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# Equity and Amateurism: How the NCAA Self-Employment Guidelines are Justified and Do Not Violate Antitrust Law

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## ABSTRACT

The NCAA's longstanding tradition of amateurism is a pillar of the NCAA that has been regularly challenged by student-athletes and the public. The NCAA has set forth numerous guidelines to safeguard this tradition, including the Self-Employment Guidelines, which provide that a student-athlete may not use his or her name, image, likeness, or reputation as an NCAA athlete in the promotion of his or her business. The Self-Employment Guidelines have become particularly relevant and controversial recently, as the NCAA has found student-athletes to be ineligible based on these Guidelines, and has warned future student-athletes against these practices in order to remain in compliance. In August 2017, Donald De La Haye, the kicker for the University of Central Florida, was deemed ineligible for a violation of the Self-Employment Guidelines after receiving advertising revenues on his YouTube channel. Additionally, the NCAA has expressed concern over highly anticipated sixteen-year-old basketball star LaMelo Ball's participation in his family's business, Big Baller Brand.

Antitrust claims are a common vehicle for student-athletes to challenge NCAA regulations. Thus, this Comment will engage in a rule of reason analysis of the NCAA's Self-Employment Guidelines to determine if the maintenance of the tradition of amateurism, along with the desire for parity amongst universities and amongst student-athletes, sufficiently justifies any anticompetitive effects that the student-athletes might feel from the Self-Employment Guidelines. Ultimately, this

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\* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2019. First, I would like to thank my parents for their unwavering love and support as I have journeyed through law school and life. I would also like to thank Professors Geoffrey Scott and Steve Ross for their mentorship and guidance throughout my time at Penn State Law, and Professor Jeffrey Erickson for believing in me as a writer and supporting my inquisitive nature.

Comment will conclude that the procompetitive justifications outweigh the anticompetitive effects of the Guidelines.

### Table of Contents

I.	INTRODUCTION .....	249
II.	BACKGROUND.....	250
	A. History of the NCAA.....	250
	1. Amateurism and the NCAA.....	252
	B. Antitrust Law Generally.....	254
	1. Elements of a Sherman Antitrust Act Violation.....	255
	2. Two Analyses to Determine if a Practice is an Unreasonable Restraint on Trade .....	256
	a. Per Se Analysis.....	256
	b. Rule of Reason Analysis.....	257
	C. History of the NCAA and Antitrust .....	258
	D. NCAA Guidelines for Student-Athletes.....	260
	1. Student-Athlete Employment Guidelines Generally .....	260
	2. Student-Athlete Self-Employment Guidelines .....	262
	3. The Student-Athlete Statement .....	262
III.	ANALYSIS .....	263
	A. Antitrust Analysis of the NCAA Student-Athlete Self- Employment Guidelines.....	264
	1. Student-Athletes Have Standing .....	264
	2. The NCAA is Subject to the Sherman Antitrust Act.....	265
	3. Rule of Reason Analysis is Appropriate .....	266
	B. Rule of Reason Analysis .....	267
	1. Anticompetitive Effects of Self-Employment Guidelines.....	267
	2. Procompetitive Effects of Self-Employment Guidelines .....	268
	a. Preservation of Amateurism .....	268
	b. Equity Between Member Institutions .....	270
	c. Equity Amongst Student-Athletes .....	271
	3. Are the Self-Employment Guidelines Necessary to Achieve a Legitimate Objective or Can the Objective be Achieved in a Substantially Less Restrictive Manner? .....	272
	C. LaMelo Ball and Donald De La Haye.....	273
IV.	CONCLUSION .....	276

## I. INTRODUCTION

Student-athletes at times feel stifled by National Collegiate Athletic Association (“NCAA”) regulations, as they have bigger dreams beyond their intercollegiate athletics careers.<sup>1</sup> Whether their aspirations are to play a sport professionally, open their own business, or work for a large corporation, the ultimate goal is to make a living doing it.<sup>2</sup> Those student-athletes with an entrepreneurial spirit are often inspired to use the resources available to them to their advantage.<sup>3</sup> Many times, the most valuable resources are their own name, image, likeness, and reputation.

In the 2017-2018 NCAA Division I Manual (“NCAA Manual”),<sup>4</sup> the NCAA set forth a number of regulations to protect their product, which relies heavily on the maintenance of the tradition of amateurism.<sup>5</sup> Amateurism<sup>6</sup> has been a pillar of the NCAA since its inception, and is characterized primarily by a lack of direct or indirect compensation for athletes.<sup>7</sup> Article 12 of the NCAA Manual provides a comprehensive list of eligibility rules to protect the tradition of amateurism.<sup>8</sup> While student-athletes have attempted to challenge a number of these eligibility rules in the past, courts have yet to make a determination on the legality of the NCAA’s Self-Employment Guidelines, which restrict student-athletes’ ability to use their name, image, likeness, or status as an NCAA athlete in order to promote his or her product or business.<sup>9</sup>

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1. For example, Donald De La Haye has felt stifled by the NCAA’s regulations, as the regulations have forced him to choose between his YouTube channel and his intercollegiate athletics career. *See* Iliana Limón Romero, *UCF YouTube kicker seeks donations, unsure about legal options*, ORLANDO SENTINEL (Aug. 1, 2017, 9:30 PM), <http://www.orlandosentinel.com/sports/ucf-knights/os-sp-ucf-kicker-ncaa-reaction-0802-story.html>.

2. *See generally id.* (discussing De La Haye’s financial struggles, and how he uses his YouTube channel to earn a living).

3. *See, e.g.*, Donald De La Haye (@Deestroying), YOUTUBE (Apr. 1, 2017), <https://www.youtube.com/watch?v=HA9ln1wmxcg> (showing De La Haye practicing his sprints for football); *see also* Donald De La Haye (@Deestroying), YOUTUBE (Mar. 13, 2017), <https://www.youtube.com/watch?v=d8PG8BJdzfY> (showing De La Haye working out with teammates and practicing his kicking).

4. NAT’L COLLEGIATE ATHLETIC ASS’N, 2017–2018 NCAA DIVISION I MANUAL (2017), <http://www.ncaapublications.com/productdownloads/D118.pdf> [hereinafter NCAA, DIVISION I MANUAL].

5. *See id.*, art. 2.9, at 4.

6. *See Amateur*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/amateur> (last visited Aug. 14, 2018) (defining an amateur as one who “who engages in a pursuit, especially a sport, on an unpaid basis”).

7. *See infra* Section II.A.1 (discussing the history and definition of amateurism).

8. *See* NCAA, DIVISION I MANUAL, *supra* note 4, art. 12, at 61-91.

9. *See id.*, art. 12.4.4, at 72.

This Comment will examine the NCAA's dedication to the tradition of amateurism through the Self-Employment Guidelines and whether that commitment has led to a violation of the Sherman Antitrust Act.<sup>10</sup> First, Part II of this Comment will provide a brief history of the NCAA and the NCAA Manual, followed by a description of the elements required to assert a claim under the Sherman Antitrust Act.<sup>11</sup> Next, Part III will engage in a "rule of reason" analysis to determine if the Self-Employment Guidelines are sufficiently procompetitive to justify their alleged anticompetitive effects.<sup>12</sup> Part III will then analyze the self-employment of LaMelo Ball and Donald De La Haye to examine how the indirect compensation they received for their athletic ability potentially damaged the NCAA's product.<sup>13</sup> This Comment will ultimately recommend that the Supreme Court grant certiorari to a case challenging the NCAA's rules against indirect compensation for athletic ability, and hold that the Self-Employment Guidelines do not violate the Sherman Antitrust Act.<sup>14</sup>

## II. BACKGROUND

The NCAA has a long and telling history that gives courts insight as to the NCAA's motives and objectives in its governance of intercollegiate athletics.<sup>15</sup> These motives and objectives in turn influence the courts' interpretations of the NCAA's guidelines. Student-athletes have regularly used antitrust law to challenge the NCAA's guidelines, but student-athletes are often unsuccessful, as courts tend to be persuaded by arguments for the maintenance of the tradition of amateurism.

### A. *History of the NCAA*

In the early twentieth century, scandals, cheating, and serious injuries were common amongst intercollegiate athletic programs, leading President Theodore Roosevelt to call for the formation of a governing

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10. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2012 & Supp. 2017)).

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Section III.C.

14. *See infra* Part IV.

