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## More Money, More Problems: NCAA Modernization and Student Athletes' Right to Compensation

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**MORE MONEY, MORE PROBLEMS: NCAA MODERNIZATION AND  
STUDENT ATHLETES' RIGHT TO COMPENSATION**

*Sydney Wood*<sup>†</sup>

*Abstract*

*In 2019, California passed a law that would allow collegiate athletes in California to receive compensation for their name, image, and likeness. Currently, the National Collegiate Athletic Association distinguishes between amateur and professional athletes and does not allow student athletes to receive compensation beyond scholarships. This Comment analyzes noteworthy case law and summarizes the arguments of current and former student athletes over the years. The new California legislation opened the door for substantial change and challenged the NCAA to finally modernize their bylaws and regulations. Furthermore, this Comment recommends that the NCAA adapt the definitions contained in their bylaws to create consistency and implement a new compensation model that allows student athletes to financially benefit from their name, image, and likeness while maintaining their amateur status.*

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## I. INTRODUCTION

For years, collegiate athletes, postsecondary educational institutions, and athletic organizations and associations have addressed the controversial topic of collegiate athlete compensation. However, in September 2019, California took the first step in creating substantial change for student athletes. The California law challenges the National Collegiate Athletic Association (“NCAA” or the “Association”) and its current rules regarding amateurism and compensation. Beginning in January 2023, individuals in California who compete in intercollegiate athletics will have the right to receive compensation for their name, image, and likeness (“NIL”) and obtain professional representation. In response to this legislation, the NCAA announced that each division will evaluate their current rules and propose modifications that accommodate student athlete compensation, while maintaining NCAA amateurism standards. In addition to drafting new regulations, the NCAA needs to redefine its terms to allow amateurs to benefit from their skills without direct compensation for their participation.

The goal of this Comment is to analyze the ongoing issue of student athlete compensation, evaluate the validity of current legislation, and ultimately suggest a uniform model for the NCAA and its member schools to implement. Section II will give a background of student athlete compensation and some of the factors that continue to play a role in the controversy. This section will discuss the history of the NCAA, its rules, and how it currently regulates intercollegiate athletics. It will also address noteworthy court cases, demonstrating

how current and former athletes have challenged the validity of the NCAA rules. A brief discussion of the Sherman Antitrust Act is also necessary to understand the claims athletes bring against the NCAA. Section III will outline the new California legislation and explain its provisions. Then, Section IV will outline recommendations provided by the NCAA Board of Governors Federal and State Legislation Working Group Report, consider how the recommendations should be implemented, and analyze the impact of new regulations on college athletics as a whole. Lastly, Section V will provide detailed suggestions for the NCAA as it begins the modernization process, such as amending their bylaws and implementing a new compensation model. This Comment proposes a distributed trust fund compensation model with three essential components: student athletes' right to receive payments, scheduled distribution, and regulation and oversight. The proposed model allows student athletes to receive compensation from endorsement deals and considers issues that previous models have not addressed.<sup>1</sup>

## II. BACKGROUND

### A. National Collegiate Athletic Association

Regulation of intercollegiate football has been a priority in the United States for over a century, beginning with the need to monitor the safety of college athletes.<sup>2</sup> The issue became a national concern in

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1. Student athlete compensation has been a controversial and highly analyzed topic with many articles published relating to antitrust laws, NCAA amateurism and eligibility rules, paying student athletes, student athletes' right to publicity, etc. See generally Stanton Wheeler, *Rethinking Amateurism and the NCAA*, 15 STAN. L. & POL'Y REV. 213 (2004); Thomas Bright, *NCAA Institutes Multi-Year Scholarships*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 179 (2012); Audrey C. Sheetz, *Student Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865 (2016); William D. Holthaus, Jr., *Ed O'Bannon v. NCAA: Do Former NCAA Athletes Have a Case Against the NCAA for its Use of Their Likeness?*, 55 ST. LOUIS U. L. J. 369 (2010); Victoria Roessler, *College Athletes Rights After O'Bannon: Where do College Athlete Intellectual Property Rights Go From Here?*, 18 VAND. J. ENT. & TECH. L. 935 (2016); Stephanie M. Greene, *Regulating the NCAA: Making the Calls Under the Sherman Antitrust Act and Title IX*, 52 ME. L. REV. 81 (2000); Michael S. McLeran, *Playing for Peanuts: Determining Fair Compensation for NCAA Student-Athletes*, 65 DRAKE L. REV. 255 (2017).

2. Rodney Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 10 (2000).

1905 when President Roosevelt invited officials from major football programs to participate in a White House conference to evaluate football rules.<sup>3</sup> After injuries continued to occur, representatives from the nation's major college football programs gathered to evaluate the possibility of developing valid and effective safety regulations or consider whether college football should be eliminated altogether.<sup>4</sup> These representatives formed the Rules Committee.<sup>5</sup> The new Rules Committee met with participants in the White House conference in an effort to reform college football rules.<sup>6</sup> The combined sixty-two members ultimately formed the Intercollegiate Athletic Association, later renamed the NCAA in 1910.<sup>7</sup> Originally, the NCAA formulated safety rules for various collegiate sports.<sup>8</sup>

In the following years, public interest in college athletics increased, causing a similar increase in commercialization.<sup>9</sup> A rise in access to higher education along with growing popularity of television, radio, and broadcasting attracted further attention to collegiate sports.<sup>10</sup> This created an incentive for more universities and colleges to create athletic programs or expand their existing programs.<sup>11</sup> These factors resulted in an increase in NCAA authority, allowing the Association to create additional rules, specifically the "Sanity Code."<sup>12</sup> The NCAA established the Sanity Code to "alleviate the proliferation of exploitive practices in the recruitment of student athletes."<sup>13</sup> However, after discovering that the rules were ineffective, the NCAA repealed the Sanity Code in 1951, replacing it with the Committee on Infractions.<sup>14</sup>

Since its formation, the NCAA gained more and more authority, drifting further from its initial purpose.<sup>15</sup> Now, the NCAA

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3. *Id.* at 12.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 14.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 15.

