

**THE BOWL CHAMPIONSHIP SERIES: IS IT FAIR
AND IN COMPLIANCE WITH ANTITRUST LAW?**

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS
OF THE

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UNITED STATES SENATE

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TRUST LAW?**

TUESDAY, JULY 7, 2009

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY,
AND CONSUMER RIGHTS
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:30 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, Schumer, and Hatch.

**OPENING STATEMENT OF HON. HERB KOHL, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Chairman KOHL. Good afternoon to everybody here today. Today we will examine the state of competition in the college football Bowl Championship Series. College football is a sport enjoyed by millions of fans and is the central focus of the athletic programs at dozens of colleges and universities across our great Nation.

I myself, of course, am a Badger fan and a fan of the Big 10. The revenues derived from participation in the end-of-year college football bowl games are essential to supporting college athletic departments. Dozens of lower-profile sports enjoyed by thousands of students are funded by successful college football programs.

The Bowl Championship Series was created more than a decade ago in an effort to find a fair and equitable way to select universities to participate in the lucrative end-of-year bowl games and in order to have an objective means to select teams to participate in a National Championship game.

While many believe this system is working well, critics of the BCS argue that it unfairly disadvantages those universities that are not aligned with the large athletic conferences.

Today's hearings will be an examination of whether the current BCS system truly serves the interest of competition of universities and of millions of college football fans. Today's hearing was called at the request of Senator Orrin Hatch, and so I will now turn over the gavel to my good friend and our esteemed Ranking Member who will chair and conduct this hearing.

I thank Senator Hatch for his work on this issue, and I also thank our panel of witnesses for the testimony that they will be offering today.

Senator Orrin Hatch.

Senator HATCH [PRESIDING.] Well, thank you, Mr. Chairman.

Mr. Chairman, I appreciate your willingness to schedule this hearing because I believe it will address a number of important issues, not the least of which is the legality of the Bowl Championship Series. I continue to enjoy our long service together on this Committee, Mr. Chairman, due in large part to your willingness to work with those of us on both sides of the aisle to address a wide variety of issues. Indeed, your willingness to address the concerns of members from both parties is almost unheard of in today's very partisan climate.

Turning to the BCS, I think we all know Congress' interest in this issue is not a recent development. In the 10 years the BCS has been in existence, numerous congressional committees have held hearings to examine the legal and consumer protection issues associated with the BCS system. In fact, I chaired a hearing in the full Judiciary Committee on this issue in 2003. And over the years some changes have been made to the BCS system. Ostensibly, the system is now more open to non-preferred conferences than it once was. However, even with these changes in place, the BCS continues to place nearly half of all the schools in college football at a competitive and, perhaps more importantly, a financial disadvantage.

These disadvantages are not the result of fair competition, but of the inherent structural inequities of the BCS system. And for these reasons, I believe that this hearing is necessary today. There is no shortage of opinion and ideas on how the BCS system should be changed. Indeed, I think any time college football fans gather together to watch a game, one of them has a playoff idea that they believe will solve all of college football's problems.

For today I think our time would be best served by leaving the debate over such alternatives in the living rooms of our country and instead focus on answering one question: Does the BCS comply with the law?

The law requires that all business enterprises meet certain standards with regard to pro- and anticompetitive behavior. Our focus should, therefore, be on comparing the current system with the standards required by our Nation's antitrust laws.

Personally, I believe there are enough antitrust problems with the current BCS system that we will have more than enough material to cover during the course of this hearing. Put simply, Section 1 of the Sherman Antitrust Act prohibits contracts, combinations, or conspiracies to limit competition. I have said before that I do not believe a plainer description of the BCS exists.

The system itself is an agreement between the preferred conferences and the major Bowl Games as to how they will compete with one another and, more apparently, how they will compete against the non-preferred conferences. More still, under the current BCS regime, each of the six privileged conferences is guaranteed to receive a large share of the BCS revenue to distribute among their member schools.

The remaining five conferences, which include nearly half of all the teams in Division I, all share a much smaller portion of the BCS revenue, even if one of their teams is fortunate enough to play their way into a BCS game.

Over the lifetime of the BCS, the preferred conferences have received nearly 90 percent of the total revenues. These disparities are explicit in the BCS arrangement. It brings to mind the major Supreme Court decisions prohibiting price fixing and horizontal restrictions on output. Under Section 1, such arrangements are prohibited.

Section 2 of the Sherman Antitrust Act is violated when one is in possession of monopoly power and uses that power in a way not associated with growth or development as a consequence of having a superior product or business acumen. I think there is a strong argument that the BCS may very well be in violation of that provision as well.

Practically speaking, there are two relevant markets in question here. Given the drastic difference between the revenues and the prominence of the BCS bowls when compared to other bowl games played throughout late December and early January, I think it is safe to conclude that the BCS bowls constitute a market that is all their own. And if Supreme Court precedence has any relevance here, the National Championship game also constitutes a separate market.

The BCS enjoys a monopoly over both these markets and has, through what appears to be deliberate action, restricted the ability of teams from non-privileged conferences to participate.

The BCS selects participants primarily through the use of subjective polling, complex computer ranking systems, and a set of biased selection criteria. Not surprisingly, this system expressly limits the number of outside teams that are able to qualify for one of the lucrative and prestigious BCS bowl games.

Take last year, for example. In 2008, two teams—Utah and Boise State—met the qualifications for the automatic BCS berth, but under the rules only one of them, the University of Utah, was invited to play in a BCS game. Furthermore, four teams—Utah, Boise State, Texas Christian, and Brigham Young—finished the season ranked higher in the BCS' own standings than at least one of the teams that received an automatic bid.

Clearly, the BCS bowl games exist in a category all their own, and the architects of the BCS system appear to have intentionally excluded teams from non-privileged conferences, not on the basis of competition, but due to prearranged agreements.

The Section 2 problems continue with regard to the National Championship game, as the current system ensures that only teams from the BCS' preferred conferences can qualify to play in the National Championship game. This is evidenced by the fact that although several teams from non-preferred conferences have gone undefeated over the years, none of them has even a remote chance of qualifying for the National Championship game.

Indeed, last season alone, two teams—Utah and Boise State—finished the regular season with better records than any team from any of the preferred conferences. Yet neither was even a consideration when it came to crowning a national champion. The University of Utah finished the season by routing a team that had been ranked number one for much of the season. It is hard to imagine what more Utah could have done with its season in search of a Na-

tional Championship. Yet under the BCS system, they were eliminated from such consideration before the season even started.

Section 2 was specifically intended to prevent such exclusionary tactics on the part of monopolists. The problems with the BCS extend well beyond the football field and address more significant issues than qualifying for either a National Championship or participation in a BCS game.

Ultimately, when we are talking about college football and the BCS, we are talking about institutions of higher learning. Each of these schools faces unique challenges when it comes to funding athletics and academic initiatives. The purposeful disparities in funding created by the BCS ensure that schools in privileged conferences, even those whose football teams are not all that competitive, enjoy advantages in offering scholarships and providing staff and facilities for their athletic programs.

The increased visibility that a company's automatic qualification into a BCS game guarantees that the teams from outside conferences face disadvantages with regard to recruiting players and hiring top coaches. This would be tolerable if the inequities were the result of inferior performance on the part of the teams on the outside, but I do not believe that the evidence really supports such a claim.

In addition to facing unique financial challenges, colleges and universities are charged with a unique mission: educating our young people and preparing them for their careers. In addition, they are in large part subsidized by the taxpayers, either through the receipt of funds or by enjoying tax-exempt status. That being the case, I believe they should be held to the highest legal and ethical standards.

For these reasons and others, the BCS has garnered the attention of Congress and the President, not to mention the dissatisfaction of fans throughout the country. Yet after the 2008 season, when the flaws in the BCS system were made all the more obvious than ever, the architects have sought to extend the status quo for the foreseeable future.

Of course, the new agreement is even more lucrative and quite likely promises to expand the divisions between the privileged and the non-privileged programs. It is my understanding that even as Congress has focused its attention on the system, the BCS appears to be attempting to strong-arm those in weaker bargaining positions into signing a new agreement by July 9, many months before the current contract expires.

Given the widespread public criticism of the current system and its obvious flaws with regard to competition, I had hoped that going forward would see a greater willingness to adapt on the part of the BCS. However, that does not appear to be the case.

Now, I am certain that some members of today's panel disagree with my conclusions. I welcome their testimonies and will give them ample opportunity to make their case to change not only my mind but the minds of, I think, millions of others as well. I am hopeful that rather than being just another chapter in the endless BCS debate, this hearing will shed some real light on the legal issues surrounding these matters. And toward that end, I want to thank all members of the panel for their attendance here today,

and I particularly want to thank the distinguished Chairman for allowing me to conduct this hearing.

Now I would like to just introduce our panel of distinguished witnesses.

Our first witness to testify today is President Michael Young. President Young is the president of the University of Utah. He is the former Dean and Law Professor of the George Washington University Law School. In addition, President Young was a professor at Columbia Law School. He also is a graduate of Harvard Law School, where he was note editor of the Law Review.

Next we will hear from Mr. Barry Brett. Mr. Brett is a partner of Troutman Sanders in New York. He is also chairman of the American Bar Association's Antitrust Section Committee on Sports, Labor, and Entertainment. Mr. Brett represents the Mountain West Conference here today, as I understand it.

Also testifying today is Harvey Perlman, the Chancellor of the University of Nebraska at Lincoln. Chancellor Perlman is the former Dean of the University of Nebraska College of Law. Chancellor Perlman currently sits on the BCS Oversight Committee, and we are grateful to have all of you here today.

Our next witness will be Mr. William Monts. Mr. Monts is a partner at Hogan and Hartson in Washington, D.C. He has 20 years of experience in litigating antitrust cases, and for 18 of those years, Mr. Monts has represented various interests in post-season college football.

I want to thank you all for appearing today. We want to welcome you to the Subcommittee's hearing, and after each of you gives your testimony, we will proceed to questions. I do not know who is going to show up here today, but if they do not, I will have plenty of questions.

However, before I swear in today's witnesses, I would like to thank Mr. Paul Michael Kaplan, a partner at Arent Fox, for his assistance to the Subcommittee in preparing for today's hearing. I would also note that the Subcommittee was looking forward to hearing the testimony of Bob Kustra, the president of Boise State. Unfortunately, due to a family emergency, he is unable to be with us today. Accordingly, I ask for unanimous consent that President Kustra's and Mr. Kaplan's testimony to the Subcommittee be included in the record and, without objection, so ordered.

Now, if I could ask all of the witnesses to rise and raise their right hand as I administer the oath, I would appreciate it.

Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Young. I do.

Mr. Brett. I do.

Mr. Perlman. I do.

Mr. Monts. I do.

Senator HATCH. Thank you.

So, President Young, we will proceed with you first, and we will just go right across the table. We are very grateful to all of you for being here, and we look forward to taking this testimony, and hopefully it will answer some of the questions that many of us have.

President Young.

