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Major Violations for the NCAA: How the NCAA can Apply the Dodd-Frank Act to Reform its Own Corporate Goverance Scheme

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By: Jason Rudderman

The financial crisis of 2007 – 2009 sent the United States and the global economy into its worst recession in 90 years.[1] Large, interconnected financial[2] and non-financial institutions were at the center of the financial crisis. As a result, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[3] the "most sweeping changes to the financial system since the New Deal".[4] The effect (or non-effect) of the Dodd-Frank Act has been extensively analyzed for the role that it will play in reshaping the United States' financial institutions and reforming corporate governance within businesses in the United States.[5]

This paper, however, applies the Dodd-Frank Act, and specifically its corporate governance laws, to the National Collegiate Athletic Associate (NCAA).[6] The NCAA has experienced rapid, largely uncontrolled growth over the past decade[7] that has led to an influx of corporate governance and regulatory problems within its member institutions.[8] Since 2004, the median total revenue for

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[1] *See* Nestor M. Davidson, Rshmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV 1607, 1608 (2010). *See generally,* Jeffrey N. Gordon and Christopher Muller, *Confronting Financial Crisis*: *Dodd-Frank's Dangers and the Case for a Systemic Emergency Insurance Fund*, 28 YALE J. ON REG. 151 (2011); Kevin T. Jackson, *The Scandal Beneath the Financial Crisis: Getting a View From a Cultural Mental Model*, 33 HARV. J.L. & PUB. POL'Y 735 (2010); Karl S. Okamoto, *After the Bailout: Regulating Systemic Moral Hazard*, 57 UCLA L. REV. 183 (2009).
[2] *See* Jerome A. Madden, *A Weapon of Mass Destruction Strikes: Credit Default Swaps Bring Down AIG and Lehman Brothers*, 5 Bus L. Brief (Am. U) (2008) (describing the financial condition of AIG, Lehman Brothers, and Bear Stearns and their effect on counterparties before and during the financial crisis).
[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010)(enacted).
[4] Jennifer Liberto, *Wall Street reform ready for final votes*, CNNMONEY.COM, June 25, 2010, http://money.cnn.com/2010/06/25/news/economy/Wall_ Street_Reform/index.htm.
[5] *See,* e.g., Jeffrey N. Gordon and Christopher Muller, *Confronting Financial Crisis: Dodd-Frank's Dangers and the Case for a Systemic Emergency Insurance Fund,* 28 YALE J. ON REG. 151 (2011); Frank A. Mayer, III, *Pricing Risk: Title II of the Dodd-Frank Act Orderly Liquidation Authority,* 30 No. 2 Banking & Fin. Services Pol'y Rep. 1 (2011); Stephen M. Bainbridge, *Dodd-Frank: Quack Federal Corporate Goverance Round II,* 95 MINN. L. REV. 1779 (2011); Christopher M. Bruner, *Corporate Governance Reform in a Time of Crisis,* 36 J. CORP. L. 309 (2011).
[6] *See generally*, David F. Larcker & Brian Tayan, The NCAA Adopts "Dodd-Frank": A Fable, Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-20 (2011).
[7] *See* Revenues and Expenses, NCAA Division I Intercollegiate Athletics Programs Report, 2004-2010, *available at* http://www.ncaapublications.com/p-4237-2004-2010-revenues-and-expenses.aspx.
[8] Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where it Belongs*, 52 B.C. L. REV. 551, 551 (2011) (arguing that the NCAA's sanctions reach is overly limited, in that "they extend only to member institutions, not to individual coaches, players, agents, boosters, or other involved individuals. . . . The sanctions are [also to] broad in that they negatively impact current student-athletes, who are restricted in their ability to transfer without penalty." The article proposes holding head coaches financially accountable for program violations, forcing member institutions to disgorge winnings and suffer financial consequences, and forcing the NCAA to cooperate with professional leagues on player agent issues.).

Football Bowl Subdivision schools has increased from 28.214 million to 48.298 million.[9] The largest NCAA athletic institutions drove the vast majority of that growth, and the gap in revenue between the richest and the poorest member institutions is widening.[10] As with financial institutions, the influx of money itself is not the inherent problem. Money in college athletics is good. When large schools succeed, they help support smaller schools in their conference through revenue sharing plans.[11] It is the lack of control and governance mechanisms regulating the influx of money that poses the risk. Money flowing from the public to athletic associations or NCAA member institutions helps drive the NCAA. But, when money flows from the public, or even from institutions, to student athletes in an impermissible manner,[12] the NCAA slips toward the kind of professionalism that will ultimately cause severe damage to the member institutions and the NCAA as a whole.[13]

As more money flows into the NCAA, its member institutions, and its corporate leaders, new opportunities for exploitation and profits arise. Over the past few years, the NCAA has struggled as agents and boosters begin to play an increasingly significant, but undesirable role in the athletic programs of NCAA member institutions. Cheating amongst players, coaches and administrators is rampant.[14] The NCAA, like the financial industry, is experiencing a period of rapid growth, inconsistent (or a total lack of) enforceable regulation, and a tremendous influx of "foreign" variables into its system. Much like the structured finance, mortgage backed securities (MBSs), and

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[9] *Supra* note 7, at 17.
[10] College Athletics Revenues and Expenses – 2011, *http://espn.go.com/ncaa/revenue/_/year/2009* (noting that in 2011, 5 schools topped the 100 million dollar mark in total revenue (including Alabama, Texas, Ohio State, Florida and Tennessee. By contrast, the 40th most profitable school (Oregon) had just 56 million in revenue.).
[11] NCAA.org, Big 12 schools approve revenue share: First, second-tier TV money to be shared in exchange for rights, http://www.ncaa.com/news/ncaa/article/2011-10-03/big-12-schools-approve-revenue-share (last visited Apr. 29, 2012).
[12] *See generally,* 2011-2012 NCAA Division 1 Manual, Article 12.01-12.6, 14.01-14.12, *available at* http://ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx.
[13] Philip D. Bartz & Nicholas S. Sloey, The Joy of College Sports: Why the NCAA's Efforts to Preserve Amateurism Are Both Lawful and in the Best Interest of College Athletics, BRYAN CAVE BULLETINS, 2, Dec. 13, 2011, *available at* http://www.bryancave.com/bulletins/list .aspx?KeywordPhrase=the+joy.
[14] *Id.* at 1.

collateralized debt obligations that eventually brought down the financial system in the United States, the influx of agents, booster control, and extreme profits within NCAA member institutions threatens the amateur status and ultimate viability of the NCAA and its member institutions.

The NCAA is also experiencing a moral hazard problem. In the financial sector, the idea of government bailouts creates moral hazard problems by effectively insuring large financial institutions.[15] "The notion of 'too big to fail' creates a race to the bottom, whereby institutions attempt to grow faster than regulators can regulate, in order to force themselves into the category of 'too big to fail' to implicate the implicit insurance scheme."[16] The NCAA is experiencing a similar phenomenon, as the largest institutions understand that they bring significant value to the NCAA, and that the NCAA will be hesitant to levy harsh penalties with severe financial consequences on large institutions because of the consequences such penalties would have on the rest of the NCAA.[17]

The NCAA, however, has the opportunity to avoid the fate of the financial industry by adopting modified provisions of the Dodd-Frank Act to reform corporate governance both within NCAA corporate headquarters and member institutions. More stringent regulation of coaches, boosters and agents, harsher penalties for violation of those regulations, and consistent enforcement of such penalties will help curb the impermissible behavior of the NCAA's member institutions.[18]

Part I of this paper briefly discusses the goals of the NCAA and identifies the harms being imposed as a result of the current regulatory regime. Part II of this paper explores the similar market trajectories of the United States financial sector and the NCAA. Part III highlights the need

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[15] Jason Rudderman, *Eliminating Wall Street's Safety Net: How a Systemic Risk Premium Can Solve "Too Big to Fail,"* 11 Fla. St. U. Bus. Rev., 16 (forthcoming 2012).
[16] *Id.*
[17]Michael Rosenberg, *Why NCAA couldn't, and wouldn't, give Miami the death penalty,* SI.COM, Aug. 18, 2011, http://sportsillustrated.cnn.com/2011/writers/michael_rosenberg/08/18/miami.death penalty/index.html.
[18] Jon Saraceno, *NFL's big hit: Will the Saints' penalty change the game?* USA TODAY, Mar. 22, 2012, *available at* http://www.usatoday.com/sports/football/nfl/saints/story/2012-03-21/bounty-program-unprecendented-punishment/53696548/1 (noting that as a result of the Saint's illegal bounty program designed to injure opposing players, the NFL levied the harshest penalty in league history by, among other actions, suspending the head coach for 1 year. The NFL clearly sent a signal to the rest of the league that this kind of behavior will not be tolerated, and that no team is above the law of the league. The NCAA could benefit from sending a similar signal, when the time arises.)

for corporate governance reform. Part IV explores how many of the corporate governance reforms in the Dodd-Frank Act can solve the problems in NCAA corporate governance. The purpose of this part is not to explore the many arguable flaws in the Dodd-Frank Act as it applies to governance in the financial sector, but to explore its novel application to solving the much less complicated, but equally present corporate governance issues in collegiate athletics. Part V concludes.

