

Executive Summary of Legal Reviews
(Released: July 30, 2021)

Last year, the Knight Commission on Intercollegiate Athletics completed a year-long examination of how the governance and structure of Division I sports can better serve college athletes, their institutions, and the mission of intercollegiate athletics. The Commission concluded it was time for transformational change.

The Commission's "[Transforming the NCAA D-I Model](#)" report, released in December 2020, made a series of bold recommendations focused on four key areas:

- 1) The creation of a separate entity, dubbed the National Collegiate Football Association (NCFA), to oversee and manage all aspects and governance of the sport of FBS football including its championship. The NCFA would be completely independent of the NCAA and funded by College Football Playoff (CFP) revenues, which are already managed independent of the NCAA;
- 2) Continued NCAA oversight of the national operations and championships for all Division I sports other than FBS football, but including FCS football under a reorganized governance structure;
- 3) Adoption of governing principles by both the NCAA and proposed NCFA that prioritize college athlete "education, health, safety, and success in the operation of intercollegiate athletics" and ensure that college presidents and chancellors remain accountable for all athletic programs at their institutions; and,
- 4) Changes to the current NCAA revenue distribution system under the existing structure as well as in the proposed structure.

The report also reiterated a call for the adoption of the Commission's principles, advanced in April 2020, to guide new rules to allow college athletes to earn compensation from third parties for the use of their name, image and likeness (NIL) under a uniform approach providing sufficient guardrails to prohibit institutional "pay-for-play."

The Commission recognizes any remedy for college sports' problems should not create legal challenges that are worse than what ails it. Bold and transformational change – like any change in college sports – has potential legal implications. The Knight Commission engaged two leading national legal firms to thoroughly assess the antitrust and Title IX implications of our governance and revenue distribution recommendations. Winston & Strawn provided a legal analysis of antitrust matters and Church, Church, Hittle + Antrim conducted a legal analysis of Title IX implications. These analyses were completed prior to the June 21, 2021 ruling of the Supreme Court in *NCAA v. Alston*.

The general conclusions are as follows:

- The creation and operation of a separate entity to govern the sport of FBS Football (dubbed the National Collegiate Football Association or NCFA) should not increase the legal risk regarding antitrust or Title IX;
- For the NCAA and non-NCFA institutions, the creation and operation of the NCFA eliminates future legal exposure to potential antitrust litigation related to NCFA football because the NCAA would no longer regulate, and non-NCFA institutions would not participate in, FBS football; and,
- The creation of the NCFA may enhance opportunities for gender equity.

The full reports can be found [here](#).

Antitrust Analysis

Winston & Strawn was engaged to evaluate potential antitrust risks associated with the creation of the NCFA, with a focus on the NCFA's development of membership criteria and related restrictions. The firm's review examined how the NCFA's decisions on these issues may impact antitrust exposure for the NCFA, the NCAA, member institutions, and non-NCFA institutions, and endeavored to identify possible risk management options for the Knight Commission's new model for DI sports under antitrust law.¹ The antitrust analysis draws four central conclusions:

- 1) "The development of a standalone NCFA to separately govern FBS football can be seen as a form of risk mitigation for the NCAA, as it will shift prospective antitrust exposure arising out of FBS football from the NCAA to the NCFA. This, in turn, will eliminate FBS football-related antitrust exposure for the NCAA itself, going forward, and for any NCAA member institutions and conferences that do not participate in the NCFA."
- 2) "While the creation of the NCFA will not eliminate the antitrust risks that currently permeate Division I college sports, with counseling and vigilance, the NCFA should not increase antitrust exposure beyond the status quo."
- 3) "Member institution and conference antitrust exposure would remain unchanged."
- 4) "NCAA and NCFA member institutions themselves are unlikely to see a material change in their antitrust exposure since, as a general matter, schools' antitrust liability stems from their participation in their conferences and/or the NCAA."