**STATEMENT OF MICHAEL YOUNG, PRESIDENT, UNIVERSITY
OF UTAH, SALT LAKE CITY, UTAH**

Mr. YOUNG. Senator Hatch, thank you very much for holding this very important hearing.

I would not be here today if all universities had a realistic opportunity to compete for the National Championship and if the BCS revenues were equitably distributed among the institutions. If those were the facts and the only question was whether the correct teams were chosen to play in the championship each year, then the commissioners of the 11 Football Bowl Subdivision universities and conferences could adequately address any necessary tweaking to the BCS. But, unfortunately, that is not the case.

I am here this afternoon to talk to you about the inherent unfairness of the BCS. The BCS embraces favoritism rather than fairness in three critical respects, among others.

First, the champions of six of the 11 conferences that play major college football called the Automatic Qualifying Conferences—or, as you have so eloquently put it, “the privileged conferences”—automatically receive berths in the five most prestigious and lucrative bowls each year, known as the BCS bowls. The champions of the other five conferences, called the non-AQ Conferences, must earn a place in the BCS bowls, and practically speaking, at most, as you have pointed out, only one non-AQ team will receive such a berth. The AQ Conferences, along with Notre Dame, effectively guarantee themselves nine of the ten berths in the top bowls every year, regardless of their performance on the field.

Let me explain what I mean by that. Performance should be the measure by which all conferences, AQ and non-AQ alike, receive BCS bowl berths. If performance were the governing criteria, the Mountain West would be entitled to AQ Conference status. Over the past 2 years, the Mountain West has had a better record in interconference games against the AQ Conferences than any of the other ten conferences. Over the past 4 years, the Mountain West has been extremely competitive against the AQ Conferences, as I have indicated in my written testimony. Off-the-field agreements should not, as the BCS mandates, trump on-the-field performance.

Second, the BCS has provided major college football with a dubious distinction: it is the only sport that effectively eliminates half of its teams from the championship before the season even begins. The BCS system effectively tells the world—and, more importantly, the pollsters—that non-AQ Conference teams are undeserving of an automatic bid to a BCS bowl.

Coaches and administrators from AQ Conferences perpetuate the stereotype by frequently denigrating the non-AQ Conferences, stating, for example, that they are not real conferences. As a consequence, non-AQ teams are never appropriately ranked in the pollster popularity contests.

Cementing the fate of non-AQ Conference universities is the fact that just two teams are selected at the close of the regular season to compete in the championship game. This fact, combined with second-class status of the non-AQ Conferences mandated by the

BCS, leads to the inevitable exclusion of non-AQ Conference teams from competing for the National Championship.

In 2008, as you pointed out, Utah was denied an opportunity to compete for the National Championship. When your conference has the top interconference record against AQ Conference teams, and your university from that same conference has the top record in the country, you should have a chance to compete for the title. Championships should be decided by competition, not conspiracy.

Third, the revenue inequities under the BCS system are stark. In 2008, Mountain West Champion Utah was ranked far ahead of the ACC and Big East Champions. Mountain West went 6–1 in regular season play against the PAC 10. And all four of these conferences sent one team to a BCS bowl game. Yet the three AQ conferences each received \$18.6 million from the BCS, whereas the Mountain West received only \$9.8 million.

The story over time is even more telling. During the past 4 years, the Mountain West has competed very well against all six AQ Conferences, yet over that same period of time, Mountain West has received an average of \$18 million, or 75 percent less than the six AQ Conferences. And over the past four seasons, the AQ Conferences have received \$492 million, while the non-AQ Conferences have received less than \$62 million.

Simply stated, the competitive and revenue inequities of the BCS system condemns the non-AQ Conferences to a permanent underclass. Non-AQ Conferences struggle to build new facilities, pay competitive coach salaries, finance effective recruiting, and fund student scholarships. These economic inequities harm football programs, but also harm other sports that rely heavily upon the revenue from football.

Student athletes can see these economic disparities between the programs, and they hear the message loud and clear from the AQ Conference coaches, that playing for a non-AQ team means no chance for a National Championship experience.

Finally, and in my judgment, most importantly, as educators we work hard to teach the right values in the classroom. We want our students to take away from their college experience the belief that hard work and skill are the necessary tools to achieve. We want our students to strive to make all playing fields in life level and to give everyone the same opportunities to succeed.

It is tough, however, to make these values stick when we teach a different message on the playing field. A BCS system that relegates non-AQ Conferences to permanent second-class status, that denies nearly half the schools of any opportunity to compete for the National Championship, and rewards nearly 87 percent of the revenues to the AQ Conferences, regardless of their on-field performance, sends the wrong message to our students.

The BCS changes the old saying, “If you can’t beat them, join them,” to this: “If you can’t beat them, eliminate them.” This is a bad message and actions, after all, speak far louder than words.

A variety of justifications for this system have been offered in the past by representatives of the BCS. As outlined in my written submission, in my judgment, none of these even pass the straight-faced argument test. And, in fact, some even cut entirely in the opposite direction. But the essential point is simple and straight-

forward. This is a system designed to channel money to certain universities based on an agreement, not on achievement. Championships and opportunities are made available by conspiracy, not by competition. It harms higher educations, our student athletes, and the American public.

Thank you. I would be delighted to take questions.

[The prepared statement of Mr. Young appears as a submission for the record.]

Senator HATCH. Thank you, President Young.

We will turn to Barry Brett now, a distinguished attorney.

STATEMENT OF BARRY BRETT, ESQ., PARTNER, TROUTMAN SANDERS, NEW YORK, NEW YORK

Mr. BRETT. Thank you, Mr. Chairman, and thank you for inviting us to speak today on this very important issue and for holding this hearing.

I am the chair of the antitrust practice group of Troutman Sanders. I was chair of the Sports and Entertainment Committee of the American Bar Association Antitrust Section and of the New York State Bar Association Antitrust Section. I was on the governing committee of the ABA Forum of Sports and Entertainment. In short, I am an antitrust lawyer by trade and a sports junkie by choice.

I am very gratified to see the Committee addressing the Bowl Championship Series, which controls major post-season college football bowl games, controls the fictional National Championship, and uses this control to exclude all but its founding members from fair access to this competition and the hundreds of millions of dollars involved. The system offends the most basic antitrust law principles of competition.

There are 88 playoffs run by the NCAA covering college sports. All can accommodate the needs of the students and academia. In what was just historically called Division I college football, however, the NCAA does not act. Instead, it allows a self-designated cartel, created and controlled by six conferences, to set the rules for access to major post-season football games and its National Championship. It allows these conferences to control the enormous revenue they generate and to prevent the playoff desired by the public.

It is estimated that a playoff system would produce twice the current revenues of the BCS system. In antitrust terms and in the jargon of my business, the BCS system "limits output, limits consumer choice, and restrains competition in violation of the Sherman Act."

Our written submission details the history and workings of the BCS and sets forth many of the applicable legal precedents and principles. The BCS guarantees each of its six conferences a place in one of the major bowls and a large payday based on agreements rather than performance. In practice, the foreclosure has been almost complete.

Teams from other conferences face great barriers to qualify for one of the major bowls, and they face what effectively have been insurmountable battles to qualifying for a chance at the fictional

National Championship. The six conferences have reserved for themselves approximately 87 percent of the BCS revenues.

There have been 90 major bowl appearances by the original conference teams and only four appearances by non-original conference teams during the history of the BCS. Every contestant in the National Championship game has been from one of the original conferences. We have set forth in our printed materials data and studies showing this inequity and the manner in which it is not justified by performance.

By any objective criteria, the excluded teams are as good as many of those included. Yes, the anticompetitive effects and economic disparities are dramatic.

Some months ago, the Mountain West Conference submitted to the BCS a detailed proposal which provided for a playoff system that would finally yield a national champion based on competition and equal opportunity rather than reliance on poorly drawn, rarely understood, and deeply flawed formulae. The proposal would preserve the historic bowl games, add exciting games, and generate much more income for all concerned.

On June 15th, USA Today reported that the proposal was not even put on the BCS agenda, and it has been summarily rejected.

When rebuffed, the Mountain West Conference asked my partner Roy Bell and me to analyze and discuss with them whether the BCS structure violates Federal antitrust law. We have prepared a report, which has not been adopted as a position of the Mountain West Conference, but has been codified into a detailed legal memorandum to this Committee.

In the words of the Supreme Court, "The Sherman Act was designed to be a comprehensive charter of economic liberty, aimed at preserving free and unfettered competition as the rule of trade."

The BCS offends everything the Sherman Act is designed to accomplish. Instead of competition on the merits, the BCS is a commercial enterprise which flouts the Sherman Act and sacrifices on-field competition in order to protect an enormous revenue stream. The BCS has nothing to do with amateurism or education, but is a commercial venture based on barriers to competition. The BCS has negotiated a new TV contract for almost \$500 million. Each of the six controlling conferences is guaranteed at least \$18 million a year.

From the point of view of fans and players, the goals and barriers of sports are corrupted by commercial goals. Competitive success does not yield access to the National Championship.

Twenty-five years ago, the Supreme Court established that NCAA rules limiting the televising of games was a violation of the Sherman Act. The NCAA fought vigorously to protect its restrictions, just as the BCS now defends its restrictions. The finding of a violation of Section 1 of the Sherman Act in that case was one of the great foundations for college football as we know it today and its enormous popularity.

Every element of a violation of the Sherman Act is present in the BCS. The agreement required for a Section 1 violation is clear. The anticompetitive effects are manifest and shown in study after study. Price competition among the bowls is eliminated by agree-

ment. The claimed benefits of the arrangement are illusory and easily achieved by less anticompetitive alternatives.

Similarly, all of the elements of a Sherman Act Section 2 violation are apparent. The BCS has secured, maintained, and exercised the power to exclude competition and control price, which are the hallmarks of the offense of monopolization. It has reserved for itself the spots in the major bowl games without regard to competitive success. The BCS will not even consider a playoff, and it reflects all of the evils of monopoly power that the Sherman Act prohibits.

The competing teams, the schools, the student athletes, and the public want a playoff and the competition on the merits, which the Sherman Act requires. A group of competing businesses would face criminal antitrust scrutiny if they tried a stunt like this. Antitrust principles require that it end and that we bring back the principles of equal opportunity, competitive reward, and fair play on and off the field.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Brett appears as a submission for the record.]

Senator HATCH. Well, thank you. We appreciate your testimony. Chancellor Perlman, we will take your testimony now.

**STATEMENT OF HARVEY PERLMAN, CHANCELLOR,
UNIVERSITY OF NEBRASKA-LINCOLN, LINCOLN, NEBRASKA**

Mr. PERLMAN. Senator Hatch, thank you.

I acknowledge that there are football fans and sports writers who believe the ideal system to crown a national champion is an NFL-style playoff. Unfortunately, those of us responsible for our universities' involvement in post-season football must try to craft a system that reflects the restraints of the real world.

In my written statement, I have discussed those realities at length, and I will only highlight three of them here.

