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**NCAA INDIVIDUALS ASSOCIATED WITH PROSPECTS  
(IAWP) RULE: IMPACT ON COLLEGE FOOTBALL AND  
ANTITRUST CONCERNS**

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**I. INTRODUCTION**

Coach Smith aspires to one day become the head football coach at a major Division I college football program. As a high school football coach in Texas, Smith established himself as one of the bright young minds in the game by leading South High School to four straight State Championships. Colleges around the state have taken notice, as Smith has sent a number of talented young high school prospects to their programs over the past few years. One of those programs, the University of XYZ comes to Coach Smith and wants to offer him a position as a local recruiting coordinator for the program. The University explains that success in his off-field role will lead to an opportunity to advance to on-field coaching position with the team—the common practice for high school coaches entering the college ranks.

Unfortunately for Coach Smith, a recent rule passed by the National Collegiate Athletic Association (NCAA) eliminates this opportunity. Intended to eliminate the practice of larger schools luring recruits by offering jobs to their unqualified family and friends, the new rule severely penalizes colleges for hiring an individual to a non-coaching position who has a relationship with current or former recruits. Since Smith has former players who now play at the University of XYZ, taking the job would render those players automatically ineligible to play. Furthermore, all of Smith's current players at South High with scholarship offers to attend the University of XYZ would now also be considered ineligible to attend that program. With the University of XYZ unwilling to sacrifice the eligibility of its current players and recruits from South High, and Coach Smith not willing to sacrifice

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the opportunity for his current and former players to play for the University, he is forced to turn down his big break and return to the high school ranks.

While merely hypothetical, this is the reality currently facing college football in the wake of the NCAA's passing of the Individuals Associated with Prospects (IAWP) rule. Enacted as a way to address the inequalities associated with recruiting student-athletes, the rule has reached far beyond its intended effect and caused collateral damage to the ability of both coaches and players to move between NCAA member schools. Therefore, this article will argue that the IAWP rule must be reformed from its current state, as it currently constitutes an illegal restraint of trade in violation of Article 1 of the Sherman Antitrust Act.

Part I of this article will briefly introduce the problem created by the IAWP Rule. Part II will analyze the NCAA's recent legislation bundle addressing college football recruiting—specifically the IAWP Rule—and identify its core objectives and overall impact on college football programs. Part III will examine the IAWP rule's unintended negative effects on high school coaches, colleges football support staffers, and student-athletes. Part IV will discuss how these negative effects constitute an illegal restraint of trade in violation of Section 1 of the Sherman Antitrust Act by analyzing the potential claim of coaches, support staffers, and student-athletes against the NCAA. Finally, Part V will make recommendations as to how the NCAA can reform the current IAWP rule to avoid antitrust liability.

## II. UNDERSTANDING PROPOSAL 2016-116 AND THE IAWP RULE

In an effort to better regulate the college football recruiting environment, which gives a marked advantage to larger programs with more disposable income, the NCAA Division I Council, composed of University Presidents and Chancellors, set out to overhaul the current recruiting process and restore competitive balance.<sup>1</sup> Citing a strong need for more transparency and better protection for student-athletes,<sup>2</sup> the NCAA Division I board of directors challenged the Division I Council to develop a

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<sup>1</sup> Michelle Brutlag Hosick, *College Football: DI Council Adopts New Recruiting Model*, NCAA (Apr. 14, 2017), <http://www.ncaa.com/news/football/article/2017-04-14/college-football-di-council-adopts-new-recruiting-model>.

<sup>2</sup> *Id.*

comprehensive package of recruiting rule changes.<sup>3</sup> After nearly five years of debate and numerous proposals, the Council introduced its final version, Proposal 2016-116, for a vote in the Spring of 2017.<sup>4</sup>

Addressing a wide variety of recruiting-related concerns, the Proposal was developed as an “all or nothing” style legislation bundle, requiring unanimous approval of all new rules in order to pass.<sup>5</sup> Those opposed to the blanket adoption argued it would be better to address each new rule individually, as not all rules were as well-regarded as others.<sup>6</sup> Despite this opposition, the Division I Council compromised and approved the Proposal in full, which took effect January 9, 2017.<sup>7</sup>

The legislation was touted by Council Chair Jim Phillips as “the most significant progress in recent years to improve the football environment and culture for current and prospective student-athletes and coaches.”<sup>8</sup> The package’s most significant changes included:

- Allowing for earlier official recruiting visits in the calendar year,
- Creating an early December signing period,
- Limiting the number of Division I football scholarships to 25, and

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<sup>3</sup> George Schroeder, *What the New NCAA Recruiting Rules Mean for Players, Coaches*, USA TODAY (Apr. 14, 2017), <https://www.usatoday.com/story/sports/ncaaf/columnist/george-schroeder/2017/04/14/what-ncaa-recruiting-rules-mean-college-football-signing-day/100479194/>; see also Hosick, *supra* note 1.

<sup>4</sup> Jeremy Crabtree, *NCAA Approves Proposal Overhauling College Football Recruiting*, ESPN (Apr. 14, 2017), [http://www.espn.com/college-football/story/\\_/id/19157689/ncaa-division-council-passes-proposal-overhauling-college-football-recruiting-rules](http://www.espn.com/college-football/story/_/id/19157689/ncaa-division-council-passes-proposal-overhauling-college-football-recruiting-rules); see also Hosick, *supra* note 1.

<sup>5</sup> George Schroeder, *Rule Proposal Restricting Hiring of High School Coaches Creates Division*, USA TODAY (Apr. 11, 2017), <https://www.usatoday.com/story/sports/ncaaf/2017/04/11/college-football-proposed-rules-changes-hiring-high-school-coaches/100348806/>.

<sup>6</sup> *Id.*

<sup>7</sup> See Crabtree, *supra* note 4.

<sup>8</sup> Hosick, *supra* note 1.

- Adding a 10th assistant coach to the current college football staff size.<sup>9</sup>

The most controversial and criticized rule of the bunch, however, involves restrictions placed on the hiring of individuals associated with prospects.<sup>10</sup>

#### A. THE IAWP RULE AND ITS MECHANICS

The Individuals Associated with Prospects rule—better known as the “IAWP” rule—is a restriction on a college football program’s ability to hire individuals who have relationships with players that a school is currently recruiting or has recruited in the past.<sup>11</sup> The language of the rule, enumerated in Bylaw 11.4.3 of the current Division I Manual, reads:

[i]n bowl subdivision football, during a two-year period before a prospective student-athlete’s anticipated enrollment and a two-year period after the prospective student-athlete’s actual enrollment, an institution shall not employ (either on a salaried or volunteer basis) or enter into a contract for future employment with an individual associated with the prospective student-athlete in any athletics department noncoaching staff position or in a strength and conditioning staff position.<sup>12</sup>

In plain English, for a two-year period prior to a recruit’s anticipated enrollment in a program and for two-years after the recruit’s enrollment, a college may not hire individuals associated with a prospect (IAWP) to a non-coaching staff position.<sup>13</sup> According to Bylaw 13.02.19 of the NCAA Division I Manual, an IAWP is defined as:

[A]ny person who maintains (or directs others to maintain) contact with the prospective student-athlete, the prospective student-athlete’s relatives or legal guardians, or coaches at any point during the prospective student-athlete’s participation in football, and whose contact is directly or indirectly related to either the prospective student-athlete’s athletic skills

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<sup>9</sup> See Schroeder, *supra* note 3.

<sup>10</sup> See Schroeder, *supra* note 5.

<sup>11</sup> Crabtree, *supra* note 4.

<sup>12</sup> NCAA Division III Bylaw 11.4.3.

<sup>13</sup> Schroeder, *supra* note 5.

and abilities or the prospective student-athlete's recruitment by or enrollment in an NCAA institution.<sup>14</sup>

While the rule clearly extends to parents, legal guardians, and coaches,<sup>15</sup> the broad language of the rule seems to encapsulate handlers, personal trainers, and possibly teachers. Because the rule merely requires "contact with an indirect relationship" to the athlete's abilities or recruitment, it begs the question as to whether the rule is too sweeping in its classification of who qualifies as an IAWP.<sup>16</sup>

#### B. VIOLATIONS OF THE IAWP RULE

Penalties issued for violations of the IAWP are wide-ranging, including, but not limited to, the permanent ineligibility of those players involved, as well as suspensions of collegiate coaches.<sup>17</sup> For example, a parent who is hired in violation of the rule would likely only qualify as an IAWP for their child. As a result, the penalty would be limited to rendering that single prospect ineligible to participate in intercollegiate competition, as well as potential penalties for the coach who hired the IAWP.<sup>18</sup> When the illegal hire involves a high school coach, however, the implications become far more reaching.<sup>19</sup>

High school coaches are currently considered IAWP's to all current and former players. As a result, hiring a high school coach in violation of the rule has the potential to affect a large number of student-athletes. Stated another way, if a college chose to hire a high school coach to a "non-coaching" position in its program (recruiting analyst, player quality control, etc.), it "[could] not have recruited a [single] player from that high school for two years prior to hiring the coach, and must . . . refrain from recruiting players from said high school for another two years after his employment."<sup>20</sup> For college football programs who rely on

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<sup>14</sup> NCAA Division III Bylaw 13.02.19.