Part I: Why the lack of workable corporate governance and punishment mechanisms harms student athletes, universities, and the NCAA as a whole

NCAA president Mark Emmert says that the NCAA should remain an institution focused on bettering the academic experience of student athletes through collegiate athletics, and not on acting as a conduit for professional athletics, or as a professional athletic institution.[19] The dangerous trek towards professionalism, de-amatuerization, and corporate governance chaos could produce widespread harm for students, universities, and the ultimate consumer. As Bartz and Sloey discuss, "turning college sports into a pure business – as the critics effectively urge – will not fix the problems" of scandals and rule violations in college sports.[20] Certain restrictions on eligibility requirements are necessary to preserve the unique product of college sports.[21]

The NCAA must continue to enforce its bylaws and regulations in order to preserve the uniqueness of its product. The NCAA's academic standards, for example, are a mechanism for the NCAA to prevent member institutions from competing for recruits on the basis of decreased

[19] NCAA.org, On the Mark: Quotes from President Emmert on various NCAA Topics, http://www.ncaa.org/wps/wcm/connect/public/NCAA/NCAA+President/On+the+Mark (last visited Apr. 29, 2012) (On the collegiate model of athletics, President Emmert, referring to the NCAA as a whole, said that "We must be student-centered in all that we do. The Association was founded on the notion of integrating athletics into the educational experience, and we have to make sure we deliver on that 100-year-old promise. We have to remind ourselves that this is about the young men and women we asked to come to our schools for a great educational experience.").

[20] Bartz & Sloey, *supra* note 13, at 1-2 (allowing professionalism into college sports would actually harm the NCAA and its member institutions).

[21] *Id.* at 16-17 (discussing that the "unique quality of the athletes is that they are college students who are also amateurs. Those unique qualities are what make NCAA sports so popular.").

academic requirements.[22] Similarly, the NCAA's amateurism requirements that restrict pay and other benefits to college athletes are also necessary to preserve the product.[23] Eliminating these requirements "would almost certainly negatively impact the attractiveness of college [sports]."[24]

Professionalizing college sports would make a select few institutions better off, but would harm the vast majority of schools.[25] While most schools operate football and basketball at a profit, when combined with the non-revenue generating men's and women's sports, only 22 NCAA member institutions made a profit in 2010.[26] A lack of regulation and consistency in governance by the NCAA, at the margin, will effectively eliminate most college athletic programs.[27] The biggest, most profitable ones will survive simply because they have the resources to entice athletes to attend their institutions.[28] If an NCAA of 120 Division 1-member institutions is more desirable than one of 10-15, then it is necessary to enforce consistent, accountable regulation and governance upon the NCAA.

Free market proponents will argue that if market forces dictate the elimination of athletic programs at most NCAA institutions, then the market should be allowed to dictate the structure of the NCAA, and pay student athletes, by way of salary above and beyond the value of their scholarship, for their services. But, remember that goal of the NCAA should not be profit maximization—it should be fostering the advancement of academics at the highest level through athletics.

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[22] *Id.* at 18.
[23] Id. at 19.
[24] *Id.* at 23.
[25] *Id.* at 24.
[26] Libby Sander, *22 Elite College Sports Programs Turned a Profit in 2010, but Gaps Remain, NCAA Reports Say,* THE CHRONICLE OF HIGHER EDUCATION, June 15, 2011, http://chronicle.com/article/22-Elite-College-Sports/127921/.
[27] Bartz & Sloey, *supra* note 13, at 24-28.
[28] *Id.* at 25.

The NCAA and its member institutions, much like the country's largest financial institutions, are quickly losing sight of long-term objectives in exchange for short-term profits.[29] For example, the head basketball coach at the University of Kentucky received $350,000 for winning the national title this year, but had just $50,000 in incentives tied to the graduation rate for his players.[30] There is an inherent problem in the fact that member institutions sanction such bonus structures, but provide no real economic or moral incentive for a coach to invest in his or her student athletes' chances at graduation.

Over the past decade, the NCAA has slowly shifted from a focus on amateurism and bettering the educational experience of the student athlete,[31] to focusing on commercialism and profiting from collegiate sports.[32] It is imperative that the NCAA adopt and enforce new regulations to rectify its corporate governance issues and return the NCAA to a forum for healthy amateur competition.

Part II: The similar market trajectories of the United States financial sector and the NCAA

A. The rise and fall of the United States financial sector

The financial crisis began with a decade of a capital influx into the United States.[33] The newfound capital made raising and borrowing money easy, and decreased rates on safe investments such as T-bills, leading to a decline in long- term interest rates.[34] The easy money led financial

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[29] *See generally,* ESPN.com, *Final Four coaches collect bonuses,* Mar. 27, 2012, http://espn.go.com/mens-college-basketball/tournament/2012/story/_/id/7744519/final-four-coaches-john-calipari-thad-matta-rick-pitino-bill-self-poised-keep-cashing-in.
[30] *Id.*
[31] NCAA.org, Where does the money go?: Eye on the money, http://www.ncaa.org/wps/wcm/connect/public/NCAA/Answers/Eye+on+the+Money (last visited Apr. 29, 2012) (stating that the NCAA's core purpose is "to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount.").
[32] Michael J. Critelli, *The Good, Bad and Ugly About the Commercialization of Amateur Sports,* THE HUFFINGTON POST, Apr. 5, 2011, http://www.huffingtonpost.com/michael-j-critelli/amateur-sports_b_844686.html.
[33] Ben S. Bernanke, Chairman of the Fed. Res., *Four Questions about the Financial Crisis* (April 14, 2009) (transcript available at http://www.federalreserve.gov/newsevents/speech/bernanke200904 14a.html).
[34] Ben S. Bernanke, Chairman of the Fed. Res, *Global Imbalances: Recent Developments and Prospects* (September 11, 2008) (transcript available at http://www.federalreserve.gov /newsevents/speech/bernanke20070911a.html).

institutions to become highly leveraged,[35] using hard to value assets like collateralized debt obligations (CDOs) and mortgage backed securities (MBSs) as collateral for loans.[36]

Meanwhile, Wall Street investors noticed a consistent housing price increase from 1990 through 2005, and investors, borrowers and lenders viewed real estate as the one investment that could never decline in value.[37] Wall Street viewed securitizing subprime loans as a way to diversify risk.[38] Investment banks purchased mortgages from a variety of originators and downstream bankers.[39] The investment banks bought thousands of these mortgages, and pooled them together based on factors like the creditworthiness of the borrower and the loan to value ratio of the home.[40] Once the mortgages were pooled together based on these factors, the large pool of similar mortgages was split up into thousands of little slices and sold to investors as MBSs.[41] The slice gives the investor the right to his or her fair share of the payment stream from the larger pool of mortgages.[42] These assets, however, were built on the assumption that housing markets would never decline.[43]

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[35] Roger Lowenstein, *Smart Banks with Dumb Customers Don't Exist,* Bloomberg.com, March 7, 2010, http://www.bloomberg.com/news/2010-03-07/smart-banks-with-dumb-customers-don-t-exist-roger-lowenstein.html (arguing that there "no such thing as a smart bank with a dumb customer; if the loan turns sour, the bank was dumb, too." Leverage allows a "financial institution to increase the potential gains or losses on a[n] . . . investment beyond what would be possible . . . [with its] own funds."); *See also,* Satyajit Chatterjee, *De-Leveraging and the Financial Accelerator: How Wall Street Can Shock Main Street*, The Philadelphia Fed Business Review, Quarter 2, 2010, *available at* http://www.philadelphiafed.org /research-and-data/publications/business-review/2010/q2/brq210_de-leveraging-and-financial-accelerator.pdf (arguing that leverage and maturity transformations caused a relatively small number of mortgage defaults to develop into a systemic financial crisis.).

[36] Bengt Holmstrom, *Discussion of "the Panic of 2007,"* by Gary Gorton, October 14, 2008, *available at* Kansascityfed.org (noting that as the subprime market began to collapse, the MBS's and CDO's became unable to serve as collateral for loans.).

[37] *See,* Interview by ABC News with Robert Schiller (Apr. 8, 2008), http://www.nytimes.com /2010/08/08/business/08gret.html?r=1.

[38] Gretchen Morgenson, *Housing Policy's Third Rail,* N.Y. TIMES, Aug 7. 2010, at BU1.