First, any system of play must recognize that athletes who play football are also students. For the vast majority of them their success in the classroom will have far more to do with their success as adult citizens than their performance on the football field. As presidents and chancellors, this reality must be our highest priority.

Second, not every school in Division I is equal on the football field or in any other field of endeavor. Each university has pillars of strength that were created by conscious investments, hiring of great leaders, natural advantages, significant philanthropic donations, dumb luck, or a combination of these factors.

All students, like student athletes, can make individual choices among the strengths of the various institutions in which they could enroll, and these choices may enhance or diminish their future opportunities. This is a reality that cannot be ignored, nor is it one that can be easily changed.

Third, any system designed to determine a national champion in intercollegiate football can only come about through the agreement of those universities who consistently field highly ranked teams. A system that did not involve schools from the six automatic qualifying conferences and Notre Dame could not claim to be one that

is likely to produce a national champion. This is not true of other conferences.

To secure the participation of these essential conferences, the system must provide revenue in excess of their other opportunities, must be consistent with their academic values, must take into account the impact on the fans who provide their schools with support, must preserve the excitement of the regular season, and must honor the long-standing relationships that they have had with the bowls and the communities those bowls support.

The current BCS is able to satisfy those requirements; we have yet to see an alternative arrangement that does the same. This has not worked out to the disadvantage of the five conferences that do not automatically qualify for a BCS bowl. Before the BCS, none of the teams in these conferences had agreements with any of these major bowls, and these teams seldom played in them. Since the BCS, they have had more access to these bowls.

Because of the BCS, these conferences also receive considerably more revenue than they did under the old system. In fact, we know informally from media experts that the payments we make to these conferences is, in fact, a subsidy of their athletic programs because the access we have provided does not increase the market value of the BCS product.

The bottom line is that with the BCS these conferences have increased their access to and exposure in national television markets, and they have substantially enhanced the revenue available to them from post-season football. There might be many concerns expressed about the BCS, but it is hard for me to see how these conferences can claim to be disadvantaged.

Finally, there is an assumption that the uneven distribution of revenues generated by the BCS is responsible for disparity in athletic success. When considered from an institutional perspective, the revenue a university like mine receives from the BCS is a very small proportion of our total revenue.

My university's athletic department budget for next year will be approximately \$75 million. If the Big 12 Conference places one team in a BCS bowl, the University of Nebraska can expect a distribution of approximately \$1.5 million. This is 2 percent of our budget. To put this in perspective, if we added an additional home football game, we could more than double that revenue.

To be sure, some schools are thought to have an advantage because of the schedule they play, their history of success, the size of their budgets, and the support they receive from fans and donors. But at the beginning of the season, every Division I football team has an equal chance to become national champion if they rank first or second in the country.

You would not predict that the University of Nebraska would have enjoyed the success we have had on the football field. We come from one of the smallest population States in the country and must recruit athletes nationwide. We do not have mountains or seashores or large cities or a moderate climate capable of attracting student athletes, and we labored long in the obscurity of losing seasons. But we sustained a loyal fan base, we hired and retained gifted coaches who were skilled at recruiting student athletes getting

them to play at the height or even sometimes beyond their athletic abilities.

We built this success, as we have built our recent academic success, by working harder and being more creative than the competition. We believe these options remain open for all schools in Division I. We do not believe that the BCS has made this process more difficult. In fact, by granting greater access and exposure to these schools than ever before and providing them with more revenue than ever before, we have created the opportunities for them to be successful.

Thank you.

[The prepared statement of Mr. Perlman appears as a submission for the record.]

Senator HATCH. Well, thank you, Chancellor Perlman.

Let's go to you, Mr. Monts, now and take your testimony.

STATEMENT OF WILLIAM MONTS III, ESQ., PARTNER, HOGAN AND HARTSON, WASHINGTON D.C.

Mr. MONTS. Thank you, Senator Hatch. I am William Monts. I am a partner in the law firm of Hogan and Hartson here in Washington, D.C. and have practiced for nearly 20 years in the firm's antitrust, competition, and consumer protection practice group.

For roughly 18 years, I have had the privilege of working on various matters related to post-season college football—first representing certain bowl games in connection with the Bowl Coalition, and in the past 14 years, representing certain conferences in connection with the Bowl Alliance and now the Bowl Championship Series.

I have thought about these issues a great deal over the past 18 years, not merely as a lawyer, but as an avid fan of the game. I have spent a great deal of time studying its history and the athletic, economic, and legal developments that have shaped it.

I am going to limit my remarks today to an analysis under Section 1 of the Sherman Act and will assume, for the sake of argument, that a number of threshold issues that I covered in my written statement could be proved by a complainant against the BCS.

I do that because, one, if the BCS passes muster under Section 1, I believe it also passes muster quite easily under Section 2; and I want to focus on those issues that I understand are animating the hearing that brings us here today.

The BCS would be analyzed as a joint venture under Section 1 of the Sherman Act and would be reviewed under the so-called rule of reason under which procompetitive benefits of an arrangement are weighed against the anticompetitive effects. Only if the anticompetitive effects outweigh the procompetitive benefits is the agreement unlawful. So let me turn to that analysis. I believe there are at least four procompetitive effects that I would like to highlight here today.

First, the BCS creates a guaranteed national championship match-up between the top two ranked teams each year. No conference or institution can produce that product on its own. It can only result from an agreement among the conferences and the University of Notre Dame. Without the agreement, there is no such game.

Second, the BCS creates attractive match-ups between conference champions and highly ranked runner-up teams in the other BCS bowls based on the a full-season's results. The old bowl system often resulted in match-ups that were created after seven or eight games, as a bowl filled its empty slots by effectively committing to take a particular team. If that team later went on a losing streak at the end of the season, nonetheless, the bowl was often left with no other choice because other bowls had paired up with other attractive teams.

Third, the BCS preserves and strengthens the bowl system overall, thus creating the maximum number of post-season opportunities for student athletes, coaches, and fans and the maximum number of post-season games. It is important to note that there are only five bowl games that are a part of the BCS and that there are 29 other bowl games that are independent of the BCS and make their own decisions about teams that they choose and conferences with which they will have affiliation arrangements.

Fourth, and finally, the BCS and the bowl system generally enhances the college football regular season by making every game meaningful. Today college football is widely regarded as having the best regular season in all of American sport. That I suggest to you, is largely the result of the BCS and the bowl system.

Now, against these substantial procompetitive benefits stand what I understand to be two alleged anticompetitive effects. The first is that the BCS denies conferences access to the BCS bowls and the National Championship; and, secondly, that the BCS revenue is not split equally. Neither is an anticompetitive effect.

The purpose of the antitrust laws is to protect not producers of college football but consumers. And in this case the immediate consumers are the bowl organizations and television networks; the ultimate consumers are the fans. If the BCS were to disappear tomorrow, nothing would arise to take its place. We would return to the old bowl system in which each conference competed with one another for the most attractive bowl slots. When that is understood, it is easy to see why the exclusion argument fails.

BCS bowls could today, if they wished, always demand to have a champion from one of the five conferences without an annual automatic berth. Similarly, they could take one with an at-large pick. They have chosen not to do so. The BCS, nonetheless, guarantees those conferences access to those bowl games under certain circumstances—guarantees they would not have otherwise.

In short, it enhances their bowl opportunities over what would be available to it in the absence of the BCS and, therefore, there is no denial of access. As for the championship game, if there is no BCS, there is no championship game and, thus, there is no denial of access there either.

On the revenue distribution point, the BCS provides the five conferences now with revenues they would not be able to obtain on their own. Thus, far from being anticompetitive, it subsidizes those leagues.

In any event, revenue distribution within a joint venture is not the concern of antitrust law. The issue is market output, and here there is no negative effect on output by the BCS. Either the venture is lawful and does not restrict output, in which case how it

divides up revenues among its 11 members, 12 members in this case, is of no antitrust concern; or the venture is not lawful, in which case it is enjoined and there will not be any revenues at all to distribute.

At bottom then, the BCS has several procompetitive benefits and its alleged anticompetitive effects are non-existent.

Let me make one final point because I think it further demonstrates why an antitrust claim is of no benefit to the five conferences without annual automatic berths. Even if one were to assume a Sherman Act violation, the remedy for the prevailing party is an injunction against the arrangement. The BCS will go away, but no court is going to write a playoff system or some alternative structure, establish selection procedures, negotiate relevant contracts, allocate costs and revenues that might be earned from the arrangement; that is just not what courts do.

Having declared one form of cooperation—and a very mild form at that—unlawful, no court is going to set about crafting from whole cloth a more restrictive form of cooperation that would be required to have a playoff. The Sherman Act does not give it the authority to do so, and the Supreme Court in the last 5 years has cautioned against these sorts of judicial misadventures.

Instead, we would be back to the old bowl system—but with one important caveat. With the judgment on the record that the BCS is unlawful, I suspect that conferences would be far less willing to entertain the concept of a playoff which would rest upon an agreement among the exact same parties, with the exact same market power, that would be far more restrictive than BCS and likely to have substantially adverse effects on the bowls.

The peculiar irony of an antitrust claim is that it is likely to sound the death knell of the alleged playoff that the critics have insisted and claimed they want. In that sense, it would be a pyrrhic victory and would leave those conferences from whom the critics profess concern in a much worse position.

Again, Senator, it is an honor to appear before you today, and I look forward to answering any questions you may have.

[The prepared statement of Mr. Monts appears as a submission for the record.]

Senator HATCH. Thank you, Mr. Monts.

Let us start with you, President Young. It is my understanding that privileged—I call them “privileged”—conferences can rely upon receiving a substantial yearly sum of BCS revenues. Under the BCS system, such revenues are guaranteed to the teams in the six privileged conferences regardless of how they perform on the field; and proponents of the BCS have implied that the revenue distribution is both fair and equal and that every conference that receives one bid in a BCS game in a year receives the same amount.

Now, I personally think the numbers tell a different story. Is that true? And what are the practical effects of the current distribution of revenue?

Mr. YOUNG. Senator, let me answer that question in two parts, if I may. I am going start with the paragraph from an op-ed piece that President Robert Kustra from Boise State University wrote, which I think illuminates the fallacy in the first part of that argument.

He says, "To take a page from recent history, in 2004 Boise State went undefeated and finished the season number 9 in the BCS, yet was excluded from a BCS bowl while number 13 Michigan and number 21 Pittsburgh qualified."

"In 2006, Boise State went undefeated and finished the season ranked number 8, was invited to play, and defeated Oklahoma in one of the greatest games ever played."

"In 2008, Boise State went undefeated again and finished the season number 9 in the BCS, yet was passed over for a BCS bowl, while number 10 Ohio State, number 12 Cincinnati, and number 19 Virginia Tech were all chosen for BCS bowls."

And I could go on with a series of other examples even from our own conference. This year, three teams were ranked more highly in our conference alone than teams that were chosen to play in a BCS bowl. So it seems to me that it is challenging to make that argument.