15. Roessler, *supra* note 1, at 940.

develops and enforces rules that promote fairness and a level playing field.<sup>16</sup>

### 1. Structure & Governance

The NCAA is an unincorporated, non-profit organization, consisting of “1,117 colleges and universities, 100 athletic conferences, and 40 sports organizations.”<sup>17</sup> The members represent 19,750 teams and over half a million college athletes competing in twenty-four sports across three divisions.<sup>18</sup> The NCAA’s purpose is “prioritizing academics well-being and fairness so college athletes can succeed on the field, in the class, and for life.”<sup>19</sup> The Association’s ranks include “college presidents, athletic directors, faculty athletics representatives, compliance officers, and conference staff.”<sup>20</sup> Other ranks include “academic support staff, coaches, sports information directors, and health and safety personnel.”<sup>21</sup> Athletic directors are responsible for overseeing their university’s athletic staff and guiding policy decisions, while compliance officers ensure athletes and staff follow the NCAA-mandated rules.<sup>22</sup>

The NCAA divides member schools into three divisions based on factors such as university size, athletic program funding, and public appeal.<sup>23</sup> Each division maintains certain rules and regulations that member schools must comply with.<sup>24</sup> Division I consists of 350 colleges and universities, most of which have large student bodies, manage substantial athletics budgets, and offer numerous scholarship opportunities to their students.<sup>25</sup> Within Division I, member schools

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16. *Questions and Answers on Name, Image, and Likeness*, NCAA (Oct. 29, 2019), <http://www.ncaa.org/questions-and-answers-name-image-and-likeness> [https://perma.cc/5RVH-XNFZ].

17. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [https://perma.cc/48A2-ZWPH].

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *About NCAA Division II*, NCAA, <http://www.ncaa.org/about?division=d2> [https://perma.cc/G4PZ-463G].

24. *Divisional Differences and the History of Multidivision Classification*, NCAA, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification> [https://perma.cc/4CYD-AAFJ].

25. *NCAA Division I*, NCAA, <http://www.ncaa.org/about?division=d1>

are further divided based on college football sponsorship.<sup>26</sup> The Football Bowl Subdivision (“FBS”) represents schools that compete in top tier bowl games, making it arguably the most competitive subdivision in Division I.<sup>27</sup> The FBS contains well-known conferences, such as the Big Ten, Pac-12, the Southeastern Conference (SEC), the Atlantic Coast Conference (ACC), and the Big 12.<sup>28</sup> These five conferences are made up of sixty-five programs and are referred to collectively as the “Power Five.”<sup>29</sup> No other sport in this division is further subdivided in this way.<sup>30</sup> Division II includes 310 member schools and provides scholarships or athletic aid to 60% of student athletes in the division.<sup>31</sup> Finally, Division III is the largest division in the NCAA with over 400 member schools.<sup>32</sup> In this division, one out of six students are student athletes; however, Division III member schools do not award athletic scholarships.<sup>33</sup>

The NCAA governance structure consists of committees through which member representatives propose rules for college sports regarding compliance, recruiting, academics, and championships.<sup>34</sup> Member schools ultimately have the power to adopt proposed rules and implement them on their campuses.<sup>35</sup> This structure also allows volunteers from member schools to serve in the legislative groups that govern each division.<sup>36</sup> The Board of Governors is the highest governing authority in the NCAA, comprised of presidents and chancellors from each division.<sup>37</sup> The Association publishes the Board of Governors Report about four or five times each

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[<https://perma.cc/6CCV-EN9X>].

26. *Id.*

27. Chris Murphy, *Madness, Inc.: How Everyone is Getting Rich Off College Sports, Except the Players* 4–5 (Mar. 2019), <https://www.murphy.senate.gov/download/madness-inc> [<https://perma.cc/B7Y3-K9BH>].

28. *College Football Conferences*, ESPN, <http://www.espn.com/college-football/conferences> [<https://perma.cc/ZTW4-JBHB>].

29. Murphy, *supra* note 27, at 5.

30. *NCAA Division I*, *supra* note 25.

31. *Our Three Divisions*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> [<https://perma.cc/9UNZ-WFQP>].

32. *About Division III*, NCAA, <http://www.ncaa.org/about?division=d3> [<https://perma.cc/4TRH-MS9>].

33. *Our Three Divisions*, *supra* note 31.

34. *What is the NCAA?*, *supra* note 17.

35. *Id.*

36. *Governance*, NCAA, <http://www.ncaa.org/governance> [<https://perma.cc/RT78-TRR7>].

37. *Id.*

year, outlining the agenda for the meeting, issues discussed, and any decisions made during the meeting.<sup>38</sup>

The NCAA emphasizes amateurism as a major pillar of collegiate athletics, ensuring all college athletes compete on a level playing field.<sup>39</sup> The underlining idea of this principle is that student athletes and their participation in collegiate athletics should be motivated first and foremost by education.<sup>40</sup> Therefore, the Association emphasizes the importance of “maintaining a clear line of demarcation between college athletics and professional sports.”<sup>41</sup> The NCAA does not define amateur or amateurism in their bylaws or manuals, instead it defines what an amateur athlete is by describing what it is not.<sup>42</sup> However, the NCAA Division I Manual (the “Manual”) does define student athlete.<sup>43</sup> The Manual states that a *student athlete* is a student who enrolled in a university in response to solicitation from a member of the university’s athletics staff to ultimately compete in a collegiate athletics program.<sup>44</sup> The Manual defines *professional athlete* as an individual “who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.”<sup>45</sup> The Manual goes on to define *pay* as “the receipt of funds, awards, or benefits not permitted by the governing legislation of the Association for participation in athletics.”<sup>46</sup> The rules outline the Amateurism Certification Process that student athletes and institutions must complete for athletes to secure eligibility for practice or competition.<sup>47</sup> The Manual also lists the various ways in which an individual can lose

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38. *Id.*

39. Stacey Osburn, *Board of Governors starts process to enhance name, image, and likeness opportunities*, NCAA (Oct. 29, 2019, 1:08 PM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities> [https://perma.cc/M85F-GGH7].

40. NCAA, *2019-20 NCAA Division I Manual*, 3 (Aug. 2019), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [https://perma.cc/UUX9-9V73].

41. Sheetz, *supra* note 1, at 871 (quoting *2013-14 NCAA Division I Manual 1*, 1 (2013) <http://www.ncaapublications.com/productdownloads/D114.pdf> [https://perma.cc/N5XP-A6AY]).