[39] Posting of James Kwak to The Baseline Scenario: What happened to the global economy and what we can do about it, http://baselinescenario.com/financial-crisis-for-beginners/#securitization.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

When the housing market collapsed, these assets became almost impossible to value.[44] As foreclosed homes went up for sale by the thousands, neighboring homes also lost value because potential buyers were wary of buying a home in a neighborhood with lots of other foreclosures.[45] Without home price appreciation, the homeowners who entered into complex, adjustable mortgages during the housing boom found themselves underwater on their mortgages.[46] Investment bankers who leveraged millions of dollars to purchase mortgages were stuck with homes or payment rights they could no longer sell. The damaged housing market led to frozen credit markets, as financial institutions were left holding billions of dollars of worthless mortgages.[47]

On September 15, 2008, Lehman Brothers filed for bankruptcy while holding billions of dollars worth of MBSs and caused widespread investor and market panic.[48]

B. The similar rise of the NCAA

While a lack of corporate governance in the NCAA does not carry the same systemic threat as the financial markets discussed above, a total failure of the NCAA and, as a result, professional sports, would have large-scale consequences on the United States' economy.[49] The revenue numbers in the NCAA since 2004 are staggering.[50] Median total revenue of NCAA institutions has increased by over 71% during the 6 years from 2004 to 2010. By comparison, for the 7 years prior

[44] Danielle DiMartino and John V. Duca, *Economic Letter – Insights from the Federal Reserve Bank of Dallas: The Rise and Fall of Subprime Morgatges,* November, 2007, *available at* http://www.dallasfed.org/research/eclett/2007/el0711.html.
[45] *Id.*
[46] *Id.*
[47] Ben S. Bernanke, Chairman of the Fed. Res., *Global Imbalances: Recent Developments and Prospects* (September 11, 2008) (transcript available at http://www.federalreserve.gov /newsevents/speech/bernanke20070911a.html).
[48] Jenny Anderson and Eric Dash, *For Lehman, More Cuts and Anxiety*, N.Y. TIMES, Aug. 29, 2008, at C1 (noting that Lehman Brothers incurred losses of 2.8 billion dollars during the second quarter of 2008.).
[49] Chris Isidore, *College Football's $1.1 billion profit,* CNNMONEY.COM, Dec. 29, 2010, http://money.cnn.com/2010/12/29/news/companies /college_football_dollars/index.htm (noting that NCAA profits topped $1 billion dollars in 2010).
[50] Revenues and Expenses, *supra* note 7, at 17.

to the peak of the housing bubble in early 2007, the average home price in the United States increased by approximately 36.8%.[51]

Much like the United States economy, the financial gap between the richest and poorest NCAA member institutions is increasing.[52] The University of Texas, the NCAA's highest revenue generator, earned $143,555,354 in 2010.[53] By contrast, the University of North Texas, the lowest revenue generator of the 120 NCAA Football Bowl Subdivision teams, generated just $10,201,988.[54] The University of Alabama's athletic department had the highest profit in 2010 ($31,684,872), while 72 of the 120 other Division 1 athletic departments failed to return a profit.[55] Meanwhile, the costs of tuition are rising across the board and, even for full scholarship athletes, attending college is becoming an expensive proposition.[56] The market trajectories of the United States economy from 2000 to 2007 and the NCAA from 2004 to present, are eerily similar. Both experienced an enormous increase in revenue and capital influx and struggled to create meaningful, workable, and consistent regulatory regimes to control and manage the growth. Without meaningful corporate governance reform, the NCAA is bound to collapse as schools are driven toward competing for athletes, not fans, in a market driven by player compensation, rather then by academic and athletic opportunity.[57]

Part III: The case for reform of the NCAA rulebook and compliance manual

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[51] Reggie Middleton, *The Global Housing Bubble: It's a Small World After All,* SEEKING ALPHA, Mar. 5, 2009, http://seekingalpha.com/article/124306-the-global-housing-bubble-it-s-a-small-world-after-all.
[52] Jack Gillum & Jodi Upton, *USA Today database: What NCAA schools spend on athletics,* USA TODAY, http://www.usatoday.com/sports/college/ncaa-finances.htm.
[53] *Id.*
[54] *Id.*
[55] Alice Jessop, *Highest Net Income Amongst Athletic Departments,* THE BUSINESS OF COLLEGE SPORTS, Mar. 21, 2012, http://businessofcollegesports.com/2012/03/21/highest-net-income-amongst-athletics-departments/ (note that, like much of the financial sector prior to the collapse, the rich are getting richer in college football).
[56] National College Players Association, *NCPA Scholarship Shortfall Search: NCAA Forces College Athletes to Pay,* http://www.ncpanow.org/research?id=0018 (noting that the out of pocket cost to a full scholarship college athlete can range from $200 to $10,962 per semester) (last visited Apr. 29, 2011).
[57] Bartz & Sloey, *supra* note 13, at 17-18.

The NCAA Constitution states that the NCAA's purpose is to "maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[58] However, there has been widespread criticism of the NCAA and its regulatory framework for " [not] paying student athletes, limiting pay for coaches, measuring academic eligibility requirements in the form of standardized testing and high school curriculum, and using amateurism as a guise for commercialism in college sports."[59] The tilt towards a commercial focus for the NCAA has also permeated the NCAA's member institutions and promoted a win at all costs mentality. Among the NCAA schools that have won a football national championship since 1936, all but two teams, Brigham Young University and Penn State University, have had a major violation in football.[60] A major violation is defined as one that "usually provide[s] an extensive recruiting or competitive advantage [that] can lead to significant penalties against the school and involved individuals."[61] Almost half of the Division 1 NCAA member institutions have had a major violation in football since 1987, and over 80% of those are from the so-called BCS conferences.[62] Since 1987, the Southeastern Conference has won 10 national titles in football, more than any other conference.[63] During that same timeframe, the Southeastern Conference had 13 major football violations, also more than any other conference.[64] The numbers raise the question, is it possible to

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[58] 2011-2012 NCAA Division 1 Manual, *supra* note 12, at 1.3.1.
[59] Weston, *supra* note 8, at 562.
[60] Dennis Dodd, *Championships without cheating? History is against it,* CBSSPORTS.COM, July 6, 2011, http://www.cbssports.com/collegefootball/story/15298370/championships-without-cheating-maybe-doable-but-history-against-it (noting that even the schools without major violations "aren't necessarily crowing over that fact, more like crossing their fingers.").
[61] Brett McMurphy, *Major NCAA violations yield relatively minor consequences,* CBSSPORTS.COM, July 11, 2011, http://www.cbssports.com/collegefootball/story/15312728/major-ncaa-violations-yield-relatively-minor-consequences (major violations include repeated impermissible contact with recruits, and delivering impermissible benefits to players).
[62] Dodd, *supra* note 60.
[63] CBSSports.com, Past FBS champions, http://www.cbssports.com/collegefootball/story/2554072 (last visited Apr. 29, 2011).
[64] Brett McMurphy, *Infractions scoreboard: Nearly everybody gets in on the fun,* CBSSPORTS.COM, July 8, 2011, http://www.cbssports.com/collegefootball/story/15304779/infractions-scoreboard-nearly-everybody-gets-in-on-the-fun.

win in college football without cheating and, if not, why hasn't the NCAA made it impossible to win again after cheating? The "social acceptance of cheating has gotten ridiculous . . . It's only a problem if you get caught. There does not seem to be the moral shame there once was."[65]

One of the main problems with corporate governance inside financial institutions, and the promulgated regulations outside the organizations, is the one time reputational game many managers were playing. For example, a manger has two options: behave honestly, truthfully, and ethically or behave in a self interested, profit maximizing manner. Where these options are aligned, and the honest, truthful, ethical behavior is also the profit maximizing behavior, then many problems of corporate governance disappear. Where, however, as was the case in the financial sector, the profit maximizing behavior is not the honest, truthful, ethical and fair behavior, managers begin to play a different game. Now, managers begin by asking: Why am I pursuing the course or career I am pursuing? Is it for personal fulfillment, or financial gain? Again, where it is for personal fulfillment, the inquiry stops and the manager likely behaves ethically. Where it is for financial gain, the inquiry continues. Now, the manager asks a final question: do the financial rewards I can gain from behaving unethically outweigh the reputational hit I will take as a result of this behavior? If the costs to the manager's reputation outweigh the financial reward, the inquiry ends again, and the manager behaves ethically. Where the financial gain outweighs the reputational hit to the manager, the manager behaves unethically.

From a coaching and player perspective, the inquiry is much the same. The coach, for example, asks whether he should behave in the honest, ethical, rule abiding manner, or in the "win" maximizing manner.[66] Where those two outcomes are the same, the inquiry ends. Where they

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[65] Dodd, *supra* note 60.

[66] Evidence of this behavior is derived from the coaches who knowingly take action that violates a NCAA rule in order to try to gain a competitive advantage on the field. *See* ESPN.com, *Bruce Pearl told recruits of violation,* ESPN.com, Oct 22, 2010, http://sports.espn.go.com/ncb/news/story?id=5714649 (stating that Bruce Pearl, the former men's basketball coach at Tennessee, hosted a BBQ for recruits at his home and told the recruits and their families that "their visit

differ, the coach asks why am I pursuing the course I am pursuing? If it is because of the ultimate desire to win at all costs, the coach cheats. If it is because the coach wants to be a role model for the young men and women he mentors, then he behaves ethically and the inquiry ends. If the coach decides he wants to win at all costs, the coach asks, do the prospective gains from cheating outweigh the costs to my reputation if I am caught? Where the gains outweigh the costs, the coach cheats.[67]

In the financial sector, when a manager decides to pursue financial gain at the expense of a reputational hit, the violation is often incredibly damaging and the consequences are made exceedingly public.[68] However, the golden parachutes present in many executive compensation packages are often so substantial, that any public hit to reputation (if there is one)[69] is minimal in comparison. In college athletics, however, the financial reward from cheating is substantially greater than the cost to a coach's, player's, or administrator's reputation because of the lack of consistently enforceable punishment mechanisms in the NCAA.[70] NCAA President Mark Emmert acknowledged the reputational problem, and recently proposed revised punishment guidelines for

equated to an NCAA violation."); ESPN.com, *NCAA puts Radford on 2-year probation,* ESPN.com Feb, 24, 2012, http://espn.go.com/college-sports/story/_/id/7612521/ncaa-punishes-radford-highlanders-sanctions-brad-greenberg (stating that Radford basketball coaches instructed managers to provide impermissible transportation and lodging benefits to recruits); NCAA.com, *Boise State cited for major violations: Show-cause for former coach, loss of scholarships included,* NCAA.com, Sept. 27, 2011, http://www.ncaa.com/news/ncaa/article/2011-09-13/boise-state-cited-major-violations (noting that Boise State, in addition to multiple recruiting violations, provided impermissible lodging, transportation, practice sessions, financial aid and cash payments to players and recruits); ESPN.com, *NCAA accepts Baylor's penalties,* ESPN.com, Apr. 12, 2012, http://espn.go.com/college-sports/story/_/id/7801565/ncaa-puts-baylor-bears-probation-accepts-self-imposed-penalties-text-messages (noting that Baylor was placed on 3 years probation after coaches made hundreds on impermissible phone calls and text messages to recruits); ESPN.com, *Arizona St. postseason ban upheld,* ESPN.com, Nov. 4, 2011, http://espn.go.com/espn/story/_/ id/7189349/ncaa-upholds-postseason-ban-arizona-state-sun-devils-baseball (discussing a postseason ban and vacation of wins for the Arizona State baseball team, after it was found the head coach failed to promote an atmosphere of compliance and committed a number of recruiting violations).