<sup>15</sup> *Id.*

<sup>16</sup> *See id.*

<sup>17</sup> Crabtree, *supra* note 4.

<sup>18</sup> *See id.*

<sup>19</sup> *See* Zach Barnett, *This NCAA Proposal Could Have a Disastrous Effect on High School Coaches Looking to Move Up*, FOOTBALL SCOOP (Apr. 11, 2017), <http://footballscoop.com/news/ncaa-proposal-disastrous-effect-high-school-coaches-looking-move/>.

<sup>20</sup> *Id.*

certain high schools for recruits year after year the implications of this type of penalty can be crippling.

C. PURPOSE OF THE IAWP RULE

The Division I Council's purpose for creating the IAWP rule was to create more competitive balance in college football's recruiting environment.<sup>21</sup> By restricting the hiring of those close to recruits, the NCAA sought to curb package-style recruiting deals in which commitments from highly-rated recruits became contingent upon programs finding jobs for coaches and family members.<sup>22</sup> With larger programs increasing the size of their support staffs to absurd numbers in recent years,<sup>23</sup> the NCAA feared that larger programs with more disposable income could create "sham" positions within their program for the sole purpose of attracting top-tier recruits.<sup>24</sup> The most recent example of this type of practice occurred when Michigan head football coach Jim Harbaugh attempted to hire an offensive analyst who turned out to be the father of Michael Johnson, the number one rated quarterback in the class of 2019.<sup>25</sup> Though Johnson's father was a former NFL offensive coordinator who may have been qualified for the position,<sup>26</sup> this is the type of questionable practice the NCAA intended to stop. Allowing larger programs with more resources to use job creation as a recruiting tool creates a clear disadvantage for smaller programs who lack the resources necessary to match these types of offers.<sup>27</sup>

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<sup>21</sup> Richard Johnson, *How a New NCAA Rule Hurt High School Coaches and Players*, SB NATION (Apr. 15, 2017), <https://www.sbnation.com/college-football-recruiting/2017/4/12/15267040/ncaa-rule-high-school-coach-recruit-camp-hire>.

<sup>22</sup> Barnett, *supra* note 19.

<sup>23</sup> Dennis Dodd, *As NCAA Zeroes in on College Football Staff Size, Survey Shows Inconsistencies*, CBS SPORTS (May 15, 2017), <https://www.cbssports.com/college-football/news/as-ncaa-zeroes-in-on-college-football-staff-sizes-survey-shows-inconsistencies/> (the University of Notre Dame maintains a staff of 45 individuals for its football program alone, including "on field coaches, strength coaches, graduate assistants, and support staff").

<sup>24</sup> See Schroeder, *supra* note 5.

<sup>25</sup> Barnett, *supra* note 19.

<sup>26</sup> *Id.*

<sup>27</sup> See Schroeder, *supra* note 5.

D. IS COLLEGE FOOTBALL SUFFICIENTLY DIFFERENT FROM COLLEGE BASKETBALL TO WARRANT ITS OWN IAWP RULE?

One of the main justifications for the design of the IAWP rule was that the same rule had already been successfully implemented in college basketball just a few years prior.<sup>28</sup> The executive director of the American Football Coaches Association, Todd Berry, commented on the decision to borrow basketball's rule, stating, "[i]t's a workable framework for the NCAA to enforce, so it made great sense to take the model already out there."<sup>29</sup> But while the rule has worked successfully in basketball, some question whether college football and college basketball are similar enough to justify the same rule.<sup>30</sup> Current Southern Methodist University head football coach Chad Morris believes that fundamental differences between the two sports protects football from falling into college basketball's trend of hiring individuals to lure recruits.<sup>31</sup> So what are these major differences?

The most obvious difference has to do with the immediate impact college basketball recruits can have on a team's success.<sup>32</sup> With only five players on the court at a time in basketball, a single basketball player can have a much more profound impact on a game than can a single football player. College football teams often require a handful of high-caliber players to see sustained success. On the other hand, a single college basketball recruit can often mean the difference between an average season and a top-25 finish.<sup>33</sup> The other key difference has to do with the time table of recruit's contributions to a team. Unlike college football, where freshman seldom contribute in a substantial manner, elite freshman recruits dominate the sport of college basketball.<sup>34</sup> In the

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<sup>28</sup> *Id.*; see also Schroeder, *supra* note 3.

<sup>29</sup> Schroeder, *supra* note 5.

<sup>30</sup> See *id.*

<sup>31</sup> *Id.*

<sup>32</sup> Gene Clemons, *NCAA's Ban on IAWP: Good Intentions Bad Form*, FOOTBALL GAMEPLAN.COM (Apr. 2017), <http://footballgameplan.com/ncaa-good-intentions-bad-form/>.

<sup>33</sup> *Id.*

<sup>34</sup> See Eamonn Brennan, *Elite Group of Freshman Ready to Take Over College Basketball*, ESPN (Oct. 31, 2016), [http://www.espn.com/mens-college-basketball/story/\\_/id/17909028/it-year-freshmen-college-basketball](http://www.espn.com/mens-college-basketball/story/_/id/17909028/it-year-freshmen-college-basketball). University of Kentucky coach John

2016 season alone, five freshman college basketball players elected to turn pro and were drafted in the first round of the NBA draft.<sup>35</sup>

So how does this translate to a need for different IAWP rules? With high school recruits making a more immediate and substantial impact on a college basketball program's success, college basketball programs have far greater incentive to use IAWP hires to lure in top level recruits. For basketball teams, the difference between an average season and a trip to the NCAA tournament can mean millions of dollars.<sup>36</sup> If one elite freshman recruit can help a team to make the tournament, programs have clear motive to engage in questionable practices. Football, on the other hand, is not as simple. Considering all the moving parts and physical development required of top football recruits, the payout for an elite recruit often isn't realized until years after he commits to the program.<sup>37</sup>

### III. NEGATIVE EFFECTS OF THE IAWP RULE

Despite the IAWP rule's good intentions and seemingly effective policy, it fails to account for one glaringly important scenario—when a qualified individual is hired to a support staff role in a college program for a legitimate purpose, but happens to qualify as an IAWP.<sup>38</sup> In this scenario, a college with good intentions is effectively barred from hiring a qualified applicant simply because that applicant happens to have a relationship

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Calipari relied on a core group of elite Freshman to lead his team to a National Title in 2012. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Tim Parker, *How Much Does the NCAA Make off of March Madness?*, INVESTOPEDIA (Mar. 13, 2017), <http://www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp>. In 2017, 68 teams got an invitation to play in the tournament. *Id.* Each of those team's conferences will get a piece of a \$220 million pot of money. *Id.* For each game a team plays, its conference gets a payout, spread over six years. *Id.* For playing one game the team's conference gets roughly \$1.7 million. *Id.*

<sup>37</sup> See Jenna Johnson, *Freshman Football Players Balance Stresses of College Life*, THE WASHINGTON POST (Dec. 25, 2013), [https://www.washingtonpost.com/local/education/freshman-football-players-balance-stresses-of-college-life/2013/12/25/ff5b446a-6673-11e3-a0b9-249bbb34602c\\_story.html?utm\\_term=.063c5ee8e96c](https://www.washingtonpost.com/local/education/freshman-football-players-balance-stresses-of-college-life/2013/12/25/ff5b446a-6673-11e3-a0b9-249bbb34602c_story.html?utm_term=.063c5ee8e96c).

<sup>38</sup> See Schroeder, *supra* note 5.



(possibly minimal) with a student-athlete who currently plays for that college, or is being recruited by that college.<sup>39</sup> This scenario is particularly applicable to two key groups within the college football demographic—high school coaches and NCAA support staffers.<sup>40</sup> In each group’s case, the IAWP rule creates a clear obstacle for career advancement opportunities.<sup>41</sup>

#### A. EFFECT ON HIGH SCHOOL COACHES

While recognizing the need to regulate larger programs’ hiring to lure recruits,<sup>42</sup> a number of college football coaches have expressed their strong displeasure with the IAWP rule’s effect on their ability to hire legitimately qualified high school coaches.<sup>43</sup> As Auburn head football coach Gus Malzahn described it, the new rule is “a death sentence to any high school coach wanting to coach college (football).”<sup>44</sup>

To better understand the new rule’s effect on high school coaches, consider the experience of Dave Ballou, the head strength and conditioning coach of the Florida high school, IMG Academy.<sup>45</sup> After being named a finalist for the “2014 National Strength and Conditioning Association High School Strength Coach of the Year,” Ballou was hired in 2017 as a football strength coach at the University of Notre Dame.<sup>46</sup> Unfortunately for

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; see also Nick Moyle, *UT’s Herman Believes NCAA Got It Wrong with Latest Rule Change*, SAN ANTONIO EXPRESS-NEWS (Apr. 18, 2017), [http://www.expressnews.com/sports/college\\_sports/longhorns/article/U-T-s-Herman-believes-NCAA-got-it-wrong-with-11081761.php](http://www.expressnews.com/sports/college_sports/longhorns/article/U-T-s-Herman-believes-NCAA-got-it-wrong-with-11081761.php).