15. *See generally History*, NAT'L COLLEGIATE ATHLETIC ASS'N, <https://web.archive.org/web/20110807060521/http://www.ncaa.org:80/wps/wcm/connect/public/ncaa/about+the+ncaa/who+we+are/about+the+ncaa+history> (last updated Nov. 8, 2010) [hereinafter NCAA, *History*] (providing details as to the NCAA's formation and growth as a governing body).

body to help curtail these issues.<sup>16</sup> Originally called the Intercollegiate Athletic Association of the United States (“IAAUS”), the NCAA was formed in 1906 by 62 member institutions.<sup>17</sup>

The NCAA began as a rule-making body and discussion group, but over time developed into a much larger and more complex organization.<sup>18</sup> With the creation of national championship games and increased regulations in areas like recruiting and financial aid, the NCAA grew quickly.<sup>19</sup> This surge in growth created a demand for full-time professional leadership, leading to the appointment of Walter Byrnes as the NCAA’s first Executive Director in 1951.<sup>20</sup> With new leadership, the NCAA continued to expand their influence.<sup>21</sup> The NCAA not only grew to dictate rule-making for more sports, but it also expanded its sanctioning authority with the creation of the Committee on Infractions.<sup>22</sup> The Committee on Infractions was created in the 1950s as a more powerful force in ensuring that member institutions were complying with NCAA rules.<sup>23</sup>

The NCAA continued to grow rapidly throughout the late twentieth century,<sup>24</sup> thus leading to the creation of Divisions I, II, and III in 1973.<sup>25</sup> These divisions were created for both competitive and legislative purposes, and to account for the increased membership and varying levels of emphasis on athletics at each member institution.<sup>26</sup> In the 1980s,

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16. *See id.*

17. *See id.* (stating that the IAAUS was renamed the National Collegiate Athletic Association in 1910).

18. *See id.*

19. *See id.* (stating the NCAA hosted its first national championship in 1921 for Track and Field, and that the “Sanity Code” was the NCAA’s attempt to regulate recruitment and financial aid).

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See NCAA, History, supra* note 15.

26. *See id.*; *see also Divisional Differences and the History of Multidivisional Classification*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/about/who-we-are/membership/divisional-differences-and-history-multidivisional-classification> (last visited Aug. 14, 2018) [hereinafter NCAA, *Divisional Differences*]. Division I requires institutions to sponsor at least seven sports for men and seven sports for women, or six sports for men and eight for women. *Id.* Division I also has strict contest minimums, participation minimums, and scheduling criteria for each sport. *Id.* Member institutions in Division I must also meet the requisite minimum for financial aid awards for their athletic programs, and may not exceed the maximum financial aid awards for each individual sport. *Id.* Division II and Division III both require their member institutions to sponsor at least five sports for men and five sports for women, or four sports for men and six for women. *Id.* However, they differ in that Division II has strict scheduling criteria, especially for football and basketball teams, while Division III institutions do not. *Id.*

the NCAA greatly expanded again; this time to include women's sports.<sup>27</sup> Today, the NCAA consists of 1,123 member institutions with nearly half of a million college athletes under its influence and direction.<sup>28</sup>

### 1. Amateurism and the NCAA

Amateurism in sports is the idea that athletes have not played their sport professionally, meaning that they have not entered into contracts with a professional teams or agents, or profited from their athletic ability above the cost of their expenses.<sup>29</sup> An amateur is often defined as “a person who engages in a pursuit, especially a sport, on an unpaid basis.”<sup>30</sup> Amateurism has been the NCAA's eligibility standard since its inception in 1906.<sup>31</sup> The IAAUS, and eventually the NCAA, adopted bylaws that outlined the principles of amateurism and ways to avoid violating those principles.<sup>32</sup> In 1916, the NCAA provided more detailed guidance for member institutions by formally defining an amateur as “one who participated in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom.”<sup>33</sup> The NCAA operated using this definition of

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Notably, Division III member institutions may not distribute financial aid based on a student-athlete's athletic ability, whereas, like Division I institutions, Division II institutions may, so long as they do not exceed the maximum financial aid awards for each sport. *Id.*

27. See NCAA, *History*, *supra* note 15.

28. See *What is the NCAA?*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Aug. 14, 2018).

29. *Amateurism*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/amateurism> (last visited Jan. 19, 2018, 1:00 PM).

30. *Amateur*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/amateur> (last visited Aug. 14, 2018).

31. See Gregory Sconzo, *They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law*, 67 U. MIAMI L. REV. 737, 742-43 (2013) (citing MATHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 100 (2d ed. 2009)).

32. See W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 222 (2006) (discussing the IAAUS 1906 bylaws, which decreed that “[n]o student shall represent a College or University in any intercollegiate game or contest who at any time received either directly or indirectly, money or other consideration, to play on any team, or for his athletic services,” and further explaining the IAAUS student-athlete eligibility rules). Additionally, student-athletes were required to sign an “Eligibility Card” to verify their eligibility based on compliance with the amateurism principles. See *id.* at 223-224.

33. Sconzo, *supra* note 31, at 743 (citing Kay Hawes, *Debate on Amateurism Has Evolved over Time*, NCAA NEWS (Jan. 3, 2000), <http://fs.ncaa.org/Docs/NCAANewsArchive/2000/associationwide/debate%2Bon%2Bamateurism%2Bhas%2C2Bevolved%2Cover%2Btime%2B-%2B1-3-00.html>).

“amateur” for many years; however, the amateurism guidelines were not strictly enforced until the 1950s with the creation of the Committee on Infractions.<sup>34</sup> The Committee on Infractions had great sanctioning authority, which allowed them to fully enforce the amateurism rules.<sup>35</sup>

Presently, the NCAA and the courts clearly continue to place enormous value on the principles of amateurism.<sup>36</sup> In the NCAA Manual, the NCAA unambiguously identifies its basic purpose as “maintain[ing] intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>37</sup> This separation between professional and intercollegiate athletics is created and maintained by the NCAA amateurism requirement.<sup>38</sup> The NCAA further emphasizes the importance of amateurism by providing explicit examples of how student-athletes can lose their amateur status later in the NCAA Manual.<sup>39</sup>

Moreover, the courts have continuously protected the NCAA’s tradition of amateurism.<sup>40</sup> The Supreme Court of the United States and the federal circuit courts have consistently chosen to defend the NCAA’s tradition of amateurism when presented with opportunities to uproot that

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34. *See id.*

35. *See* NCAA, *History*, *supra* note 15.

36. *See* Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 120 (1984) (stating that the “role of the NCAA must be to preserve [the] tradition [of amateurism] that might otherwise die” and “[t]here can be no question but that it needs ample latitude to play that role”).

37. NCAA, DIVISION I MANUAL, *supra* note 4, art. 1.3.1, at 1 (emphasis added).

38. *See id.*, art. 12, at 61-91.

39. *See id.*, art. 12.1.2, at 63 (stating that student-athletes will lose their amateur status, and therefore be deemed ineligible by the NCAA, if they do any of the following activities). Article 12.1.2 prohibits a student-athlete from:

- (a) Us[ing] his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accept[ing] a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Sign[ing] a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1;
- (d) Receiv[ing], directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Compet[ing] on any professional athletics team per Bylaw 12.02.11, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1;
- (f) After initial full-time collegiate enrollment, enter[ing] into a professional draft (see Bylaw 12.2.4); or
- (g) Enter[ing] into an agreement with an agent.

*Id.*

40. *See infra* Part III.

tradition.<sup>41</sup> For example, as recently as October 2016, the Supreme Court denied certiorari to *O'Bannon v. NCAA*,<sup>42</sup> a case in which Ed O'Bannon<sup>43</sup> submitted a writ of certiorari challenging the NCAA's tradition of amateurism on antitrust grounds.<sup>44</sup> In *O'Bannon*, the Ninth Circuit Court of Appeals safeguarded the tradition of amateurism by denying the student-athletes' demands for compensation beyond the cost of attendance at their respective schools.<sup>45</sup> This case is just one example of student-athletes challenging NCAA policies on antitrust grounds, and provides interesting discussion as to what the court feels it means to be an amateur athlete.

### B. Antitrust Law Generally

In 1890, Congress passed the first antitrust law, which is known as the Sherman Antitrust Act.<sup>46</sup> Originally, the Sherman Antitrust Act was simply a “comprehensive charter designed to preserve free and unfettered competition as a rule of trade.”<sup>47</sup> Now, the Sherman Antitrust Act is intended to promote competition amongst businesses to prevent the creation of monopolies.<sup>48</sup> To be a violation of the Sherman Antitrust Act, a claim must contain: (1) an existing contract, combination, or conspiracy; (2) an unreasonable restraint on trade in a relevant market resulting from the contract, combination, or conspiracy; and (3) an injury resulting from the unreasonable restraint on trade.<sup>49</sup> A per se analysis or a “rule of reason” analysis is applied to determine if the allegations arise to

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41. See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016) (finding the maintenance of the tradition of amateurism to be persuasive in making its decision, and the Supreme Court ultimately denying certiorari to the case despite both parties requesting review).

42. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

43. Ed O'Bannon is a former amateur basketball player at University of California, Los Angeles and professional basketball player in the National Basketball Association. See Tom Hoffarth, *Hoffarth on the Media: Q&A with Ed O'Bannon*, ORANGE COUNTY REG. (Mar. 10, 2018, 8:00 AM) <https://www.ocregister.com/2018/03/10/hoffarth-on-the-media-qa-with-ed-obannon/>.

44. See Petition for Writ of Certiorari at 13-34, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 277 (2016) (No. 15-1167), 2016 WL 1085599.

45. See *O'Bannon*, 802 F.3d at 1076-79.

46. See *Sherman Antitrust Act*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Sherman-Antitrust-Act> (last visited June 16, 2018).

47. A. Douglas Melamed, *Antitrust at the Turn of the Century*, U.S. DEP'T OF JUSTICE (Dec. 7, 1999), <https://www.justice.gov/atr/speech/antitrust-turn-century>.