The second thing I would say with respect to revenue distribution, it is true if a non-automatic qualifying conference team does exceptionally well, much better, necessarily better, than a number of the automatic qualifying teams, and manages to work its way in, despite all these handicaps, it does, in fact, get less because the agreement within the five non-automatically qualifying is that that revenue will be divided up. And, frankly, we oppose that. But the system set up under this agreement forced us into an arrangement where we have to share those revenues with these other schools, so we get approximately half of what a BCS conference automatic-qualifying team would get playing in the same bowl game.

Senator HATCH. Chancellor Perlman, you have argued that the BCS revenue distribution is not only fair but better than it would be under any feasible alternative or system. However, last year both the PAC 10 and the Mountain West had exactly one team qualify for a BCS game. Yet the PAC 10 received nearly twice as much revenue as the Mountain West. As a result, the team that finished at the bottom of the PAC 10, which did not win a single game last year, was guaranteed before the season even started to receive more BCS revenues than the University of Utah, to pick one school, which finished the season as the only undefeated team in college football.

Now, tell me how that result can be justified.

Mr. PERLMAN. Senator, the bowls and the conferences have had relationships, and you have to think of this in the context of multiyear relationships. The alignment of the Fiesta Bowl with the Big 12 is based on the proposition that every year the Big 12 will produce at least one or two teams that are significantly highly ranked. The years when Oklahoma and Nebraska were not playing as well as they had been, we still produced a Texas or a Texas A&M or a Missouri.

These relationships reflect not only the strength of a team in a conference, but the depth of strength in a conference. And those relationships were long standing before the BCS, and it was based on that that these revenue distributions are made.

The fact is we know that from our conversations, negotiations with the media and others, that adding the other five conferences did not increase the revenue available through the BCS. So the

revenue is distributed based on the contribution made to the value of the product.

Senator HATCH. OK. Well, let me go back to President Young. The BCS proponents have claimed that the current BCS system, including the distribution of BCS revenues and the system for awarding BCS bids, is required by the marketplace.

Now, is that true?

Mr. YOUNG. Well, again, I think there is little evidence that that is actually true, if you look at the data. If, for example, you look at the opportunity for bowls for the University of Utah, we were selected over teams—Cincinnati and Virginia Tech, for example—and that Sugar Bowl, in which we played, had a much, much higher viewership than the bowl in which Cincinnati and Virginia Tech played. It just is not clear to me at all where one can assert with confidence that the marketplace drives this in that particular way.

I think that if you actually look as well at the period from 1982 to 1991, you see seven of the ten teams that actually were ranked as national champions were not then in automatic-qualifying conferences and were put in, in part, as Commissioner Swafford said, in order to bring in the teams that had been playing for the National Championship and designed to solidify and create that certainty.

And so one could argue that these teams have these relationships and, therefore, the finances follow. Or, conversely, the bringing of the teams into it has generated the money itself, and the current practice that excludes 51 of the teams in college football from having a realistic opportunity to prove themselves on the field in that way, it seems to me to belie the notion that this is market-driven.

Senator HATCH. Chancellor Perlman—and then I am going to turn to Senator Schumer—you have argued that the marketplace that the six preferred conferences receive automatic bids due to their prominence in college football and to preexisting bowl tie-ins.

Now, does that apply to every one of the privileged conferences? For example, let me give you an example. The Big East has no bowl agreement and in recent years have been outperformed on the field by outside teams in conferences. Now, what is the market justification for including the Big East and excluding the Mountain West?

In addition, last year, two non-privileged teams qualified for BCS games, but only one was invited due to the BCS rules. What is the market justification for excluding eligible teams even when they could have been invited without affecting the automatic bids of any privileged conferences?

Mr. PERLMAN. Senator, when the BCS was formed, the Big East conference did, in fact, produce a number of national champions and teams that played with national champions. When we revised the BCS system in 2003 and 2004, we created a pathway for conferences who were not automatic qualifiers to become automatic qualifier based on the strength and depth of the conference on the field.

The Big East went through that process and was successful. That process is open to the other five conferences as well. So we did try and create a mechanism whereby conferences, through the strength

and depth of their success on the field could become automatic qualifiers in the Bowl Championship Series.

Senator HATCH. Well, tell us about the specifics of that criterion because that has not been made public to my knowledge.

Mr. PERLMAN. Well, Senator, it was part of the agreement of the group of five that all of them agreed to when we revised the system in 2003–04. I am not sure that I can give you the details without referring back to the contract, and I do not know if Mr. Monts remembers them as well. But there is a process, and it is one that has objective criteria for meeting that process.

Mr. MONTS. Senator, may I add to that?

Senator HATCH. Certainly.

Mr. MONTS. There is a process. It relates to three different criteria: first is the ranking of the highest ranked team in the conference; second is the number of teams ranked in the top 25 of the final BCS standings; and then the third is the strength of the conference measured by the ratings of all of its teams from top to bottom.

The standards work over a 4-year period. The 4-year period began in 2004 and went through 2007. There was a new period that began last year, will run through the 2011 regular season. And so based on those standards, we are in the new period, and certainly any conference that triggers them that does not now have an automatic berth will earn one.

Senator HATCH. Have those criteria been made public, the four you mentioned here?

Mr. MONTS. I do not know if they have been made public, Senator. They are part and parcel of the BCS agreement.

Senator HATCH. OK. Let me go back to you, Chancellor Perlman. One of the arguments made in defense of the BCS specifically with regard to the National Championship game is that it is objectively open to every team regardless of their conference affiliation.

Now, put simply, if the team is ranked No. 1 or two, it will not play in the National Championship no matter what conference it hails from. However, as a practical matter, while this standard is theoretically objective, it eliminates most teams from consideration before the season even begins. Isn't that correct? Or, in your opinion, does every team begin the season with the possibility of playing in the National Championship game?

Mr. PERLMAN. Senator, I can say certainly that the system allows every team an equal right to be No. 1 or No. 2 if they are successful on the field.

I am not so naive as to think that, as a practical matter, some schools do not have, because of tradition, because of reputation, a better chance at it. It is the same as when Nebraska walks into NIH and seeks a Federal grant and we are competing against Harvard. Theoretically, we have the same opportunity. Do we as a realistic matter? I am not sure.

But I do believe that—I mean, the problem is, of course, that we do not all play each other, and there is no conceivable way that we could play each other. And so a team that may be undefeated may not have played the same strength of schedule, may not have interacted with a sufficient number of teams to solicit a ranking of

one or two from those people that look at the system and try and pick the No. 1 or No. 2 teams.

Senator HATCH. President Young, do you care to comment about that?

Mr. YOUNG. Well, I think the key point—and I wanted to emphasize and appreciate Chancellor Perlman's emphasis of the key point—is that the system is entirely self-referential and so that you have at least as one of the major data—

Senator HATCH. Self what, now?

Mr. YOUNG. Self-referential. That is to say, it starts with a series of rankings, rankings based on a great deal of polling data—much of it by people who confessed this year that they have never seen a single Mountain West team play this year—and create a ranking system, and from that ranking system, then, however you perform on the field, whatever the strength of your schedule, climbing up that ranking becomes, at least to point one or two, virtually impossible. Coupled with the dialogic way of discussing BCS versus non-BCS, it makes it very difficult for any team in a process that is based in some large degree on popularity polling and on historic patterns rather than actual on-field performance to be ranked one or two. It is simply not realistic.

Senator HATCH. Well, do you think that a team from an outside, non-privileged conference has a realistic chance to qualify for a National Championship game?

Mr. YOUNG. Well, Senator Hatch, the University of Utah comes from the conference that this year had the best interconference record. Against the PAC 10 we were 6–1, and we were undefeated and unable to climb that ranking.

I do not know what more we could do. We have worked hard; we have hired gifted coaches; we have invested heavily in our program. We have worked diligently by dint of tremendous sweat and labor and after a year like that could not rise.

Senator HATCH. Well, let me just rephrase it in another way for both you and Chancellor Perlman. Let us take last year's Utah team, for example. What more could they have done to play their way into a National Championship game? You know, if the BCS system ensures that most teams will not even have an outside chance of playing for the National Championship, isn't it fair to say that it is exclusionary?

Mr. YOUNG. Well, if we had been part of an automatic-qualifying conference, I suspect we would have had an opportunity to play for a championship.

Senator HATCH. I see.

Chancellor.

Mr. PERLMAN. Senator, it is hard to respond to this without appearing to be disrespectful of Utah, which I am not.

Senator HATCH. You do not want to be in this room.

[Laughter.]

Mr. PERLMAN. I know. I know.

Senator HATCH. I happen to love the University of Nebraska, too. We have watched it for years, and your former coach was a good Member of Congress, and he is back with you, as I understand it.

Mr. PERLMAN. He is.

Senator HATCH. Well, that is going to do a lot of good, I think.

Mr. PERLMAN. It will.

Senator HATCH. And you have been very kind to come here and give us your viewpoint.

Mr. PERLMAN. Well, I just want to say—I mean, there is realistically something that Utah could do. They could have played the schedule Nebraska played last year, where we played Oklahoma, Texas Tech, and Missouri—all of them ranked within the top five.

Senator HATCH. Did they even have a chance to do that?

Mr. PERLMAN. Well, they got a non-conference schedule that they could fill.

Senator HATCH. Well, they played a lot of big-time teams last year.

Mr. PERLMAN. I know, but the issue is—

Senator HATCH. And they whipped one team that was No. 1 for most of the season.

Mr. PERLMAN. And if they had have beaten Alabama before that bowl game instead of at that bowl game, they might have had a better shot at it.

Senator HATCH. Well, I see. You are making my case for me.

Mr. PERLMAN. You know, at some point—at some point—regardless of what system you talk about, somebody is going to have to pick the teams that play and the teams that are excluded.

Senator HATCH. Is it fair to pick teams when you do not even go and see—when the criteria does not require you to even go and see a game? And let us use the Mountain West Conference as a perfect illustration.

Mr. PERLMAN. I appreciate that it may seem unfair and it may, in fact, be unfair.

Senator HATCH. Well, you know it is unfair.

Mr. PERLMAN. But the fact is that somebody, no matter what system is proposed, is going to have to pick those teams that get to play and those teams that do not. And we have looked at every system possible. And you can look at the March Madness basketball, NCAA, where we have 64 teams, and we have a small committee locked in a room over that last weekend to pick the teams. And there is controversy every year about who is in and who is out. And it may be based on—

Senator HATCH. It is based on a playoff game, you know.

Mr. PERLMAN. Well, you do, but the issue is the same.

College baseball this year picked the 64 teams to play in the regionals, and there is enormous controversy about how many of the Big 12 got in as opposed to how many the ACC or the SEC got in.

There is no perfect system in this. And do some of us start out with a disadvantage? As I say, Nebraska has advantages and it has disadvantages in all of the areas that this university competes with other universities. That is the way the world is, I am afraid.

Senator HATCH. President Young, do you have anything to say about that?

Mr. YOUNG. Well, I appreciate those comments very much, and I do appreciate the tremendous football team that Nebraska fields and wish that they were willing to play us. If you look at the ranked teams in the top 20 that we played—

Senator HATCH. There you have a challenge. Now, let us get this—

[Laughter.]