<sup>41</sup> See Schroeder, *supra* note 5.

<sup>42</sup> *Id.*

<sup>43</sup> Ben Baby, *Why SEC Football Coaches are Unhappy with a New NCAA Recruiting Rule*, SPORTSDAY (May 2017), <https://sportsday.dallasnews.com/college-sports/collegesports/2017/05/31/sec-football-coaches-unhappy-new-ncaa-recruiting-rule>. See also Schroeder, *supra* note 5.

<sup>44</sup> Schroeder, *supra* note 5.

<sup>45</sup> Jim Halley, *High School Football Coaches Say New NCAA Rule Limits Their Ability to Make a Living*, USA TODAY HIGH SCHOOL SPORTS (Apr. 20, 2017), <http://usatodayhss.com/2017/high-school-football-coaches-say-new-ncaa-rule-limits-their-ability-to-make-a-living>.

<sup>46</sup> *Id.*

Ballou, Notre Dame had three members of its roster who attended IMG Academy and was heavily involved in the recruiting of two more IMG players in the class of 2018.<sup>47</sup> Since the IAWP rule would render these players ineligible to play at Notre Dame if Ballou accepted the position, he was forced to return to his high school job.<sup>48</sup> While Ballou was later given an exception to the rule to take the job, a large number of high school coaches fear they will not be as lucky in the future.<sup>49</sup>

While Dave Ballou's scenario is only a single instance of the new IAWP rule's unfortunate effect, Ballou's path to college football is not uncommon. In fact, the strength coach's situation mirrors the career path of a large number of current college football coaches who would have violated the IAWP rule if it had been in place when they took their first job.<sup>50</sup> Current University of Tennessee head coach, Jeremy Pruitt, was once a local Alabama high school football coach hired by University of Alabama coach, Nick Saban, to serve as director of player development.<sup>51</sup> Current offensive coordinators at Auburn and North Carolina respectively, Chip Lindsay and Eliah Drinkwitz, each started their careers in non-coaching roles as offensive analysts.<sup>52</sup> Last year alone, twelve high school coaches were hired by college programs.<sup>53</sup> Of those, eight of the positions were for support staff roles that did not involve coaching.<sup>54</sup> The IAWP has effectively eliminated the most common pathway for high school coaches with larger career aspirations to take the next step in their careers.

Supporters of the new IAWP rule argue that since the rule permits colleges to hire high school coaches directly to on-field positions without triggering the rule, all concerns about stifling high school coach career advancement opportunities are

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.* It is uncertain whether Ballou made the individual decision to return to his high school job or whether Notre Dame revoked his offer in hopes of retaining the recruits' eligibility. *Id.* Ballou was unavailable for comment. *Id.*

<sup>49</sup> *See id.* The NCAA later made an exception for Ballou to take the job at Notre Dame. *Id.* This was likely based on his role as a strength coach, as opposed to an analyst or player quality control position with less concrete job descriptions. *Id.*

<sup>50</sup> *See* Barnett, *supra* note 19; Schroeder, *supra* note 5.

<sup>51</sup> Barnett, *supra* note 19.

<sup>52</sup> *Id.*

<sup>53</sup> *See* Halley, *supra* note 45.

<sup>54</sup> *Id.*

unfounded.<sup>55</sup> When taking a closer look at the method behind college football hires, however, this exception to the rule fails to solve the problem.

College football programs are only allowed a total of ten on-field assistant coaching positions per season.<sup>56</sup> While that may seem like a large number in isolation, it loses zeal when considering that NCAA rules permit college football teams to carry 105 players on a roster.<sup>57</sup> Therefore, it is not hard to comprehend why colleges would be hesitant to use one of those “limited” ten spots on a high school coach who remains unproven in the college ranks.<sup>58</sup> As current North Carolina State football offensive coordinator Eliah Drinkwitz explains, “[t]he problem is it’s hard to hire a guy right into an on-field role without any prior (college football) experience. You’re grooming them for this (on-field) position. It’s a great way to train up a staff.”<sup>59</sup>

Current UNLV football head coach Tony Sanchez reinforced this sentiment while discussing the possibility of hiring high school coaches to his own staff.<sup>60</sup> “I would love to hire some of those guys on at some point in some capacity and give them an opportunity,” stated Sanchez.<sup>61</sup> “But I want to get to know them, I want to see their work ethic. I want to see their true knowledge . . . and if [it] is what I think it is, those are the guys I eventually end up hiring as on-the-field assistants.”<sup>62</sup> With a large number of college coaches sharing the thought process of both Drinkwitz and Sanchez, relying on the “on-field” exception to the IAWP rule does not seem to be a long-term solution to high school coaches looking to make the leap into the college ranks.

While there are undoubtedly scenarios where colleges take advantage of a recruiting loophole by hiring unqualified high

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<sup>55</sup> See Crabtree, *supra* note 4.

<sup>56</sup> See generally Zach Barnett, *How Most FBS Programs Will Use a 10th Assistant Coach*, FOOTBALL SCOOP (Oct. 5, 2016), <http://footballscoop.com/news/fbs-programs-will-use-10th-assistant-coach/>.

<sup>57</sup> See *Roster FAQ's*, LOYAL COUGARS, <https://www.loyalcougars.com/football-roster/roster-faqs/> (last visited Nov. 6, 2018).

<sup>58</sup> See Schroeder, *supra* note 5.

<sup>59</sup> *Id.*

<sup>60</sup> See Halley, *supra* note 43.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

school coaches into “sham” positions for the sole purpose of securing potential recruits, it seems the more common purpose for these hires has to do with a vetting process that allows high school coaches a meaningful opportunity to prove themselves and better learn the college game.<sup>63</sup>

#### B. EFFECT ON COLLEGE FOOTBALL SUPPORT STAFFERS

Unfortunately, the indirect effect of the IAWP rule on career advancement is not limited to high school coaches. Based upon the broad language of the rule, the IAWP rule could also cost career college administrators and support staff’s future advancement opportunities.<sup>64</sup> Texas head football coach Tom Hermann pointed this problem out in a teleconference with other Big 12 Conference head coaches.<sup>65</sup> Using a hypothetical scenario, Hermann stated, “if my director of player personnel leaves and I want to hire Texas Tech’s director of player personnel, I can’t, because he has a relationship with thousands of recruits that [the IAWP rule] would deem ineligible to participate at the University of Texas.”<sup>66</sup>

Hermann’s hypothetical raises a legitimate concern. While a Director of Player Personnel (DPP) position carries with it various responsibilities relating to player support and management of day to day player experiences, the main job duty of a DPP is the recruitment of prospects.<sup>67</sup> Recruiting is a cornerstone duty within a program, and can mean the difference between sustained success and program downturn.<sup>68</sup> But every time a DPP makes contact with a recruit in any capacity, that DPP would qualify as an IAWP.<sup>69</sup> Since larger schools recruit thousands of prospects each year, a school looking to hire a DPP from one of those larger schools would have to be willing to forfeit the eligibility of all of prospects that DPP had contact with. The

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<sup>63</sup> See Barnett, *supra* note 19.

<sup>64</sup> Moyle, *supra* note 40.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Clayton Browne, *Director of Player Personnel Job Description*, HOUSTON CHRONICLE, <http://work.chron.com/director-player-personnel-job-description-23382.html> (last visited Nov. 19, 2018).

<sup>68</sup> See Chris Hummer, *Our Yearly Reminder: Why Recruiting Rankings Matter*, 247 SPORTS (Jan. 30, 2017), <https://247sports.com/Article/National-Signing-Day-Why-recruiting-unquestionably-matters-for-c-50905753>.

<sup>69</sup> See NCAA Division III Bylaw 13.02.19.

cost of losing thousands of potential prospects would seemingly always outweigh the benefit of hiring one individual, and therefore experienced and qualified DPP's are being denied the opportunity to advance their careers. In Hermann's hypothetical, this would leave University of Texas in quite a bind. With a vacancy in one of the programs most key positions, the school is essentially forced to overlook the most qualified individuals who reside at other colleges in order to hire an inexperienced applicant who does not violate the IAWP rule.

Since the IAWP rule's purpose is to curtail shady practices of colleges hiring unqualified individuals for the sole purpose of attracting recruits, the rule seems to reach far beyond its principal justification. Indeed, there are undoubtedly examples of colleges using bad faith motives when deciding to hire a new support staff employee.<sup>70</sup> However, the new rule will arguably place college football in an even worse position by disqualifying a substantial number of the qualified college football support staffers who serve important roles within programs.

#### C. EFFECT ON STUDENT-ATHLETES

Keep in mind that colleges are not barred from hiring high school coaches and support staffers to off-field positions if willing to face the consequences of forfeiting recruiting rights and eligibility of those players that have an IAWP relationship with the hire. While coaches like Auburn's Gus Malzahn claim that they have never recruited or signed a recruit from a school in which they hired a high school coach,<sup>71</sup> it begs the question—what effect does the IAWP rule have on student-athletes?