48. See 15 U.S.C. § 1 (2012 & Supp. 2017).

49. See *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012) (citing *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993)); see also *infra* Section II.D.1.

an unreasonable restraint on trade, and therefore, a violation of the Sherman Antitrust Act.<sup>50</sup>

### 1. Elements of a Sherman Antitrust Act Violation

Section One 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, or with foreign nations, is declared to be illegal,”<sup>51</sup> and has consistently been interpreted to require plaintiffs to prove three elements to demonstrate a violation of the Sherman Antitrust Act.<sup>52</sup>

The three elements are: (1) an existing contract, combination, or conspiracy, (2) an unreasonable restraint on trade in a relevant market resulting from the contract, combination, or conspiracy, and (3) an injury resulting from the unreasonable restraint on trade.<sup>53</sup> The Supreme Court has specified that Section One only bars those restraints on trade that are considered unreasonable.<sup>54</sup> The requirement of unreasonableness is particularly important because nearly every contract requiring parties to behave in a certain way constitutes some type of restraint of trade.<sup>55</sup>

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50. See *infra* Section II.D.2.

51. See 15 U.S.C. § 1.

52. See *Agnew*, 683 F.3d at 335 (citing *Denny’s Marina*, 8 F.3d at 1220); see also *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1016 (10th Cir. 1998).

53. *Id.* (citing *Denny’s Marina*, 8 F.3d at 1220).

54. See *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 120 (1984) (finding that a horizontal price fixing agreement that places a restraint on output is an unreasonable restraint on trade); see also *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 342-43 (1982); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687-88 (1978) (stating that the “[p]etitioner’s ban on competitive bidding prevent[ed] all customers from making price comparisons in the initial selection of an engineer,” and after an application of the rule of reason analysis, this constituted an unreasonable restraint on trade); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Law*, 134 F.3d at 1016 (finding that the limit placed on coaches’ compensation was an unreasonable restraint on trade, after a thorough rule of reason analysis). In a rule of reason analysis, a regulation is deemed to be unreasonable if the anticompetitive effects of the regulation outweigh the procompetitive effects. *Bd. of Regents*, 468 U.S. at 103-05.

55. See *Bd. of Regents*, 468 U.S. at 98 (stating that the challenged NCAA practices are undoubtedly a restraint on trade, as they limit the member institution’s ability to freely negotiate their own television contracts, but the Supreme Court has consistently recognized that the Sherman Antitrust Act only bars unreasonable restraints); *Law*, 134 F.3d at 1016.

## 2. Two Analyses to Determine if a Practice is an Unreasonable Restraint on Trade

Once a claim is determined to arise under the Sherman Antitrust Act, the court will apply one of two analyses to determine the reasonableness of the challenged restraint.<sup>56</sup> A per se analysis and a rule of reason analysis are the two accepted ways of evaluating whether a practice constitutes an unreasonable restraint on trade.<sup>57</sup> A court will look to the surrounding circumstances of a case when determining which analysis to apply.<sup>58</sup>

### a. Per Se Analysis

A per se violation of the Sherman Antitrust Act is reserved for those practices or regulations that are blatantly unreasonable restraints on trade.<sup>59</sup> A regulation is a blatantly unreasonable restraint on trade, and therefore illegal per se,<sup>60</sup> “when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”<sup>61</sup> Therefore, once a regulation is deemed illegal per se, the court is not required to make any further inquiry into the procompetitive justifications for the regulation, and may deem the regulation a violation of the Sherman Antitrust Act.<sup>62</sup>

A per se analysis of a Sherman Antitrust Act claim is only applied to those practices “that ‘are entirely void of redeeming competitive rationales.’”<sup>63</sup> The Supreme Court, in *NCAA v. Board of Regents of University of Oklahoma*,<sup>64</sup> explained that a practice that is void of competitive rationales is one that “facially appears to be one that would always or almost always tend to restrict competition and decrease

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56. *See Bd. of Regents*, 468 U.S. at 100-04.

57. *See id.*

58. *See id.* at 101, 103-04 (considering that “this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all,” and therefore, the rule of reason analysis is appropriate in order to fully consider the anticompetitive effects and procompetitive justifications).

59. *See id.*

60. *See Illegal per se*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “illegal per se” as something “unlawful in and of itself”).

61. *Bd. of Regents*, 468 U.S. at 103-04.

62. *See Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1016 (10th Cir. 1998)

63. *Id.* (citing *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994)).

64. *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984).

output.”<sup>65</sup> The Supreme Court has also continuously emphasized that a per se analysis “is a ‘demanding’ standard that should be applied only in clear cut cases.”<sup>66</sup>

b. Rule of Reason Analysis

A rule of reason analysis is appropriate whenever further inquiry into the procompetitive justifications for a regulation is warranted.<sup>67</sup> Therefore, if the court does not deem the regulation to be illegal per se, a rule of reason analysis is appropriate.<sup>68</sup>

A rule of reason analysis consists of four steps with shifting burdens of proof.<sup>69</sup> Step one places the burden of proof on the plaintiff to show that the regulations have anticompetitive effects.<sup>70</sup> If the plaintiff meets that burden, step two then shifts the burden to the defendant to provide procompetitive justifications for the regulations.<sup>71</sup> If the defendant meets that burden, step three subsequently shifts the burden back to the plaintiff

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65. *Bd. of Regents*, 468 U.S. at 100 (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979)) (internal quotation marks omitted).

66. *Law*, 134 F.3d at 1019 (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977)) (recognizing that a rule of reason analysis is appropriate, even in cases of horizontal price fixing, when the industry involved is one that requires some horizontal restraints for the product to be available). Horizontal price fixing is defined as “price-fixing among competitors on the same level, such as retailers throughout an industry.” *Price-fixing*, BLACK’S LAW DICTIONARY (10th ed. 2014). Horizontal price fixing is typically deemed to be a per se violation of the Sherman Antitrust Act. *See Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (finding that the agreement amongst sugar refiners to purchase sugar-beets at a previously agreed upon price likely constituted a per se violation of the Sherman Antitrust Act); *see also Nat’l Macaroni Mfrs. Ass’n v. Fed. Trade Comm’n*, 345 F.2d 421, 426-27 (7th Cir. 1965) (finding that the agreement amongst macaroni producers to limit the amount of premium wheat purchased and substitute a specifically agreed upon percentage of inferior wheat into the finished macaroni was a per se violation of the Sherman Antitrust Act because this agreement had the effect of artificially reducing the price of premium wheat).

67. *See Bd. of Regents*, 468 U.S. at 100-04; *see also Law*, 134 F.3d at 1016-19.

68. *See Bd. of Regents*, 468 U.S. at 100-04; *see also Law*, 134 F.3d at 1016-19.

69. *See Law*, 134 F.3d at 1019; *see also Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 335 (7th Cir. 2012).

70. *See Law*, 134 F.3d at 1019 (stating the plaintiff’s burden of proving anticompetitive effects, and further explaining that “[a] plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price” (citing *Orson Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (10th Cir. 1998))); *see also Agnew*, 683 F.3d at 335.

71. *See Law*, 134 F.3d at 1019, 1021 (stating the defendant’s burden of proving procompetitive effects, and further explaining that procompetitive “[j]ustifications offered under the rule of reason may be considered only to the extent that they tend to show that, on balance, ‘the challenged restraint enhances competition’” (quoting *Bd. of Regents*, 468 U.S. at 1004)); *see also Agnew*, 683 F.3d at 335-36.

to show that the regulations are “not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.”<sup>72</sup> Finally, step four requires the judge to weigh the alleged procompetitive effects against the alleged anticompetitive effects to determine if the regulation at issue constitutes an unreasonable restraint on trade.<sup>73</sup>

Notably, some regulations that were seemingly illegal per se have been deemed by the Supreme Court to instead warrant a rule of reason analysis.<sup>74</sup> In *Board of Regents*, the Supreme Court decided that a rule of reason analysis should be applied despite the agreement at issue constituting a horizontal price fixing<sup>75</sup> plan in blatant violation of the Sherman Antitrust Act.<sup>76</sup> The Court rationalized that the rule of reason analysis was appropriate because the industry of intercollegiate athletics required some degree of horizontal restraints in order to ensure that the product remained available.<sup>77</sup>

### C. *History of the NCAA and Antitrust*

As the NCAA continued to expand its influence, student-athletes, coaches, and athletic associations began to challenge the extensive NCAA regulations on antitrust grounds.<sup>78</sup> In 1981, the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association filed a class action suit in the Western District of Oklahoma.<sup>79</sup> This class action suit alleged that the NCAA’s agreement with a network regarding the televising of college football games was an unreasonable restraint on trade and constituted an attempt to monopolize the market.<sup>80</sup> After decisions in the district court and the court of appeals, the Supreme Court of the United States granted certiorari.<sup>81</sup> In *Board of*

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72. *Law*, 134 F.3d at 1019; *see also Agnew*, 683 F.3d at 336.

73. *See Law*, 134 F.3d at 1019.

74. *See Bd. of Regents*, 468 U.S. at 100.