[67] Id. In all the above scenarios, it is safe to say that coaches committed these recruiting violations because they believed that the gains to be had from signing a key recruit outweighed the risk of the violation.

[68] *See, e.g.,* Michael Rothfeld, Madoff Investors Brace for Lawsuits, WALL ST. J., July 26, 2010, *available at* http://online.wsj.com/public/page/bernard-madoff.html (just one article as part of an entire online section dedicated to the Madoff scandal).

[69] Steven M. Davidoff, *Out of the Ruins: Where Directors Landed,* N.Y. TIMES DEALBOOK, Aug. 2, 2011, *available at* http://dealbook.nytimes.com/2011/08/02/out-of-the-ruins-where-directors-landed/ (noting that often times, managers take extreme risk with very little downside).

[70] Dodd, *supra* note 60 ("The near death penalty handed to USC might have been a good place for the NCAA to start cleaning up [their regulatory regime]. . . . But, the college world is waiting to see if the NCAA infractions committee is going to keep the momentum going [in future punishments.]).

NCAA member institutions to deal with the issue.[71] Emmert emphasized the need for "some sort of constructive fear" in NCAA member institutions.[72] The NCAA's Vice President for enforcement also remarked that the NCAA needs a fair penalty structure, but also one that that is strong and predictable.[73] Member institutions acknowledge that scholarship reductions, postseason bans and coaching suspensions have the greatest deterrence effect and do the most to eliminate the advantages gained from an infraction.[74] However, the NCAA has been more apt in recent years to shy away from using its harshest penalties.[75]

Although the NCAA is taking steps to restructure its enforcement team for more effective regulation,[76] the current "reward [of cheating] outweighs the risk."[77] What fans want, and what the NCAA needs, is a more court-like proceeding—one where "cases . . . are processed quickly and similar penalties [are handed down] for similar violations."[78] During the 2011 football season, 25 programs, including 16 bowl teams and 4 BCS bowl teams were on probation.[79] The consequences for violations in the NCAA are *so* minor that two teams on probation, Alabama and LSU, can still compete for a national title. Of the 72 major NCAA violations handed down since 1987, 30 teams had a higher winning percentage for the five-year period *after* the penalties were levied than they did during the five years *before.*[80] Cheating by NCAA member institutions obviously provides a long-

[71] Steve Wieberg, *NCAA Proposal would ratchet up penalties,* USA TODAY, Feb. 2, 2012, *available at* http://www.usatoday.com/sports/college/story/2012-02-09/ncaas-emmert-backs-tough-enforcement-changes/53033832/1.
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] NCAA.org, *NCAA enforcement restructures for greater flexibility,* NCAA, June 30, 2011, http://www.ncaa.org/wps/wcm/connect/public/ncaa/resources/latest+news/2011/june/ncaa+enforcement+restructures+for+greater+flexibility.
[77] Dodd, *supra* note 60.
[78] *Id.*
[79] *Id.*
[80] McMurphy, *supra* note 62 (but note, probation is a necessary, but only a part, of the story. There are a number of variables that affect the winning percentage of programs after a major violation. One reason for the increased winning percentage is the change in coaching staff that results after a major violation occurs. Programs actually benefit from the violation, as they get a fresh start with a new coach.).

term benefit to its offenders. That benefit, as evidenced by the fact that many teams actually win more frequently after a penalty is levied than they do prior to the penalty, also indicates that the consequences for cheating do little to eliminate the competitive advantage gained by the cheating institution.

PART IV: Where the NCAA structure and governance align with the financial sector, and how the Dodd-Frank Act can help resolve corporate governance problems in the NCAA

With the regulatory inconsistencies and recent historical contexts in mind, I now turn to the provisions of the Dodd-Frank Act that deal with corporate governance in financial institutions and, with some modifications, are equally applicable to the NCAA.

A. Too Big to Fail.[81]

B. Executive compensation

    a. Section 951: requiring shareholder votes on executive compensation.[82]

    b. Section 953: requiring executive compensation disclosure.[83]

    c. Section 954: requiring executives to return compensation in certain circumstances.[84]

C. Regulatory consistency, comparability, and transparency

    a. Section 712: requiring consultation by broker dealers with the CFTC or SEC before making a trade in order to assure regulator consistency, comparability, and transparency.[85]

D. Independent committees

    a. Section 932: providing for an independent board of directors.[86]

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[81] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010)(enacted).
[82] *Id.* at §951.
[83] *Id.* at §953.
[84] *Id.* at §954.
[85] *Id.* at §712.

E. Whistleblower protections

a. Section 1014: the consumer advisory board[87]

A. Too Big To Fail

The opening paragraph of the Dodd-Frank Act states that the purpose of the act is to "promote the financial stability of the United States by improving accountability and transparency in the financial system, to end *'too big to fail,'* to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[88] Similarly, the opening paragraph of the NCAA Rulebook on Enforcement states, "it shall be the mission of the NCAA enforcement program to eliminate violations of NCAA rules and impose appropriate penalties should violations occur."[89]

During the financial crisis, Congress learned quickly that inconsistent treatment of the largest financial institutions would create significant backlash from the public and private sectors, and create confusion in the markets.[90] Title 1 of the Act creates the Financial Stability Oversight Council (FSOC) to "monitor emerging risks to United States financial stability" and to identify and recommend for monitoring those financial and non-financial institutions that pose a systemic risk to the United States financial system.[91] However, knowing the regulatory framework that is in place, large institutions, as part of their growth plan, will consider the likely response of government should the institution fail. The institution knows that the government will likely find that the cost of

[86] *Id.* at §932.
[87] *Id.* at §1014.
[88] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010)(enacted).
[89] 2011 – 2012 NCAA Division 1 Manual, *supra* note 12, at 19.01.1 (the regulation continues, "the program is committed to fairness of procedures and the timely and equitable resolution of infractions cases. The achievement of these objectives is essential to the conduct of a viable and effective enforcement program. Further, an important consideration in imposing penalties is to provide fairness to uninvolved student athletes, coaches, administrators, competitors and other institutions.").
[90] *See* Franklin Allen and Douglas Gale, *Financial Contagion*, 110 J. Pol. Econ. 1 (2000).
[91] The Restoring of American Financial Stability Act of 2010, 11th Congress 2d Session, Report 111-176, Calendar No. 349, at 2.

saving a single, too big to fail institution is outweighed by the cost to the overall economy should that institution be allowed to fail.

> "Thus, in a one-time game, the institution has every incentive to take great risk to ensure that [the damage the institution would do should it fail is so great that] the government will [essentially have no choice but to] bail out the institution. . . . However, the government is involved in a longer term game, and while it may be rational for the government to bail out a financial institution in one period, it may not be rational for the government to send a signal to other institutions, by way of a bailout, that they are able and willing to bail out a failing institution in a future period."[92]

The NCAA has found itself wrapped up in a similar game, whereby institutions, like Ohio State University and the University of Texas, and Conferences like the SEC and Pac 12, have essentially been tagged "too big to fail." These institutions and conferences have positioned themselves so that their "failure," (by way of cheating) and equivalent severe punishment by the NCAA, would have such devastating effects on the schools' conference and the NCAA, that levying serious sanctions on the school would be equivalent to allowing, as the government did, Lehman Brothers to fail.[93] Lehman Brothers, while operating, helped support the United States credit market by issuing loans, receiving loans, and using asset backed securities as collateral in both instances.[94] By analogy, most major conferences have revenue sharing plans, whereby the largest, most profitable ("too big to fail") athletic programs in each conference help support the lower revenue generating schools.[95] As discussed, large financial institutions will ensure that they become so large that the government will be forced to bail them out to avoid a total systemic collapse of the economy. NCAA member institutions do not have the same tools at their disposal to rapidly scale their size and profitability. Instead, and what has happened over recent years, the NCAA has levied lesser penalties on larger institutions for similar violations because of what the larger institutions

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[92] Rudderman, *supra* note 15, at 12-13.
[93] Rethinking the Financial Network, Speech by Andrew G. Haldane, Executive Director, Financial Stability, Bank of England, at the Financial Student Association, Amsterdam (2009). Haldane compares the contagion effect of the financial crisis to the SARS outbreak, highlighting the gross overreaction of the masses that led to the ultimate collapse of a system.
[94] *Id.*
[95] NCAA.org, *supra* note 11.

mean to the profitability and viability of conferences and the NCAA.[96] Large member institutions now have an incentive to "bend" the rules as much as possible without being subject to serious penalties (the threshold of which is *much* higher than with smaller member institutions), and, in turn, the NCAA has incentive to levy harsh penalties on small, low revenue generating institutions in an inadequate attempt to signal to NCAA member institutions that violations will not be tolerated.[97]

As with financial institutions, however, the regulatory scheme to solve "too big to fail" cannot be a hands off approach that allows every systemically important, but struggling, institution to fail. And it cannot be a system of pure ex ante regulations because the ingenuity of the financial markets, and the NCAA, will simply perpetuate a race to the bottom.[98]

The NCAA cannot levy crippling penalties on its largest, most profitable schools because of the systemic impact it would have on the NCAA and its member institutions, nor can it regulate away all violations of NCAA rules through ex ante regulations. What the NCAA can do, however, is adopt the system of ex ante regulations proposed below and develop a framework for punishment that is consistently decided based on the nature of the violations, and not the size, scale, profitability, or history of the member institution.