When a high school coach joins a college staff in a non-coaching capacity, all high school players currently being recruited from that coach's school are now barred from playing for that college.<sup>72</sup> While a great deal of coaches may choose to turn down the job to preserve their players' eligibility—as Dave

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<sup>70</sup> University of Miami conveniently landed commitments from two coveted high school teammates around the same time they hired an assistant coach of the boys' high school. Rob Cassidy, *New NCAA Hiring Rule Has Some Coaches Perplexed*, RIVALDS.COM (Apr. 17, 2017), <https://n.rivals.com/news/new-ncaa-hiring-rule-has-some-coaches-perplexed>.

<sup>71</sup> Schroeder, *supra* note 5.

<sup>72</sup> See NCAA Division III Bylaw 11.4.3.

Ballou did at Notre Dame<sup>73</sup>—this might not always be the case. If a coach or staffer did choose to take a job, this could leave a large number of high school players who had scholarship opportunities to play football at that school without a way to attend college.

The rule also creates conflicts of interest for high school coaches trying to advance their own careers. Now, if a coach believes he may have an opportunity to take a job at a college in a coming season, he may avoid helping a player from his team receive a scholarship to that college to avoid triggering the rule and making himself more unattractive to the college.

With Division I member institutions now forced to overlook certain players as a result of hiring an individual who happens to have known or coached the players in the past, it seems as though the IAWP rule is hurting, rather than helping student-athletes—which is what the rule aimed to promote in the first place.<sup>74</sup> While encouraging balanced recruiting competition, the IAWP rule actually has a negative impact on the scholarship opportunities of student-athletes.

#### IV. ANTITRUST VIOLATIONS OF THE IAWP RULE

Legal recourse for those key groups affected by the passing of the IAWP rule is grounded in federal labor law. As University of Texas head football coach Tom Hermann put it, “[T]o say that to a person that is in a support staff role as a career and not allow them upward mobility . . . to me, you’re talking about federal labor laws now.”<sup>75</sup> The laws Hermann refers to are codified in the Sherman Antitrust Act,<sup>76</sup> a piece of legislation designed to promote free competition in the marketplace and curtail the monopolization of trade and commerce.<sup>77</sup>

By implementing harsh sanctions on schools who violate the IAWP rule, and placing eligibility penalties on the athletes involved, the NCAA has created two anticompetitive effects. First, high school coaches and support staffers may no longer freely move between NCAA Division I schools, restraining the market for NCAA support staff and potentially affecting the price

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<sup>73</sup> Halley, *supra* note 45.

<sup>74</sup> Hosick, *supra* note 1.

<sup>75</sup> Cassidy, *supra* note 70.

<sup>76</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

<sup>77</sup> *Sherman Antitrust Act*, AMERICAN-HISTORAMA.ORG (July 1, 2014), <http://www.american-historama.org/1881-1913-maturation-era/sherman-antitrust-act.htm>.

for qualified employment candidates. Rather than basing potential hires on the qualifications and organizational fit of candidates, schools are now forced to overlook the most qualified candidates and base their hiring decision on the number of eligible recruits they may lose as a result of the hire. Second, athletes with scholarship offers to schools that have chosen to hire an IAWP are now unable to play for that school, restraining the market for athletic talent in the NCAA marketplace. Without the IAWP rule, athletes would be able to freely bargain with the schools of their choice to exchange their on-field labor for an athletic scholarship. These unnecessary restraints create anticompetitive behavior and form the basis for a potential antitrust challenge against the NCAA.

After analyzing the mechanics of a claim under the Sherman Act, this section will explore the applicability of the Sherman Act to the NCAA, analyze recent case law relating to antitrust challenges against the NCAA, and attempt to layout a potential Sherman Act claim against the IAWP rule.

#### A. SHERMAN ANTITRUST ACT

Section 1 of the Sherman Antitrust Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”<sup>78</sup> To establish a valid Sherman Act claim, a plaintiff bears the burden of establishing the presence of three key elements.<sup>79</sup> These include: “(1) a contract, combination, or conspiracy; (2) which unreasonably restrains competition in a relevant market; (3) which affects interstate commerce.”<sup>80</sup> However, it is important to understand that in analyzing the second element, the presence of a restraint alone is not considered a violation of the Sherman Act. Rather, a plaintiff must demonstrate that the restraint is unreasonable.<sup>81</sup>

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<sup>78</sup> Sherman Antitrust Act, 15 U.S.C. § 1 (2004).

<sup>79</sup> Justin Seivert, *NCAA Legislation Will Continue to Be Attacked Under Antitrust Law*, SPORTING NEWS (Mar. 17, 2016), <http://www.sportingnews.com/ncaa-football/news/ncaa-legislation-antitrust-lawsuit-law-sherman-antitrust-act-mark-emmert/1qhywyk6qhxxo16byd7g0xceq7>.

<sup>80</sup> *Id.*

<sup>81</sup> *See, e.g.,* NCAA v. Bd. of Regents, 468 U.S. 92, 98 (1984).

When analyzing whether a restraint challenged under the Sherman Act is “unreasonable,” courts apply “one of two analytical standards.”<sup>82</sup> The first is the *per se* rule, which is reserved for the most obviously unlawful restraints on trade, with little-to-no procompetitive value.<sup>83</sup> If used, the *per se* rule deems restraints unlawful without any analysis of the justifications or reasonableness of the restraint.<sup>84</sup>

The more standard framework applied by the courts is known as the “Rule of Reason” analysis.<sup>85</sup> Under the Rule of Reason, courts employ a rigorous burden shifting framework.<sup>86</sup> The plaintiff has the initial burden of proving the restraint will result in a significant anticompetitive effect in the relevant market. If the plaintiff successfully demonstrates an anticompetitive effect, the burden then shifts to the defendant to justify the restraint based on some procompetitive ground.<sup>87</sup> If the defendant is successful, the burden shifts once more to the plaintiff who must either demonstrate that the restraint is unnecessary to meet its main objectives, or establish the presence of substantially less restrictive alternatives to achieving those objectives.<sup>88</sup>

#### B. APPLICABILITY OF THE SHERMAN ANTITRUST ACT TO THE NCAA

Sherman Act challenges to NCAA rules and regulations are not an issue of first impression on the courts, who have tried a number of cases involving restraint of trade allegations against the NCAA.<sup>89</sup> Unfortunately, precedent is far more inconsistent than

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<sup>82</sup> Daniel Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, 1 Perspectives in Antitrust 2, AMERICAN BAR ASSOCIATION (2013).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 2.

<sup>85</sup> *See Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012); *see also Fundakowski, supra* note 82.

<sup>86</sup> Fundakowski, *supra* note 82, at 2.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *See generally NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (involving an antitrust challenge against NCAA’s restriction of college football broadcasting rights); *Agnew*, 683 F.3d at 339 (involving student-athletes challenge to an NCAA rule capping the number of allowable scholarships); *O’Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015) (involving an antitrust challenge against the NCAA compensation rules relating to player name, likeness, and image).



unified on the issue of whether plaintiffs can successfully challenge NCAA bylaws on antitrust grounds.<sup>90</sup> The NCAA often relies on its non-profit business model to advance the argument that its educational objectives and focus on amateurism exempt it from the reach of Section 1 of the Sherman Antitrust Act, which is “tailored for the business world, not for the non-commercial aspects of the liberal arts and the learned professions.”<sup>91</sup> This argument loses muster, however, when considering the enormous revenue generated by college football for its member institutions year after year. In 2016 alone, the University of Alabama football program generated \$103.9 million in revenue,<sup>92</sup> paying its head coach a salary of nearly \$11.1 million.<sup>93</sup> Courts cannot ignore the business aspect associated with the coaching of student-athletes and the production of games and other athletic events to the general public.<sup>94</sup> Some courts have strongly suggested that the NCAA is not entitled to an exemption from antitrust scrutiny.<sup>95</sup> In fact in *O’Bannon v. NCAA*, one of the seminal cases on antitrust applicability to NCAA rules, the U.S. Court of Appeals for the Ninth Circuit reasoned that all regulations passed by the NCAA are subject to the Sherman Act.<sup>96</sup> The following cases provide a look at some of the more recent Sherman Act challenges against the NCAA.

1. *Hennessey v. Nat’l Collegiate Athletic Ass’n*

Although ultimately unsuccessful, *Hennessey v. NCAA* provides the framework for one of the early challenges brought against an NCAA bylaw directly affecting working opportunities of coaches.<sup>97</sup> In August of 1975, the NCAA passed a bylaw which limited the number of full-time assistant football and basketball coaches who could be employed by an NCAA member school.<sup>98</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Hennessey v. NCAA*, 564 F.2d 1136, 1148 (5th Cir. 1977).

<sup>92</sup> Ahiza Garcia, *Alabama’s Crimson Tide is Rolling in Green*, CNN MONEY, <https://money.cnn.com/2017/01/09/news/alabama-clemson-championship-revenue/index.html> (last visited Oct. 22, 2018).