42. NCAA, *2019-20 NCAA Division I Manual*, *supra* note 40.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 62.

47. *Id.* at 63.



his or her amateur status, including “using his or her athletic skill for pay; entering into an agreement with an agent; or accepting a promise of pay.”<sup>48</sup>

## 2. Association & Member Schools’ Profitability

The commercialization of college sports provides the NCAA and its member schools with large profits primarily generated from ticket sales, merchandise, television contracts, and other various revenue streams.<sup>49</sup> In 2018, the NCAA reported over \$1 billion in total revenue.<sup>50</sup> Proceeds from television and marketing rights alone account for over \$800 million of the total reported revenue.<sup>51</sup> Similarly, the Association reported about \$57 million in revenue from sales, services, and other similar activities.<sup>52</sup> The NCAA suggests that it provides over \$10 million in scholarships to students and member schools annually.<sup>53</sup> However, the NCAA only awards these scholarships to student athletes to pursue a graduate degree or to “complete their undergraduate degree after they have exhausted their eligibility for other athletics-related financial aid.”<sup>54</sup>

According to the Department of Education, college athletics programs generated \$14 billion in total revenue in 2018.<sup>55</sup> Division I and Division II member schools award over \$2.9 billion in athletics scholarships annually to about 150,000 student athletes.<sup>56</sup> In 2011, the NCAA enacted legislation allowing member schools to award multi-year scholarships.<sup>57</sup> While this was a step in the right direction to

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48. *Id.*

49. Murphy, *supra* note 27, at 2–3.

50. DELOITTE & TOUCHE LLP, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES: CONSOLIDATED FINANCIAL STATEMENTS AS OF AND FOR THE YEARS ENDED AUGUST 31, 2018 AND 2017, SUPPLEMENTARY INFORMATION FOR THE YEAR ENDED AUGUST 31, 2018, AND INDEPENDENT AUDITORS’ REPORT 4 (2018).

51. *Id.*

52. *Id.*

53. *NCAA Scholarships & Grants*, NCAA, <http://www.ncaa.org/about/resources/ncaa-scholarships-and-grants> [<https://perma.cc/7DKJ-BK98>].

54. *Id.*

55. *Equity in Athletics Data Analysis*, U.S. DEPARTMENT OF EDUCATION, <https://ope.ed.gov/athletics/Trend/public/#/subjects> [<https://perma.cc/WMU6-SLPM>].

56. *Scholarships*, NCAA, <http://www.ncaa.org/student-athletes/future/scholarships> [<https://perma.cc/JJY6-RACV>].

57. Bright, *supra* note 1, at 179.

protect student athletes, the legislation received backlash from athletic directors and universities who argued that the legislation would hinder the process of recruiting new players.<sup>58</sup> Although the legislation ultimately created stability for student athletes, the opposition shown by member schools indicates their desire to control the financial power over their student athletes.<sup>59</sup>

NCAA member schools, specifically Division I schools, generate a substantial amount of money from endorsement deals.<sup>60</sup> In 2018, college programs executed the largest endorsement deals with Nike, Adidas, and Under Armour.<sup>61</sup> The University of California, Los Angeles conducted an endorsement deal with Under Armour valued at an annual average of \$12.76 million, making it the most valuable deal that year.<sup>62</sup> Other top programs such as the University of Louisville and the University of Washington executed deals with Adidas for an average annual value of \$10.96 million and \$7.89 million respectively.<sup>63</sup> Nike continued to dominate college athletics branding by establishing a deal with the University of Texas valued at an annual average of \$9.76 million.<sup>64</sup> These examples highlight the market demand for collegiate endorsements that may be available to high performing student athletes during their collegiate career.<sup>65</sup>

### B. *Sherman Antitrust Act*

It is important to understand how the Sherman Antitrust Act (“Sherman Act”) relates to the NCAA, specifically how courts have

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58. *See id.* at 180.

59. *Id.* at 181.

60. *See* Daniel Kleiman, *The Most Valuable College Endorsement Deals 2018*, FORBES (Sept. 11, 2018, 9:54 AM), <https://www.forbes.com/sites/danielkleinman/2018/09/11/the-most-valuable-college-apparel-deals-2018/#6c32f1df4be9> [https://perma.cc/D8WX-U2C6].

61. *Id.*

62. Daniel Kleiman, *The Most Valuable College Apparel Deals: UCLA Leads As Gear Companies' New Mindset Thwarts Rivals*, FORBES (Sept. 13, 2019, 8:00 AM), <https://www.forbes.com/sites/danielkleinman/2019/09/13/ucla-most-valuable-college-apparel-deals/#2645d8146762> [https://perma.cc/ND3X-GSBL].

63. *Id.*

64. Daniel Kleiman, *The Most Valuable College Endorsement Deals 2018*, FORBES (Sept. 11, 2018, 9:54 AM), <https://www.forbes.com/sites/danielkleinman/2018/09/11/the-most-valuable-college-apparel-deals-2018/#6c32f1df4be9> [https://perma.cc/D8WX-U2C6]; Kleiman, *supra* note 62.

65. *Id.*

interpreted whether the Association's regulations are subject to the Sherman Act's protection. The Sherman Act prohibits the restraint of any trade or commerce that has a commercial or business objective.<sup>66</sup>

When bringing a claim under the Sherman Act, "plaintiffs must show (1) that there was a contract, combination, or conspiracy; (2) the agreement unreasonably restrained trade under either per se rule of illegality or rule of reason analysis; and (3) that the restraint affected interstate commerce."<sup>67</sup> The conduct at issue must have restrained trade, commerce, or commercial competition.<sup>68</sup> When analyzing a Sherman Act claim, courts established the *rule of reason* analysis and evaluated reasonableness by weighing the anticompetitive effect against the procompetitive justifications.<sup>69</sup> To apply the *rule of reason* test, the plaintiff must show that a cognizable market exists.<sup>70</sup> The plaintiff bears the burden of proving that the challenged conduct has a significant adverse impact on competition as a whole.<sup>71</sup> If the plaintiff meets their initial burden, the burden then shifts to the defendant who must provide evidence that the conduct has sufficient procompetitive "redeeming virtues."<sup>72</sup> Then, if the defendant provides sufficient procompetitive effects, the plaintiff must show that any procompetitive effects argued by the defendant could be achieved with less restrictive means.<sup>73</sup>

It is also important to evaluate how the Sherman Act interacts with the NCAA and the Association's amateurism rules. Courts typically grant the sports industry vast deference when deciding cases involving antitrust claims.<sup>74</sup> Some critics refer to this as *special treatment*.<sup>75</sup> The NCAA amateurism defense originated in the Supreme Court case *NCAA v. Board of Regents of the University of Oklahoma*.<sup>76</sup> In this case, members of the NCAA argued that the

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66. Greene, *supra* note 1, at 83.

67. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1091 (N.D. Cal. 2019).

68. Holthaus, *supra* note 1, at 377.

69. *Id.* at 378.

70. *Id.* at 377–78.

71. *Id.* at 378.

72. *Id.*

73. *Id.*

74. Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 249 (2014).

