

Memorandum

**PRIVILEGED & CONFIDENTIAL
ATTORNEY WORK PRODUCT**

TO: The Knight Commission on Intercollegiate Athletics

FROM: Winston & Strawn LLP

DATE: May 21, 2021

RE: Antitrust Considerations for the National College Football Association's Membership Criteria and Restrictions

EXECUTIVE SUMMARY

The Knight Commission on Intercollegiate Athletics (“the Commission”) has asked Winston & Strawn to provide legal analysis, from an antitrust perspective, on certain aspects of the restructuring of Division I college football proposed by the Commission in December 2020. Pursuant to that proposal, Football Bowl Subdivision (“FBS”) athletic programs would separate from the National Collegiate Athletic Association (“NCAA”) to form their own independent, self-governing entity, the National College Football Association (“NCFA”). This memo evaluates potential antitrust risks associated with the creation of the NCFA, with a focus on the NCFA’s development of membership criteria and related restrictions.¹ We examine how the decisions made by the NCFA on these issues may impact antitrust exposure for the NCFA, the NCAA, member institutions, and non-NCFA institutions, and identify possible options for risk management as the Commission refines its NCFA governance proposal.

While the creation of the NCFA will not eliminate existing antitrust exposure for the NCAA, for the most part it will not increase exposure beyond the status quo. Instead, if developed carefully, a standalone NCFA to separately govern FBS football could serve as a form of risk mitigation for the NCAA, as it will shift prospective antitrust damages exposure arising out of FBS football from the NCAA to the NCFA. This, in turn, will eliminate many aspects of prospective FBS football-related antitrust exposure for the NCAA and for any NCAA member institutions and conferences that do not participate in the NCFA.

The NCFA will need to carefully implement its membership criteria and other restrictions in coordination with antitrust counsel. Because the NCFA would conduct itself like a single sports league, it is likely that most of its membership criteria and restrictions will be subject to the more flexible rule of reason, which permits an antitrust defendant to justify its restrictions under federal antitrust laws (as opposed to other circumstances in which the restrictions may be condemned as

¹ Although the NCAA currently defines its compensation restrictions (including name, image, and likeness (“NIL”) restrictions) as eligibility rules, we view those restrictions to be covered by several subsections of Question C, which are outside the scope of our engagement by the Commission. Accordingly, we reference, but do not elaborate on, those issues herein.

unlawful *per se*). Justifying a restraint-of-trade means establishing that the challenged rules serve a competition-enhancing purpose that outweighs any competition-reducing restrictions. For example, member agreements regarding which teams may be NCFA members, or whether NCFA athletes must be students at the university they represent, are likely to survive antitrust scrutiny under the rule of reason test. On the other hand, agreements that limit athlete compensation will continue to present the same types of antitrust risk that the NCAA has had to litigate over the past few decades.

Similarly, the NCFA and the NCAA will need to exercise caution as to whether and when to enter into agreements with each other, as restrictions that limit competition between the two organizations would create potential antitrust exposure. This too will require close coordination with antitrust counsel, as the validity of each agreed-upon restriction between the NCFA and NCAA would be viewed in light of all relevant facts. That said, as explained below, the only type of agreements that should present a material antitrust risk would be those concerning Division I football, *i.e.*, between FCS schools and what are now the FBS schools. As a general matter, it is unlikely that the NCFA and NCAA could agree that one entity's football games will take place on certain days of the week or at certain times while the other organization's games will take place on other days or at other times. Nor could the two associations agree to prohibit their members from participating in regular season games against one another, just as FBS and FCS schools may currently compete during the regular season.