Mr. PERLMAN. I will report to Athletic Director Osborne when I get back.

Senator HATCH. You tell Osborne I want a University of Utah game.

Mr. PERLMAN. All right.

Mr. YOUNG. I have heard that before. We really appreciate that and the tremendous programs that those are. But given the rankings of the teams that we played—again, it gets very hard to figure out what we do in a system that inherently stacks it against us, and that I think becomes the most fundamental concern.

We are not concerned about external constraints placed on our system. I envy Nebraska's athletic budget, and they produce tremendous success because of it.

My athletic budget is less, but we Westerners do more with less, and those kinds of constraints are ones we understand. It is the systemic constraints where the system starts systemically balanced and structured against the possibilities that are the problem—the man-made constraints, not those constraints that come because of weather and mountains and my capacity to fundraise or not fundraise.

Senator HATCH. President Young, I wanted to ask you about the message the current BCS system sends to our young people. As you know, a group of colleges and universities are the primary movers behind the current system. It is these same institutions that we charge with the task of educating our young people and preparing them for the workforce.

What impact, if any, does the BCS have on your efforts to teach students the proper values?

Mr. YOUNG. Senator, if I may take the liberty of reading two things that encapsulate it a bit?

Senator HATCH. Sure.

Mr. YOUNG. One comes from my written testimony, and it just focuses on the fact that I believe, as I believe most Presidents believe, that we have a paramount responsibility to teach our students to be good citizens, to model fairness and equity and to lead by example. This is true in all aspects of university life, but particularly true for college football, which creates such great interest and enthusiasm and attention among our student body. College sports should promote fairness and equity and the fundamental American concept that anyone with the skills and drive to succeed can achieve the highest level of greatness.

These are not the messages being sent by college football today. The BCS system, with its stranglehold on college football, sends the message that economic power rather than athletic ability is the key to success. As Commissioner Swafford said, "Fairness depends on where you sit." Rather than promoting fairness and equity, the BCS system promotes the status quo—a system of schools who have and those who have not—and virtually assures that many highly successful athletic programs will be forever excluded from the highest levels of recognition and financial gain. And these are not values that we want our students to really model or emulate.

I will read one last statement, if I may, which I think is beautifully written, that highlights our obligation, and it comes from David Frohnmayer, President of Oregon State University, who says, "We can easily go too far—authority is seductive; we can reach a personal tipping point. . . .Some environments blind us to the human consequences of our actions—so we MUST be attuned to the consequences of our behavior. . . .This ethical life is hard work—"knowing right from wrong" requires diligence, self-scrutiny and looking into a very well-lit and refractive mirror." And, of course, President Frohnmayer is the most recently retired Chair of the BCS.

I agree wholeheartedly with his statement and what we ought to be teaching our students, and I do not believe that the BCS does that.

Senator HATCH. Thank you.

Chancellor Perlman, our State universities were created so each student would have an opportunity to attend college. Now, getting an education has increasingly become a prerequisite to achieve the American dream, which says if you work hard enough, you too can be a success and enjoy the fruits of your labor. But under the BCS system, it does not matter how good of a team you are. In the BCS system, there are significant and largely insurmountable obstacles at play in the so-called National Championship.

Now, if your school does not belong to a privileged conference, that becomes even harder. Therefore, does not the BCS system violate the intellectual and ideological foundation which was the basis for the creation of State universities?

Mr. PERLMAN. Well, Senator, of course, it is always—it depends on your perspectives on these matters. As I tried to indicate in my testimony, both written and oral, universities come with a set of endowments, some of them that they have earned, some of them that they acquired through luck. We are all different. It seems to me that one of the things that universities ought to teach students is the fact that, however the natural set of endowments are arrayed against you, hard work and creative activity can cause you to rise to the top.

Bowl Championship Series gives every school an opportunity to play for the National Championship. It has increased the access of students and schools that did not have it before. It has increased the revenue of schools that have aspirations for playing at the highest level of college football. I do agree that the issue is one about students, and if you would permit me to also provide you a quote, it is from Gary Patterson, football coach at TSU, which I believe is a member of the Mountain West Conference:

"Obviously, a true playoff gives you a national champion. But my answer has always been it's for the kids. And bowl games are for the kids. If you're in the playoff, you spend all week at your place, and if you get beat, you're done. You never experience a new place; you never see new things. For me, the key to the bowl games is you get to experience another place; you get to learn about another program. A lot of our kids never get to go to the West Coast. In all this arguing, we tend to forget about the kids, about their academic load and everything else that comes with being a student-athlete. I have a tendency to stick with the bowls."

I think that is the attitude in most of the university presidents I come in contact with.

Senator HATCH. Well, let me go back to President Young. Both Chancellor Perlman and Mr. Monts, in his testimony, in his written testimony, have stated that the BCS is needed to protect the overall bowl system and to preserve the exciting nature of the regular season.

Now, in the past, proponents of the BCS have also argued that any playoff proposal would harm the schools' academic missions. Do you agree with any of those claims?

Mr. YOUNG. Not a single one of them, as it turns out. If you actually look at the regular season, I think March Madness in basketball certainly created a lot of excitement in a particular of period of time. But, in fact, because selection into March Madness depends in some large measure on performance on the court during the regular season, in fact, there is some substantial evidence that TV revenues for the regular season have actually gone up, not down, as has attendance as well.

I think in addition, if you look at the regular season at the moment, given the way the system is structured, there are comparatively few games that have actual National Championship implications. I included this in my written testimony. If you go to a system, even a modified playoff system like ours—as we have suggested from the Mountain West—and I am not in any way, as I do not think the conference is, wedded to that particular system but simply trying to show there are alternatives that achieve all the objectives without engaging in harm. If you look at that system, it basically would extend the season by a week for two teams, and that hardly seems problematic, particularly given what Division II and Division III do in terms of their playoffs, where it is extended by 21 to 29 days, respectively.

Eighty-eight NCAA sports, and only one without a playoff. My suspicion is if I were to ask any one of the students from any one of the non-BCS automatic qualifying conferences, "Would you like to go to the West Coast and go to a party, or would you like to actually compete for the National Championship?" I doubt there is little disagreement among the 2,000 athletes who are currently largely precluded from participating in that.

And, finally, with respect to destroying the bowls, in fact, since the BCS system has been created, there has been an addition of a number of bowls. The revenue for the existing bowls has actually gone up. There is very little evidence that that has harmed the bowl system. In fact, it appears by all evidence to have increased the number of bowls, enthusiasm for bowls, revenue for bowls in the United States as well. I think that is unarguable.

Senator HATCH. I am going to get to you antitrust lawyers, so do not worry. I know President Young has to leave by 4, and I am trying to cover as much as I can with these two great presidents.

Let me go to you again, Chancellor Perlman. Do you care to respond to that? It seems to me that the bowls outside the BCS exist on a completely separate plane and would not be affected by the establishment of a playoff. Also, under the current system, most teams are eliminated from National Championship consideration if

they lose a single game, and their games fall off the national radar after that loss occurs.

Now, wouldn't the establishment of a playoff mean that more regular season games have championship implications because teams would remain in contention even after they have suffered a loss?

Mr. PERLMAN. Senator, I think with respect to the impact on the bowl games, I think in at least all of the proposals I have seen for a playoff, it would be inconceivable how that would work and still retain the bowl system as we know it. You cannot run—I do not think you can run Nebraska in the Rose Bowl 1 week and if we win we go to Orlando the next week, and if we win that we go to the Cotton Bowl in Dallas and play for the National Championship. I do not think our fans are going to travel that much in December and January. I do not think they can afford to travel that much, which means that those teams will then be playing on their home fields.

That withdraws a number of teams from the bowl system that currently are playing in bowls, and we can right now barely fill out the bowls that we have. I do not think you can think it will not have a diminished impact on the bowls across the country if we went to a playoff system.

Senator HATCH. President Young, we will end with you and let you catch your airplane.

Mr. YOUNG. From 1999 to 2009, it increased from 23 to 34 bowls. The March Madness actually has increased the number of basketball tournaments around the country by a substantial margin, not decreased it.

It is possible everybody will say these bowls, while they have been great for the thousand sponsors of these bowls—and it is about a thousand sponsors—will say, What were we thinking? This has not been good for the economy of our city. These teams that otherwise are not in this playoff system, we do not want to see them play; we do not want to have them; they are second and third in their conferences, so we are just going to cancel the bowl because there is now a playoff system.

It is possible. But it strikes me as enormously unlikely. Possible, but I would be stunned if that is what happened.

Senator HATCH. Well, thank you. You need to catch a plane. But, you know, there are some university presidents who would not want to testify in this hearing. Do you understand why?

Mr. YOUNG. I do not, really, and I will tell you why I do not: because this is part of a broad dialog. I have enormous confidence in my fellow presidents and chancellors that they understand that open, honest disagreement is the stuff of which great systems and great countries and great universities are made. If the notion is that somehow the University of Utah will be viewed badly because we aired these concerns, it strikes me as entirely implausible. I have the utmost respect for my fellow presidents, their athletic directors. I cannot imagine that they would stand back and say we are not going to schedule Utah. In fact, I think I just got an agreement we were going to be scheduled.

Senator HATCH. All right, Perlman. I want to see this—
[Laughter.]

Mr. YOUNG. So I appreciate that, Senator, but I think the great gift to America is higher education, and, for those who stand at the top of those institutions, I have enormous respect. I cannot imagine that these respectful disagreements on these issues will do anything other than deepen our collaboration, cooperation, and camaraderie.

Senator HATCH. Well, thank you.

Mr. PERLMAN. Senator, if I might just be permitted, I want to indicate the same thing. This is a conversation that has been going on for a long time. Any conversation depends on the perspective you have. It will not in any way diminish our respect for presidents that testify from a different perspective.

The universities around this country have an enormous range of relationships. Intercollegiate football is just one. And, frankly, I do not think it is the most important one, and I think we engage collaboratively in a wide variety of areas for the good of the country, and I am sure that will continue regardless of what position is taken with respect to post-season football.

Senator HATCH. Well, thank you. I expect that to be the case. I appreciate both of you being here. You need to catch your plane, and I would be happy to let you go at this time.

Mr. YOUNG. Thank you, Senator. I would be deeply grateful. I have a son getting married, and if I miss his wedding, I just have a feeling he will be very huffy.

[Laughter.]

Mr. YOUNG. So I very much appreciate your indulgence. Thank you so much, and thank you for the privilege of testifying and for the opportunity to be with this enormously distinguished panel.

Senator HATCH. I just want to tell everybody what a great university president you are. You are a terrific human being, and you have got a terrific intellectual background as well, which is always nice to see in a university president.

Mr. YOUNG. Will that be in the record, Senator?

[Laughter.]

Senator HATCH. It is on the record. We will send it to you.

All right. Now, let me go to Mr. Monts, and we will excuse you, President Young. We appreciate your efforts in being here, especially with the family problems.