75. *Id.*

76. *Id.*

Association's plan to televise college football games violated antitrust laws.<sup>77</sup> The plan limited "the total amount of televised intercollegiate football" games and "the number of games that any one team may televise."<sup>78</sup> It also prohibited any member of the NCAA from selling television rights except as permitted by the plan.<sup>79</sup> In determining the reasonableness of the restraint, the Court decided that the promotion of amateurism and academic ideals are sufficient procompetitive virtues under the *rule of reason* analysis and are consistent with the goals of the Sherman Act.<sup>80</sup> The Court also described amateurism as an economic justification, arguing that amateurism rules are essential to the unique product of college football.<sup>81</sup> This analysis asks courts to balance the "anticompetitive economic effects of restrictions on student athletes with the social benefits of amateurism to college sports."<sup>82</sup> Critics argue that the promotion of amateurism is a social goal and therefore should have no impact on the legal analysis of the restraint.<sup>83</sup> Although *Board of Regents* did not involve the regulation of student athlete compensation, Justice Stevens emphasized compensation caps to explain why competing institutions must cooperate to continue marketing NCAA sports products.<sup>84</sup> Justice Stevens agreed with the NCAA's argument that the amateurism rules protect collegiate sports from becoming minor league or professional athletics.<sup>85</sup>

*Board of Regents* was not the first antitrust claim against the NCAA and will not be the last. The overall basis for bringing an antitrust claim against the Association is that the member schools under the NCAA conspire to keep student athletes' compensation fixed at tuition and educational fees, essentially forming a covenant not to compete.<sup>86</sup> However, courts in the most notable antitrust cases

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77. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).

78. *Id.* at 94.

79. *Id.*

80. Feldman, *supra* note 74, at 252.

81. *Id.* at 252–53.

82. *Id.* at 257.

83. *Id.*

84. Thomas Baker, *Why the Latest NCAA Lawsuit is Unlikely to Change its Amateurism Rules – But it Should*, FORBES (Sept. 11, 2018, 12:40 PM), <https://www.forbes.com/sites/thomasbaker/2018/09/11/the-economics-of-amateurism-breaking-down-the-latest-lawsuit-against-the-ncaa/#498b23e62478> [<https://perma.cc/2LRD-94QK>].

85. *Id.*

86. Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, 14

have continually agreed that “the rules governing intercollegiate athletics are not always subject to strict antitrust analysis.”<sup>87</sup>

### C. Case Law

The NCAA is no stranger to court battles regarding the validity and enforceability of its amateurism rules and overall conduct.<sup>88</sup> Historically, the majority of litigation focused on allegations that the NCAA rules violate antitrust laws.<sup>89</sup> Over time, current and former student athletes fought for their right to compensation, making progress through the following noteworthy cases.<sup>90</sup>

#### 1. Gaines v. NCAA

To establish a Section 2 violation of the Sherman Act, the court must determine that there was an unlawful exercise of monopoly power by an organization. Under Section 2, an unlawful monopoly consists of “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from the growth or development as a consequence of a superior product, business acumen, or historic accident.”<sup>91</sup> The federal antitrust laws are in place to prevent restraints on “free competition in business and commercial transactions.”<sup>92</sup> In *Gaines v. NCAA*, the ultimate question was whether the NCAA amateurism and eligibility rules were “unreasonably exclusive” or “anticompetitive.”<sup>93</sup> Gaines argued that the NCAA rules were exclusive because they discouraged talented college football players from pursuing a career in the NFL and created a system of maintaining control over the sport’s top athletes.<sup>94</sup> The court determined that the NCAA eligibility rules were not in place to provide the Association with a commercial advantage, rather they were meant to protect the unique product of college football from commercial influences.<sup>95</sup> Therefore, the court held that

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SPG ANTITRUST 46, 49 (2000).

87. Greene, *supra* note 1, at 83.

88. Baker, *supra* note 84.

89. *Id.*

90. *Id.*

91. *Gaines v. NCAA*, 746 F. Supp. 738, 742 (M.D. Tenn. 1990).

92. *Id.* at 743.

93. *Id.* at 745.

94. *Id.*

95. *Id.* at 744.

the NCAA amateurism and eligibility rules were not subject to scrutiny under Section 2 of the Sherman Act.<sup>96</sup>

## 2. Banks v. NCAA

In 1992, the NCAA faced another challenge to its rules under a slightly different theory.<sup>97</sup> Braxton Banks, a college football player, filed suit against the NCAA alleging that the Association's "no-draft" and "no-agent" rules violated antitrust laws under the Sherman Act.<sup>98</sup> Banks argued that the NCAA rules restricted trade in two specific ways.<sup>99</sup> First, he argued the NCAA restrains trade by prohibiting member universities from allowing athletes to rejoin college athletics once that athlete has elected to be considered in the draft or hired an agent to pursue professional sports.<sup>100</sup> Second, Banks broadly argued that the NCAA placed a restraint on trade by requiring member institutions to follow the Association's strict rules and declining to grant waivers of those rules.<sup>101</sup> Ultimately, the Seventh Circuit noted the previously held requirement that in order to make a claim for a violation of the Sherman Act, the plaintiff must allege anticompetitive effects on a market.<sup>102</sup> Because Banks did not allege that the NCAA rules had an anticompetitive impact on an identifiable market, the court affirmed the district court's dismissal for failure to state a claim.<sup>103</sup>

## 3. O'Bannon v. NCAA

The NCAA rules serve a procompetitive purpose by promoting an understanding of amateurism, thereby preserving consumer demand for college sports.<sup>104</sup> In *O'Bannon v. National Collegiate Athletic Association*, a group of current and former college football and men's basketball players alleged that the NCAA compensation rules violated the Sherman Act by restricting trade relating to the

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96. *Id.* at 745.

97. *Banks v. NCAA*, 977 F.2d 1081, 1083–84 (7th Cir. 1992).

98. *Id.* at 1088.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1087.

104. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1059 (9th Cir. 2015).

athletes' NIL.<sup>105</sup> After an appeal from the district court ruling in favor of the plaintiffs, the Ninth Circuit contemplated whether the NCAA rules were subject to antitrust laws and if so, whether they were an unlawful restraint on trade.<sup>106</sup> The Ninth Circuit held that although the NCAA rules were likely procompetitive, they were still subject to antitrust laws and should be analyzed under the *rule of reason*.<sup>107</sup> Under the *rule of reason*, the court identified two relevant markets affected by the NCAA rules: the college education market and the group licensing market.<sup>108</sup> The court concluded that the NCAA rules had an anticompetitive effect on the college education market, reasoning that without the rules, colleges would compete with each other by offering compensation beyond the institution's cost of attendance.<sup>109</sup> Although the Ninth Circuit agreed that banning compensation for NIL violated antitrust laws, the court struck down Judge Wilken's suggestion at the district level that student athletes benefit from this use of their NIL in the form of \$5,000 annually.<sup>110</sup> The court reasoned that the NCAA had the power to control payments that are non-educational or that are not "tethered to education."<sup>111</sup> Ultimately, the court rejected the district court's decision and allowed the NCAA to maintain their amateurism rules, finding that the rules were likely procompetitive.<sup>112</sup>

In these cases, the courts established that the Association's rules protected the unique nature of college sports and were not "unreasonably exclusive" or "anticompetitive."<sup>113</sup> Similarly, plaintiffs must allege anticompetitive effects on an identifiable market in order to bring a valid claim against the NCAA.<sup>114</sup> Although the Association's rules are subject to antitrust laws, courts have also found that the Association's rules are likely procompetitive and that the

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105. *Id.* at 1055.

106. *Id.* at 1052–53.

107. *Id.* at 1053.

108. *Id.* at 1056–57.

109. *Id.* at 1057.

110. Marc Tracy, *The NCAA Lost in Court, but Athletes Didn't Win, Either*, NY TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/sports/ncaa-court-ruling-antitrust.html> [<https://perma.cc/PVN9-UH7C>].

111. *Id.*

112. Mike Stocz et al., *Student Athlete Compensation: An Alternative Compensation Model for All Athletes Competing in NCAA Athletics*, 1 J. HIGHER EDUC. ATHLETICS & INNOVATION 82, 85–86 (2019).

113. Gaines, 746 F. Supp. at 742.

114. Banks, 977 F.2d at 1083–84.

NCAA has the power to control payments that are not related to education.<sup>115</sup> Based on this analysis, courts have historically provided the NCAA with favorable treatment regarding challenges to its amateurism and eligibility rules.<sup>116</sup>

### III. FAIR PAY TO PLAY ACT

In September 2019, Governor Gavin Newsom signed Senate Bill No. 206, which will allow California students competing in collegiate athletics to obtain compensation and representation.<sup>117</sup> The Bill, originally proposed by Senator Nancy Skinner, will take effect in January 2023 and will be added to the California Education Code.<sup>118</sup> The provisions in this legislation, called the Fair Pay to Play Act (“the Act”), challenge historic rules prohibiting student athletes from receiving compensation for their NIL.<sup>119</sup>

First, the Act directly discusses the issue of compensation, addressing the rights of student athletes, athletic organizations and associations, and postsecondary educational institutions.<sup>120</sup> The first provision expressly prohibits any postsecondary education institution from enforcing a rule that prevents a student competing in intercollegiate athletics from receiving compensation for their NIL.<sup>121</sup> Within the first provision, the Act states that a student athlete’s receipt of compensation shall not affect their scholarship eligibility.<sup>122</sup> The Act goes on to state that any group or organization with authority over intercollegiate athletics, including the NCAA, “shall not prevent a student participating in intercollegiate athletics from receiving compensation for their NIL.”<sup>123</sup> The provision also addresses postsecondary educational institutions, stating that any group or organization with authority over intercollegiate athletics shall not

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115. Tracy, *supra* note 110.

116. *See generally* Gaines, 746 F. Supp. 738; Banks, 977 F.2d 1081; O’Bannon, 802 F.3d 1049.

117. Tom Goldman, *College Athletes in California Can Now be Paid Under Fair Pay to Play Act*, NPR (Sept. 30, 2019, 5:23 PM), <https://www.npr.org/2019/09/30/765834549/college-athletes-in-california-can-now-be-paid-under-fair-pay-to-play-act> [<https://perma.cc/78JJ-S9H8>].

118. *Id.*

119. *Id.*

120. 2019 Cal. Stat. 3526.

121. *Id.*

122. *Id.*

123. *Id.*



prevent a postsecondary educational institution from competing in intercollegiate athletics due to the compensation of one of its student athletes.<sup>124</sup> The Act defines *postsecondary educational institution* as “any campus of the University of California or the California State University, an independent institution of higher education, or a private postsecondary educational institution.”<sup>125</sup> The Act applies to individuals competing in intercollegiate athletics, but it maintains the current rule prohibiting prospective student athletes from receiving compensation.<sup>126</sup>

The next group of provisions addresses a student athlete’s ability to obtain professional representation while competing in intercollegiate athletics.<sup>127</sup> The Act permits student athletes to obtain professional representation regarding legal matters and contracts, representation by agents, and legal representation by an attorney.<sup>128</sup> Professional representation must be licensed in California and comply with relevant sections of the Business and Professional Code regarding agent and legal representation.<sup>129</sup>

The Act specifies how potential student athlete contracts should cooperate with their respective team contract.<sup>130</sup> The student athlete’s contract to receive compensation for their NIL should not conflict with the athlete’s team contract, and the student athlete must disclose the nature of the contract with an official at the athlete’s education institution.<sup>131</sup> Team contracts that are modified, renewed, or entered into after the enactment of the legislation must not prevent a student athlete from using their NIL for a commercial purpose while the student athlete is not engaged in official team events.<sup>132</sup>

One provision specifically addresses the receipt of compensation in relation to a student athlete’s scholarship.<sup>133</sup> The provision states that a student athlete’s scholarship is not considered compensation for the purposes of the Act, and a scholarship must not

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

be revoked due to a student athlete's receipt of compensation or use of professional representation.<sup>134</sup>

#### IV. NCAA MODERNIZATION

After California passed the new legislation, the NCAA faced pressure to announce its position.<sup>135</sup> The NCAA agreed that changes need to be made but that changes should occur on a national level through the Association's governance structure.<sup>136</sup> California is not alone in this movement.<sup>137</sup> According to the NCAA Division I Update on the NIL topic, "thirty-one additional states have introduced or are expected to introduce [NIL] related legislation."<sup>138</sup> Florida announced its support for the legislation, and New York revealed a similar, yet more progressive, bill called the New York Collegiate Athletic Participation Compensation Act.<sup>139</sup> The Association argued that different legislation at the state level would create an unfair playing field for universities and student athletes.<sup>140</sup> The NCAA announced that each division will modernize their rules in response to the state and federal legislative environment.<sup>141</sup>

##### A. Board of Governors Report

On October 29, 2019, the NCAA revealed that the Board of Governors ("the Board") will start the process "to enhance name, image, and likeness opportunities" for collegiate athletes.<sup>142</sup> Michael

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134. *Id.*

135. Dan Murphy, *What California Bill Means for Image and Likeness Debate*, ESPN (Oct. 1, 2019), [https://www.espn.com/college-football/story/\\_/id/27585301/what-california-bill-means-ncaa-image-likeness-debate](https://www.espn.com/college-football/story/_/id/27585301/what-california-bill-means-ncaa-image-likeness-debate) [<https://perma.cc/39PV-HND3>].