BACKGROUND

A. The Current NCAA Model

The NCAA's Division I football programs are subdivided into the FBS and the Football Championship Subdivision ("FCS"), with the FBS serving as the top tier and the FCS serving as the second tier of Division I football. There are also a number of Division I schools that do not offer a football program at all. The ACC, Big 10, Big 12, Pac-12, and SEC constitute a subset of the FBS, known as the "Autonomy Five" or "Power Five" conferences, that wields a disproportionate level of control in NCAA decision-making. The Autonomy Five conferences also dominate the NCAA monetarily; in 2014, the NCAA enacted governance changes permitting the Autonomy Five to collectively create their own rules in several key areas, including with respect to some narrowly defined areas of student-athlete compensation and benefits (such as cost of attendance and rules relating to permissible meals and snacks, insurance, and pre-enrollment expenses and support). The Autonomy Five member schools enacted rules within the NCAA's parameters, which further enhanced the divide between the wealthiest and least wealthy programs in Division I. These changes also codified a weighted voting system in which the Autonomy Five holds 37.5 percent of the voting power, the remaining five FBS conferences hold 18.8 percent, the FCS and non-Division I football conferences collectively share 37.5 percent, and student-athletes and faculty representatives hold 3.1 percent each.

FBS football generates its own revenues through an annual four-team College Football Playoff ("CFP") and FBS "Bowl Games," making it largely independent of the NCAA. These revenues are distributed only to FBS member schools and conferences. The NCAA does, however,

absorb the national expenses associated with the sport (*e.g.*, the costs of FBS-related eligibility and rules enforcement, catastrophic insurance, legal services, health and safety administration, and injury research), even though neither it nor its non-FBS member schools and conferences share in FBS revenues. Moreover, the NCAA credits FBS schools for their football programs when accounting for the number of sports and scholarships offered by a school for purposes of the NCAA revenue distribution formula. In recent years, as FBS football revenues have continued to rise, the NCAA's distribution formula has only exacerbated the inequities among its FBS and non-FBS conferences and institutions. Notably, because the CFP is independently managed, no single entity is currently accountable for all of FBS football.

The NCAA has faced, and continues to face, numerous antitrust challenges. These lawsuits are costly to defend, and the outcomes have been far from consistent.² Absent systemic change, there is reason to believe that the current model will continue to subject the NCAA, its member schools, and its conferences to substantial antitrust exposure. Even more fundamentally, with NCAA conferences and schools increasingly focused on generating revenues, there are many who believe that the NCAA's current model no longer serves to "safeguard[] the well-being of student-athletes"³ or "to maintain college athletics as a public trust, rooted in the mission of higher education."⁴ As public perception that the NCAA's decisions are guided by revenues rather than student-athlete welfare continues to expand, the NCAA's "amateurism" defense to antitrust lawsuits will become less and less viable, as we have already seen from one antitrust litigation (*O'Bannon v. NCAA*) to the next (*Alston v. NCAA*).

B. The Knight Commission's Proposed Reforms

The Commission has made three core recommendations to the NCAA with the aim of helping to restore equity in Division I college sports.⁵ *First*, the Commission proposed the creation of a separate entity, the NCFA, to oversee and manage FBS football. The NCFA entity would be completely independent of the NCAA and funded by CFP revenues. *Second*, the Commission proposed continued NCAA oversight of the national operations and championships for all Division I sports other than FBS football, including FCS football. *Third*, the Commission recommended that both the NCAA and the NCFA adopt governing principles that prioritize student-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.

² Compare, *e.g.*, *Deppe v. NCAA*, 893 F.3d 498, 503–04 (7th Cir. 2018) (unsuccessful antitrust challenge to student-athlete transfer rule), and *Smith v. NCAA*, 139 F.3d 180, 185–86 (3d Cir. 1998) (unsuccessful antitrust challenge to student-athlete eligibility rule), with *O'Bannon v. NCAA*, 802 F.3d 1049, 1074–79 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016) (successful antitrust challenge to limitations on athletic scholarships), *Law v. NCAA*, 134 F.3d 1010, 1024 (10th Cir. 1998) (successful antitrust challenge to caps on coaches' salaries), and *NCAA v. Board of Regents*, 468 U.S. 85, 120 (1984) (successful antitrust challenge to NCAA control over television rights for regular-season football games).