Mr. Monts, in your written testimony, you purposefully limit your antitrust analysis to only a discussion of Section 1 of the Sherman Antitrust Act. However, I believe that an analysis of both Sections 1 and 2 is required to fully appreciate and understand the legal arguments for modifying the BCS system. Now, how can one argue the BCS system does not violate Section 2?

And let me just add one other thing. The Supreme Court in *U.S. v. Grinnell* lays out a two-part test for determining if a Section 2 violation has occurred. The first prong of the test asks if there is a monopoly power in the relevant market. Well, does not the BCS exclude competition by limiting the number of non-privileged conference teams which can qualify for the BCS bowl? And regarding the question of relevant markets, who would argue the vast sums expended to acquire the exclusive television rights for broadcast of the BCS bowls and the National Championship game is not evidence of distinct markets?

Now, the second part of the *Grinnell* test, if the willful acquisition or maintenance of that power is distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident, now here, again, I believe the Supreme Court's criteria is met. Has not the BCS acquired and maintained its monopoly power by limiting the participation of non-privileged conferences in the management of the BCS structure? And does the BCS not limit the five non-privileged conferences collectively to a single vote, whereas the privileged conferences get one vote each? Now, how can you say that Section 2 is not violated under those circumstances?

I asked a number of questions there, and I would be happy to repeat them if—

Mr. MONTS. I may need you to unpack them again for me, Senator, but I will address those, because I think the first question or the question you raised about the question of governance is not really an antitrust issue at all. There is a BCS Presidential Oversight Committee. That committee was created with the agreement of all conferences, all 11 conferences and the University of Notre Dame. At the time it was created, that was a request that was made by those five conferences to have one seat on that committee, and that was agreed to.

Senator HATCH. I understand that if the University of Notre Dame finishes eighth or better, it will qualify for one of the—

Mr. MONTS. If the University of Notre Dame finishes eighth in the Nation or better, it in that season will earn an automatic berth in a BCS bowl game.

Senator HATCH. That is my understanding.

Mr. MONTS. Just as if a team in one of the five other conferences finishes 12th or better, a champion finishes 12th or better, or 16th and higher than one of the champions from the annual automatic qualifying conferences, it, too, will earn an annual automatic berth.

Senator HATCH. Right.

Mr. MONTS. Now, I think the way to look at this, Senator, is to look at it in comparison to what we would have without the BCS, and this is where I think the antitrust argument falls flat, and it is this: Without the BCS, we would simply be back in the old bowl system in which each conference makes its own bowl arrangements. That is what we had for many, many years prior to 1991 with the formation of the Bowl Coalition and what we would return to if the BCS went away. We would have each conference negotiating for the best bowl deal it could arrange for its champion and for its runner-up teams, just as we have today.

Senator HATCH. Not if you have a playoff system.

Mr. MONTS. No court is going to write that, Senator. None whatsoever. That is not what courts do.

Senator HATCH. There are some that would.

[Laughter.]

Senator HATCH. I can even name the judges.

Mr. MONTS. But no court has the authority, in my view, under the antitrust laws, and it would be extraordinary, in my view, because the BCS is a form of cooperation today if we assume a Section 1 agreement.

Now, what we are asking, what is being asked of the court is to enjoin the BCS and then replace it with another form of cooperation. That is not what the antitrust laws do. Courts do not sit there and serve as super-regulatory bodies or public utility commissions to deal with post-season college football or any other—

Senator HATCH. No, but they can decide what is right and wrong.

Mr. MONTS. Pardon?

Senator HATCH. They can decide what is right and wrong.

Mr. MONTS. Certainly, Senator. They will decide—

Senator HATCH. Once they do that, then you have to comply.

Mr. MONTS. But the remedy that would be issued by a court is simply an injunction against the BCS agreement, and then each conference would be on its own in terms of negotiating its bowl arrangements. That is essentially what happened with the *NCAA v. Board of Regents* case. The Supreme Court issued a decision, the NCAA television agreement was enjoined, and each conference is now selling its own regular season television rights individually. The same thing would happen with the BCS if it were to go away.

Senator HATCH. Mr. Brett, do you agree with that?

Mr. BRETT. No, I do not, Senator Hatch.

Senator HATCH. Would you hit your button there?

Mr. BRETT. I am sorry. I do not. The fact is that in all the years that I have been practicing—and it is, unfortunately, a lot longer than Mr. Monts. In fact, I was in the *Grinnell* cases way back when. And I know how in each one of those cases and in every monopoly case the defendant will invariably claim that this is the only way to do it, we must do it, this is the best system, and we are doing something good.

It is unheard of, in antitrust parlance, for a group of competing entities to form their own cartel, set up a series of rules, and say this is the best way to do it, therefore, allow us to do it.

We have abundant evidence that their claim that this is the best system and the only system is a flawed premise. In fact, there are 88 playoffs run by the NCAA. It is very curious that in the most lucrative of sports, the NCAA has stepped out of the picture and allowed this separate cartel to function. The NCAA has rules operative in the basketball program which require that all teams involved that are invited, participate and play within that structure.

A structure administered by the NCAA, for example, could very easily adopt a playoff system and implement a playoff system.

The suggestion that this is the best or the only way to do it is not a decision that should be made by a group of competitors by agreement in a manner which excludes competing companies and excludes others who are not involved. The data as to the impact of this system is abundant. The data to show the discriminatory and anticompetitive effects is abundant. The impact on the public, which is the primary concern of the antitrust laws, is dramatic.

There can be little doubt that if there were a playoff system or some free competition, every school in the country would want to participate. Can one imagine USC and Texas, which were so indignant at not having the opportunity to compete for the National Championship last year, saying that they would not want to participate in that competition? And we would have all liked to see those games, see USC, see Texas in there.

Their system is one that does not make sense, but it just simply follows the practice of every monopolist of saying we have to do it. Those arguments were made by the NCAA in the *Board of Regents* case. They were made more recently in a case where they tried to limit the compensation given to coaches. And, again, in all those circumstances the courts evaluated and rejected the arguments of the NCAA that, "Our way is the best way and the only way to do it." The evidence does not support it, and the fact that they can do 88 playoffs in other sports suggests that there is no reason that it cannot be and should not be done in this sport as well.

Senator HATCH. In your testimony, Mr. Brett, you argue the BCS violates Section 1 of the Sherman Antitrust Act. In his written testimony to the Committee, Mr. Paul Kaplan of our very important law firm down here, one of the important firms, Arent Fox, agrees with your analysis that there is a Section 1 violation. However, Mr. Kaplan argues the BCS construct should be evaluated under a per se rule.

Now, he argues the BCS system is an illegal horizontal constraint. On the other hand, you argue for a rule-of-reason analysis, as I understand it. Why do you believe the Subcommittee should evaluate the BCS system using the rule of reason? And if we use the per se rule, do we reach a different conclusion? In addition, do you believe the BCS system violates the rule of reason?

Mr. BRETT. I do believe it violates the rule of reason. I think that there are certainly indicia of the BCS system which reflect areas to which the per se rules apply. Certainly there is an absence of price competition with respect to bowl games, bowl televising of games, and they are sold as a package. Those are certainly areas of practice which could be subject to per se consideration.

We in our submission took a more conservative view of saying that we do not have to deal with the per se rules which the Supreme Court has sought to narrow, which were not applied in the *Board of Regents* case and the more recent law case; so that without dealing with that controversial proposition, we think it is very clear under the rule of reason that it is a violation of Section 1 of the Sherman Act, and we think it is also very clear that it is a very, very obvious violation of Section 2 of the Sherman Act; that there is absolutely no doubt that this monopoly was illegally acquired and maintained and it continues to be maintained by exclusionary conduct. The relevant market is easy. The monopoly power is manifest. And I do not know even know what the arguments are that would be advanced in defense.

Senator HATCH. Well, so would it not be safe to say that a reasonable case can be made under both the per se and rule-of-reason analysis that there is a violation here?

Mr. BRETT. Absolutely.

Senator HATCH. If you have a—

Mr. MONTS. I do, Senator, because I do not think there is any credible case to be made on the per se rule. There would be no BCS without an agreement, and there would be no other alternative system without an agreement among the conferences and the participants.

In fact, the only way that we can have any kind of post-season structure of any sort, no matter how it is structured, is through an

agreement of the parties. So the suggestion that there is a per se violation in any way here strikes me as simply flatly wrong.

In terms of the rule of reason, the question in antitrust is output, and there is no game that I am aware of that is not played; there is no conference that is not playing—no team that is not playing the maximum number of games it is entitled to play under NCAA rules.

The fact of the matter is there is just no output restriction here whatsoever, and that being the case, there is no violation at all.

Senator HATCH. Mr. Brett.

Mr. BRETT. There is certainly restraint on output. If there were a playoff system as proposed by the Mountain West, for example, there would clearly be two or three additional games played each year, and one can imagine the revenues that would be generated by games that would have that kind of imprimatur of a genuine National Championship. If they are paying half a billion dollars for these games, imagine what they would pay for the Super Bowl of college football. So that there is a restraint on output. There are less anticompetitive restrictions or restraints on matters in which the same results can be achieved, and those have to be considered. And not only is there a restraint on output, there are exclusionary rules adopted by this self-designated group, with no portfolio and no authority such as the NCAA or any other group would have. They designated themselves as the arbiters of what is necessary to create a system where they get 87 percent of the revenues. That is just directly contrary to the spirit and objectives of the Sherman Act.

Senator HATCH. Let me ask both Mr. Monts and Chancellor Perlman, if you care to comment, Chancellor. Many have argued that a playoff system would mean more money not only for the privileged BCS conferences but for all the schools in the country. I have to assume that television networks, advertisers, and sponsors would welcome some sort of a playoff system if for no other reason than it would mean a few more games.

Now, wouldn't that be the case? Wouldn't the playoff system mean more money for everybody?

Mr. PERLMAN. It might, Senator, but I do not think you can be assured of that. If we are right that the value of the regular season would decline with a broader playoff, then it is not clear the total amount of money would be the same.

But as a university president sitting between two antitrust lawyers, I would just comment that I think university presidents that I talk to are legitimately concerned about the number of games that you can ask student athletes to play under these circumstances and at this level, not only for the health of student athletes but for their academic success.

These athletes are strong, they are fast, and they get beat up in these games. And I think that there are limits to how many they would play, and I guess I would argue that at least that output restraint would have some basis in reason.

Senator HATCH. OK. Mr. Monts.

Mr. MONTS. I certainly agree with Chancellor Perlman, but the question is the overall revenues from all of college football, regular season and post-season.

I part company with Mr. Brett, I think, on a couple of avenues. The argument that output is restricted because if we had a playoff there would be more games is a little bit like saying, well, we would have more games if the National Football League extended its season to 18 games or 20 games rather than the current 16; or we would have more output if the NCAA did not limit regular season games to 12—or 13 for those who travel to Hawaii—but had 15 or 16. There must be some limit on that, and so no matter what the structure is, one could always hypothesize a different format that would come up with more games.