75. *See supra* note 66 (describing horizontal price fixing).

76. *See Bd. of Regents*, 468 U.S. at 100-01, 103 (reasoning that “despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA’s justifications for the restraints”).

77. *See id.* at 101.

78. *See, e.g., id.* at 88, 94-99.

79. *See id.* at 95.

80. *See Complaint* at 31-39, *Bd. of Regents of Univ. of Oklahoma v. Nat’l Collegiate Athletic Ass’n*, 546 F. Supp. 1276 (W.D. Okla. 1982) (No. CIV-81-1209-E), 1981 WL 760127.

81. *See Bd. of Regents*, 468 U.S. at 95-98 (describing the decisions of the district court and the court of appeals). The District Court found that control exhibited by the NCAA over the televising of college football games constituted a violation of the

*Regents*, the Supreme Court performed a thorough antitrust analysis using the rule of reason test to assess the legality of the NCAA's price fixing plan for televised college football games.<sup>82</sup> Notably, the Supreme Court recognized that the NCAA is subject to antitrust laws, and that the price fixing plan at issue constituted an unreasonable restraint on trade in violation of the Sherman Antitrust Act.<sup>83</sup>

In the decades following the Supreme Court's decision in *Board of Regents*, federal circuit courts across the country have used this decision to hold the NCAA accountable for those regulations placing an unreasonable restraint on trade, while also allowing the NCAA to argue that the procompetitive effects justify their regulations.<sup>84</sup> The Tenth Circuit, in *Law v. NCAA*,<sup>85</sup> applied the same rule of reason analysis as the Supreme Court in *Board of Regents*.<sup>86</sup> In *Law*, the court found that an NCAA rule that placed a limit on the annual compensation for college basketball coaches constituted an unreasonable restraint on trade that could not be justified by the alleged procompetitive effects, and was therefore a violation of the Sherman Antitrust Act.<sup>87</sup>

Similarly, the Seventh Circuit in *Agnew v. NCAA*<sup>88</sup> also applied the rule of reason analysis in considering the viability of the claim at issue.<sup>89</sup> In *Agnew*, student-athletes alleged that the NCAA regulations that put a cap on the number of scholarships available per team had anticompetitive effects on the market for student-athletes, and was therefore a violation of the Sherman Antitrust Act.<sup>90</sup> The Seventh Circuit affirmed the lower court's decision to dismiss the claim on grounds that the Sherman

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Sherman Antitrust Act. *Id.* at 95. The Court of Appeals similarly found that the NCAA television plan at issue was a per se violation of the Sherman Antitrust Act, and even if a rule of reason analysis were to be applied, the anticompetitive effects would outweigh any procompetitive justifications set forth by the NCAA. *Id.* at 97-98.

82. *See id.* at 105-12. A rule of reason analysis consists of four steps. *Id.* First, the plaintiff must show that the regulation at issue has anticompetitive effects. *Id.* Next, the defendant is tasked with providing procompetitive justifications for the regulation. *Id.* Then the burden shifts back to the plaintiff to show that the defendant's goals can be achieved in a substantially less restrictive manner. *Id.* Finally, the judge is required to weigh the alleged procompetitive and anticompetitive effects to determine if the regulation constitutes an unreasonable restraint on trade. *Id.*

83. *See id.* at 105-12; *see also* 15 U.S.C. § 1 (2012 & Supp. 2017) (delineating the Sherman Antitrust Act, which is designed to protect competition and prevent agreements and regulations that are unreasonable restraints on trade).

84. *See infra* Section III.A.2.b.

85. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998).

86. *See id.*

87. *See id.* at 1016-24.

88. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2012).

89. *See id.*

90. *See id.* at 333.

Antitrust Act was inapplicable because the plaintiffs failed to show a labor market for student-athletes.<sup>91</sup>

Overall, the decisions in *Board of Regents*, *Law*, and *Agnew* showcase the widespread acceptance of the rule of reason analysis, and how courts hold both parties, student-athletes, and the NCAA to a high standard for proving that the regulations at issue are either procompetitive or anticompetitive.

#### D. NCAA Guidelines for Student-Athletes

The NCAA Manual provides specific guidelines for member institutions, athletics personnel, and student-athletes to follow.<sup>92</sup> These guidelines cover a vast assortment of areas, from information on how to become a member of the NCAA, to championship procedures, to athlete eligibility.<sup>93</sup> Specifically, Article 12 of the NCAA Manual describes the relationship between amateurism and the athletic eligibility process.<sup>94</sup> Article 12 emphasizes the importance of amateurism in determining a student-athlete's eligibility by providing specific details as to how student-athletes can maintain their amateur status and eligibility, and how that status and eligibility can be lost.<sup>95</sup>

##### 1. Student-Athlete Employment Guidelines Generally

Article 12.4 of the NCAA Manual lays out specific guidelines for student-athletes seeking employment while simultaneously playing a sport for their school.<sup>96</sup> Article 12.4.1 states that “[c]ompensation may be paid to a student athlete: (a) [o]nly for work actually performed; and (b) [a]t a rate commensurate with the going rate in the locality for similar services.”<sup>97</sup> This article clearly seeks to ensure that student-athletes are

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91. *See id.* at 347. The Seventh Circuit made it clear that the identification of a relevant market was necessary in order to show how the regulation at issue had an anticompetitive effect on that particular market. *Id.* at 345-47. Here, the plaintiffs alleged that the relevant markets were the market for bachelor's degrees and the market for student-athlete labor. *Id.* The court was not persuaded by the argument that the market for bachelor's degrees was a relevant market because the argument was vague and the market would have encompassed far more people than just those student-athletes receiving scholarships. *Id.* The court notes that the market for student-athlete labor could be a relevant market, however, the plaintiffs did not sufficiently identify this market in their complaint. *Id.* Thus, the court chose to dismiss the claim. *Id.*

92. *See generally* NCAA, DIVISION I MANUAL, *supra* note 4.

93. *See id.*, Table of Contents, at iii-v.

94. *See id.*, art. 12, at 61-91.

95. *See id.*

96. *See id.*, art. 12.4, at 72.

97. *Id.*, art. 12.4.1, at 72.

not given special treatment, in the form of additional compensation, in the course of their employment.<sup>98</sup> Article 12.4.1.1 specifies that “[s]uch compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation or personal following that he or she has obtained because of athletics ability.”<sup>99</sup> In other words, Article 12 places emphasis on the NCAA’s dedication to amateurism by attempting to ensure that student-athletes do not become professionals through receipt of compensation due to their athletic ability, either directly or indirectly.<sup>100</sup>

Moreover, NCAA Manual Articles 12.4.2.3 and 12.5 provide guidance for those student-athletes seeking to be employed to sell or promote sporting equipment.<sup>101</sup> Article 12.4.2.3 states, “[a] student-athlete may not be employed to sell equipment related to the student-athlete’s sport if his or her name, picture or athletics reputation is used to advertise the product, the job or the employer.”<sup>102</sup> This is similar to the guideline set forth in Article 12.5, which outlines non-permissible promotional activities and exceptions to those rules.<sup>103</sup>

Once a student-athlete becomes an NCAA student-athlete, they are prohibited from advertising and promotional activities unless the activity falls into one of the exceptions delineated in Article 12.5.2.1.1.<sup>104</sup> An important exception to this general rule is the exception which allows for the “[c]ontinuation of [m]odeling and [o]ther [n]onathletically [r]elated [p]romotional [a]ctivities [a]fter [e]nrollment.”<sup>105</sup> This exception allows a student-athlete to continue to receive compensation for promotional activities that use his or her name or picture to promote the sale of a product or service, as long as a number of conditions are met.<sup>106</sup> These conditions are:

- (a) The individual’s involvement in this type of activity was initiated prior to his or her enrollment in a member institution;
- (b) The individual became involved in such activities for reasons independent of athletics ability;
- (c) No reference is made in these activities to the individual’s name or involvement in intercollegiate athletics;
- (d) The individual’s remuneration under such circumstances is at a rate commensurate with the individual’s skills and experience as a model or

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98. *See id.*

99. *Id.*, art. 12.4.1.1, at 72.

100. *See id.*

101. *See id.*, art. 12.4.2.3, at 72; *see also id.*, art. 12.5, at 73-77.

102. *See* NCAA, DIVISION I MANUAL, art. 12.4.2.3, at 72.

103. *See* NCAA, DIVISION I MANUAL, art. 12.5, at 73-77.

104. *See id.*, art. 12.5.2.1.1, at 75-76.

105. *Id.*, art. 12.5.1.3, at 74.

106. *See id.*

performer and is not based in any way upon the individual's athletics ability or reputation.<sup>107</sup>

These conditions help to ensure that student-athletes maintain their amateur status, despite their employment.