<sup>93</sup> *NCAA Salaries*, USA TODAY, <http://sports.usatoday.com/ncaa/salaries/> (last visited Oct. 22, 2018).

<sup>94</sup> *See Hennessey*, 564 F.2d at 1149.

<sup>95</sup> *Id.*

<sup>96</sup> *O’Bannon*, 802 F.3d at 1079.

<sup>97</sup> *See Hennessey*, 564 F.2d at 1136.

<sup>98</sup> *Id.* at 1140.

As a result, the University of Alabama, who exceeded the number of permissible assistant coaches in both sports, demoted Lawrence Hennessey and Wendell Hudson to part-time coaches to avoid penalty.<sup>99</sup> The coaches responded to the demotions by challenging the new bylaw in federal court under a theory of—among other things—an illegal restraint of trade in violation of Section 1 of the Sherman Antitrust Act.<sup>100</sup>

The court began by acknowledging that the bylaw satisfied the “agreement” element of a restraint of trade claim due to the agreement amongst the various members of the association in relation to the rule.<sup>101</sup> Despite the NCAA’s argument that its educational nature exempted it from the reach of antitrust laws, the court determined the bylaw was subject to Section 1 Sherman Act analysis.<sup>102</sup> The court next turned to the interstate commerce element, where it relied on the multi-state nature of coaching college athletics and the revenue of NCAA competition to make its determination.<sup>103</sup> With NCAA competition involving travel around the country, and coaches providing their services to athletes across state borders at these competitions, the court concluded the bylaw had a “sufficient impact” on interstate commerce so as to fall under the Section 1 Sherman Act blanket.<sup>104</sup>

The coaches’ restraint of trade claim ultimately failed, however, when the court reached the “unreasonableness element.”<sup>105</sup> The coaches advanced a theory that the bylaw acted as a “group boycott,” and was therefore *per se* illegal.<sup>106</sup> Relying on the non-profit nature and purpose of the NCAA, however, the court concluded that the bylaw was not *per se* illegal, and rather subject to a rule of reason analysis.<sup>107</sup>

After conducting the rule of reason analysis, the court found for the NCAA.<sup>108</sup> The driving factor in the decision was the NCAA’s purpose for the rule, which was to balance the

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<sup>99</sup> *Id.*

<sup>100</sup> *See id.* at 1147.

<sup>101</sup> *See id.*

<sup>102</sup> *Id.* at 1148.

<sup>103</sup> *See id.* at 1150–51.

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 1154.

<sup>106</sup> *Id.* at 1151.

<sup>107</sup> *Id.* at 1152–53.

<sup>108</sup> *Id.* at 1154.

competitive and economic advantages of larger schools who had expanded their programs and placed economic pressure on smaller schools to “catch up” and “keep up.”<sup>109</sup> However, the court did admit that the actual effect of the bylaw on coaches was still largely unknown, as it had only been in place for a little over a month at the time the suit was brought.<sup>110</sup> As a result, the court acknowledged that the adverse impact of the rule could ultimately outweigh its procompetitive effects, and admitted these negative impacts could form the basis for a subsequent lawsuit in the future.<sup>111</sup>

## 2. *Law v. Nat'l Collegiate Athletic Ass'n*

In a more recent and successful challenge to an NCAA bylaw affecting coaches, a group of NCAA basketball coaches filed an antitrust challenge in August 1995. The coaches alleged that an NCAA bylaw that set a salary cap for entry level coaches violated Section 1 of the Sherman Act.<sup>112</sup> Citing a need to stop a “catastrophic cost spiral” in which NCAA member schools continued to increase spending on recruiting and coaches to compete with other schools, the NCAA formed a Cost Reduction Committee in 1989 which developed the “Restricted Earnings Coach Rule.”<sup>113</sup> The rule functioned by limiting the number of coaches a Division I program could hire, and forced the school to designate one of those coaches as a “restricted earnings coach,” who could not be paid in excess of \$12,000 during the academic year and \$4,000 during summer months.<sup>114</sup>

Citing Supreme Court precedent relating to antitrust challenges against the NCAA, the U.S. Court of Appeals for the Tenth Circuit affirmed the District Court’s determination that the Rule of Reason inquiry was the appropriate mechanism for Sherman Act analysis of NCAA bylaws, as opposed to a *per se* analysis.<sup>115</sup> Conducting the Rule of Reason analysis, the court

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<sup>109</sup> *Id.* at 1153.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1154.

<sup>112</sup> *See* *Law v. NCAA*, 902 F. Supp. 1394, 1394 (D. Kan.

1995).

<sup>113</sup> *Id.* at 1399–1400.

<sup>114</sup> *Id.* at 1400.

<sup>115</sup> *See* *Law v. NCAA*, 134 F.3d 1010, 1018–19 (10th Cir. 1998); *see also* *NCAA*, 468 U.S. at 101–03.

denied the NCAA's argument that because restricted earnings coaches could find coaching jobs in other arenas—NCAA Division II, high school, non-NCAA college teams—no anticompetitive effect existed.<sup>116</sup> The court reasoned that despite Division I coaching positions making up only a small portion of the overall coaching market, the NCAA's lack of market power did not eliminate clear anticompetitive effects under the Sherman Act."<sup>117</sup> Since the rule effectively reduced the responsiveness of price (coaching salaries) to demand, no market power analysis was needed to determine the anticompetitive effect on the "market for coaching services."<sup>118</sup>

The NCAA attempted to counter this anticompetitive effect by providing procompetitive justifications for the rule similar to those presented in *Hennessey*.<sup>119</sup> Namely, that the new rule "maintain[ed] competitive equity," "retain[ed] entry-level coaching positions," and protected NCAA member schools from destructive cost increases.<sup>120</sup> However, the court stated that the *Hennessey* court placed too much emphasis on the good intentions of the NCAA, without requiring it to present concrete evidence showing the bylaw actually helped to achieve those proffered objectives.<sup>121</sup> As a result, the NCAA's inability to present evidence showing the Restricted Earning Rule's positive effect caused the court to find for the coaches.<sup>122</sup>

As the NCAA failed to meet its burden of demonstrating legitimate procompetitive objectives, the court affirmed the District Court's granting of summary judgement for the Plaintiff's as to antitrust liability, without inquiry into whether there were less restrictive means of achieving those objectives.<sup>123</sup>

#### C. ESTABLISHING A SHERMAN ACT CLAIM BASED ON THE IAWP RULE AND THE POTENTIAL RESTRAINT OF TRADE VIOLATION

As indicated by analysis of the forgoing precedent, courts have been somewhat inconsistent in their rulings related to

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<sup>116</sup> *See Law*, 134 F.3d at 1019–20.

<sup>117</sup> *Id.* at 1020.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1020–21.

<sup>120</sup> *Id.* at 1021.

<sup>121</sup> *Id.* at 1021–24.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1024.

restraint of trade claims against the NCAA.<sup>124</sup> Despite this inconsistency, the IAWP rule seems to present a clear restraint of trade on more than one key demographic of the NCAA market. This may be a distinguishing factor which has not been seen by the courts when analyzing previously challenged NCAA regulations. As a result, a legitimate Sherman Act challenge could be made against the IAWP rule on the basis of both its restraint on the market for high school coaches and college football support staff available for hire, as well as student-athlete's ability to freely engage with Division I schools for a scholarship.

As noted in Section IV(a) above, coaches, support staff or players wishing to bring a restraint of trade challenge against the NCAA would bear the burden of establishing a "(1) a contract, combination, or conspiracy; (2) which unreasonably restrains competition in a relevant market; (3) which affects interstate commerce."<sup>125</sup> The first element, a "contract, combination, or conspiracy" is presumptively satisfied by the IAWP rule, and therefore will not be discussed in great detail. To demonstrate the existence of a contract, the plaintiff must establish the presence of agreement "between two separate entities rather than a single entity."<sup>126</sup> Just like the bylaw in *Hennessey*, the IAWP rule was codified through the NCAA legislative process, which requires agreement by all NCAA Football Bowl Subdivision (FBS) institutions. With 130 colleges and Universities currently making up the FBS,<sup>127</sup> agreement among these institutions regarding the new rule satisfies the "agreement between separate entities" requirement.<sup>128</sup>

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<sup>124</sup> Compare *Hennessey*, 564 F.2d at 1148 (finding a restriction on the number of college coaches was not an unreasonable restraint on trade), and *Agnew*, 683 F.3d at 335 (dismissing student-athletes challenge to an NCAA rule capping available scholarships under the Sherman act), with *Law*, 134 F.3d at 1010 (granting coaches challenging an NCAA rule restricting their pay summary judgement as to antitrust liability).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See *Football Bowl Subdivision Records*, NCAA 187 (2017), [http://fs.ncaa.org/Docs/stats/football\\_records/2017/FBS.pdf](http://fs.ncaa.org/Docs/stats/football_records/2017/FBS.pdf).