The difficulty, I think, again, Senator, is going back to what would we have if there were an antitrust injunction entered against the BCS, and the answer is we would have each conference selling its own bowl rights individually, and the only way we could have any kind of structure that would create any sort of National Championship playoff or any alternative structure to the BCS would be through some other agreement of those conferences and Notre Dame.

This is the agreement that the conferences and Notre Dame can reach. To have a National Championship requires the participation of each and every one.

Now, several conferences have alternatives. For example, the Big 10 and PAC 10 have played for many, many years in the Rose Bowl, going back to January 1, 1947. Those conferences have that alternative, and if they wish to simply go back to the Rose Bowl and not participate in the playoff, that will be their prerogative, and there will not be a National Championship structure. It will be very difficult to go to any sort of television network or even to the public at large and say, “We are going to have a National Championship arrangement, but we will not have USC, Michigan, Ohio State, Penn State”—or many other fine teams.

The same thing would be true if the Big 12 or the Southeastern Conference decided for whatever reason it wanted to continue individually its own bowl arrangement with its historic bowl partners. So the only way are going to have a championship is by the participation of all conferences.

Now, let me address one other point that Mr. Brett made, because I think it actually makes my point rather than his, and that is, the NCAA’s rule requiring mandatory participation in the Men’s Basketball Championship. That rule was tested in the *Metropolitan Intercollegiate Basketball Association v. NCAA* case in New York. MIBA was the former operator of the NIT, the National Invitational Tournament, which was a competitive post-season tournament with the Men’s Basketball Championship. The specific challenges that MIBA raised in that case were to the mandatory participation rule and to the one-post-season-tournament rule that the NCAA had imposed.

Now, MIBA survived a motion for summary judgment, meaning that the NCAA was going to have to try that case and at the risk of losing its mandatory participation rule, which is crucial to the playoff. So it settled it for \$57 million.

Now, the bowls would be in the exact same position today as the NIT if there were a playoff and they were deprived of teams. They would be deprived of the ability to compete for teams. That litiga-

tion playbook, I think, has been written, and I believe it cuts far more in favor of our position than it does Mr. Brett's. So we must respectfully disagree on that point.

Senator HATCH. Mr. Brett, do you have any comments?

Mr. BRETT. Well, first, I am quite familiar with Judge Cedarbaum's decision in the MIBA case, and it was not settled for \$57 million. The NCAA bought the National Invitation Tournament, so there was no payment made and there was certainly no adjudication that the rule we referred to was incorrect.

But I think more fundamentally, Senator, the real problem here is that what we have before us at the BCS now is a group of competitors who have formed a cartel which has worked out to their great advantage. They have managed to secure for themselves 87 percent of the revenues and 90 of the 94 spots in the major bowls. And now they come in and tell us you must allow us to make the decision as to how these revenues are distributed, how these people are selected for the bowls, because we know the best way to do it. The fact that it works out to our great economic advantage is almost coincidental, but trust us, trust us to make the best decisions.

That is directly contrary to what the Sherman Act requires, and it is directly contrary to the jurisprudence under antitrust law, where every single case will see a defendant coming in and saying, "What we did was good and wholesome. We really did not mean to do anything harmful." And the NCAA has lost again and again in asserting that its views as to the way to restrict competition were essential.

The law is that competition, and not a group of self-designated competitors who should be competing, makes the rules. And it is not coincidental that the rules which they make, when we look back at their effect, have been dramatically in favor of those six conferences. And antitrust jurisprudence is to look for anticompetitive effects, and these effects have been dramatically and offensively anticompetitive.

Senator HATCH. Well, let me just say, this has been a very interesting hearing for me, and you all have been excellent witnesses.

I have to say I am having a lot of troubles with the BCS approach because, you know, Mr. Thompson comes up with some ideas, and maybe they were not what the BCS wanted, but they just kind of dismissed it without argument. And there is kind of an arrogance there that I see that just should not be there. And you know who I am talking about, too, and you are not it. But the fact of the matter is that I am really concerned about it because I think it is really the wrong example for our young people, and it is certainly not working well. And I do believe—I hate to say it to you, Mr. Monts. You have been very loquacious, and you are undoubtedly a good attorney. But I believe there are real antitrust issues here that are not going to be solved unless the folks at BCS start to work to resolve these matters.

And, Mr. Perlman, I know a lot about you. You are a very fine man and a very good university administrator. I want you to go back and argue with these people and let them know that, hey, we are sick of it, to be honest with you. And I think Mr. Brett has made a pretty darn good case here today.

Did you have something you wanted to say? I do not want to cut you off.

Mr. PERLMAN. I am sorry. I just wanted to clarify the record.

Senator HATCH. Sure.

Mr. PERLMAN. The BCS agreement that will start in 2011 was agreed to by all the conferences in November of 2008. The Mountain West proposals were brought to us after we had reached that agreement, and it was the position of the ten conferences that we would honor our commitments to ESPN and not review the Mountain West proposals at that time. But they have not been summarily rejected and, indeed, what we have stated publicly is that when the next BCS agreement is negotiated, we will consider the proposals of the Mountain West as well as any other proposals for changing the Bowl Championship Series to make it better.

Senator HATCH. That is a long time away.

Mr. PERLMAN. Well, it is actually not as long as you might think, because we start renegotiating the agreement about a year into whatever agreement we have. It is not immediate, but the fact is that all ten conferences have made a commitment to the current system, and we have signed an agreement to that effect with ESPN. And all of us thought that we did not want to upset that agreement and we thought we ought to honor our promises.

Senator HATCH. Mr. Brett, do you have any comment about that?

Mr. BRETT. There is right now a July 9 deadline for the signing of the agreement. Counsel for the Mountain West has requested that that deadline be extended to allow everyone to digest and take into account these proceedings and other events which are now going on.

The ESPN agreement contemplates that it would be revised if the current system has to be upset for any reason, and it contemplates the possibility of it being upset for antitrust violations implicitly.

There is no reason that that deadline cannot be lifted and there be given time for everyone to work out a more equitable system that does not violate the antitrust laws. Unfortunately, as history teaches us, one of the great evils of monopoly power is the arrogance and the willingness to move ahead and exercise that power. And that is what happens when you have a monopolist.

Mr. Perlman and his colleagues are fine people, and I have been very impressed and very privileged to sit with him here today and hear his views. But they have gotten themselves into a situation where they have made so much money, they have got an economic interest that they want to keep, and it is being protected by a group of competing companies that have avoided competition. It is time that that stopped, and I think your observations were appropriate. There is no reason that contract has to be signed now.

Senator HATCH. Well, thank you. I want to thank all three of you, and certainly President Young as well, for being here. This has been one of the most interesting hearings to me that we have had around here in a long time, and it is great to have great witnesses who could testify. So I appreciate your being here. You have not changed my viewpoint. In fact, it is reinforced, and in all honesty, I am very, very concerned about it as a Pitt graduate, you know, the law school.

All I can say is that this has been an informative hearing, and I am grateful for the four of you for taking your time to be with us today.

With that, I am going to have to end the hearing. Thanks so much.

Mr. BRETT. Senator Hatch, thank you, and thank you for allowing us to participate in this great exercise in democracy not available anywhere else. We appreciate the opportunity and the privilege.

Mr. MONTS. Senator, it has been an honor. Thank you very much.

Senator HATCH. An honor for us. Thanks so much.

[Whereupon, at 4:11 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

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July 7, 2009

Senator Herb Kohl
Chairman of the Senate Judiciary Subcommittee
on Antitrust, Competition Policy and Consumer Rights
330 Hart Senate Office Building
Washington, DC 20510

Senator Orrin G. Hatch
Ranking Member of the Senate Judiciary Subcommittee
on Antitrust, Competition Policy and Consumer Rights
104 Hart Office Building
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Dear Senators Kohl and Hatch:

The Mountain West Conference ("MWC") consists of nine public and/or non-profit universities, the United States Air Force Academy, Brigham Young University, Colorado State University, University of New Mexico, San Diego State University, Texas Christian University, University of Nevada, Las Vegas, University of Utah and University of Wyoming. On its behalf, we appreciate the opportunity to present these comments which reflect concerns of the MWC as well as views we have expressed to the MWC as antitrust lawyers with respect to issues relating to actions by the controlling group of the Bowl Championship Series ("BCS"). The MWC and others are severely, adversely and unfairly impacted by the exclusionary system by which the BCS and others have limited the opportunities to share in the hundreds of millions of dollars in

ATLANTA CHICAGO HONG KONG LONDON NEW YORK NEWARK NORFOLK ORANGE COUNTY
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revenues of major post-season college football bowl games, consisting of the Rose, Orange, Sugar and Fiesta Bowls (the "Major Bowls") and the related National Championship Game (collectively, the "BCS Bowls"), a system which has deprived the public of a true college football national championship competition.

The timeline of the consideration of these matters by your Subcommittee and the economic significance of the issues here raised are further evidenced by the pressures arising from an agreement negotiated between the BCS and ESPN to televise all of the BCS Bowls (other than the Rose Bowl) for the next several years in exchange for a payment of about half a billion dollars (\$500,000.00). This proposed agreement was negotiated by the BCS without separate negotiations by individual bowls, schools or conferences. The MWC and others face a July 9, 2009 deadline to sign the Agreement or risk loss of any share in those revenues which are so critical to their strained budgets.

This submission will address the facts and legal principles which demonstrate that the structure and operation of the BCS are not consistent with applicable antitrust principles.

**The Public Interest Would Be Served By Remedial
Action To Address The Exclusionary BCS System**

A. The BCS Combination

In all college athletics other than what was formally called Division I football, and is now called the Football Bowl Subdivision ("Division I Football"), the national collegiate champion is selected by a playoff system in which all eligible teams have a realistic opportunity to qualify for post-season tournaments, compete for the title, and earn the revenues which flow from

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competitive success. The National College Athletic Association (“NCAA”), as the governing body of most college sports other than post-season football, sponsors 88 championship competitions. In all of those tournaments the schools are able to accommodate class schedules and the needs of the student athletes in order to participate in playoffs which may run over several weeks; eligibility and selection rules are established by the neutral umbrella organization; no elite group of schools or conferences have usurped for themselves unique advantages and control over access to any other competition. In no other collegiate sport has a discrete group been able to decide the rules which govern which teams will compete in lucrative post-season events, and how the proceeds of these games will be distributed. Similarly, in no other collegiate sport does a group of schools or conferences control and protect for themselves the dominant or exclusive share of the lucrative revenues and ancillary benefits which flow from participation in the post-season competitions. In Division I Football, however, the sport which generates the most revenue and interest, the NCAA has discussed but not acted to set up a playoff or other means to determine a champion of the Football Bowl Subdivision (*see* Oversight Hearing Before House Commerce, Trade and Consumer Protection Subcommittee, May 1, 2009 (“Oversight Hearing”), Statement by Gene Bleymaier. The five Statements submitted for the Hearing are annexed as Appendix C). Instead the NCAA has remained silent as the BCS is allowed to control the key post-season college football games.