136. *NCAA Statement on Governor Newsom Signing SB 206*, NCAA (Sept. 30, 2019, 10:44 AM), <http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gov-newsom-signing-sb-206> [<https://perma.cc/9J47-SXYP>].

137. Jabari Young, *Florida and NY Push Bills to Compete with California's NCAA 'pay to play' Law*, CNBC (Oct. 24, 2019, 2:29 PM), <https://www.cnbc.com/2019/10/24/florida-and-ny-push-bills-to-compete-with-californias-ncaa-pay-to-play-law.html> [<https://perma.cc/Q6HU-4PU9>].

138. *NCAA Division I Update on the review of Name, Image and Likeness*, NCAA (Dec. 2019), [https://ncaaorg.s3.amazonaws.com/governance/d1/resources/D1Gov\\_DecMembershipWebinar.pdf](https://ncaaorg.s3.amazonaws.com/governance/d1/resources/D1Gov_DecMembershipWebinar.pdf) [<https://perma.cc/3QHZ-NECU>].

139. Young, *supra* note 137.

140. *NCAA Statement on Governor Newsom Signing SB 206*, *supra* note 136.

141. Osburn, *supra* note 39.

142. *Id.*

Drake, chair of the Board, said that the NCAA must embrace change and continue to take affirmative steps for additional flexibility as the Association has done in recent years.<sup>143</sup> The Board announced this decision after reviewing recommendations provided by the NCAA Federal and State Legislation Working Group (“the Group”).<sup>144</sup> The Group consisted of presidents, commissioners, athletic directors, administrators, and student athletes.<sup>145</sup> The Group spent several months gathering feedback from current and former student athletes, coaches, faculty, and commissioners to provide the Board with an informed and thorough report (“the Report”).<sup>146</sup> Acknowledging that suggestions from each NCAA division are necessary before finalizing any changes, the Group made the following recommendations:

- Assure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate.
- Maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
- Ensure rules are transparent, focused and enforceable and facilitate fair and balanced competition.
- Make clear the distinction between collegiate and professional opportunities.
- Make clear that compensation for athletics performance or participation is impermissible.
- Reaffirm that student-athletes are students first and not employees of the university.
- Enhance principles of diversity, inclusion and gender equity.
- Protect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution.<sup>147</sup>

The Report emphasized that the use of an athlete’s NIL should in no way be considered a substitute currency in a *pay for play* model.<sup>148</sup>

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. Federal and State Working Group, *Report to the NCAA Board of Governors*, NCAA 3–4 (Oct. 23, 2019), [https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec\\_boardgov/Oct2019BOG\\_Report.pdf](https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf) [<https://perma.cc/534Y-RK2F>].

148. *Id.* at 3.

Another problem that the Report notes is the lack of uniformity that individual state legislation, like the California law, will create.<sup>149</sup> One of the most important aspects of this process is drafting rules that each state will adopt, allowing national consistency.<sup>150</sup> The Group will continue to collect suggestions and evaluate options until April 2020, while each division begins drafting potential new rules.<sup>151</sup> The Board instructed each division to begin the process but specified that each division must submit their proposed rules by January 2021.<sup>152</sup> This deadline falls before the California legislation is set to take effect in 2023.

The Group analyzed the NIL opportunities on a continuum, noting potential issues and examples of regulation on both ends of the spectrum.<sup>153</sup> On one end, the Group stated that student athletes should receive compensation for their NIL when it is in the interest of promoting their work product or business, especially when unrelated to athletics.<sup>154</sup> In the event that the work product or business is related to athletics, the Group suggested that the NCAA implement certain regulations to monitor any potential abuse.<sup>155</sup> The Group listed examples of potential regulations including prior approval by athletic directors or university representatives and prohibiting school involvement in the development or promotion of related opportunities.<sup>156</sup> On the other end of the spectrum, the Group addressed one of the more obvious concerns: allowing student athletes to receive compensation for their NIL would be the equivalent of allowing student athletes to receive compensation for participating in athletic events.<sup>157</sup> The Group noted again that this form of compensation is potentially *pay for play*, which is inconsistent with the collegiate model.<sup>158</sup> The Report suggested that the NCAA prohibit agreements that require or encourage enrollment in a particular school or group of schools.<sup>159</sup> Another potential regulation involves

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149. *Id.*

150. *Id.*

151. Osburn, *supra* note 39.

152. *Id.*

153. Federal and State Working Group, *supra* note 147, at 4.

154. *Id.*

155. *Id.*

156. *Id.* at 5.

157. *Id.* at 6.

158. *Id.*

159. *Id.*

restricting college athletes or third parties from using any institutional, conference, or NCAA brand marks in the activity.<sup>160</sup>

### B. *Division Regulations*

The NCAA instructed each division to evaluate their current rules and draft new or amended rules.<sup>161</sup> The Report outlines two areas where the NCAA needs to address NIL compensation: (1) compensation for NIL when promoting work product or business and (2) compensation derived from a student athlete's association with their university or participation in NCAA athletics.<sup>162</sup>

In a short statement regarding new action by the NCAA, the Board already provided more information on how to realistically address the compensation issue than any proposed legislation. The text of the Act itself lacks any indication of how California institutions will regulate student athlete compensation or even who holds that responsibility.<sup>163</sup> The Report mentions consistency as one of the most important aspects of responding to the legislative environment.<sup>164</sup> As this Comment points out, California is not the only state to announce new legislation. If every state enacted similar legislation but included different requirements, such as the New York bill requiring distribution of 15% of revenue to student athletes, it would be nearly impossible to regulate collegiate sports. Therefore, consistency is the basis for drafting new regulations for all NCAA member schools to implement.

The Report differentiates the first type of compensation by work product or business unrelated to athletics and work product or business that is related to athletics.<sup>165</sup> The most difficult issue will be determining where value driven by the work product ends and value driven by the student athlete's NIL begins.<sup>166</sup> The Report suggested that the NCAA may address these concerns by requiring prior approval from an athletic director or representative.<sup>167</sup> In order for this regulation to work, each university would need to create an athletic

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160. *Id.*

161. Osburn, *supra* note 39.

162. Federal and State Working Group, *supra* note 147, at 4, 6.

163. 2019 Cal. Stat. 3526.