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[96] Bleacher Report, *Auburn's Cam Newton Got a Day and USC Trojans' Football Got Bush-Whacked by NCAA,* BLEACHER REPORT, Dec. 1, 2010, http://bleacherreport.com/articles/532046-usc-football-auburns-cam-newton-got-a-day-and-the-trojans-got-bushwhacked (noting that it makes a big difference playing in the SEC, as Auburn received a slap on the wrist for its potential pay for play scheme, and USC received sever punishment in a case where the NCAA had little proof of knowledge on the part of the institution.).

[97] *Compare,* Rosenberg, *supra* note 17 (noting that Miami "means" too much to college football for the NCAA to levy sever penalties commensurate with the violations. A Miami booster provided upwards of 70 players with cash, benefits, parties and adult entertainment), with, ESPN.com, *NCAA puts Radford on 2-year probation, supra* note 66 (discussing severe penalties for Radford's basketball program resulting from relatively minor lodging and transportation violations.).

[98] Rudderman, *supra* note 15, at 16.

B. Sections 951, 953, 954 and how these compensatory regulations can be applied to players and coaches

In the years leading up to the financial crisis, executive compensation ballooned largely out of control. As a result, Congress enacted sections 951, 953, and 954 of the Dodd-Frank Act.[99] Section 951 provides that at least once every 3 years, executive compensation shall be subject to a shareholder vote.[100] At least once every 6 years, shareholders shall vote to determine whether to vote on executive compensation every 1, 2, or 3 years.[101] However, the SEC may exempt small issuers from the voting requirements if it "disproportionally burdens" the issuer.[102]

Section 953 requires disclosure to shareholders of executive compensation schemes, as well as information showing "the relationship between executive compensation actually paid and the financial performance of the issuer, taking into account any change in the value of the shares of stock and dividends of the issuer, and any distributions."[103] The section also requires that the issuer disclose the median of the annual total compensation of all employees of the issuer, except the chief executive officer.[104]

Section 954 requires that:

> "in the event that the issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer with any financial reporting requirement under the securities laws, the issuer will recover from any current or former executive officer of the issuer who received incentive based compensation during the 3 year period preceding the date on which the issuer is required to prepare an accounting restatement, based on the erroneous data, in excess of what would have been paid to the executive officer under the accounting restatement."[105]

[99] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. §951, 953, 954 (2010)(enacted).
[100] *Id.* at §951(a)(1).
[101] *Id.* at §951(a)(2).
[102] *Id.* at §951(e).
[103] *Id.* at §953(a)(i).
[104] *Id.* at §953(b)(1)(A-C).
[105] *Id.* at §954(b)(2).

In other words, the executive must repay the difference between what the executive actually received and what the executive would have received if the financial statements were correctly reported.[106]

These three main executive compensation provisions of Dodd-Frank can be implemented, in an altered form, to remedy a misalignment of incentives in coaches' and directors' salaries in collegiate athletics.[107] At most large schools, the three highest profile "executives" are the head men's basketball coach, head football coach, and athletic director. They are often the most highly compensated members of the athletic department.[108] Despite their high salaries and public figure status, the NCAA rulebook is relatively silent on coaches and directors "executive" compensation.[109]

The NCAA rulebook spends just over one page discussing "executive compensation."[110] The NCAA imposes regulations and restrictions mostly aimed at prohibiting athletic association employees from accepting outside supplemental pay for unspecified achievements, and prohibits any outside source from controlling the employment or compensation decisions of athletic association employees.[111] Below are three proposed amendments that should be added to section 11.3 of the NCAA rulebook in order to align the incentives of NCAA "executives" with the goals of the NCAA, and to implement more responsibility and accountability amongst the chief officials at member institutions.

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106 *Id.*
107 *See, supra* note 66.
108 Steve Berkowitz, Erik Brady & Jodi Upton, *Even small schools pay big for hot NCAA coaches,* USA TODAY, Mar. 29, 2012, http://www.usatoday.com/sports/college/mensbasketball/story/2012-03-29/salaries-continue-rise-shaka-smart-vcu/53828414/1 (noting the average salary for a coach in the NCAA men's basketball tournament is $1.4 million); Steve Berkowitz, Erik Brady & Jodi Upton, *Salaries for college football coaches back on rise,* USA TODAY, Nov. 17, 2011, http://www.usatoday.com /sports/college/football/story/2011-11-17/cover-college-football-coaches-salaries-rise/51242232/1 (noting that the average compensation for a NCAA head football coach in a BCS conference is 2.125 million); Steve Berkowitz & Jodi Upton, *Athletics directors seeing major increase in salaries,* USA TODAY, Oct. 6, 2011, http://content.usatoday.com/communities/campusrivalry /post/2011/10/athletics-directors-increase-salaries-school-presidents/1#.T513FI6Ws7A.
109 2011-2012 NCAA Division 1 Manual, *supra* note 12, at 11.2-11.3.
110 *Id.*
111 *Id.* However, the NCAA rulebook restrictions on executive compensation makes no mention of how compensation is determined, nor the financial consequences for executives in the event the school is placed on probation as a result of their actions.

First, in assessing and applying Dodd-Frank to the NCAA, it is necessary to think of students, faculty, boosters, alumni, student athletes and academic administration as stakeholders of the private athletic associations, and each individual athletic association as a stakeholder of the larger NCAA governing body. In considering the abovementioned parties as stakeholders, it is easy to see how section 951 (requiring an annual, bi annual, or tri annual votes by shareholders on executive compensation, and requires a vote at least once every 6 years on how often to vote on executive compensation[112]) and 953 (requiring certain disclosures of executive and other employee salaries[113]) can apply to the NCAA. Currently, NCAA member institution "executives" are accountable either to the athletic director, in the case of a head coach, or to the university president, in the case of an athletic director. The university system in America is unique, however, as alumni and current students largely power the incoming cash flow for the schools that in turn support athletic associations.[114] The corporate governance structure of allowing such closely held evaluations by a few individuals determine the amount of compensation of executives and the satisfactory or non-satisfactory nature of their performance is more akin to the present structure in a closely held start up company, rather than a large, even private, institution. Allowing university students, faculty, boosters, alumni, student athletes and academic administration to vote annually or bi-annually on the compensation of the top "executives" within its athletic department will force accountability on the part of the "executives" to its stakeholders and align "executives" goals with the long term goals of the university and its stakeholders.

Critics will argue that current students would not sacrifice winning now to remove or limit the compensation of a coach committing violations, causing damage to the long-term reputation of

[112] Dodd-Frank Act, *supra* notes 100-102.
[113] Dodd-Frank Act, *supra* notes 103-104.
[114] *See generally,* Mike Fish, *Most Powerful Boosters*, ESPN.com, Jan. 12, 2006, http://sports.espn.go.com/ncf/news/story?id=2285986; Darren Rovell, *The high price of supply and demand,* ESPN.com, Jan 13, 2006, http://proxy.espn.go.com/ncf/news/story?id=2286027.

the school. However, at schools that are the subject of this paper, athletics drive academics as much as academics drive athletics.[115] Athletic success on the field drives up applications and institutional ranking in the 2-3 years following a national championship in football or basketball.[116] Unlike financial investments, where shareholders have the ability to disconnect themselves with a company by selling stock and have every incentive to maximize value *now*, students and stakeholders of an academic institution often make a lifelong financial and emotional commitment to that institution. Thus, students and boosters alike have a long-term incentive in maintaining the academic and athletic prestige of their institution. As important as it is to win now, most college students also understand the role athletics plays in helping maintain the value of their degree.

Second, section 954 provides a bigger stick for enforcement by the NCAA. As discussed supra, major violations of NCAA rules and the issuance of major probations have been widespread in recent years.[117] However, instead of placing the brunt of the penalty where it belongs-on the supervising executives-the NCAA too often punishes players, coaches, and students who had less to do with the violation than the "executives."[118] Dodd-Frank succeeds in assigning blame where it belongs and requiring repayment of fraudulently obtained compensation.[119]

The actions that result in probation or major punishment in the NCAA usually arise at two levels within the organization-the coaching level and the player level. Section 954 of the Dodd-Frank Act, requiring repayment of compensation to the institution, is most applicable at the coaching level. The NCAA is prone to leveling two different kinds of penalties on coaches: a

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[115] Drew Kann, *Athletics can help lessen budget cuts,* RED AND BLACK, Mar. 4, 2010, *available at* http://redandblack.com/2010/03/04/athletics-can-help-lessen-budget-cuts/ (noting that the University of Georgia athletic department, and others around the country, donate millions of dollars to their institutions academic programs each year.).
[116] Steven R. Cox & Dianne M. Rodent, *Quality and perception and the championship effect: Do collegiate sports influence academic rankings?* 6 RESEARCH IN HIGHER ED. J. 4, 4 (2010) (finding that "the average college ranking . . . for the two years after winning a national championship in football or basketball is significantly improved compared to the two years bore. Consistent with increased applications, acceptance rates are lower and SAT scores are higher.").
[117] *Supra* note 66.
[118] Weston, *supra* note 8, at 564-566.
[119] *Id.*; *see also, supra* note 105.