## 2. Student-Athlete Self-Employment Guidelines

NCAA Manual Article 12.4.4 specifically addresses those student-athletes seeking to start their own business.<sup>108</sup> Article 12.4.4 states, “[a] student-athlete may establish his or her own business, provided the student-athlete’s name, photograph, appearance or athletics reputation are not used to promote the business.”<sup>109</sup> These guidelines are similar to those set forth earlier in Article 12.4 for general employment, as the NCAA is consistent in barring student-athletes from using their name, image, likeness, and reputation as an NCAA athlete for financial gain.<sup>110</sup>

## 3. The Student-Athlete Statement

Each year, all NCAA student-athletes are required to sign the Student-Athlete Statement to assist the NCAA in certifying their eligibility.<sup>111</sup> The 2018-2019 Student-Athlete Statement contains six sections, which include: “I. A statement concerning eligibility; II. A Buckley Amendment consent;<sup>112</sup> III. An affirmation of status as an amateur athlete; IV. Results of drug tests; V. Previous involvement in NCAA rules violation(s); and VI. An affirmation of valid and accurate information provided to the NCAA Eligibility Center.”<sup>113</sup> Student-athletes are required to sign each section in order to certify the

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107. *Id.*

108. *See id.*, art. 12.4.4, at 72.

109. *Id.*

110. *See id.*; *see also id.*, art. 12.4.1, at 72.

111. *See Form 18-1a: Student-Athlete Statement*, NAT'L COLLEGIATE ATHLETIC ASS'N (2018),

[http://www.ncaa.org/sites/default/files/201819\\_DIForm\\_18\\_1a\\_Student\\_Athlete\\_Statement\\_20180608.pdf](http://www.ncaa.org/sites/default/files/201819_DIForm_18_1a_Student_Athlete_Statement_20180608.pdf) [hereinafter NCAA, *Form 18-1a*]. NCAA Division I compliance forms are updated on an annual basis and published online at *Division I Compliance*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/compliance?division=d1> (last visited Aug. 19, 2018).

112. *See* NCAA, *Form 18-1a*, *supra* note 111, at 3-4 (requiring student-athletes to consent to the disclosure of their academic records, drug test records, and other related information, to authorized representatives of their institution, the NCAA, and their athletics conference).

113. *Id.* at 1.

information they provided to the NCAA, and to certify that they read and understand the NCAA rules as delineated in the NCAA Manual.<sup>114</sup>

The completion of the Student-Athlete Statement is required by NCAA Manual Articles 3.2.4.6<sup>115</sup> and 12.7.2.<sup>116</sup> Article 3.2.4.6 generally requires that each student-athlete sign a statement,<sup>117</sup> whereas Article 12.7.2.1 provides that the statement should contain information about the student-athlete's "eligibility, recruitment, financial aid, amateur status, previous positive-drug tests administered by any other athletics organization[,] and involvement in organized gambling activities related to intercollegiate or professional athletics competition."<sup>118</sup> A student-athlete that fails to sign such a statement would be deemed to be ineligible to participate in intercollegiate athletics.<sup>119</sup>

The signing of the Student-Athlete Statement by hundreds of thousands of student-athletes every year demonstrates the vast power of the NCAA to control the behaviors of student-athletes. Nevertheless, increasing discontent with that power has led to more than a few challenges to NCAA regulations on antitrust grounds.<sup>120</sup> These challenges will likely continue to grow in number until the Supreme Court decides to grant certiorari to one of these cases to ultimately decide how far the NCAA can go in the regulation of student-athletes.

### III. ANALYSIS

Initially, Section III.A of this Comment will discuss why student-athletes have standing against the NCAA and why the NCAA is subject to the Sherman Antitrust Act.<sup>121</sup> Section III.B will then engage in a rule of reason analysis to determine whether the procompetitive effects of the NCAA Self-Employment Guidelines outweigh the anticompetitive effects of the Guidelines.<sup>122</sup>

Student-athletes may choose to rely on the harsh limits that the Self-Employment Guidelines place on the student-athletes' ability to market their own businesses to show that the Self-Employment Guidelines are

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114. *See id.*

115. *See* NCAA, DIVISION I MANUAL, *supra* note 4, art. 3.2.4.6, at 10.

116. *See id.*, art. 12.7.2, at 78.

117. *See id.*, art. 3.2.4.6, at 10.

118. *Id.*, art. 12.7.2.1, at 78.

119. *See id.*

120. *See generally* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); *see also* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016); Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).

121. *See infra* Sections III.A.1-2.

122. *See infra* Section III.B.

anticompetitive, whereas the NCAA would likely have a persuasive argument that maintenance of amateurism coupled with equity amongst member institutions and student-athletes are valid procompetitive justifications for the Self-Employment Guidelines. Finally, Section III.C of this Comment will address two athletes who have been, and could be, sanctioned based on the Self-Employment Guidelines.<sup>123</sup> Ultimately, this Comment will conclude with a recommendation that the Supreme Court grant certiorari to a case challenging indirect compensation of student-athletes based on athletic ability, and hold that the Self-Employment Guidelines do not violate the Sherman Antitrust Act.<sup>124</sup>

A. *Antitrust Analysis of the NCAA Student-Athlete Self-Employment Guidelines*

If student-athletes were to bring suit challenging the Self-Employment Guidelines on antitrust grounds, courts would be tasked with deciding issues like standing, whether the Sherman Antitrust Act is applicable, and the type of antitrust analysis to apply. Notably, the Supreme Court has consistently found that the NCAA is subject to the Sherman Antitrust Act, as the NCAA often falls squarely within the confines of Section One.<sup>125</sup> Additionally, lower courts have regularly recognized student-athletes' standing to bring suit against the NCAA.<sup>126</sup> In a challenge to the Self-Employment Guidelines, courts would likely find a rule of reason analysis to be appropriate, rather than a per se analysis.<sup>127</sup>

1. Student-Athletes Have Standing

While standing is not a highly litigated issue and standing requirements differ amongst state and federal courts, courts have widely accepted that student-athletes do have standing to sue the NCAA for a variety of claims, including antitrust claims.<sup>128</sup> Generally, federal courts require plaintiffs to show that they have standing by proving three factors: (a) an "injury in fact," (b) "a causal connection between the injury and the conduct complained of," and (c) a probability that the

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123. *See infra* Section III.C.

124. *See infra* Part IV.

125. *See infra* Section III.A.2.

126. *See infra* Section III.A.1.

127. *See infra* Section III.A.3.

128. *See, e.g.,* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1066-69 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

injury will be remedied by a favorable decision.<sup>129</sup> Whether the student-athletes argued their standing in court or in their pleadings, numerous federal cases in which the student-athletes brought suit against the NCAA under the Sherman Antitrust Act have proceeded with little or no contention on the issue.<sup>130</sup>

Similarly, state courts have found that student-athletes have standing to sue the NCAA.<sup>131</sup> For example, in *Bloom v. NCAA*,<sup>132</sup> the Colorado Court of Appeals found the plaintiff had standing because he was a third-party beneficiary to the contractual relationship between the NCAA and the member institution that he attended.<sup>133</sup>

Overall, student-athletes are generally found to have standing to sue the NCAA in both federal and state courts.

## 2. The NCAA is Subject to the Sherman Antitrust Act

The Supreme Court has made it clear that the NCAA is required to abide by the limitations set forth in the Sherman Antitrust Act.<sup>134</sup> The most prominent Supreme Court case addressing this subject is *Board of Regents*.<sup>135</sup> In *Board of Regents*, as previously mentioned, the University of Oklahoma and the University of Georgia Athletic Association sued the NCAA on antitrust grounds arguing that the NCAA's agreement with a television network to limit the number of college football games televised each year, and preventing member institutions from individually contracting with broadcasters, violated the Sherman Antitrust Act.<sup>136</sup>

Ultimately, the Supreme Court found that the NCAA had engaged in horizontal price fixing, which was a per se violation of the Sherman Antitrust Act.<sup>137</sup> However, the Court decided to engage in a rule of reason analysis, reasoning that some horizontal restraints were necessary in order for college football games to be available on television at all, and therefore, that the justifications for such regulations should be

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129. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

130. *See O'Bannon*, 802 F.3d at 1066-70; *see also Agnew*, 683 F.3d at 335.

131. *See, e.g., Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 623-25 (Colo. App. 2004).

132. *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004).

133. *See id.* at 624 (finding a collegiate skier had standing to sue the NCAA and seek injunctive relief-although unsuccessfully-for not allowing him to keep endorsement money).

134. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 88 (1984).

135. *See id.*

136. *See Complaint, Bd. Of Regents, supra* note 80, at 31-39.

137. *See Bd. of Regents*, 468 U.S. at 100-01.

explored.<sup>138</sup> *Board of Regents* notably demonstrates that the NCAA can be held responsible for unreasonable restraints on trade under the Sherman Antitrust Act.<sup>139</sup>

Clearly, the NCAA falls within the purview of the Sherman Antitrust Act, allowing student-athletes to challenge restrictions and guidelines that they feel are a violation thereunder.<sup>140</sup> Similar to most NCAA rules and procedures, the Self-Employment Guidelines are contained within the NCAA Manual,<sup>141</sup> which the student-athletes agree to abide by when signing the Student-Athlete Statement at the outset of each season.<sup>142</sup> The signing of the Student-Athlete Statement constitutes an agreement between the parties that would fall within the scope of the Sherman Antitrust Act, and consequently, courts would then be tasked with deciding whether a per se analysis or rule of reason analysis is appropriate.