164. Federal and State Working Group, *supra* note 147, at 4, 6.

165. *Id.*

166. *Id.*

167. *Id.*

director position to keep track of which student athletes this regulation applies to and monitor whether the student is seeking approval or not; this would require significant time and commitment from the athletic director. It would also be beneficial to implement penalties for noncompliance, another aspect requiring time and commitment by representatives.<sup>168</sup>

Division III delegates provided updates and received input at the 2020 NCAA Convention.<sup>169</sup> The Division III Issues Forum highlighted the NIL topic, discussing potential areas of change.<sup>170</sup> Delegates at the forum led the conversation on innovative compensation models that allow compensation for the use of NIL, noting that any new legislation related to NIL issues would not be presented until the 2021 Convention.<sup>171</sup> Division III rules currently include specific exceptions that allow the use of NIL, such as “institutional, charitable, educational and nonprofit; modeling and other non-athletically related promotional activity; media activities; and student athlete’s own business.”<sup>172</sup> At the convention, members stated that “fairness, equity, and opportunity” were key concepts to consider as the modernization process continues.<sup>173</sup>

#### V. IMPACT AND SUGGESTIONS

As this Comment emphasizes, the NCAA is committed to adopting a comprehensive solution that allows student athletes participating in college athletics to benefit from the use of their NIL, so long as that compensation complies with the NCAA collegiate model.<sup>174</sup> The NCAA acknowledges that as the realm of college athletics changes, student athletes have a right to benefit from the use

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168. *Id.*

169. See Jeremy Villanueva, *DIII Issues Forum Highlights NIL, Generational Gap*, NCAA (Jan. 24, 2020, 8:23 PM), <http://www.ncaa.org/about/resources/media-center/news/diii-issues-forum-highlights-nil-generational-gap> [<https://perma.cc/9NZN-HQ89>].

170. *See id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Michelle Brutlag Hosick, *2020 NCAA Convention: Division I Preview*, NCAA (Jan. 17, 2020, 9:18 AM), <http://www.ncaa.org/about/resources/media-center/news/2020-ncaa-convention-division-i-preview> [<https://perma.cc/TQ8M-KTNM>].

of their reputation while competing at the collegiate level.<sup>175</sup> NCAA President Mark Emmert addressed concerns surrounding the use of NIL at the NCAA 2020 Convention, stressing the importance of the Association's role in developing rules that support student athletes.<sup>176</sup> Emmert stated that he "regularly meets with lawmakers" and noted that their concerns are broad and span more issues than just NIL.<sup>177</sup> He defined the ongoing debate as one over "inherent fairness."<sup>178</sup> Emmert closed the presentation by saying, "[the NCAA] may need help from Congress and others along the way, but this is our job."<sup>179</sup>

By highlighting their role in this process, the NCAA outwardly takes responsibility for implementing effective change. The NCAA must adapt its bylaws and implement a new compensation model for all member schools to follow. The Association maintains a strict distinction between amateurs and professional athletes, and allowing student athletes to receive compensation while in college will affect the meaning of those words. Therefore, the NCAA must reevaluate the definitions contained in its bylaws and amend the language to reflect the Association's modernization. The NCAA must also develop and implement a new compensation model that considers the proposed changes and the demands of student athletes.

#### A. *Definitions that Create Consistency*

The NCAA continues to voice its opinion on one major problem with the new legislation: the possibility that student athlete compensation will be a substitute currency in a *pay for play* model.<sup>180</sup> Following the recommendations in the Report, the NCAA must amend its bylaws and redefine the terms at issue as the Association develops a new compensation model. One problem with the California legislation is the name itself. The Act is referred to as the Fair Pay to Play Act, insinuating that student athletes will be paid simply for their participation athletic programs. In reality, the Act allows for student

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175. *See id.*

176. *See* Charlie Henry, *Emmert Sets Stage for Transformative Year in College Sports*, NCAA (Jan. 23, 2020, 8:00 PM), <http://www.ncaa.org/about/resources/media-center/news/emmert-sets-stage-transformative-year-college-sports> [https://perma.cc/6KSB-MKRX].

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* Federal and State Working Group, *supra* note 147, at 2.

athletes to receive compensation not for their participation in athletics but for the use of their NIL, mannerisms, and overall identity. Even more controversial, the New York bill would require each NCAA member school in New York to set aside 15% of their revenue from athletic ticket sales to divide among student athletes.<sup>181</sup> The goal of the Group and the NCAA is to create new rules that anticipate and allow for future compensation of college athletes while preserving amateurism in the collegiate model.<sup>182</sup>

The NCAA does not define amateur athlete, but it does define professional athlete. Essentially, the NCAA defines professional athlete as an individual who receives payment for their participation in an athletic event; therefore, the NCAA should redefine *pay* and *compensation* to ensure that student athletes do not receive payment for their participation even if they receive compensation while competing in college athletics. The rules should differentiate between professional athletes who receive a salary for their participation in sporting events and collegiate athletes who receive compensation for their NIL—essentially their public appeal. This would ensure clarity when drafting and enforcing new regulations and would protect the Association's notion of amateurism.

### B. Fair & Enforceable Compensation Model

The NCAA should create a compensation model that allows student athletes to receive compensation for their NIL, while honoring its fundamental beliefs in amateurism and commitment to education. To achieve these goals, the most effective model is a trust fund model that distributes money on a predetermined schedule. However, the trust fund model is not new. While the models suggested in the past are beneficial to student athletes and provide a solution to the compensation issue, they are vulnerable to attacks based on employment status, personal regulation, and education. The best model to adopt is a distributed trust fund compensation model with modifications that account for the NCAA's focus on amateurism and education; the concern that student athletes will be viewed as

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181. Jabari Young, *Florida and NY Push Bills to Compete with California's NCAA 'pay to play' Law*, CNBC (Oct. 24, 2019 2:29 PM), <https://www.cnbc.com/2019/10/24/florida-and-ny-push-bills-to-compete-with-californias-ncaa-pay-to-play-law.html> [<https://perma.cc/Q6HU-4PU9>].

182. Osburn, *supra* note 39.



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employees; and student athletes' best interests. The proposed framework has three components: the right to receive payments, scheduled distribution, and regulation and oversight.