"show-cause"[120] penalty that makes it difficult for the coach committing the violation to work at another institution in the NCAA, and a probational penalty against the school and its athletic department. The NCAA, however, does not require repayment of salary or benefits by the coach to the institution, and probational penalties often hurt the student-athletes and students more so than the coach who caused the probation to be levied.[121] Coaches can leave a probation stricken program to coach at another institution if there is not a show cause penalty attached to the probation, or they can leave to coach in professional sports.[122] By adopting a compensation provision inspired by Section 954 of the Dodd-Frank Act, the NCAA can eliminate the ability for coaches who incur probational penalties for their schools to escape without consequence. The regulation should be similar to the Dodd-Frank Act provision and require an assessment of income generated by the coach, both in the season prior to the probation being levied and in the season after the probation is levied. For example, a team like USC, who Pete Carroll left amidst a slew of probational penalties, was forced to forgo a lucrative BCS bowl this season as a result of penalties incurred under Pete Carroll's watch.[123] USC could have made millions of dollars simply by participating in the bowl.[124] The proposed regulation would account for that loss, among other measurable losses as a direct

[120] 2011-2012 NCAA Division 1 Rulebook, *supra* note 12, at 19.5.2 (requiring "that an institution that has been found in violation of the provisions of NCAA legislation while representing another institution, show cause why a penalty or additional penalty should not be imposed, if, in the opinion of the Committee on Infractions, the institution has not taken appropriate disciplinary or corrective action against athletics department personnel involved in the infractions case or any other institutional employee, if the circumstances warrant, or a representative of the institution's athletic interests.").

[121] Weston, *supra* note 8, at 565.

[122] *See, e.g.* ESPN.com, *Seahawks introduce new coach Carroll,* ESPN.com, Jan. 13, 2010, http://sports.espn.go.com/nfl/news/story?id=4819493 (Pete Carroll left USC in the wake of NCAA violations to pursue a career in the NFL, where he would not be subject to whatever sanctions the NCAA placed on USC.); ESPN.com, *Colts hire Jim Tressel as consultant,* ESPN.com, Sept. 2, 2011, http://espn.go.com/nfl/story/_/id/6922766/indianapolis-colts-hire-jim-tressel-replay-review-consultant (Jim Tressel, after leaving Ohio State as a result of numerous NCAA violations and a subsequent cover up, obtained a job with the NFL's Indianapolis Colts as a "replay review consultant.").

[123] ESPN.com, *NCAA delivers postseason football ban,* ESPN.com, June 11, 2010, http://sports.espn.go.com/los-angeles/ncf/news/story?id=5272615.

[124] Chris Greenberg & Chris Spurlock, *Bowl Game Payouts Map: Money Earned in 2011-2012 BCS and Other Football Bowls,* THE HUFFINGTON POST, Dec. 29, 2011 http://www.huffingtonpost.com/2011/12/29/bowl-game-payouts-map-2011-2012-bcs_n_1174808.html (losing teams in BCS bowls received $6.1 million in 2012, and winning teams received $22.3 million).

result of probation, and determine the percentage decrease in football revenue as a result of the probation. If the percentage decrease is, for example, 20%, then the coach responsible for the probation should be forced to return 20% of his salary for the year(s) in which the probation occurred for as long as the decrease in revenue continues. So, in the case of a coach directly committing violations that result in the "death penalty"[125] for the program, the forfeited compensation would equal 100% of the coach's salary. By implementing such a scheme, the NCAA could solve one of the major sources of violations that lead to probation.

The second major source of probational violations is player misconduct.[126] The NCAA struggles in governing player misconduct in much of the same way as it struggles governing coaching misconduct. Players, like coaches, who commit violations or are suspended from their current school can transfer to a lower division school and play immediately or, if the meet they professional eligibility requirements of their respective league, they can leave school. The student athletes, like the coaches, are currently in a one time reputational game where the risk of cheating is often worth the reward, not because the reward is so great, but because the consequences are so minor. In order to solve this asymmetry, there are two possible solutions. The first, paying student athletes, has been widely debated and criticized, and is one I will not explore here.[127] Since players are not paid, the compensation clawbacks discussed above are not a viable alternative.

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125 ESPN.com, *NCAA Prez: Death penalty an option,* ESPN.com, Aug. 19, 2011, http://espn.go.com/college-football/story/_/id/6877907/ncaa-president-mark-emmert-says-death-penalty-option-punish-rule-breakers (The death penalty is a potential enforcement mechanism for the NCAA. When a school has had two major infractions during a 5 year period, the NCAA can issue the "death penalty" for the sport that incurred the infractions. The death penalty prevents the school from participating in the sport for 1 year.).
126 *See, e.g.,* Steward Mandel, *Tressel on borrowed time at Ohio State in wake of NCAA allegations,* SI.COM, http://sportsillustrated.cnn.com/2011/writers/stewart_mandel/04/25/ohio-state-tressel-ncaa/index.html (discussing the player misconduct and subsequent cover up that eventually cost Jim Tressel his job); Pete Thamel, *Hurricane Players and Recruits Accused of NCAA Violations,* N.Y. TIMES, Aug. 16, 2011, at B14 (discussing former Miami booster Nevin Shapiro, and his role is distributing thousands of dollars to Miami players and providing yachts and adult entertainment to players and recruits at his home); Lynn Zinser, *U.S.C. Sports Receive Harsh Penalties,* N.Y. TIMES, June 10, 2010, at B9 (discussing the improper benefits that basketball star O.J. Mayo and football star Reggie Bush accepted during their time at U.S.C.).
127 *See, e.g.,* Doug Bandow, *End College Sports Indentured Servitude: Pay "Student Athletes,"* FORBES, Feb. 21, 2012, http://www.forbes.com/sites/dougbandow/2012/02/21/end-college-sports-indentured-servitude-pay-student-

The third proposed reform, and second potential solution to solving the reputational game athletes play, is a partnership between the NCAA and the NFL and NBA. The partnership can serve as an analog to coach's compensation clawbacks. We have seen this structure begin to develop already, as both the NFL and NBA have implemented policies requiring collegiate athletes to spend a specified number of years removed from high school in order to be eligible for the professional draft.[128] The requirement has had a widespread effect on players leaving college early for the draft, or not attending college at all, but has done little to curb violations amongst amateur players. The NCAA should continue its relationship with the NBA and NFL and view the professional leagues as government regulators who will impose penalties on players who commit infractions at the college level. By doing so, the NCAA will eliminate the one time reputational game many players play during their college tenure, and will force players and coaches to become repeat players in the broader game of sports, rather than one-time players under the NCAA's watch.

A player, for example, who commits a violation in his senior year and is forced to sit out at the Division 1 level or play at a community college or Division 2 levels, and then enter the professional draft, has no real incentive to behave properly in college. Then end game result is still the same for a player who turns professional. In order to effectively deter student athletes from committing violations, the NCAA needs to enforce carry over penalties that follow the athletes into their professional careers.

C. Consistency, comparability, and transparency in recruiting and post enrollment benefits

Financial markets struggle to create common knowledge because of the delicate balance between disclosing enough information to avert a disastrous collapse, and keeping confidential

athletes/; Ben Cohen, *The Case for Paying College Athletes: The Issue is Gaining Momentum, But Nobody Knows How to Do it; the 'Trust Fund' Model,* WALL ST. J., Sept. 16, 2011.

128 John Infante, *Draft Rules Fail Basics of Amateurism,* NCAA.org, http://www.ncaa.org/blog/ 2011/02/draft-rules-fail-basics-of-amateurism/; 2011-2012 NCAA Division 1 Manual, *supra* note 12, at 12.2.4.2.

enough information to ensure an institution retains its proprietary advantage in the marketplace.[129] Too much common knowledge stifles innovation and eliminates some competitive advantages, while too little common knowledge "perpetuates risky behavior beyond an efficient threshold."[130] Often times, the longer the market goes without creating common knowledge, the higher the profits and the harder the collapse.[131] The lack of common knowledge prevents a bubble from bursting.[132]

A major potion of the Dodd-Frank Act is to create transparency and accountability, and in turn common knowledge, for exotic instruments such as asset backed securities, hedge funds, MBSs and payday lenders.[133] It is well discussed that the depth and breadth of asymmetric information regarding the abovementioned exotic instruments contributed greatly to the financial crisis.[134] Issuers, purchases, and unsophisticated consumers allowed the cash flows from these exotic instruments to dictate their price and demand, without conducting much, if any, due diligence into the underlying assets. By the time the credit markets froze, these exotic instruments were so far removed from their original source or issuer that institutions and counter parties were unable to determine how risky their investments actually were.[135]

Title VII of the Dodd-Frank Act charges the CFTC and the SEC with consulting each other and the prudential regulators to ensure that any rulemaking or orders regarding the abovementioned