³ *Who We Are*, NAT'L COLLEGIATE ATHLETICS ASS'N, <https://www.ncaa.org/about/who-we-are> (last visited May 7, 2021).

⁴ *Transforming the NCAA D-I Model*, THE KNIGHT COMMISSION, Apr. 5, 2021, at 19.

⁵ *Id.*

Carving out FBS football into an independently governed NCFA will relieve the NCAA of obligations to those programs, while allowing the NCFA to tailor its operations to the characteristics and needs of FBS football more effectively than the NCAA presently can. The Commission's proposed structure will shift some antitrust risk between the two entities, making the NCFA responsible for antitrust risk associated with FBS football on a going-forward basis, while the NCAA would remain responsible for antitrust risk arising from FCS football and all other sports.

C. Basic Principles of Antitrust Law

The antitrust laws exist to promote and protect free market competition. The Sherman Antitrust Act prohibits competitors from agreeing to eliminate or decrease competition in a given market. Generally, antitrust claims challenging NCAA rules are based on the fact that NCAA members compete with one another in myriad respects both on and off the field. Accordingly, the NCAA's rules constitute agreements between competitors to limit competition with one another. For example, in *Law v. NCAA*, the plaintiffs—assistant basketball coaches—argued that an NCAA rule capping the amount that member schools could pay certain assistant coaches was an agreement between competitors to decrease competition for the services of assistant coaches. The plaintiffs successfully argued that, absent this NCAA rule, the free market—not the NCAA—would determine how much each school would pay its assistant coaches.

Not all agreements among competitors are violations of the antitrust laws. Antitrust claims will succeed only if the agreement at issue is judged to be an *unreasonable* restraint on free market competition. In assessing the reasonableness of an agreement among competitors, a court will employ one of three approaches to determine the agreement's effect on competition: (1) the *per se* rule; (2) a “full” rule-of-reason analysis; or (3) a “quick-look” rule-of-reason analysis.

The *per se* rule applies where the category of agreement is well-understood to so egregiously thwart competition that the court does not need to conduct an in-depth analysis of the benefits and detriments of the agreement. This rule is typically reserved for agreements among horizontal competitors to fix prices, divide markets, or rig bids. Notably, the U.S. Department of Justice is trying to add to the category of *per se* illegal behavior agreements among competing employers that concern hiring and compensating employees. As you can see, many of the NCAA's rules concerning compensation for athletes, and limiting athletes' movement from school to school, would in most industries be condemned as *per se* illegal (even criminal). But, in *Board of Regents*, the Supreme Court held that the NCAA needs latitude to superintend college athletics, and thus one of the other two antitrust standards—*i.e.*, the “full” and “quick-look” versions of the rule of reason—will in most circumstances be applied to NCAA rules. 468 U.S. at 98-104. The same principle holds for many sports leagues and joint ventures which, without some forms of collaboration, might not be able to offer their products or services at all. *Am. Needle Inc., v. NFL*, 560 U.S. 183, 203 (2010). In fact, the NCFA will more closely resemble a joint venture than the NCAA because the NCFA will be a single-tier, single-sport league, and most joint venture restrictions are subject to rule-of-reason analysis.⁶

⁶ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

Under the multi-step “full” rule-of-reason review, the court first examines the product and geographic market in which the agreed-upon restraint exists (the “relevant market”). The plaintiff must show that the competitors who made the agreement control a sufficient portion of that market to alter the forces of free competition. If the plaintiff makes this showing, the defendant must demonstrate a legitimate procompetitive justification for the agreement. Often, defendants will try to show that the agreed-upon restraint creates an efficiency or a distinct product that ultimately benefits competition (and thus, consumers). If the defendant demonstrates a viable procompetitive justification, the plaintiff must then show that the restraint is not reasonably necessary to accomplish the defendant’s justification and that the procompetitive objective can be achieved through substantially less restrictive means. Alternatively, the plaintiff may show that, on balance, the challenged rules are more anticompetitive than procompetitive.