### 3. Rule of Reason Analysis is Appropriate

If a court were to analyze the NCAA Self-Employment Guidelines, a rule of reason analysis would be appropriate. The Court has made it clear that a per se analysis is a demanding standard that is only appropriate when the practice at issue is so void of competitive rationales that further inquiry into the possible justifications for the practice is not warranted.<sup>143</sup> The Self-Employment Guidelines clearly possess a number of procompetitive rationales that would need to be explored by the courts.<sup>144</sup>

Additionally, the Supreme Court and the circuit courts have recognized the existence of a procompetitive presumption for those practices of the NCAA that serve to protect the tradition of amateurism.<sup>145</sup> In *Board of Regents*, the Supreme Court explained that

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138. *See id.* at 100-03.

139. *See id.* at 120 (finding that the network agreements at issue did constitute an unreasonable restraint on trade under the Sherman Antitrust Act).

140. *See generally id.*; *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016); *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (7th Cir. 2012).

141. NCAA, DIVISION I MANUAL, *supra* note 4, art. 12.4.4, at 72.

142. *See* NCAA, *Form 18-1a*, *supra* note 111, at 1.

143. *See Bd. of Regents*, 468 U.S. at 100-04; *see also* *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1016-19 (10th Cir. 1998).

144. *See infra* Section III.B.3.b.

145. *See Bd. of Regents*, 468 U.S. at 100-03, 120 (finding that the NCAA plays an important role in preserving the character of college football and making the product available to the public, which can be viewed as procompetitive); *see also Agnew*, 683 F.3d at 342-43 (stating that when a restraint is clearly in place to protect the tradition of amateurism, the court should presume that restraint to be procompetitive).

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“[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports [and] [t]here can be no question but that it needs ample latitude to play that role.”<sup>146</sup> The Court went on to recognize that “a fair evaluation of [the restraint’s] competitive character require[d] consideration of the NCAA’s justifications for the restraints.”<sup>147</sup>

The Self-Employment Guidelines are clearly in place to protect the tradition of amateurism in college sports by preventing student-athletes from becoming professionals through compensation for their athletic ability or status as an NCAA student-athlete.<sup>148</sup> Therefore, the NCAA would be deserving of a procompetitive presumption in this case, and a rule of reason analysis would be appropriate.

### *B. Rule of Reason Analysis*

When engaging in a rule of reason analysis to determine the reasonableness of the NCAA Self-Employment Guidelines, the anticompetitive and procompetitive effects of the NCAA’s Self-Employment Guidelines must be reviewed.<sup>149</sup>

#### 1. Anticompetitive Effects of Self-Employment Guidelines

Student-athletes would likely argue that the NCAA’s Self-Employment Guidelines have one primary anticompetitive effect: the Self-Employment Guidelines place a harsh limit on student-athletes’ abilities to market their products or businesses, which, therefore, restricts the student-athletes’ earning capacities within their permissible employment. Additionally, student-athletes would likely argue that, by preventing them from using all of the resources at their disposal to start and promote their business, the NCAA is unreasonably restricting their earning capacity.

The Self-Employment Guidelines, outlined in NCAA Manual Article 12.4.4, prevent student-athletes from using their name, image, likeness, or reputation as an NCAA student-athlete in the promotion of their businesses.<sup>150</sup> A student-athlete’s name, image, likeness, and reputation are extremely valuable to a business owner for many reasons,

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146. *Bd. of Regents*, 468 U.S. at 120.

147. *Id.* at 103.

148. *See supra* Sections II.C.1-.2.

149. *See infra* Sections III.B.1-.3.

150. NCAA, DIVISION I MANUAL, *supra* note 4, art. 12.4.4, at 72.

including advertising and endorsements.<sup>151</sup> Non-student-athlete business owners would easily be able to use these resources in the promotion of their businesses. Therefore, the Self-Employment Guidelines clearly limit the student-athlete business owner's ability to promote his or her product or business. By not allowing the student-athletes to utilize these viable resources in their businesses, student-athletes will argue that they are crippled in such a way that sets them apart from other business owners, thereby severely restricting the financial success of their businesses.

## 2. Procompetitive Effects of Self-Employment Guidelines

The NCAA, on the other hand, would be able to point to many procompetitive effects to justify their Self-Employment Guidelines. Some of the most persuasive of these procompetitive effects include: (a) the preservation of one of the NCAA's characteristic features, the tradition of amateurism; (b) the preservation of equity between member institutions; and (c) the preservation of equity between student-athletes.<sup>152</sup> Each of these effects has a clear positive effect on competition.

### a. Preservation of Amateurism

As previously mentioned, courts have found the protection of the tradition of amateurism to be a persuasive procompetitive justification for NCAA regulations.<sup>153</sup> This phenomenon is often referred to as a procompetitive presumption.<sup>154</sup> Despite finding the television agreement at issue to be an unreasonable restraint on trade, the Supreme Court in *Board of Regents* recognized that the NCAA plays a vital role in "preserv[ing the] tradition [of amateurism] that might otherwise die," and that the NCAA needs "ample latitude to play that role."<sup>155</sup> Lower courts have interpreted this language to mean that when an NCAA regulation is clearly designed to help maintain the tradition of amateurism, that regulation will be presumed to be procompetitive.<sup>156</sup>

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151. See Laura Lee Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 23 (1999).

152. See *infra* Sections III.B.2.a.-c.

153. See *supra* Section III.A.3.

154. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100-03, 120 (1984); see also Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 342-43 (7th Cir. 2012).

155. *Bd. of Regents*, 468 U.S. at 120.

156. See *Agnew*, 683 F.3d at 342-43.

Moreover, the NCAA is explicit in its goal of maintaining a “clear line of demarcation between intercollegiate athletics and professional sports,”<sup>157</sup> and achieves that goal through its amateurism and eligibility rules delineated in Article 12 of the NCAA Manual.<sup>158</sup> A primary characteristic of professional athletes, which is forbidden amongst amateur athletes, is receiving financial benefit from the use of the athlete’s name, image, likeness, and reputation.<sup>159</sup> Therefore, because the NCAA’s Self-Employment Guidelines, which prohibit the use of student-athletes’ name, image, likeness, and reputation in the course of their businesses, are in place to maintain the tradition of amateurism amongst student-athletes, the NCAA is accordingly deserving of the procompetitive presumption.

Although the Supreme Court has not yet granted certiorari to a case that addresses the issue of employment compensation directly, the Court’s recent denial of certiorari to both parties in *O’Bannon* is telling.<sup>160</sup> As previously discussed, the Supreme Court’s denial of certiorari allowed the Ninth Circuit’s decision, which denied the student-athletes’ demands for compensation above the cost of attendance at their respective schools, to stand.<sup>161</sup> This decision effectively safeguarded the tradition of amateurism.<sup>162</sup> While defending the tradition of amateurism, the court noted that “not paying student-athletes is *precisely what makes them amateurs*.”<sup>163</sup>

Similar to the court’s argument in *O’Bannon*, the NCAA could argue that not allowing student-athletes to exploit their name, image, and likeness for financial gain is also *precisely what makes them amateurs*. The use of one’s name, image, and likeness to promote a business or product, whether your own or that of a third party, is arguably a practice reserved for professionals.<sup>164</sup> A student-athlete who owns his own

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157. NCAA, DIVISION I MANUAL, *supra* note 4, art. 1.3.1, at 1.

158. *See id.*, art. 12, at 61-91.

159. *See id.*; *see also* Stapleton & McMurphy, *supra* note 151, at 23 (finding that “[o]ur infatuation with our favorite sports heroes is so strong that many advertisers pay professional athletes millions of dollars in order to entice more people to buy their products.”).

160. *See* *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 137 S. Ct. 277 (mem.) (2016) (denying certiorari to petitioner *O’Bannon*); *Nat’l Collegiate Athletic Ass’n v. O’Bannon*, 137 S. Ct. 277 (mem.) (2016) (denying certiorari to petitioner NCAA).

161. *See* *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1079 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

162. *See id.* at 1076.

163. *Id.*

164. *See id.* (noting that not paying student-athletes is what makes them amateurs). Arguably, a student-athlete’s use of his or her name, image, likeness, or reputation as an NCAA student-athlete in marketing for his or her business would be an indirect form of payment for being a student-athlete.

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business would be treating himself as a professional if he were to use the value in his photographs or reputation to financially benefit in such a way that a non-NCAA-athlete would not be able to. The celebrity that often comes with being an NCAA student-athlete is valuable; however, using that status to benefit the student-athlete's personal business ventures crosses the line between amateur and professional.

b. Equity Between Member Institutions

Equity amongst member institutions is undoubtedly procompetitive.<sup>165</sup> Institutions with similar resources and levels of prestige have greater competition in recruiting and on the playing field, which leads to more entertaining games and greater popularity for the sport, the teams, and intercollegiate athletics in general. The NCAA could successfully argue that the Self-Employment Guidelines preventing student-athletes from using their names, images, likenesses, and reputations to benefit their personal businesses work to maintain equity between member institutions.

