of counters) to increase each aid award. This was the likely intent when cost of attendance was adopted, although most of the focus was on head count sports such as football and men's basketball. The concern previously identified, however, is that Big State could instead use that \$48,000 to increase the size of its roster of softball student-athletes who receive athletics financial aid by putting more than twenty-four student-athletes on partial scholarships.¹⁷³

After its initial review, the Ad Hoc Financial Aid Issues Working Group submitted two options to the full Council for consideration: (1) to gather data and monitor the implementation of the legislation in equivalency sports over a two–three year period, or (2) to adopt further legislation that would require a proportionate increase to each student-athlete's equivalency scholarship.¹⁷⁴ After reviewing and considering the Ad Hoc Committee's recommendations, in April 2016, the Council approved the first option “to gather data and monitor the application of the . . . [cost of attendance] financial aid legislation” over the ensuing two years.¹⁷⁵ In particular, the Council directed the monitoring of the following four financial aid elements: “[1] counter numbers per sport; [2] average equivalency percent awarded per counter per sport; [3] roster numbers per sport; and [4] average total financial aid expenditure per institution per sport.”¹⁷⁶ A data review of trend comparisons for the two years prior to and the two years following the adoption of the cost of attendance legislation is scheduled to be completed by March 2018 and available to the Council in April 2018.¹⁷⁷ The Council expanded the intended analysis to include a “comprehensive review of financial aid legislation.”¹⁷⁸ One possible

ship-system-is-unjust/ [https://perma.cc/GQ49-28N2] (providing an analysis of scholarship distributions in equivalency sports).

173. See AD HOC FINANCIAL AID ISSUES COMMITTEE REPORT, *supra* note 166, at 3 (describing concerns about roster creep and counter creep).

174. See *id.* at 4–5 (setting forth both alternatives). As to the latter alternative, for example, if a student-athlete was previously on a 25% scholarship, she should also receive 25% of the additional amount beyond tuition, fees, books, room and board necessary for full cost of attendance at the university.

175. NCAA, REPORT OF THE NCAA DIVISION I COUNCIL & SEVEN COUNCIL STANDING COMMITTEES 12 (Apr. 6–8, 2016), http://www.ncaa.org/sites/default/files/April2016DICouncil_Report_20160418.pdf [https://perma.cc/WZC7-ALTP]. As a Council member, the Author of this Article was present for the discussion. Some members expressed concern that it was premature to recommend legislation without having the opportunity to collect and review data regarding actual implementation of the new financial aid legislations.

176. *Id.*

177. NCAA, REPORT OF THE NCAA DIVISION I COUNCIL & COUNCIL STANDING COMMITTEES 17 (June 26–28, 2017), http://www.ncaa.org/sites/default/files/Jun2017DICouncil_Report_20170712.pdf [https://perma.cc/7229-MUZC].

178. *Id.* For example, one topic that will likely be on the table is the appropriate number of counter student-athletes per equivalency sport. See *NCAA Division I Council Ad Hoc Financial Aid Issues Working Group*, NCAA, <http://www.ncaa.org/governance/working-groups/ncaa-division-i-council-ad-hoc-financial-aid-issues-work>

decision point for the Council will be whether to identify and legislate the number of student-athletes permitted to be on scholarship (“counters”) for each equivalency sport. For example, in baseball, there is a legislated cap of twenty-seven student-athlete counters who may receive athletics financial aid (and 11.7 scholarship equivalencies).¹⁷⁹

Separate from the narrower issue of how to apply or regulate cost of attendance dollars in equivalency sports, a second issue pertaining to equivalency sports relates directly to the caps on the number of scholarships themselves. A comprehensive review of financial aid in equivalency sports should include an examination of the current maximum equivalency limits in equivalency sports and recommendations for increases.¹⁸⁰ These limits should be increased with the ultimate goal of making all sports head count sports. The time commitments for a typical DI student-athlete for athletics and academics are comparable regardless of whether the student-athlete participates in a head count or equivalency sport.¹⁸¹ A commitment to the collegiate model of intercollegiate athletics suggests that each student-athlete’s scholarship opportunities should be comparable regardless of the student-athlete’s sport.