<sup>128</sup> See Seivert, *supra* note 79; see also *Hennessey*, 564 F.2d at 1147 (explaining that an NCAA Bylaw constitutes an agreement amongst member institutions and thus satisfies the contract requirement of Sherman Act analysis).

1. The IAWP Rule Unreasonably Restrains Competition

As is the case in a majority of antitrust claims involving the NCAA, the most difficult of the three elements to establish will likely be demonstrating that the new IAWP rule unreasonably restrains trade or commerce in a relevant market.<sup>129</sup> Consistent with Section IV(a) above, courts will look to make the unreasonableness determination by conducting a *per se* or Rule of Reason framework analysis.<sup>130</sup>

a. *Per Se Rule Analysis*

The *per se* Rule analysis is used in only the most extreme anticompetitive circumstances.<sup>131</sup> In other words, when the surrounding circumstances indicate that the likelihood of an anticompetitive effect is so great, the restraint is “condemned as a matter of law,” without any further examination of its unreasonableness.<sup>132</sup> Key indicators of *per se* unreasonableness include horizontal restraints on price and output, which almost always result in a restriction on competition.<sup>133</sup> Among these horizontal restraints are “group boycotts,” which involve “some concerted refusal to deal with persons or companies because of some characteristic of those persons and companies.”<sup>134</sup>

Just like the coaches in *Hennessey*, who argued that a bylaw restricting the number of coaches an NCAA member school could hire constituted a group boycott,<sup>135</sup> high school coaches and support staffers could certainly argue the IAWP rule functions as a group boycott on employment prospects who embody a particular characteristic. After all, the IAWP rule’s main function is to categorically prevent schools from engaging in economic activity (the hiring process) with certain employment prospects on the basis of their IAWP classification. This same argument could be made for student-athletes challenging the IAWP rule. When a school has hired a football support staff member who happens to have a relationship with a student-athlete, there is now “concerted refusal” on the part of that school to engage with that student-athlete in the labor-for-scholarship exchange, since that student-

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<sup>129</sup> Seivert, *supra* note 79.

<sup>130</sup> Fundakowski, *supra* note 82, at 1–2.

<sup>131</sup> *Id.* at 1.

<sup>132</sup> *NCAA*, 468 U.S. at 100.

<sup>133</sup> *Id.*

<sup>134</sup> *Hennessey*, 564 F.2d at 1151.

<sup>135</sup> *Id.*

athlete is rendered ineligible to play for the institution according to the rule.<sup>136</sup>

To discount this argument, the NCAA will likely rely on the depth of precedent concerning the *Per Se* Rule's application to NCAA bylaws. Both the *Hennessey* and *Law* courts make it clear that NCAA bylaws are treated differently by the courts than other *per se* restraints of trade.<sup>137</sup> Even the Supreme Court has weighed in on the issue, holding that the application of the *Per Se* Rule to NCAA rules would be "inappropriate" because college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all."<sup>138</sup> To uphold the "integrity of [college football]," some restraints must be agreed on by member schools so as to regulate fair competition.<sup>139</sup>

Therefore, while there is a convincing argument to be made that the IAWP rule could be considered *per se* illegal on the basis of a group boycott, recent precedent indicates coaches, support staffers, and student-athletes would likely be fighting an uphill battle in urging the court to apply the analysis.<sup>140</sup> As a result, a court hearing this challenge would likely evaluate the unreasonableness of the restraint under the Rule of Reason analysis.

#### b. *Rule of Reason Analysis*

When conducting the Rule of Reason analysis, a court hearing this claim would employ the three-part burden shifting framework discussed in Section IV(a) above.<sup>141</sup> To reiterate the framework, the plaintiff must first demonstrate the anticompetitive effect of the regulation, at which point the defendant must advance a procompetitive justification for the restraint. If successful, the plaintiff has the burden of

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<sup>136</sup> See Leonard W. Aragon & Cameron Miller, *National Letter of Intent's Basic Penalty: Analyses and Legal Basis to End the Practice*, 7 ARIZ. ST. SPORTS & ENT. L.J. 7, 61 (2017).

<sup>137</sup> See *Hennessey*, 564 F.2d at 1151–52; *Law*, 134 F.3d at 1017–18.

<sup>138</sup> See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 92, 100-01 (1984).

<sup>139</sup> *O'Bannon*, 802 F.3d at 1069.

<sup>140</sup> See, e.g., *Fundakowski* *supra* note 82.

<sup>141</sup> *Id.* at 1–2.

demonstrating those objectives could be met by less restrictive alternatives.<sup>142</sup>

c. *Establishing the Anticompetitive Effects of the IAWP Rule*

A plaintiff may establish an anticompetitive effect either directly by showing actual anticompetitive effects, such as control over output or price, or indirectly by proving that the defendant possessed the requisite market power within a defined market.<sup>143</sup> In both cases, the existence of a relevant commercial market is key.<sup>144</sup> The ultimate question to be answered when determining the effect of a restraint, however, is “whether or not the challenged restraint enhances competition.”<sup>145</sup>

**Coaches and Support Staffers:** There is a strong likelihood that the IAWP rule, just like the bylaw restricting earnings of entry level coaches in *Law*, has a clear anticompetitive effect on both the output and the price of a relevant market. Like the market for coaches analyzed in *Law*, there is a clear market for college football support staff employees involved with the IAWP rule. In this market, coaches and support staffers are considered the product, and the member institutions act as the consumers. Thus, when the NCAA passes a rule which restricts schools from hiring certain individuals who happen to qualify as IAWP’s, it effectively restricts the output of available employment candidates. Schools who are unable to hire an individual are eliminated from the consumer market, reducing both competition and demand for that individual. With less competition for the candidate, the salary required to hire him decreases, directly affecting price.

The NCAA may counter by claiming that they maintain minimal market power, which eliminates any existing anticompetitive effect. This argument relies on an assumption that the market for Division I football support staff jobs makes up just a small portion of the overall market for football support staff employees.<sup>146</sup> In other words, while high school coaches and

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<sup>142</sup> *Id.*

<sup>143</sup> *Law*, 134 F.3d at 1019.

<sup>144</sup> *See O’Bannon*, 802 F.3d at 1070.

<sup>145</sup> *Agnew*, 683 F.3d at 335 (quoting *California Dental Ass’n v. F.T.C.*, 526 U.S. 756, 780 (1999)).

<sup>146</sup> This argument is based on the argument presented by the NCAA to the district court in *Law*. *See Law*, 902 F. Supp. at 1405.



support staffers who classify as IAWPs may be restrained from employment at certain Division I institutions, they can still find other employment opportunities at Non-Division I institutions, non-NCAA member colleges, and professional organizations.<sup>147</sup> This argument is fatally flawed in two key respects.

First, *Law* stands for the proposition that when there is an agreement not to compete, proof of market power is unnecessary because the agreement's anticompetitive nature is clear.<sup>148</sup> In the case of the IAWP rule, there is a clear agreement among member schools not to compete for certain individuals who may have a relationship with recruits. Second, assuming analysis of the market power was undertaken by a court hearing this case, the market for football support staff jobs is much smaller than the market for coaching generally.<sup>149</sup> While football coaching jobs are found in the high school, college, and professional ranks, the market for football support staff employees is confined to the major college and professional ranks. Therefore, closing off the opportunity to work for a Division I program eliminates a significantly larger portion of the overall market.

**Student-Athletes:** For student-athletes, the main hurdle to establish an anticompetitive effect is to demonstrate the existence of a relevant commercial market.<sup>150</sup> Fortunately, "commerce" has been defined broadly to "include almost every activity from which the actor anticipates economic gain."<sup>151</sup> In *Agnew v. NCAA*, a court analyzing the applicability of the Sherman Act to NCAA regulations capping the number of scholarships allowed per year determined that transactions between student-athletes and NCAA schools are "commercial in nature."<sup>152</sup> Since football programs and student-athletes take

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<sup>147</sup> *Id.*

<sup>148</sup> *See NCAA*, 468 U.S. at 100–01; *see also Law*, 134 F.3d at 1020.

<sup>149</sup> Support staff jobs can include roles in recruiting, quality control, scouting, and research. *NCAA Football Positions*, INDEED, <https://www.indeed.com/q-Football-jobs.html> (last visited Mar. 10, 2018).

<sup>150</sup> *See O'Bannon*, 802 F.3d at 1064–65 (9th Cir. 2015) (stating that the existence of an affected commercial market is key to establishing a restraint of trade claim).