The “quick-look” rule of reason is a truncated version of the full rule-of-reason analysis. Courts will take an abbreviated “quick look” at an agreement if, from experience, the court knows that the restraint at issue is likely to have anticompetitive effects. Under this approach, the court will skip the detailed analysis of product and geographic markets and move directly to an evaluation of the defendant’s stated justification for the restraint and whether that objective can be achieved in a less restrictive manner.

ANALYSIS

Under current precedent, agreements among horizontal competitors (such as schools competing against one another on and off the field in Division I football) are subject to significant antitrust scrutiny. But the impact that NCFA-created membership criteria and restrictions will have on the NCAA’s and NCFA’s antitrust exposure largely depends on the actual criteria and restrictions the NCFA implements. In order to minimize its antitrust exposure, the NCFA will need to carefully develop both its internal restrictions as well as any restrictions that it might agree upon with the NCAA.

It is clear that the creation of the NCFA would shift some antitrust risk from the NCAA to the NCFA. Moreover, so long as the NCFA and NCAA are careful about any agreements between them (discussed below), the creation of the NCFA for the most part should not *increase* the NCAA’s exposure above the status quo.

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. But it should be noted that, as is the case today, member institutions would ultimately bear the costs of a lawsuit and/or damages award against the NCAA or the NCFA, as such expenditures would limit the revenues available for distribution to member institutions, and any court-ordered rule changes would necessarily impact the conduct of individual schools.

A. Key Antitrust Considerations for the NCFA's Membership Criteria and Restrictions.

So long as the NCFA's rules are ancillary to operating the league, its rules will get the benefit of being defensible under the full rule of reason. As noted above, a sports league is generally given some discretion to set criteria for its member teams, the rules of its game, and how its league will be structured. For example, the professional sports leagues restrict their member teams' ability to relocate, which in many contexts would be viewed as a *per se* illegal market allocation, but such restrictions by a sports league are nonetheless generally evaluated under the rule of reason. Of course, having the *opportunity* to defend a restraint under the rule of reason is not the same as *successfully* defending the restraint.

As a starting point, the Supreme Court has provided a handful of examples of the kinds of sports league restrictions that are, in theory, lawful under the Sherman Act. These include rules defining (1) "the conditions of the contest," (2) "[the] size of the field," (3) "the number of players on a team," (4) "the extent to which physical violence is to be encouraged," (5) the "scheduling of games," and (6) requirements that college athletes attend class.⁷ While we expect that the NCFA restrictions falling within these categories are likely to be given deference by courts, the NCFA would still be required to prove, as a factual matter, that they serve a legitimate purpose. For this reason, any NCFA-imposed restrictions would have to be carefully evaluated before implementation in order to mitigate antitrust risk.

There are other types of restrictions that have previously been found to be unlawful and are unlikely to survive scrutiny under the rule of reason. For instance, the NCFA could not place limits on the number of games its member institutions may televise,⁸ cap the salaries that a school may pay its coaches,⁹ or prohibit full cost-of-attendance scholarships for athletes.¹⁰ Still other restrictions have not previously been adjudicated but would likely pose material antitrust risk. For example, if the NCFA requires that its members agree not to participate in games against FCS teams, that agreement could amount to an impermissible refusal to deal under the antitrust laws and expose the NCFA to antitrust lawsuits brought by the NCAA, an FCS school, or even an NCFA member seeking to play such a game. A rule of this type would only be lawful if the NCFA could substantiate a legitimate purpose for restricting NCFA members from playing games against NCAA members, but we expect this would be difficult to do since the current NCAA structure allows for FBS-FCS competitions without any harm.