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[129] Gary B. Gorton*, The Subprime Panic*, 15 European Financial Management 11, 37 (2008). NBER Working Paper No. 14398.
[130] Rudderman, *supra* note 15, at 34.
[131] *Id.*
[132] *See also* Robert J. Aumann, *Backward Induction and Common Knowledge of Rationality*, 8 Games and Economic Behavior 6, 1 (2005) (arguing "that if common knowledge of rationality obtains in a game of perfect information, the backward induction outcome is reached.").
[133] Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, http://banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_ comprehensive_summary_Final.pdf (last visited Apr. 29, 2011).
[134] Michel G. Maila, *Contributing factors to the emergence of risk in financial markets and implications for risk governance*, International Risk Governance Council, 1 (2010) (noting that the prevalence of sophisticated financial products creates a large information gap).
[135] Rudderman, *supra* note 15, at 21-22 (noting that the costs of conducting due diligence far outweigh the risks for a repeat player. The cycle also increases the adverse selection problem as counter parties know that the institution holding the asset doesn't know exactly what it is, and moral hazard is exacerbated as the exotic instruments are passed so quickly that no one party has any incentive to conduct adequate due diligence.).

exotic instruments are coordinated to assure "consistency and comparability."[136] The title also requires that the CFTC and SEC address one of the main regulatory problems in any scheme: regulating function over form.[137] The title also gives the FSOC ultimate discretion over resolving disputes between the CFTC and SEC and addressing unaddressed regulatory issues.[138] The regulatory scheme gives broad discretionary authority to the CFTC, SEC and, ultimately, FSOC to (1) use their regulatory and investigatory power to create common knowledge and develop transparency and accountability, and (2) to regulate function over form in securities and swaps markets.[139]

Businesses, financial markets, and even the NCAA are like fragile ecosystems.[140] When a market, or ecosystem, consists of similar individual pieces, "one shared weakness can spell disaster for the whole lot. Even when a new beneficial trait or tool enters the picture, if all organisms adopt it . . . a tenuous balance can be quickly upset.[141] Like the spread of an infection disease, financial troubles can be launched by so-called 'super-spreaders," or, what we would deem "too big to fail" institutions.[142] The financial markets saw the introduction of a new, foreign, but beneficial, product, quickly adopted it in mass numbers, and then, because of the homogeneity of the market, collapsed after a minor blip on the radar.

We can think of the NCAA as an ecosystem; agents, boosters, and incredible sums of money as foreign, but perhaps beneficial objects, and understand how the NCAA is following the same path as the financial markets. As each member institution pays their coaches and directors more

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136 Dodd-Frank Act, *supra* note 99, at §712(a)(1-2).
137 *Id.*
138 *Id.* at §712(a)(7)(A).
139 *Id.* at §712(a)(7)(A-B).
140 Katherine Harmon, *Can ecological models explain global financial markets-and make them more stable?,* SCIENTIFIC AMERICAN, Jan. 19, 2011, http://blogs.scientificamerican.com/observations /2011/01/19/can-ecological-models-explain-global-financial-markets-and-make-them-more-stable/.
141 *Id.*
142 *Id.*

money,[143] as boosters become increasingly influential in the day to day operations of athletic institutions,[144] and as agents insert their professional advice into amateur athletics,[145] the risk of de-amateurization and the end of the NCAA in its current form increases. In order to curb the "ecosystem" effect, the NCAA should adopt modified versions of the abovementioned Dodd-Frank Act provisions to increase accountability, transparency, and ensure consistency in enforcement and regulation. We can view the CFTC and SEC as individual NCAA member institutions and conferences, and the overall governing body of the NCAA as the prudential regulators with ultimate authority. The current NCAA compliance scheme consists of a series of ex ante regulations[146] controlling actions of member institutions, but requires little in the way of proactive reporting requirements.[147] The NCAA Manual simply states that it is the responsibility of the institution to "monitor its programs to assure compliance and to identify and report to the Association instances in which compliance has not been achieved. In any such instance, the institution shall cooperate fully with the Association and shall take appropriate corrective actions."[148] The regime also consists of a series of guidelines dictating the process for ex post investigations of potential violations by NCAA investigation committees.[149] This is much the same structure that the financial industry maintained prior to 2008.[150] Instead, the NCAA's modified versions of sections 712 and 716 of the Dodd-Frank Act should force internal compliance officers of member institutions and conferences to discuss recruiting, agent interaction, and booster interaction with the ultimate governing body-the

[143] Steve Berkowitz, Erik Brady & Jodi Upton, *Salaries for college football coaches back on rise, supra* note 108.
[144] Michael Rosenberg, *Nike's Phil Knight has Branded Oregon into national power,* SI.COM, Jan. 7, 2011http://sportsillustrated.cnn.com/2011/writers/michael_rosenberg/01/06/oregon.knight /index.html (describing Phil Knight's access and influence over the Oregon athletic program. Phil Knight has his own headseat in his suite on game day at Oregon's stadium so he can listen to the dialogue between coaches during the game.).
[145] Michael A. Corgan, Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created By Unethical Sports Agents and the NCAA's Revenue Generating Scheme, 19 VILL. SPORTS & ENT. L.J. 371, 396-401 (2012).
[146] *See generally,* 2011-2012 NCAA Division 1 Rulebook, *supra* note 12 (The compliance rules are almost entirely of ex ante prohibitions, rather then constructive compliance and reporting mechanisms.).
[147] 2011-2012 NCAA Division 1 Manual, *supra* note 12, at 2.8.1 - 2.8.3.
[148] *Id.*
[149] *Id.* at 32.1 – 32.11.
[150] A series of self-reporting regulations and ex post investigations does little to prevent a systemic crisis.

NCAA[151] (or, per the analogy, the prudential regulators). Such a requirement would help solve the common knowledge problem. The NCAA would effectively become the prudential regulator to the ecosystem. If there are ex ante reporting requirements, not just prohibitions, the NCAA prudential regulators can identify trends towards homogeneity in the form of rules violations, which pose a systemic risk to the NCAA. Because the risks will be identified by an independent agent (the NCAA instead of each individual institution), the regime also solves the collective action problem whereby member institutions continue behaving in a way that maximizes their profit but exposes the entire system to systemic risk.

As noted above,[152] the current dialog between the NCAA and its member institutions occurs largely *after* a member institution discovers a violation because the NCAA manual demands self-reporting of violations.[153] The clear problem with this self reporting mechanism, however, is that the violation has already occurred. A constant dialogue between the NCAA and its member institutions regarding recruiting visits from prospective players, booster interaction, and any questionably permissible benefits given to student athletes would allow the NCAA to address potential violations by processing the information they receive *before* the violation occurs. In turn, the NCAA can work with the member institution to act in a swift, preventative manner to either avoid the impermissible conduct, or take mitigating action to limit potential penalties.

Critics will argue that we should let the market dictate the level of amateurism in the NCAA,[154] and if players are able to command pay from the boosters, coaches or agents that recruit them, the NCAA should not treat it as a violation, nor implement a new scheme to try to remedy the issue,

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151 Many NCAA violations arise as a result of impermissible benefits provided to student athletes by boosters or agents. Others arise as coaches violate contact and communication rules with recruits, as they try to attract the best talent possible to their programs.
152 2011-2012 NCAA Division 1 Manual, *supra* note 12, at 2.8.1 - 2.8.3.
153 *Id.*
154 Andy Schwarz, *Excuses, Not Reasons: 13 Myths about (Not) Paying College Athletes*, Selected Proceedings of the Santa Clara Sports Law Symposium, Sept. 8, 2011, 46, 67.

nor even be concerned about any violation that is not illegal outside the context of the NCAA.[155] Rather, critics argue, the NCAA should allow college sports to turn into pure business.[156] As discussed above, however, complete deregulation and a lack of monitoring of the NCAA would effectively eliminate athletic programs at all but the most profitable institutions.[157] Schools with large, profitable athletic programs would no longer agree to revenue sharing plans because the assets they share with smaller institutions can now be used in an attempt to recruit the most sought after players.[158] As a result, non revenue generating sports and many women's sports would be eliminated from member institutions.[159] The end result of not policing NCAA violations would be an elimination of all but the very best football and basketball programs.[160]

In order to effectively implement the above regime, and prevent the de-amateurizaiton of college sports, however, the NCAA also needs to reform its idea of compliance coordinators at member institutions. Currently, most NCAA compliance directors and assistant directors hold degrees in Sports Management or a related business field.[161] Many compliance directors are not practicing lawyers.[162] However, a "compliance director in a major program is an educator, arbitrator, mediator, advocate, enforcer, and not infrequently, the fall-guy."[163] Why, then, do we not require that the compliance director be educated as such? A compliance director's main contribution to his or her employer is developing a system for investigating and reporting NCAA infractions.[164] In

155 Bartz & Sloey, *supra* note 13, at 2.
156 *Id.* (Note, however, that a pure business is not viable in any sports league. Even the NBA and NFL have salary caps and anti tampering rules that promote some kind of order and preserve the leagues product.).
157 *Id.*
158 *Id.* at 24.
159 *Id.*
160 *Id.* at 28-29.
161 Megan Fuller, *Where's the Penalty Flag: The Unauthorized Practice of Law, the NCAA, and Athletic Compliance Directors*, 54 NEW YORK L. J. 495, 516 (2009).
162 *Id.* at 508.
163 Gene Marsh & Marie Robbins, *Weighing the Interests of the Institution, the Membership and Institutional Representatives in an NCAA Investigation*, 55 FLA. L. REV. 667, 669 (2003) (noting that "given the infusion of millions of dollars into major college athletics, the resultant pressure to win and the never ending quest of purportedly well meaning individuals to get into the inner circle of the department, a compliance director has the most difficult job in college athletics.").
164 *Id.*

order to adequately do so, however, the compliance director needs to have read, interpreted, and understood the 436 page NCAA rulebook. The rulebook reads much like a state or federal law and, as one Texas basketball coach noted, "[y]ou've got to be a lawyer at the top of your class to understand the NCAA rules."[165] Putting the right people in the right places (simply executing on a fundamental business principle) will help ensure that the NCAA creates meaningful, bottom up reform in its corporate governance.