<sup>151</sup> *Id.* at 1065

<sup>152</sup> *Agnew*, 683 F.3d at 341.

economic factors into consideration when deciding how to recruit and which schools to attend respectively, bylaws relating to recruiting satisfy a relevant commercial market for Sherman Act purposes.<sup>153</sup>

Similar to the regulation in *Agnew*, the IAWP rule, while relating to eligibility, is directly connected to an economic transaction. The IAWP rule functions by governing the eligibility of potential recruits who have signed or will be signing with a school. At the heart of this recruiting process is an economic transaction between player and school.<sup>154</sup> By supplying labor in the form of participation in football, the player is worth hundreds of thousands of dollars per year to the school.<sup>155</sup> Therefore, the school anticipates economic gain from the signing. Similarly, the student is bargaining with schools for the price of tuition, room and board, and the cost of books, with those incentives making up the student-athlete's economic gain.<sup>156</sup>

With a commercial market established, student-athletes could demonstrate the anticompetitive effect the IAWP rule has on the labor-for-scholarship exchange. With the IAWP rule rendering athlete's ineligible to play for any program who hires an individual associated with them to a non-coaching position, the market for that player's services has now been restricted. As a result of the IAWP rule's penalties, schools who would otherwise engage with this athlete in the economic exchange of labor-for-scholarship will be forced to look elsewhere for student-athletes who do not trigger the IAWP rule.

To rebut the existence of an anticompetitive effect, the NCAA will likely argue that NCAA rules related to eligibility are "presumptively procompetitive," and thus not subject to Sherman Act scrutiny.<sup>157</sup> However, this argument is unpersuasive. Courts

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<sup>153</sup> *Id.*

<sup>154</sup> See Aragon & Miller, *supra* note 136, at 71.

<sup>155</sup> "The average FBS player is worth \$163,087 a year" to their respective schools. Cork Gaines and Mike Nudelman, *Why the NCAA may Eventually be Forced to Pay Some Student Athletes, in One Chart.*, BUSINESS INSIDER (Nov. 24, 2017), <http://www.businessinsider.com/college-football-player-value-2017-11>.

<sup>156</sup> See Aragon & Miller, *supra* note 136, at 71.

<sup>157</sup> See *Agnew*, 683 F.3d at 341–42 (discussing the Supreme Court's reasoning in *NCAA v. Bd. of Regents* that most NCAA bylaws should be presumed procompetitive because they enhance public interest in intercollegiate athletics and foster competition); see also *NCAA*, 468 U.S. at 117.

have explicitly rejected the notion that an NCAA rule which contains characteristics of an eligibility rule must always escape antitrust scrutiny.<sup>158</sup> “Were the law otherwise, the NCAA could insulate its member schools’ relationships with student-athletes from antitrust scrutiny by renaming every rule governing student-athletes an ‘eligibility rule.’ The antitrust laws are not to be avoided by such ‘clever manipulation of words.’”<sup>159</sup> Therefore, student-athletes would likely succeed in establishing the existence of anticompetitive effects on relevant commercial markets.

d. *NCAA’s Procompetitive Justifications for the IAWP Rule*

With an anticompetitive effect established, the NCAA would carry the “heavy burden of establishing an affirmative defense,” which competitively justifies “infringement on the Sherman Act’s protected domain.”<sup>160</sup> The pro-competitive justifications advanced by the NCAA would likely include maintaining competitive balance amongst member schools in recruiting, and promoting amateurism. Plaintiffs bringing a claim could persuasively refute each of these justifications.

As discussed in Section II of this paper, the NCAA’s primary motivation for the IAWP rule was to maintain competitive balance in recruiting.<sup>161</sup> Specifically, the NCAA intended to curb the practice of larger Division I programs using program revenue to create sham employment positions for family and close friends of highly touted prospects.<sup>162</sup> Unfortunately, the IAWP rule does little to deliver on its promise of creating competitive balance and eliminating recruiting advantages of larger Division I programs. This is because competitive balance does not exist in the NCAA.<sup>163</sup> While the ability to hire individuals

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<sup>158</sup> *O’Bannon*, 802 F.3d at 1064.

<sup>159</sup> *Id.* at 1065.

<sup>160</sup> *NCAA*, 468 U.S. at 86.

<sup>161</sup> Johnson, *supra* note 21.

<sup>162</sup> Barnett, *supra* note 19.

<sup>163</sup> See *O’Bannon*, 802 F.3d at 1059 (discussing the district court’s reasoning that “numerous economists have studied the NCAA over the years and that ‘nearly all’ of them have concluded” that NCAA rule fail to promote competitive balance); see also Andy Schwarz, *The Competitive-Balance Argument Against Paying Athletes is Bullshit*, DEADSPIN (May 15, 2014), <https://deadspin.com/the-competitive-balance-argument-against-paying-athlete-1576638830>.

close to potential prospects favors larger programs with more disposable resources, it is but one small avenue by which larger schools use money to gain a competitive advantage over smaller schools in recruiting.<sup>164</sup>

This argument is supported by *O'Bannon v. NCAA*. In *O'Bannon*, the U.S. Court of Appeals for the Ninth Circuit agreed with the district court's reasoning that while NCAA compensation rules relating to athletes helped to prevent larger schools from paying athletes large amounts to entice them to sign, it did not stop schools from spending on other aspects of the program, like facilities and coaching.<sup>165</sup> As a result, any positive effect on competitive balance realized from the passing IAWP rule is likely minimized by the ability of wealthier programs to continue to spend on other areas that make their schools more enticing to attend.

The NCAA could also argue that the IAWP rule helps to preserve amateurism by eliminating the financial pressures felt by smaller institutions who may choose to ignore athlete compensation restrictions in an effort to "keep up" with larger programs.<sup>166</sup> However, this argument is weak. First, the IAWP rule is not related to the concept of amateurism, which deals with

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Studies conducted by a variety of economists show that recruiting rules do little to promote competitive balance in the NCAA. *Id.*

<sup>164</sup> In 2014 alone, 48 schools residing in the five wealthiest college football conferences spent a total of \$772 million on athletic facilities. Will Hobson and Steven Rich, *Colleges Spend Fortunes on Lavish Athletic Facilities*, CHICAGO TRIBUNE (Dec. 23, 2015), <http://www.chicagotribune.com/sports/college/ct-athletic-facilities-expenses-20151222-story.html>. Clemson's new facility is even equipped with a movie theatre, laser tag arena, and barber shop. *Id.* University of Oregon's apparel agreement with Nike provides players with the latest Nike gear, access to internship opportunities with the company, and "player-exclusive sneakers." Matthew Kish, *10 Fun Facts About the Oregon Ducks' Unique Nike Deal*, PORTLAND BUSINESS JOURNAL (Jan. 7, 2015), [https://www.bizjournals.com/portland/blog/threads\\_and\\_laces/2015/01/10-fun-facts-about-the-oregon-ducks-unique-nike.html](https://www.bizjournals.com/portland/blog/threads_and_laces/2015/01/10-fun-facts-about-the-oregon-ducks-unique-nike.html).

<sup>165</sup> *O'Bannon*, 802 F.3d at 1059 (explaining that any equalizing effect generated by the compensation rule was essentially negated by the other areas of program spending).

<sup>166</sup> This argument is largely paraphrased from the argument presented by the NCAA when opposing an antitrust challenge against a bylaw restricting the earnings of college coaches. *See Law*, 134 F.3d at 1023.

the financial compensation that *student-athletes* receive to attend a school.<sup>167</sup> Rather, the IAWP rule effects the ability for coaches and football support staffers to take employment opportunities and receive compensation. While courts have given the NCAA “room under the antitrust laws to preserve the amateur character of intercollegiate athletics, courts have only legitimized rules designed to ensure the amateur status of student-athletes, not coaches.”<sup>168</sup> Second, the “easing of financial pressures on smaller institutions” argument runs into the same problem as the “maintaining competitive balance” argument. Namely, that while the IAWP rule may relieve some financial pressure on smaller schools to “keep up” with larger programs initially, that effect will eventually be negated by the unregulated spending of larger schools on other areas of their football program.

e. *Establishing Less Restrictive Alternatives*

In the event that the court does accept the NCAA’s procompetitive justifications for the IAWP rule, plaintiffs bringing a claim could present less restrictive alternatives to achieving these goals, thus satisfying the third prong of the burden shifting framework.<sup>169</sup> While discussed in greater detail in Section V below, these include reworking the IAWP definition to exclude high school head football coaches and current NCAA support staffers (legitimate employment candidates) from the rule’s reach, creating a formal appeals process for legitimate candidates classified as IAWP’s, or creating a defined coaching development role within each program that escapes the reach of the IAWP rule.

In conclusion, the IAWP rule is an “unreasonable” restraint on both the relevant market for college football support staff employees, as well as the market for athletic talent. By restricting the free movement of high school coaches, college football support staffers, and student-athletes, the NCAA has reduced competition amongst member schools who engage in regular economic exchange for these key groups’ services. While the NCAA may justify its actions based on a push for competitive balance and preservation of amateurism, it lacks sufficient evidence to demonstrate that either of these objectives are actually met by passing the IAWP rule. Finally, even if the NCAA

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<sup>167</sup> See *Amateurism*, NCAA, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Nov. 12, 2018).

<sup>168</sup> *Law*, 134 F.3d at 1022 n.14.

<sup>169</sup> Fundakowski, *supra* note 82, at 1–2.

demonstrates procompetitive justifications, there exists less restrictive alternatives to achieving these goals.