Areas that could raise antitrust scrutiny and should be carefully considered or avoided by the NCFA and the NCAA include:

- Limiting the number of games member institutions may televise;
- Limiting the salaries that a school may pay its coaches;
- Prohibiting full cost-of-attendance scholarships for athletes;
- Any agreement between the NCFA and the NCAA not to compete with one another, including an agreement prohibiting NCFA or NCAA members from competing in regular season games against members of the other entity;
- Any agreement between the NCFA and NCAA on athlete compensation rules, including limiting the permitted number of scholarships for college athletes; and

¹ Winston & Strawn was not retained to provide any advice about NIL restrictions, setting player compensation limits, or the related *Alston* case. These subjects were expressly outside the scope of the firm's engagement.

- Any agreement between the NCAA and NCFA prohibiting members from fielding two football programs—one in the NCAA and one in the NCFA.

Finally, any antitrust risks attributable to overlapping governance in the NCFA and NCAA can be mitigated by implementing independent governance firewalls to ensure that the NCFA schools do not participate in deliberations or voting regarding the rules or policies that are applicable to the NCAA's current Football Championship Subdivision (FCS). Only FCS matters (or comparable future classification) would need to be segregated in this manner.

Title IX Analysis

The Church, Church, Hittle + Antrim review of the Knight Commission's new model for DI sports with respect to Title IX makes four central conclusions:

- 1) "Member schools of the NCFA will continue to be subject to Title IX, just as each are now as member schools of the NCAA."
- 2) "Title IX currently poses legal, reputational, and financial risks to universities and colleges. There is even greater scrutiny on Title IX compliance in the current collegiate sports landscape with budget cuts schools are facing due to COVID-19 and in the wake of the gender disparities that occurred in women's collegiate sport championships for certain winter and spring sports in 2021. This same scrutiny will likely exist notwithstanding the creation of the NCFA."
- 3) "Creating the NCFA based on the principles delineated in the Commission's Transforming the D-I Model Report ("Reform Report") likely maintains the status quo regarding Title IX."
- 4) "If creation of the NCFA results in a level-set of revenue distribution across Division I as described in the "Reform Report," institutions may be in a financial position to provide greater monetary support to advance Title IX purposes."

Expanded guidance from the report includes:

- a) If member schools of the NCFA offer different benefits to male student-athletes than their female student-athletes, those different benefits could implicate the treatment areas under Title IX, and institutions could be responsible for determining how to offer offsetting benefits for female student-athletes.
- b) Schools that belong to the NCFA will be required to comply with Title IX, as is currently the case. That means that those schools must ensure participation opportunities for male and female student-athletes comply with Title IX; athletics aid for male and female student-athletes comply with Title IX; and laundry list treatment areas for male and female student-athletes comply with Title IX.
- c) Based on the current law and legal precedent, the NCAA is not subject to Title IX, which likely means the NCFA would not be either, unless the NCFA exerts significantly more control over its member institutions than the NCAA currently does. Examples of ways that the NCFA could exert more control over its member institutions than the NCAA currently does and thus trigger Title IX liability for the NCFA itself include: the NCFA limiting or controlling coaches' salaries for NCFA football coaches or spending on facilities; controlling schedules of each NCFA member's games; and having budgetary requirements for NCFA institutions.

- d) If the NCFA has different rules than the NCAA, and those rules potentially impact aspects of Title IX, then the schools will have to adapt to ensure they can still comply with Title IX in the face of those new rules.
- e) How the Office of Civil Rights (OCR) would view new rules is uncertain because these governance shifts were not at all contemplated when Title IX was first enacted. Title IX issues could arise if NCFA football student-athletes are provided with greater benefits than female student-athletes of NCAA sports. It is important to note OCR takes a wholistic view when evaluating compliance with Title IX. It does not look at one benefit in a vacuum. Rather, if the benefits in a treatment area that female student-athletes receive are equitable to those that male student-athletes receive, Title IX compliance is achieved.