D. How more independent directors on the NCAA's infractions committee will lead to more consistent, workable results

Section 932(t) of the Dodd-Frank Act mandates that nationally recognized statistical rating agencies have a board of directors.[166] The board shall consist of at least 3 members, and at least half of those members shall be independent from the rating agency.[167] The act specifically defines that in order to be considered independent, the director may not, other than in his or her capacity as director, "accept any consulting, advisory, or other compensatory fee from the nationally recognized statistical rating organization; or, be a person associated with the nationally recognized statistical rating organization or with any affiliated company thereof."[168] Where a director violates one of the above requirements, he or she will be "disqualified from any deliberation involving a specific rating in which the independent board member has a financial interest in the outcome."[169] Furthermore, compensation for the board of directors must not be "linked to the business performance of the nationally recognized statistical rating organization, and shall be arranged so as to ensure the independence of their judgment."[170]

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[165] *See* Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 528-44 (1995).
[166] Dodd-Frank Act, *supra* note 99, at §932(t)(1).
[167] *Id.* at §932(t)(2).
[168] *Id.* at §932(t)(2)(B)(i).
[169] *Id.* at §932(t)(2)(B)(ii).
[170] *Id.* at §932(t)(2)(C).

The goal in forcing credit agencies to contain independent directors is to remove any bias in decisions made by the rating agency that would result in financial gain to the directors, often times at the expense of the investing public. The NCAA can be viewed in the same light. The passion involved in college athletics is unmatched elsewhere in sports, and the pressures for a non-independent board member of the NCAA Committee on Infractions (the "committee") to levy penalties on a competitor, especially a rival, of his or her institution can be immense. As one former NCAA infractions committee member notes, "[f]or many people, happiness is the news that an NCAA enforcement representative is visiting another campus, most especially a competitor."[171]

The current rules governing the composition of the NCAA Committee on Infractions are as follows. The committee is composed of 10 members, seven of whom, curiously, *shall* "be at present or previously on the staff of an active member institution or member conference of the Association," and at least two, but no more than three of whom shall be members of the general public not affiliated with the association, its members, or representatives.[172] Additionally, there are two members elected as "coordinators of appeals."[173] These members are responsible for processing appeals, being present at hearings (although they cannot actively participate in the hearings), being present and participating at committee deliberations, and representing the committee in the event a decision of the committee is appealed.[174] Each member of the committee on Infractions serves a three-year term and may be reelected two times.[175] The purpose of the two coordinators of appeals is to "establish a separation between those who make the decision at the 'trial court' level and those who defend the decision on appeal" from the member institution.[176] Since two members must be designated coordinators of appeals, eight others are voting members,

[171] Gene A. Marsh, *A Call for Dissent and Further Independence in the NCAA Infractions Process,* 26 CARDOZO ARTS & ENT. L.J. 698 (2010).
[172] 2011-2012 NCAA Division 1 Manual, *supra* note 12, at 19.1.1.
[173] *Id.*
[174] *Id.* at 10.1.1.4.
[175] *Id.* at 19.1.1.3.
[176] Marsh, *supra* note 171, at 704.

with as many as three, and as few as two, being public members.[177] The current NCAA Committee on Infractions has three public members, all three of whom are attorneys, and seven non-public members.[178]

As in the financial sector, there is a serious need to increase the number of independent members on the infractions committee. I propose that the NCAA follow Dodd-Frank's footsteps and mandate that half of the ten members on the committee be independent members, and four of them be voting members. There is obvious value to having both non-public and public members on the infraction committee. For related members, they likely have a deep understanding of the NCAA, as they attend committee meetings and conventions for a variety of NCAA issues, and have daily, first hand knowledge of the workings of the NCAA and their own institution.[179] However, those non-public members also, at the very least, are viewed as being biased towards their own institution during infractions hearings and, at most, act on that bias in favor of their own institution.[180] Clearly, committee members hailing from certain institutions or conferences would not fall into Section 932's definition of "independent."[181]

By the same token, the ability to attract highly qualified lawyers and judges as public committee members almost necessitates an increase in the number of public members.[182] One former committee member and law professor notes:

> [T]he former and current public members who deliberate on cases came to us with judicial experience, either in state or federal court. What they bring to the process is years of judicial experience, seasoned by all the experience such service brings. At the same time, they are

[177] 2011-2012 NCAA Division 1 Manual, *supra* note 12, at 19.1.1.3.
[178] NCAA.org, *Committee on Infractions,* http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/People/Committee+on+Infractions (The current committee consists of one attorney each from Polsinelli Shughart, Andres Kurth, and Foley and Lardner, and seven non public members, one each from the SEC, CUSA, and MEAC conferences, and one each from Temple, Missouri, Oregon, and Notre Dame.).
[179] Marsh*,* *supra* note 171, at 705.
[180] There is also a risk that these members have an axe to grind against the NCAA or a fellow institution. The presence of multiple non-public members on the committee creates a collective action problem and disincentives NCAA members from reporting violations of other schools.
[181] Dodd-Frank Act, *supra* note 99, at §932(t)(2)(B).
[182] Marsh, *supra* note 171, at 705.

> not card-carrying members of the NCAA. It is the legal experience and the independence that makes them so valuable in the process. . . . Their questioning and skepticism – often bluntly stated – have helped us get to more just results along the way.[183]

Public members "bring to the process the same perspective, independence, and integrity that outside directors bring to corporate governance."[184] With such positive results and feedback for the role public members play on the committee, it is curious that the NCAA has not employed the minimum number of non-public members simply to adequately inform public members of relevant NCAA workings. This would maintain a feeling of "credibility in the eyes of individuals who are judged and penalized in the process,"[185] but leave much of the actual decision making and voting processes to experienced, non interested lawyers and judges.

E. How increased whistleblower protections and incentives can lead to detection of more violations and less severe punishments for those violations

My final recommendation to improve corporate governance in the NCAA is to add to its rulebook whistleblower protections, beyond those already present in state and federal law. The 439-page NCAA rulebook makes no mention of whistleblowers or protections for them. Sections 748 and 922 of the Dodd-Frank Act offer whistleblower protections and incentives in both a commodities setting and securities setting.[186] Both sections prohibit employer retaliation against employees who "(i) provide information to the SEC or the CFTC pursuant to these new programs, (ii) initiate, testify, or assist in an investigation or judicial or administrative action based on or related to such information; or (iii) make disclosures that are required or protected under [Sarbanes Oxley]."[187] The act also provides substantial reward incentives for whistleblowers.[188] The act

[183] *Id.*
[184] *Id.*
[185] *Id.* at 710.
[186] Dodd-Frank Act, *supra* note 99, at §748, 922.
[187] Daniel J. Venditti, *Whistleblower Protections Under the Dodd-Frank Act,* Weil Employer Update, January-February 2 (2011).
[188] *Id.* at 3.

provides that the SEC shall pay an award to a whistleblower(s) who "voluntarily provided original information to the commission that lead to the successful enforcement of the covered . . . action."[189] The amount of the award will be between 10% and 30% of the total amount collected of the monetary sanctions imposed on the violating party.[190] In determining the amount of the award, the SEC considers (i) the "significance of the information provided by the whistleblower to the success of the covered judicial or administrative action; (ii) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action; [and] (iii) the programmatic interest of the Commission in deterring violations of the Act by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws."[191]

Often times, the first people to find out about a violation of NCAA rules are those within the violating institutions organization. The compliance director and others within the member institution are often in the best position to remedy or self report a violation, although they seldom do so, unless they are reasonably certain that self reporting violations will lead to a less harsh penalty from the NCAA than if the violation is later discovered by the NCAA's own investigation. There are, however, two problems with attempting to apply the whistleblower protections to the NCAA. First, the unique, team oriented nature of sports puts whistleblowers at risk of being cast as outliers within their organization. Second, whistleblowers in NCAA violations have much less to gain monetarily than their financial counterparts, as many violations even deal with non-monetary items. In order to effectively incentivize whistleblowers to come forward, the NCAA should assign dollar values to the duration and types of common violations, such that potential whistleblowers have some idea regarding the value of their tip, should it lead to punishment of their institution.

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[189] Dodd-Frank Act, *supra* note 99, at §748(b)(1).
[190] Dodd-Frank Act, *supra* note 99, at §748(b)(1)(A-B).
[191] Dodd-Frank Act, *supra* note 99, at §748(c)(1)(B)(I-III).

Part V: Conclusion

The NCAA and its member institutions have experienced a meteoric rise in revenue and visibility over the past decade. Accompanying that rise are problems of the rich getting richer, large scale recruiting violations, and the overall de-amateurization of college athletics. Much like the financial industry, NCAA member institutions have sacrificed long-term gains in exchange for short-term profits. The NCAA as governing body, however, has not adjusted its enforcement mechanisms accordingly. The above discussed regulations, as adopted from the Dodd-Frank Act, will help align incentives between the NCAA and its member institutions, reduce the number and severity of cheating incidents by players and coaches, and return the NCAA to the healthy forum for amateur competition that it desires.