## 2. The IAWP Rule Affects Interstate Commerce

To complete a successful Sherman Act challenge against the IAWP rule, plaintiffs would need to demonstrate that the rule has an effect on interstate commerce, thus satisfying the third and final element of the restraint of trade claim. “Interstate commerce” is defined as “the buying, selling, or moving of products, services, or money across state borders.”<sup>170</sup> In the case of both coaches/support staffers and the student-athletes affected, this element is likely satisfied.

As was discussed in the analysis of *Hennessey v. NCAA*, a bylaw limiting the number of assistant coaches a member school could hire had a “sufficient impact on interstate commerce.”<sup>171</sup> The court reasoned that intercollegiate athletics recognizes enormous revenues from schools and tournaments spread throughout the U.S., and coaching is a vital element of that process.<sup>172</sup> A significant portion of coaching is performed in other states when teams travel to compete, and the very nature of the employment market for college coaches is multi-state.<sup>173</sup> In *Agnew v. NCAA*, a bylaw capping the number of student-athlete scholarships allowed per year had a similar impact on commerce. Relying on the economic factors taken into consideration by both student-athletes and schools in deciding where to attend school and when to extend scholarships (respectively), transactions between student-athletes and NCAA schools were deemed “commercial in nature.”<sup>174</sup>

Like the challenged bylaw in *Hennessey*, the IAWP rule directly impacts the free flow of coaches and college support staffers to NCAA member schools throughout the country. The market for college football coaches and support staff is national in nature, with candidates typically residing in different programs and institutions throughout the U.S. With non-coaching support staff positions playing a vital part in the recruiting process of all NCAA member schools, the IAWP rule surely affects the

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<sup>170</sup> *Interstate Commerce*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/interstate\\_commerce#](https://www.law.cornell.edu/wex/interstate_commerce#) (last visited Nov. 12, 2018).

<sup>171</sup> *Hennessey*, 564 F.2d at 1150–51.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Agnew*, 683 F.3d at 341.

“moving . . . of services, or money across state borders.” The same can be said of the impact the IAWP rule has on student-athletes. Similar to the bylaw capping the number of scholarships in *Agnew*, the IAWP rule has a direct effect on both the recruiting and scholarship processes of college football by limiting the amount of schools who may recruit an athlete and offer scholarships. Both of these processes are multi-state, with potential recruits residing throughout the U.S. To put this in perspective, 14 of the 21 athletes that made up Ohio State University’s 2017 football recruiting class came from outside the state of Ohio.<sup>175</sup> Therefore, each group affected by the IAWP rule can likely argue that the rule’s restrictions sufficiently impact interstate commerce.

## V. SUGGESTIONS FOR REFORM OF THE IAWP RULE

The issue with the IAWP rule is not its intention (*i.e.*, to put a stop to questionable recruiting practices and maintain competitive balance), but rather its mechanics. In its current form, it opens the NCAA up to potential antitrust liability and results in detrimental consequences to some of the key inputs to the college football product. Therefore, the following suggestions provide the NCAA with some alternatives to the current IAWP rule, which might still achieve the NCAA’s main objectives.

### A. REWORK THE DEFINITION OF AN IAWP

The most workable solution to the current problems associated with the IAWP rule is to redefine who qualifies as an IAWP. By creating a definition that exempts high school head coaches and current NCAA football support staff employees, the NCAA can effectively filter out “sham” employees without restricting the advancement of legitimate employment prospects. This could be accomplished by creating a categorical exception, or redefining the IAWP entirely. Below is a side-by-side comparison of the NCAA’s current definition of an IAWP and a proposed revision of the definition addressing antitrust-related concerns:

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<sup>175</sup> *College Football Recruiting Classes*, ESPN, [http://www.espn.com/college-sports/football/recruiting/school/\\_id/194/class/2017](http://www.espn.com/college-sports/football/recruiting/school/_id/194/class/2017) (last visited Nov. 12, 2018) (listing Ohio State football recruit information for the 2017 season).

## Current Language:

[A]ny person who maintains (or directs others to maintain) contact with the prospective student-athlete, the prospective student-athlete's relatives or legal guardians, or coaches at any point during the prospective student-athlete's participation in football, and whose contact is directly or indirectly related to either the prospective student athlete's athletic skills and abilities or the prospective student-athlete's recruitment by or enrollment in an NCAA institution.<sup>176</sup>

## Revised Language:

[A]ny person who is *not currently employed by an NCAA Division I member institution athletic department*, who maintains (or directs others to maintain) contact with the prospective student-athlete, the prospective student-athlete's relatives or legal guardians, or coaches at any point during the prospective student-athlete's participation in football, and whose contact is directly or indirectly related to either the prospective student athlete's athletic skills and abilities or the prospective student-athlete's recruitment by or enrollment in an NCAA institution,<sup>177</sup> *but excluding any and all contact, currently or previously made as the head football coach of the high school or preparatory institution attended by the prospective student-athlete.*

By exempting NCAA Division I athletic department employees entirely within the first part of the definition, the rule no longer unnecessarily lumps in current support staff employees who make up a large portion of the qualified candidate pool for future support staff jobs in NCAA football programs.

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<sup>176</sup> NCAA Division I Bylaw 11.4.3.

<sup>177</sup> *Id.*



Furthermore, by exempting all contact made by the high school head football coach of the institution attended by the prospective student-athlete, colleges can continue to promote promising young high school coaches to the college ranks without any concern as to the eligibility of potential recruits. The exception is not overly broad, however, exempting contact made only as a *head football coach*. The result is that colleges looking to hire from the high school ranks are forced to look at only the most qualified individuals (*i.e.*, head coaches), as opposed to the “sham hires” involving unqualified assistant coaches or trainers.

#### B. CREATE AN EFFICIENT APPEALS PROCESS

Another possible solution to the problem involves the NCAA developing an efficient appeals process for individuals who have been classified as an IAWP. Under this solution, IAWP’s who anticipate taking a support staff position with an NCAA member institution may file a timely appeal to an NCAA sanctioned board. Developing a set of factors for consideration, this board would be able to better distinguish legitimate hires from those based on improper motives.

Factors to be considered could include: (1) prior experience related to the anticipated position; (2) number of years spent coaching or working in a support staff role; (3) previous accomplishments which may qualify them for the position; (4) number of current and past recruits with which they have an IAWP relationship; (5) nature of the relationship with any recruit(s) to which they are considered IAWP’s; and (6) the ranking of any recruits to which they are considered IAWP’s. Ideally, each factor would weigh differently, with strong factors being able to make up for weaker ones. In other words, a long-time head coach with dozens of IAWP relationships over a number of years could overcome that factor by showing a great amount of success and experience which suits him for the anticipated position. Furthermore, no one factor would be determinative of whether or not the waiver should be granted, and determinations would need to be made on a case-by-case basis. While this may be a more costly and time-consuming solution to the problem, it creates an escape hatch for the NCAA to avoid antitrust scrutiny while still cracking down on illegal recruiting practices.

### C. CREATE A DEFINED COACHING DEVELOPMENT ROLE

A third solution to the IAWP problem is the creation a defined coaching development position within each NCAA programs.<sup>178</sup> Under this solution, the NCAA would need to pass a bylaw which creates a new off-field support staff role specifically designated for high school head coaches who college programs are looking to develop for future on-field roles, but which does not trigger the IAWP rule. By making this an off-field support staff role, it would allow colleges to take a chance on promising high school coaches without having to use one of their ten on-filed coaching vacancies, but at the same time prevent any IAWP related eligibility concerns. Limiting factors could be placed on the position in order to address the recruiting related concerns of the NCAA. These could include: (1) capping the number of designated development positions available to each program; (2) creating an eligibility requirement which requires a defined number of years spent coaching high school football to become eligible for the position; and (3) limiting the duties of the position to only on-campus recruiting, so as to avoid previous high school coaches going back into their local high school communities to recruit.<sup>179</sup>

## VI. CONCLUSION

The NCAA's effort to restore some of the competitive balance missing from the college football recruiting environment is an admirable cause. With a huge disparity in the revenue generated by some of the smaller NCAA Division I football programs when compared to larger programs, there is a logical advantage for larger schools who have more disposable income to engage in seemingly questionable recruiting efforts. With that being said, the NCAA's use of the IAWP rule as the vehicle for this change is imprudent.

Not only does the IAWP rule negatively affect current NCAA support staffers' ability to take new job opportunities at other NCAA member schools, but it essentially cuts off college football's main pipeline for promising young coaches. The rule also directly affects student-athletes, who now fear losing scholarship opportunities and athletic eligibility due to a program's employment decisions—decisions which are entirely outside the control of a student-athlete. As a result of these negative effects, the IAWP rule potentially subjects the NCAA to

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<sup>178</sup> Johnson, *supra* note 21.

<sup>179</sup> *Id.*

legal liability. To wit, the rule unreasonably restrains competition in the market for NCAA support staffers, qualified coaches, and athletic talent in violation of Section 1 of the Sherman Antitrust Act.

I urge the NCAA to strongly consider the various negative implications associated with college football's new IAWP rule, and to engage in meaningful reform by considering the implementation of one (or all) of the solutions presented above.