B. Key Antitrust Considerations for Any Coordination Between the NCFA and NCAA.

As the NCFA develops its organizational structure and position within the college sports ecosystem, it should take the approach that any potential agreement between the NCFA and NCAA must first be vetted by antitrust counsel, so that the antitrust risks of each such agreement can be

⁷ *Board of Regents*, 468 U.S. at 117; *Am. Needle, Inc.*, 560 U.S. at 202–03.

⁸ *Board of Regents*, 468 U.S. at 99.

⁹ *Law*, 134 F.3d at 1024.

¹⁰ *O'Bannon*, 802 F.3d at 1074–76.

evaluated on the basis of its particular facts and justifications. Most importantly, it is critical to bear in mind that any agreement between the NCFA and the NCAA *not to compete with one another*—in particular, as to Division I football—could subject both organizations to antitrust challenge.¹¹ In fact, several of the categories of agreements that we previously said NCFA members could reach among themselves without material antitrust risk could become extremely risky if the NCFA and NCAA coordinated in those same areas. For example, whereas the NCFA could safely set its own agreed-upon schedule, if the NCFA and NCAA were to agree with one another about scheduling FCS and NCFA games at different dates and times to avoid head-to-head competition, such an agreement would likely be found to violate the Sherman Act.

An example of a subject where the NCFA and NCAA should be able to reach agreement without significant antitrust risk includes the two entities agreeing upon on-the-field playing rules when their members compete head-to-head. Whether the NCFA and NCAA could agree on playing rules more broadly—like football team roster size—is a closer question. Agreeing to roster size is likely acceptable for NCFA-NCAA competitions, but it would be harder to justify such an agreement between the NCFA and NCAA for intra-NCAA and intra-NCFA games. In contrast, rules limiting which schools may compete for an NCFA or FCS championship are likely to pass muster. Indeed, under the current regime, the FBS and FCS already effectively operate as two leagues that have agreed on such rules without antitrust challenge.

On the other hand, restrictions prohibiting NCFA or NCAA members from competing in regular season games against members of the other entity (similar to the non-conference competitions that currently exist) are likely to entail more significant antitrust risks. As would any agreement between the two associations on athlete compensation rules, including limiting the permitted number of scholarships for student-athletes. Any such agreement would add an additional dimension to the antitrust risk that both associations would already face for their *own* respective compensation rules.

Another close question is whether the NCAA and/or NCFA may prohibit members from fielding *two* football programs—one in the NCAA and one in the NCFA. If the two organizations agreed with one another on such a prohibition, the agreement could run afoul of the antitrust laws.¹² But if each league individually enacted that rule—perhaps out of concern that consumers would be confused about, for example, which Michigan football team was playing in a given game—a court is more likely, although certainly not guaranteed, to find the rule to be justified.

¹¹ *E.g.*, *FTC v. Actavis*, 570 U.S. 136 (2013); *see also, e.g.*, *Board of Regents*, 468 U.S. at 109 (“[W]hen there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”).

¹² *See, e.g.*, *Metro. Intercollegiate Basketball Ass’n v. NCAA*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004) (finding material question of fact as to whether an NCAA rule requiring NCAA basketball teams to compete only in the NCAA tournament, if invited, violated antitrust laws); *cf. N. Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir. 1982) (prohibiting NFL from enforcing rule that restricted NFL team owners from also owning an NASL team), *cert. denied*, 459 U.S. 1074 (1982).

The Overlapping Governance Issue

We understand our advice that the NCAA and NCFA should avoid coordination or agreement in many areas may seem incompatible with the practical reality that an individual school or conference may want to designate a single school or conference administrator to represent it in both the NCFA and NCAA. Further, we understand that even if a school or conference appointed different individuals to participate in NCAA and NCFA decision-making, each such person would still likely report back to the same institutional President or Board. With the appropriate adjustments by the NCAA, however, the antitrust risks of overlapping NCFA and NCAA governance should be manageable.