When athletes are deciding where to attend college, they consider a number of factors. For example, student-athletes consider financial aid, educational opportunities, and the reputation of the team and the university. Allowing student-athletes to create businesses that directly benefit from their status as an NCAA athlete could lead student-athletes to consider many other factors, like potential market size, when deciding which institution to attend. Thus, allowing student-athletes to create businesses that directly benefit from their status would likely lead to a slippery slope of schools in larger cities and larger markets becoming more desirable because of seemingly greater opportunities for commercial success there.

Presently, the NCAA and the courts have recognized strict limits that prevent student-athletes from receiving financial aid above the cost of attendance at their school.<sup>166</sup> Removing the Self-Employment Guidelines would likely lead to athletes taking into consideration the possibility of additional compensation, through the creation of their own business, on top of the financial aid that they receive from their institution. The NCAA would likely argue that this in turn would lead to athletes choosing schools based off of where they could make the most money, thus creating a situation in which larger schools, or schools in larger cities, would be significantly more attractive than smaller schools

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165. *But see* Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 358-361 (2007).

166. *See* NCAA, DIVISION I MANUAL, *supra* note 4, art. 15, at 195-220.

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because of the larger markets and the greater opportunity to make money at those larger schools. Therefore, the NCAA's Self-Employment Guidelines are necessary to maintain the equity, and thus, the competition, between member institutions.

c. Equity Amongst Student-Athletes

The NCAA could additionally claim that the Self-Employment Guidelines are procompetitive because they help to maintain equity amongst student-athletes. Similar to equity between member institutions, equity between student-athletes helps to enhance competition by keeping all of the student-athletes on an equal playing field. Naturally, some student-athletes gain more name-recognition and popularity than others,<sup>167</sup> and significant differences in popularity likely affords some student-athletes greater economic opportunity than others. To remove these Self-Employment Guidelines and allow popular student-athletes to financially benefit, directly or indirectly, from their athletic ability would create a harshly unequal playing field.

Further, the NCAA would likely argue that these popular student-athletes would receive an unfair advantage based on the additional compensation they receive from their business. This advantage could come in the form of better living conditions, food, or medical care. The NCAA would also note that without this additional compensation from their businesses, student-athletes would be equal in each of these areas, as they would all rely solely upon their schools for these products and services.<sup>168</sup> Therefore, the Self-Employment Guidelines are arguably procompetitive in that they are necessary to maintain fairness and equality, and subsequently, viable competition, between student-athletes.

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167. For example, far more people throughout the country could name or recognize Penn State Football's Saquon Barkley before they could name or recognize any player on Penn State's women's basketball team.

168. Student-athletes would rely on their schools to provide these products and services either directly or indirectly. Schools could directly provide these products and services in the form of team sponsored meals or medical care from the university's athletic trainers. Schools could provide these products and services indirectly by providing student-athletes with financial aid up to the cost of attendance, thus financially sponsoring student-athlete choices in food and housing. *See generally* Megan Fleming, *Perks of Being a Student Athlete at Penn State*, ONWARD STATE, (Oct. 31, 2014, 4:14 AM), <https://onwardstate.com/2014/10/31/perks-of-being-a-student-athlete-at-penn-state/>.

3. Are the Self-Employment Guidelines Necessary to Achieve a Legitimate Objective or Can the Objective be Achieved in a Substantially Less Restrictive Manner?

The NCAA's named objective is to maintain a "clear line of demarcation between intercollegiate athletics and professional sports."<sup>169</sup> As previously discussed, this line is maintained through the tradition of amateurism and the guidelines set forth in Article 12 of the NCAA Manual.<sup>170</sup> This goal is clearly legitimate, as the tradition of amateurism has been a pillar of the NCAA since its inception,<sup>171</sup> and courts have recognized the importance of amateurism to intercollegiate athletics and have consistently protected it.<sup>172</sup>

The NCAA would likely argue that the Self-Employment Guidelines are necessary to achieve the legitimate goal of differentiating intercollegiate athletics from professional sports, and to financially benefit from one's athletic ability, directly or indirectly, is to be a professional athlete. It would be virtually impossible to create a less restrictive rule that would also prevent a student-athlete from improperly financially benefiting from his or her athletic ability. The NCAA would continue to argue that while it would be difficult in some cases to prove or quantify the amount that student-athletes' uses of their names, images, likenesses, or statuses as NCAA athletes helped them earn, it is likely that any of these elements, together or separately, could have a positive effect on the student-athlete's business. While a student-athlete's entrepreneurial spirit is admirable, the Self-Employment Guidelines are necessary to achieve the NCAA's goal of differentiating intercollegiate athletics from professional sports through amateurism.

In response to the NCAA's arguments, student-athletes may argue that a less restrictive way of accomplishing the NCAA's goal would be to measure each self-employed student-athlete's popularity and influence to determine if his or her name, image, likeness, or status as an NCAA athlete would have a noticeable effect on the success of his or her business. This could be accomplished by considering the student-athlete's social media following and the number of times the student-athlete is mentioned and discussed in the media by third parties. Student-athletes may also suggest that, on a case-by-case basis, a series of focus

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169. NCAA, DIVISION I MANUAL, *supra* note 4, art. 1.3.1, at 1.

170. *See id.*, art. 12, at 61-91; *see also supra* Section III.B.2.a.

171. *See supra* Section II.A.

172. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 120 (1984); *see also Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 342-43 (7th Cir. 2012); *supra* Section III.B.2.a.

groups could be conducted, in which the product or service is presented without the student-athlete's name, image, likeness, and status, and then the product or service is presented with those elements, to determine if the business is impacted by those elements. A court, however, would likely find that this suggestion is not a less restrictive means of accomplishing the NCAA's goal because it places an enormous burden on the NCAA to thoroughly investigate each individual student-athlete, which is extremely unrealistic.

Additionally, student-athletes may also argue that a less restrictive way to accomplish the NCAA's goal of differentiating intercollegiate athletics from professional sports would be to allow student-athletes to use their name, image, likeness, and status in the promotion of their business, but require a percentage of those sales to be paid to the NCAA and the student-athlete's institution. This practice of splitting sales would arguably allow the student-athletes to have and promote their businesses as they see fit, but not allow them to be unfairly compensated based on their status as an NCAA student-athlete. However, this argument would likely be unsuccessful because it ignores the tradition of amateurism and its importance as the primary division separating intercollegiate athletics from professional sports.

Ultimately, the NCAA's argument that the Self-Employment Guidelines are the least restrictive way of accomplishing its goal is significantly more persuasive. Thus, a court should find that the Self-Employment Guidelines are sufficiently competitive and justified, as they would satisfy the requirements of a rule of reason analysis.

### C. *LaMelo Ball and Donald De La Haye*

LaMelo Ball, now sixteen years old, was only thirteen when he committed to play basketball at the University of California in Los Angeles ("UCLA").<sup>173</sup> He has been a highly anticipated recruit, and his talent, along with his famous family,<sup>174</sup> has already made him into "a

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173. Although LaMelo Ball has recently decided to forego his potential NCAA career to begin a professional career in Europe, his athletic ability, stardom, and successful business are still relevant to the debate on the NCAA Self-Employment Guidelines. In December 2017, LaMelo Ball, and his brother, LiAngelo Ball, decided to sign one-year contracts to play professional basketball for Prienu Vytautas, a small team in Lithuania. See Scott Davis, *LiAngelo and LaMelo Ball were lured to their Lithuanian basketball team when a team employee DMed their agent on Twitter*, BUSINESS INSIDER (Dec. 23, 2017, 6:39 PM), <http://www.businessinsider.com/liangelo-lamelo-ball-lithuanian-team-twitter-2017-12>.

174. LaMelo Ball is the son of former professional basketball player LaVar Ball, and is the younger brother of Los Angeles Lakers player Lonzo Ball. See Michael McCann, *Who Needs the Other More: High School Phenom LaMelo Ball or the NCAA?*, SPORTS

public figure and a highly marketable athlete.”<sup>175</sup> Ball recognized the value of his popularity, and chose to capitalize with the creation of the Big Baller Brand with his family.<sup>176</sup> Recently, the Big Baller Brand came out with a new sneaker inspired by LaMelo, called the “Melo Ball 1.”<sup>177</sup> LaMelo can regularly be seen advertising and promoting these sneakers on social media, including multiple Instagram posts on both his personal profile and the Big Baller Brand’s profile.<sup>178</sup> In these photographs and videos, LaMelo is seen both wearing the sneakers and talking about them while playing basketball.<sup>179</sup> The NCAA has been upfront in expressing that these practices could make him ineligible to participate in intercollegiate athletics because he would be in direct violation of NCAA Manual Article 12.<sup>180</sup>

LaMelo Ball is precisely the type of athlete that the NCAA Self-Employment Guidelines were designed to curtail. To allow him to use his celebrity, which is derived directly from his athletic ability, to make large amounts of money selling \$395 “signature” sneakers and still continue to receive the benefits of being considered an amateur, would be clearly inequitable. To allow this kind of indirect compensation for athletic ability would be to place those student-athletes on a different playing field than those without that opportunity. It would be naïve to

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ILLUSTRATED (Sept. 7, 2017), <https://www.si.com/nba/2017/09/07/lamelo-ball-big-baller-brand-ucla-ncaa-nba-lavar-ball-lonzo-ball>.