### 1. Right to Receive Payments

First, the proposed model clearly indicates that student athletes will have the right to receive compensation for their NIL and that their compensation will be placed in a trust fund. The NCAA should adopt a trust fund model similar to those suggested in the past but should not allow student athletes to receive any part of institution's revenue from merchandise incorporating the student athlete's NIL. Instead, this model should focus on the student athlete's ability to engage in endorsement deals related to their NIL. The model should not make any comparisons to student athletes as employees or indicate that compensation is for their athletic ability. Essentially, all endorsement deals should originate from third parties, removing the possibility that universities compensate the student athlete directly.

Various arguments focus on a multiyear scholarship or trust fund structure for compensation. For example, one model suggests a percentage-based trust fund in which the student athlete receives a percentage of the NCAA's revenue from merchandise containing the student athlete's NIL.<sup>183</sup> In this model, the terms of the trust fund, specifically the percentage of revenue, are negotiated during the recruiting process.<sup>184</sup> Even though this model allows student athletes to receive compensation, it potentially infringes too far into the realm of professional sports. Negotiating terms and percentages during the recruitment process undermines the meaning of amateurism and leads to inequality among member schools and student athletes.

Two other trust fund based models have been suggested over the years.<sup>185</sup> In *O'Bannon*, the plaintiffs suggested a trust fund model in which compensation would be placed in a trust fund until the student athlete graduated or left the school.<sup>186</sup> The International Olympic Committee ("IOC") adopted a similar structure; however, it allowed student athletes to access the funds both during and after their

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183. McLeran, *supra* note 1, at 287–88.

184. *Id.* at 288.

185. See Sheetz, *supra* note 1, at 889.

186. *Id.*

time competing.<sup>187</sup> The IOC model suggests that student athletes are entitled to withdraw funds during their competition season only to pay for necessary expenses.<sup>188</sup> However, after the conclusion of the competitive season each year, student athletes have the right to access any remaining funds at their discretion.<sup>189</sup> Both of these models incorporate a percentage of revenue from the sale of merchandise containing the athlete's NIL.<sup>190</sup> Although these arguments provide examples of possible solutions, they either contain specific flaws, making them difficult to implement, or they came at a time when the NCAA felt less pressure to initiate change. However, the NCAA is now at a point where a trust fund model may be the most effective option to satisfy the demands of student athletes.

The model proposed in this Comment allows student athletes to receive compensation for their NIL based on endorsement deals they make during their collegiate career, rather than receiving distributions from the NCAA or their university's revenue. The money received from endorsement deals should be placed in a trust fund and distributed based on a schedule, which is detailed in the second component of this structure.

## 2. Scheduled Distribution

The second component of this structure is the distribution method. The terms of the contract should outline a percentage of the compensation that the student athlete may receive while competing in college athletics. This structure differs from the trust fund models described above because the percentage the athlete receives will not come from the university's revenue. The student athlete will receive the percentage of their compensation at the end of each academic year. The student athlete will receive the remainder of the compensation upon graduation from the university they attend. If the student athlete elects to pursue professional athletics before obtaining their degree, essentially initiating a breach of contract, the student athlete forfeits a predetermined percentage of their compensation to the NCAA and their member school. This provides an incentive for student athletes to

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

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continue their education and compensates the NCAA and member institution for any loss of expected benefits. Withholding part of the student athlete's compensation until graduation also emphasizes the NCAA's focus on education.

In comparison to the *O'Bannon* model, the model proposed in this Comment gives student athletes the right to receive a fraction of their compensation at the end of each academic year. However, it is similar to the *O'Bannon* model by withholding the remainder of compensation until the student graduates or leaves the institution. Like the IOC model, the model proposed here allows student athletes to receive part of their compensation during their time at the university. However, unlike the IOC model, student athletes do not have the ability to access the funds at any time. Also, this model does not suggest that the NCAA or member schools have the ability to regulate the ways in which the student athlete uses the distributed funds.

### 3. Regulation & Oversight

The third component of the proposed model requires that a representative from the NCAA and the member university oversee the execution of the contract. When executing endorsement deals, student athletes must comply with uniform terms generated by the NCAA and member schools. If an athlete fails to comply with the defined terms in any way, the athlete loses their eligibility to compete in NCAA events. Uniform terms will ensure consistency in the ways that student athletes receive compensation and avoid issues affecting the eligibility of the athlete or member school. The NCAA should also consider including terms that limit the length of contracts. For example, student athletes may not execute compensation contracts that extend longer than five years; however, they may renegotiate contracts to align with the student athlete's eligibility schedule.

The trust fund model proposed in this Comment addresses certain issues that other suggested models ignore, increasing the probability of its success if adopted by the NCAA. The revenue sharing aspect of various models creates a problem regarding the status of the student athlete during their time at the institution. If the athlete receives a percentage of the university's revenue, the athlete begins to look more like an employee of the university, rather than a student. To avoid the possibility that student athletes become employees, the NCAA should adopt a compensation model that

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ignores revenue sharing. Also, the proposed model does not allow the NCAA to regulate the student athlete's use of compensation funds, giving student athletes complete control over their compensation.

The NCAA should also consider how modernization will affect individuals that member schools intend to recruit. The right to receive compensation as a student athlete will not only affect college athletes but also high school athletes. To address this issue, the NCAA should restrict the type of student athlete eligible to receive compensation. The NCAA could implement this restriction in two ways. First, the Association could amend their eligibility rules. If athletes receive compensation or execute a contract to receive compensation before competing at the collegiate level, they will be ineligible to compete in NCAA athletic events. This method would reduce the possibility of paying student athletes to compete. The second way that the NCAA could create this type of restriction is to include a term in compensation contracts that requires proof of enrollment at a member school. Although the NCAA's current bylaws may address this issue in some way, it is important that the NCAA create as much consistency as possible moving forward to ensure fairness and equity across the different sports and divisions.

## VI. CONCLUSION

The Act from California and similar legislation finally forced the NCAA to make significant changes regarding student athletes' right to compensation. As the NCAA continues to modernize its rules, the Association must act in the best interest of student athletes and consider the purpose of the proposed legislation. Although the rules may be marginally different across NCAA divisions, the critical factor of modernization is adapting and enforcing the regulations in a uniform manner. The trust fund structure proposed in this Comment maintains the concept of amateurism by avoiding any inclination that the student athlete receive payment solely for their participation or commitment to participate at a particular university. Student athletes will have the right to receive compensation for the use of their NIL by engaging in endorsement deals during their time competing in college athletics. The proposed model considers the call to action by student athletes, highlights their right to receive compensation for their NIL, and maintains the NCAA's amateurism standards.