The starting point for our analysis on this subject is that the NCAA and NCFA are likely to be deemed horizontal competitors only as to Division I football, *i.e.*, FCS-NCFA. Accordingly, preventing certain agreements or information-sharing between the organizations' members is an issue for the NCFA only as to FCS rulemaking and governance. (We mention "information-sharing" because even though such conduct is not by itself illegal under the Sherman Act, information-sharing among competitors is often used as circumstantial evidence that they in fact reached an unlawful agreement.)

The NCFA and NCAA can mitigate any antitrust risks attributable to overlapping governance in the two organizations 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 FCS. To do this, FCS football deliberations and voting could be bifurcated from other NCAA deliberations and voting for rules that apply to all other NCAA Division I sports. This means that, for any issue affecting all Division I sports or all Division I student-athletes (like compensation or transfers), the NCAA would need to separate discussion and voting regarding rules for FCS football from discussion and voting regarding compensation rules for all other NCAA Division I sports. With this sort of firewall in place, the NCFA should be able to minimize the risk or appearance of an anticompetitive agreement with NCAA/FCS football because the only deliberations and voting taking place when representatives of both the NCFA and NCAA are in the room will only pertain to *non*-football sports. We recognize that this segregation will require rewriting a number of NCAA rules that apply across the board to all Division I sports, but we believe it likely that the NCAA would agree to this bifurcation to minimize the antitrust risks to both organizations.

This framework would be no different than when a member of a corporation's Board of Directors recuses herself from voting on issues in which she has a conflict of interest. For example, the New York City Conflicts of Interest Board ("COIB") has permitted part-time City Planning Commissioners to simultaneously serve on a not-for-profit's Board of Directors, despite the not-for-profit having an interest in real property that may come before the City Planning Commission or the Department of City Planning. The COIB held that persons with these conflicting interests "may continue to serve as Commissioners provided that . . . the Commissioners recuse themselves

at the Commission from matters involving the not-for-profit, and at the not-for-profit from matters involving the Commission or the Department.”¹³

We note that only FCS votes would need to be handled in this segregated manner, as the creation of the NCFA does not create a new issue of NCAA/FCS schools and NCFA/FBS schools “agreeing” on rules concerning other sports—such as a rule applying to both Division I football and basketball. Even if a potential antitrust plaintiff were to come along and challenge, for example, NCFA football programs and NCAA Division I basketball programs agreeing to rules and restrictions, that is no different than the status quo. Moreover, we think that in most contexts it is unlikely that schools would be considered horizontal competitors across different sports programs.

C. Creation of the NCFA Is Likely to Reduce the NCAA’s Antitrust Exposure.

The creation of the NCFA will shift FBS football-related antitrust risk from the NCAA to the NCFA. For example, the restructuring would eliminate on a going-forward basis the NCAA’s antitrust exposure relating to its athlete compensation restrictions for FBS football. We say “going forward,” because the NCFA would not eliminate NCAA antitrust risk relating to FBS football for any viable claims within the Sherman Act’s four-year statute of limitations.

Even if the NCAA were to divest from its role in FBS football, however, its antitrust risk would not be eliminated entirely. The NCAA would still govern FCS football, for instance, and—although FCS revenues are much lower than FBS revenues—the NCAA would retain antitrust risk with respect to those programs. Likewise, the NCAA would still govern all of Division I basketball, which is highly commercial and carries with it the same kinds of legal implications as FBS football, although on a smaller scale. Moreover, the NCAA would continue to maintain commercial aspects of other sports, like television and marketing contracts for baseball and hockey, for example, which may also provide incentives for antitrust plaintiffs to file suit.

As noted, the NCFA could also impact the NCAA’s risk of antitrust liability in a comparative sense. Were the NCFA to impose looser membership (or other) restrictions than the NCAA, and FBS football remained highly successful, that fact could be used as evidence against the NCAA to show that the NCAA’s stricter rules on the same subject matter are not reasonably necessary and thus a violation of the antitrust laws.