175. *Id.*

176. *See id.* Big Baller Brand is a privately held company founded by Chief Executive Officer LaVar Ball. *Id.* Due to the private nature of the company, it is unclear exactly who has an ownership interest in the company. For purposes of this Comment, it will be assumed that LaMelo Ball is a part owner in Big Baller Brand.

177. *See* Tyler Lauetta, *LaMelo Ball now has his own \$400 Big Baller Brand shoes raising concerns about college eligibility*, BUSINESS INSIDER (Aug. 31, 2017, 5:20 PM), <http://www.businessinsider.com/lamelo-ball-signature-shoe-big-baller-brand-2017-8>.

178. *See* Big Baller Brand (@bigballerbrand), INSTAGRAM (Aug. 31, 2017, 4:54 PM), <https://www.instagram.com/p/BYdzKAwhVLP/?hl=en&taken-by=bigballerbrand>; *see also* Big Baller Brand (@bigballerbrand), INSTAGRAM (Aug. 31, 2017, 5:07 PM), <https://www.instagram.com/p/BYd0pjhB2y9/?hl=en&taken-by=bigballerbrand>; *see also* LaMelo Ball (@melo), INSTAGRAM (Aug. 31, 2017), <https://www.instagram.com/p/BYdzkAaHipq/?hl=en&taken-by=melo>; LaMelo Ball (@melo), INSTAGRAM (Dec. 7, 2017), <https://www.instagram.com/p/BcbPhjHF9Mq/?hl=en&taken-by=melo>.

179. *See* Big Baller Brand (@bigballerbrand), INSTAGRAM (Aug. 31, 2017, 5:07 PM), <https://www.instagram.com/p/BYd0pjhB2y9/?hl=en&taken-by=bigballerbrand> (showing LaMelo Ball playing basketball while advertising the Melo Ball 1’s).

180. *See* McCann, *supra* note 174 (discussing Article 12 of the NCAA Manual, and the options that LaMelo Ball has to defend himself if the NCAA tries to deem him ineligible); *see also* NCAA, DIVISION I MANUAL, *supra* note 4, art. 12.4.4, at 72 (stating that student-athletes may open their own business, but they may not use “the student-athlete’s name, photograph, appearance or athletics reputation” in the promotion of the business).

think that upon his arrival at UCLA, LaMelo would not be at a significant competitive advantage compared to his fellow student-athletes.<sup>181</sup>

Removing the Self-Employment Guidelines would allow LaMelo to financially benefit off of his athletic ability, while simultaneously reaping the benefits and exposure related to his amateur status. The NCAA relies on amateurism to maintain the equitable entertaining competition of their product. To destroy that principle in order to allow some student-athletes, like LaMelo, to line their pockets with money based off of self-promotion of their own businesses just a couple of years earlier would be unfair to other student-athletes, the member institutions, and the NCAA.<sup>182</sup>

Donald De La Haye, on the other hand, was a kicker for the University of Central Florida (“UCF”) football team, and was recently deemed ineligible by the NCAA under the Self-Employment Guidelines.<sup>183</sup> While a student-athlete at UCF, De La Haye developed a popular YouTube channel called “Deestroying,” which contained videos depicting his life as a college football player.<sup>184</sup> In the videos, De La Haye is often seen playing football, practicing for football, and hanging out with teammates in the locker room and other team areas.<sup>185</sup> In August 2017, the NCAA deemed De La Haye ineligible because he was receiving advertising revenue from his YouTube channel, and he refused to take down the videos when offered a deal to remain NCAA eligible.<sup>186</sup>

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181. While it may be true that certain athletes in widely popular sports like football or men’s basketball may be viewed differently amongst the general student population, this does not put them on an unequal playing field to other student-athletes, as they are each treated equally under the NCAA Manual.

182. The rule clearly allows for student-athletes to have businesses and make money with them, and only limits the way the products and services can be promoted. *See* NCAA, DIVISION I MANUAL, *supra* note 4, art. 12.4.4, at 72.

183. *See* Henry Fernandez, *NCAA rules UCF kicker Donald De La Haye ineligible over YouTube profits*, FOX BUSINESS (Aug. 7, 2017), <http://www.foxbusiness.com/features/2017/08/02/ncaa-rules-ucf-kicker-donald-de-la-haye-ineligible-over-youtube-profits.html>.

184. *See* Donald De La Haye (@Deestroying), YOUTUBE (joined June 5, 2015), [https://www.youtube.com/channel/UC4mLIRa\\_dezwvtyudo9s1sw/featured](https://www.youtube.com/channel/UC4mLIRa_dezwvtyudo9s1sw/featured).

185. *See* Donald De La Haye (@Deestroying), YOUTUBE (Apr. 1, 2017), <https://www.youtube.com/watch?v=HA9ln1wmxgc> (showing De La Haye practicing his sprints for football); *see also* Donald De La Haye (@Deestroying), YOUTUBE (Mar. 13, 2017), <https://www.youtube.com/watch?v=d8PG8BJdzfY> (showing De La Haye working out with teammates and practicing his kicking).

186. *See* Romero, *supra* note 1. The NCAA offered to allow De La Haye to remain eligible if he stopped taking revenue for his YouTube videos or if he stopped featuring aspects of his life as a UCF football player in his YouTube videos. *See id.*

While De La Haye's business was on a much smaller scale than LaMelo Ball's, the NCAA's motivation of protecting amateurism and the procompetitive justifications for the Self-Employment Guidelines remains the same. It would be inequitable to other student-athletes and member institutions, and detrimental to the NCAA's product, to do away with the tradition of amateurism by allowing student-athletes to indirectly profit off of their athletic ability. The Self-Employment Guidelines only govern student-athletes for a few years, and if a student-athlete feels that his or her business requires the use of his or her name, image, likeness, or reputation to be successful, then the student-athlete always has the option to no longer compete in intercollegiate athletics. By not accepting the NCAA's offer of terms to keep his eligibility, De La Haye chose his business over his intercollegiate athletics career, and that was entirely his decision. However, it would be unfair to the NCAA, its member institutions, and his fellow student-athletes for De La Haye to indirectly promote the destruction of the longstanding tradition of amateurism simply for De La Haye to profit.

#### IV. CONCLUSION

The NCAA's Self-Employment Guidelines clearly do not violate the Sherman Antitrust Act. The procompetitive justifications for the Guidelines undoubtedly outweigh the anticompetitive effects, and the Guidelines are the least restrictive way of accomplishing the NCAA's legitimate goal of a "clear line of demarcation" between college and professional sports.<sup>187</sup>

While the Guidelines may have some anticompetitive effects that limit student-athletes' abilities to promote their businesses, thus restricting their business' earning capacity, these anticompetitive effects are plainly outweighed by the plethora of procompetitive justifications.<sup>188</sup> The tradition of amateurism is a touchstone of the NCAA that cannot be discounted.<sup>189</sup> The Supreme Court has made it clear that any NCAA regulation that is in place to protect amateurism is presumed to be procompetitive.<sup>190</sup> While this procompetitive presumption alone may not overcome the anticompetitive effects, the other procompetitive justifications of maintaining equity amongst student-athletes and member institutions help to tip the scale in the NCAA's favor.

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187. See NCAA, DIVISION I MANUAL, *supra* note 4, art. 1.3.1, at 1.

188. See *supra* Section III.B.2.

189. See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 120 (1984).

190. See *id.* at 120; see also Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 342-43 (7th Cir. 2012).

While the student-athletes may find these Self-Employment Guidelines inequitable, they are forgetting that being an amateur is precisely what makes them an NCAA athlete, and a collection of amateur athletes is precisely what the NCAA's product is.<sup>191</sup> If the Self-Employment Guidelines, and principles of amateurism generally, were eliminated from the NCAA Manual, student-athletes would be able to receive compensation, directly and indirectly, for their athletic ability, thus making them professionals.<sup>192</sup> The elimination of NCAA regulations set in place to safeguard amateurism would essentially create a new minor league for each of the respective sports. To create a new minor league and to receive direct or indirect compensation would be to forget the value of the education that student-athletes receive and to completely disregard a core characteristic of the NCAA's product.

Ultimately, the Supreme Court should finally grant certiorari to a case in which a student-athlete challenges an NCAA regulation that prevents the indirect receipt of compensation for his or her athletic ability, such as the Self-Employment Guidelines. Perhaps Donald De La Haye will challenge his ineligibility on antitrust grounds, giving the courts a chance to weigh-in on this complex issue. When such a challenge does come before the Supreme Court, the Supreme Court should find that the Self-Employment Guidelines, and other similar guidelines, do not violate the Sherman Antitrust Act, as the procompetitive justifications clearly outweigh any potential anticompetitive effects. The maintenance of the tradition of amateurism, and the preservation of equity amongst institutions and student-athletes, are important concepts for courts to consider in order to best protect and preserve the competition of intercollegiate athletics, both on and off the field.

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191. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1076 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

192. See *Amateur*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/amateur> (last visited Aug. 19, 2018) (defining an amateur as one "who engages in a pursuit, especially a sport, on an unpaid basis").