The price tag involved in increasing scholarship numbers in equivalency sports, however, would be significant. For example, suppose that Big State University currently provides the maximum permitted number of scholarships in eight equivalency sports. If the NCAA adopted legislation to permit just three additional scholarships for each equivalency sport, that would result in a total of twenty-four additional scholarship equivalencies.¹⁸² Suppose further that the annual cost of attendance at Big State University is \$30,000. This means that funding the additional twenty-four scholarships during the first year would cost \$720,000.¹⁸³ Although Autonomy 5 conferences and

ing-group [<https://perma.cc/Q477-VDSD>] (last visited Aug. 9, 2017) (including the “number of scholarship student-athletes” per sport as an element of the review).

179. See NCAA MANUAL 2017–18, *supra* note 4, § 15.5.4 (providing for “an annual limit of 11.7 on the value of financial aid awards (equivalencies) to counters and an annual limit of twenty-seven on the total number of counters in baseball”).

180. See *id.* § 15.5.3.1 (setting forth maximum scholarship limits in equivalency sports).

181. See Greg Johnson, *Third GOALS Survey Findings Unveiled*, NCAA (Jan. 14, 2016), <http://www.ncaa.org/about/resources/media-center/news/third-goals-survey-findings-unveiled> [<https://perma.cc/9KN7-GSCS>] (summarizing that on average DI student-athletes reported spending thirty-four hours per week on their sports and 38.5 hours per week on academics).

182. $8 \times 3 = 24$.

183. $24 \times \$30,000 = \$720,000$. Overall budgeted scholarship costs would increase, as well, over the next several years if Big State University opts to continue funding the twenty-four additional scholarships for each ensuing class, until leveling off once the initial group of twenty-four scholarship student-athletes begins to graduate. In addition, given Title IX considerations, half of the twenty-four new scholarship equivalencies should be made available in women’s sports. See 20 U.S.C.A. § 1681 (2017) (requiring institutions to provide an equality of opportunities for both sexes in

their member schools would have the resources for significant increases in the number of equivalency scholarships if permitted by the NCAA bylaws, many schools in other conferences would likely balk at the attendance costs. Moreover, this portion of the NCAA bylaws is subject to shared governance voting, and is not in an area of autonomy.¹⁸⁴ As previous research has revealed, division-wide legislation has not generally fared well when the DI proposal would increase costs.¹⁸⁵ Accordingly, adopting Council legislation to increase scholarships in equivalency sports could be challenging given the associated costs.¹⁸⁶ If there is a lack of willingness across DI to adopt legislation to increase the number of scholarships in equivalency sports, however, there is a mechanism included within the revised governance structure to permit an addition to the current areas of autonomy.¹⁸⁷ This would require a recommendation to the DI Board of Directors supported by at least three of the Autonomy 5 conferences, and a 60% or greater vote of the “president or chancellor members of the Board of Directors.”¹⁸⁸

3. Nimble Governance

One of the stated goals of the NCAA DI governance overhaul was to create “a new governance structure that will enable it [DI] to operate in a more nimble and streamlined manner, and to be more responsive to membership needs throughout the division, particularly those of student-athletes.”¹⁸⁹ In many ways, that goal has been realized. Instead of separate Leadership and Legislative Councils with sometimes

intercollegiate sports). *See also* U.S. DEP’T OF JUST., *supra* note 110; U.S. DEP’T OF EDUC., *supra* note 110 (providing general overviews of Title IX and its application to most educational programs, including intercollegiate athletics).

184. *See* NCAA MANUAL 2017–18, *supra* note 4, § 15.5 (not listing the provisions relating to counters and equivalency sports as being in an area of autonomy).

185. *See* Potuto, Dillon, & Clough, *supra* note 19, at 3 (finding cost of implementing a proposal to be statistically significant as to whether it is adopted or fails).

186. The fact of weighted voting among Council representatives, however, could contribute to the potential for success of any such measure. *See* NCAA MANUAL 2017–18, *supra* note 4, § 4.3.4 (delineating the weighted voting for each Council representative).

187. *See id.* § 5.3.2.1.2.1 (providing a procedure for adding to the areas of autonomy).

188. *Id.* In addition, any such addition “must permit the use of resources to advance the legitimate educational or athletics-related needs of student-athletes, support legislative changes that will otherwise enhance student-athlete well-being, or complement and align with the values of higher education.” *Id.* at 5.3.2.1.2.2. Adding to the number of equivalency scholarships would certainly be encompassed within this standard.