D. Member Institution & Conference Antitrust Exposure Would Remain Unchanged.

The creation of, and rules development within, the NCFA will have minimal impact on member institutions’ antitrust risk. Even now, it is unlikely that member institutions themselves would be defendants in an antitrust suit. As a general matter, schools have been subject to antitrust liability through participation in their conferences and/or the NCAA and their agreement to follow

¹³ Decision of Interest: Public Employee Policy & Benefit, 14 City Law 16 (Jan./Feb. 2003) (Conflicts of Interest Board, Advisory Opinion); *see also, e.g.*, Diane Holt Frackle, *Rules of the Road for Directors Serving Two Masters*, LAW360 (Aug. 31, 2015), <https://www.law360.com/articles/694196/rules-of-the-road-for-directors-serving-two-masters>.

the rules of those organizations.¹⁴ This is because suing the rules-making organization (such as the NCAA or a conference) is more manageable for an antitrust plaintiff than litigating against individual organization members. Accordingly, if the NCFA governs FBS football as the NCAA currently does, it is unlikely that individual member schools will be named antitrust defendants. Instead, the NCFA or its participating conferences will likely be defendants when such cases are brought. Similarly, as NCFA member schools will continue to participate in the NCAA for all non-football programs, those schools will remain unlikely to be made individual antitrust defendants with respect to NCAA rules; instead, the NCAA or individual conferences are likely to be the defendants.

That being said, NCFA- or NCAA-participating conferences will not experience a significant change in antitrust risk. Like other NCAA member institutions, most conferences traditionally have not been the subject of athlete- or school-asserted antitrust challenges. This is because, as currently constituted, no individual conference would likely be found to have market power. And assuming that no individual conference has market power, any individual conference's members may agree to restrain trade without committing a Sherman Act Section 1 violation. The antitrust problem arises when the conferences agree to restraints of trade *with one another*, because these would be agreements among competitors with combined market (if not monopoly or monopsony) power, thus resulting in undeniably substantial anticompetitive effects.

Notably, however, whether or not individual member institutions are defendants in antitrust litigation against the NCAA, the NCFA, and/or the conferences, the potential antitrust risks are ultimately borne by the schools. Any cost of litigation or damages award entered against the NCFA would necessarily limit the revenues the NCFA could distribute to its members. The same is true of any litigation or damages award against the NCAA. And any injunctive relief entered against the NCFA and/or the NCAA would necessarily affect the future actions of the organization's member schools themselves. As a practical matter, then, while an individual member school would not be forced to unilaterally defend an antitrust lawsuit, an institution's antitrust risk would be tied directly to that of the NCFA and/or NCAA and the rules that the institution agrees to follow. Thus, because, as noted above, the creation of the NCFA will shift some antitrust liability from the NCAA to the NCFA, any school that does not participate in the NCFA would also be relieved of potential antitrust liability based on the NCFA's actions.

CONCLUSION

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. In many ways, 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.

¹⁴ *E.g.*, *O'Bannon*, 802 F.3d 1049.

APPENDIX
Risk Assessment of Potential Restrictions

Internal (Independent) NCFA Restrictions

Restriction	Risk Level
Playing Rules	Low
Membership Criteria	Low
Prohibition on NCFA Members Playing Games Against NCAA Programs	Moderate
Prohibition on NCFA Members Also Fielding NCAA Teams	Moderate
Transfer Rules	High

Agreed-Upon Inter-Association Restrictions

Restriction	Risk Level
Playing Rules for NCFA-FCS Contests	Low
Only Members of an Association May Compete for Its Championship	Low
Prohibition on Members Sponsoring Teams in Other Organization	Moderate
Student-Athlete Eligibility	Moderate to High (depending on restriction)
Prohibition on Members Playing Games Against Each Other	High
Division of Days/Times of Football Games	High