189. *See* RECOMMENDED MODEL, *supra* note 13, at 5. *See also* Hosick, *supra* note 41 (quoting DI Board Steering Committee member Kirk Schulz hopes the future of NCAA governance will be described as, “nimble, strategic, collaborative, [and] transparent”).

overlapping responsibilities, DI now has a single governing Council.¹⁹⁰ Instead of dueling academic committees, the structure includes a single Committee on Academics.¹⁹¹ Key substructure committees report directly to the Council and include Council representatives among their members.¹⁹² Moreover, the Autonomy 5 conferences have separate autonomous authority over certain policy issues.

Despite the significant improvements, however, there are still challenges. For example, the Autonomy 5 conferences hold a business session to adopt autonomy legislation only once per year.¹⁹³ In turn, the Council has averaged five meetings per year since its formation in January 2015.¹⁹⁴ Typically, Council legislation is also adopted on an annual basis at the DI Council's April meeting.¹⁹⁵ With such a large membership organization involving hundreds of universities, immediate regulatory action is challenging, if not, at times, seemingly impossible.¹⁹⁶ On the other hand, the Council and the DI Board each have the ability to adopt emergency legislation.¹⁹⁷ These emergency mechanisms allow for prompt action on an as-needed basis. Given the disparate membership across DI, a regulatory process that is deliberative and that allows for member comment and involvement is generally positive despite the time that is often necessary for legislative action.

190. Compare NCAA MANUAL 2014–15, *supra* note 28, §§ 4.5.1, 4.6.1 (defining the former Leadership and Legislative Councils), with NCAA MANUAL 2017–18, *supra* note 4, § 4.3.1 (describing the current governing Council).

191. See *id.* § 4.4 (describing the Committee on Academics).

192. See *DI Council Substructure*, NCAA, <http://www.ncaa.org/sites/default/files/DI%20Council%20Substructure.pdf> [<https://perma.cc/4MU3-P7WJ>] (last visited Aug. 8, 2017) (providing a chart depicting the standing committees that report to the Council, along with information about their membership).

193. See NCAA MANUAL 2017–18, *supra* note 4, § 5.3.2.1.7 (describing Autonomy 5 voting process at annual business session).

194. See *Division I Council*, NCAA, <http://www.ncaa.org/governance/committees/division-i-council> [<https://perma.cc/P544-T3LK>] (last visited Aug. 8, 2017) (providing a list of Council meetings for 2015–17 and links to meeting reports).

195. See, e.g., NCAA, REPORT OF THE NCAA DIVISION I COUNCIL AND COUNCIL STANDING COMMITTEES, at 1 & Attachment A (Apr. 12–14, 2017), http://www.ncaa.org/sites/default/files/April2017DICouncil_Report_20170425.pdf [<https://perma.cc/ADT8-ETAG>] (listing legislative actions).

196. Consider, however, Professor Potuto's analysis that there is often a regulatory mentality that pervades NCAA legislative activities, and that member-schools are often too quick to propose rule changes when they do not like a certain practice or practices. See Potuto, *Two, Four, Six, Eight*, *supra* note 12, at 293–97.

197. See NCAA MANUAL 2017–18, *supra* note 4, § 5.3.2.2.1.1 (permitting the Council to “adopt emergency or noncontroversial legislation during any meeting by at least a three-fourths of its members present and voting”); *id.* § 4.2.2 (allowing the DI Board to adopt emergency legislation “in circumstances in which significant values are at stake or the use of the regular legislative process is likely to cause significant harm or hardship to the Association or the Division I membership because of the delay in its effective date”).

IV. CONCLUSION

The late 2014 overhaul of the NCAA DI governance structure has largely been a positive development for the DI membership. The new authority vested in the Autonomy 5 conferences and member-schools created opportunities to provide better scholarship benefits to student-athletes and facilitated the development of meaningful time demands reforms. For now, at least, the bifurcated structure within DI of certain policy areas falling within the authority of the Autonomy 5 conferences and the remaining bylaws governing DI being under the purview of the Council has worked. The model provides a framework for schools and conferences of significantly different levels of resources to continue to be affiliated as part of the same division. Although certain challenges continue to exist and more will no doubt appear on the horizon, the revamped governance structure provides a more effective and responsive means to govern DI athletics on behalf of student-athletes.