The BCS was formed in 1998 by agreement among six ostensibly competing conferences (The Big Ten, Big East, Pac-10, Southeastern Conference (“SEC”), Atlantic Coast Conference (“ACC”) and Big XII) and The University of Notre Dame. The conference champion from each

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of these conferences automatically qualifies for one of the BCS Bowls without regard to the quality of its teams. They are referenced here as the "AQs" but sports journalists routinely refer to these conferences as the BCS Conferences.

The BCS claims no formal legal status, and seems committed to avoid any classification. It was agreed among this group, and the four Major Bowls, that the champion of each of the six conferences which are parties to this agreement, and Notre Dame if it met certain criteria, would each be guaranteed an invitation to one of the eight spots in the Major Bowls with their large economic rewards. There are no other teams or conferences with similar guarantees, and there are few slots left for teams from the non-AQs to seek. In addition, since 2006, it was agreed that the two schools which were denominated first and second in the complex formula created by the BCS would compete in a fifth game, played one week later, which would be explicitly denominated as the "National Championship Game." It was further agreed by this group that the National Championship Game would rotate among the venues of the Major Bowls. By the BCS's own admission this is not a "playoff" system. According to the BCS's Coordinator, its stated purpose is to preserve the Major Bowls. Its impact is to control division of the enormous BCS revenues, and ensure that the AQs control this revenue and access to the prized and valuable bowl invitations.

Not surprisingly, there are only a handful of non-AQ-teams which have appeared in the Major Bowls, and none in the National Championship Game despite their great competitive success. For the 2006-2007 season, representatives of five additional conferences (Conference

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USA, the Mid-American Conference, the Sun Belt Conference, the Western Athletic Conference and the MWC), were added to the governing body of the BCS with a single collective vote for all five representatives as a group. The Major Bowls, however, continued on the same basis, *i.e.*, the AQ conferences continue to have automatic berths. No more than one team from a non-AQ conference can earn an automatic berth in any given year. Moreover, each added conference was granted revenue of roughly ten percent of that of the original six conferences. Attached as Appendix A are the BCS's own publicly available materials discussing membership and governance of the BCS selection criteria.

B. Exclusionary and Economic Impact of the BCS

The rules adopted by this group of ostensible competing entities place significant barriers to the ability of a team which is not a member of one of the AQ conferences to participate in a BCS Bowl, and this exclusion has significant economic repercussions. Only one team from the five non-AQ conferences will earn a bid under the BCS procedures if either: (a) the team ranks in the top 12 of the final BCS standings, or (b) the team ranks in the top 16 of the final BCS standings and its ranking is higher than that of the champion of one of the AQ conferences. The BCS has effectively precluded a playoff system which would reflect greater consensus and reward competitive success. Further, the added games in a playoff system which would bring enormous broadcasting, attendance, and ancillary revenues have been precluded.

Price competition among the Major Bowls for teams, or television revenues, has been negated by the agreement and is non-existent. A single television contract with the BCS exists for all the BCS Bowls except the Rose Bowl. The ability to negotiate separate revenue or

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television agreements with the BCS Bowls is foreclosed. The pay outs by the BCS Bowls are currently estimated at \$175 million of which the BCS ensures that the overwhelming majority is guaranteed to go to the six AQ conferences. *See* Appendix D. The gross revenues of a proposed playoff system have been estimated to be in excess of \$375 Million, more than double the current system.

Under the current system, the BCS Bowls are not only the most prestigious, but they are the most lucrative. We are attaching as Appendix B a recent article by Professor Andrew Zimbalist, an economist at Smith College, titled, *Assessing Antitrust Case Against the Bowl Championship Series*, Global Competition Policy (May 2009), which includes key statistics demonstrating the inequality, foreclosure and anticompetitive effects of the current BCS system. Illustratively, the AQ conferences with 54.6% of the Football Subdivision teams receive approximately 87% of the BCS revenues. (Appendix B, p. 4). During the first eleven years of the BCS system, there have been ninety appearances by AQ conference teams and only four appearances by non-AQ conference teams. *Id.* Every contestant in the National Championship Game has been from one of the AQ conferences. BCS revenues are distributed in greater proportion to teams that make the BCS Bowls. Teams that appeared in one of the five BCS Bowls in 2008-09 each provided \$18 million to their conference. The impact also extends into broadcasting revenues, recruiting and other aspects of athletic programs.

Broadcasting rights for BCS Bowls have been worth hundreds of millions of dollars. ABC paid approximately \$700 million to broadcast the four Major Bowl games for seven years beginning with the 1998-1999 season. The BCS has a \$320 million contract with FOX through

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2010, except for the Rose Bowl. As discussed above, ESPN has negotiated with the BCS and presented a proposed broadcasting contract for almost \$500 million covering the Sugar, Orange and Fiesta Bowls and three National Championship Games in the next several years. Thus, AQ conference teams stand to gain from the new contract over non-AQ conference teams because the AQ conferences automatically qualify for the Major Bowls.

The selections and outcomes of the Major Bowls have been vigorously criticized as to both process and result. The BCS is admittedly not a playoff system. President Obama has publicly advocated a playoff. In May of this year the House Energy and Commerce Subcommittee on Commerce Trade and Consumer Protection held a hearing on "The Bowl Championship Series: Money and Issues of Fairness at Publicly Funded Universities." The record of those proceedings and other illustrative statements are collected in Appendices C - E.

The competitive success of teams from the non-AQ conferences has not enabled them to move into the status of AQ conferences in either revenues or access to the National Championship Game. Objective criteria establish that the exclusionary effects are not reflective of success of teams involved, *i.e.*, better teams were excluded in favor of members of the six AQ conferences. (See Appendix F). Illustratively, from 2005-2008, MWC members had a .475% winning percentage against AQ members. The winning percentage against equivalent competition during that period of ACC institutions was .464 and for Big Ten members it was .439. Just last year undefeated Utah and Boise State teams were unable to compete for the National Championship. The BCS system has persisted with minor "tweaks" which did not alter the exclusionary effects or the economic impact of the system. A playoff system or other less

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anticompetitive alternatives to achieve all reasonable objectives (including a detailed proposal presented by the MWC in March 2009, Appendix G) were not seriously considered. On June 15, 2009, the USA Today reported that it was not on the BCS Agenda and press reports of June 24, 2009 confirm its rejection without analysis.

This memorandum will demonstrate the clarity of the application of relevant antitrust precedent to establish the illegality of the BCS. In appendices we present illustrative data which confirm the dramatic and indefensible economic effects of the exclusionary BCS structure, the absence of any correlation between outstanding teams and access to the BCS Bowls, and in particular its adverse impact on the public and private schools which are the victims of the cartel. (*See also* Appendix II).

The BCS is a naked restraint imposed by a self-appointed cartel which has exercised its power to limit games and prevent a playoff in order to preserve for its members access to participation in the five BCS Bowl games and the related revenues, while creating high barriers to others. Output of more games by a playoff is prevented. Price competition by the BCS Bowls for teams or broadcasting revenues is eliminated by BCS joint agreement. Non-AQ teams have been completely foreclosed from the ability to compete for the championship. The BCS is inconsistent with the goals and principles of the Sherman Act.

C. Antitrust Division Enforcement

Action by the Antitrust Division of the Department of Justice (the "Division") to remedy this illegality is a particularly appropriate use of its resources and would serve the public interest. The subject is of great public concern as demonstrated by the outspoken criticism noted above

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and illustrated in Appendices E and I and the recent congressional hearings (Appendix C). We urge the Committee to forward the matter to Assistant Attorney General Varney.

There have been several Bills proposed regarding the BCS and the method by which a Football Bowl Subdivision college football champion is determined. See H. RESOLUTIONS 68, 390 and 599 (www.thomas.gov). H. RES. 68 seeks to repudiate the current BCS system as a violation of the Sherman Act, require the Division to investigate the current system and support the establishment of a playoff system. H. RES. 390 would prohibit as an unfair trade practice the promotion "of any post-season NCAA Division I football game as a national championship game unless such game is the culmination of a fair and equitable playoff system." This is to be enforced by the FTC. H. RES. 599 would "prohibit the receipt of Federal funds by any institution of higher education with a football team that participates in the NCAA Division I Football Bowl Subdivision, unless the national championship game of such subdivision is the culmination of a playoff system." Congressional action to create an industry-specific solution is an option which may be better reserved until the Division has addressed the issue.

Action by the Division without legislation is consistent with traditional enforcement protocols and is clearly justified by the public interest. The games available to the public are limited to those decreed by the BCS, and the public is denied access to playoff games as well as the desirable result of a true competition determining a national champion. Public and private colleges and universities which desperately need equal access to the enormous revenues of post-season college football are suffering, and the absence of those revenues contribute to the curtailment of many other athletic programs in an already strained system. Neither other

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conferences nor individual schools are in nearly as good a position to initiate a lawsuit as is the Division. These institutions are all severely strained financially and none can devote the resources or attention needed to support such an effort. These schools are dependant on the revenue they earn from the BCS or broadcasting contracts involving the BCS. Suits by other conferences would also get bogged down on ancillary issues not present in a Division action.

Threatened action by state Attorneys General does not hold the prospect of the expertise, resources and national view which is present in an action by the Division, which is the historically most desirable means to address such violations. In fact, Utah's Attorney General has publicly acknowledged the difficulty of obtaining BCS cooperation with such a state investigation in view of his stated intent of initiating a suit against the BCS with the support of the NAAG, which is not a certainty.

All Of The Elements Of A Sherman Act Violation Are Presented By The BCS

A. Relevant College Sports Antitrust Litigation

The key precedent in reviewing the BCS or any other similar cartel is the seminal opinion of Justice Stevens in *NCAA v. Board of Regents*, 468 U.S. 85 (1984). The Supreme Court opinion established that federal antitrust laws apply to rules governing economic aspects of intercollegiate athletics (specifically college football) and articulated the standard of review that should be used for reviewing challenged agreements, *i.e.*, the arrangement is likely to be subject to a rule of reason analysis. The conduct challenged in that case was an NCAA television plan that limited the total number of televised intercollegiate football games and the number of games that any one college could televise. It did not allow NCAA-member institutions to sell any

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television rights, except in accordance with the NCAA plan. A number of universities joined to form the College Football Association, which negotiated a television contract with NBC. The NCAA, in turn, threatened sanctions against participating members for violating the NCAA rules.

The Universities of Oklahoma and Georgia filed suit in the Western District of Oklahoma and alleged that the NCAA restrained their right to enter into their own television contracts in violation of §1 and §2 of the Sherman Act. The District Court held that "NCAA controls over college football make [the] NCAA a classic cartel" and the plaintiffs were entitled to injunctive and declaratory relief because the NCAA television plan constituted price fixing and a group boycott under §1, and that the NCAA monopolized the college football broadcasting market in violation of §2. The Tenth Circuit Court of Appeals affirmed the finding that the NCAA restrictions were *per se* illegal under §1 but did not address the monopolization claim under § 2.

In affirming the finding of illegality the Supreme Court held that the NCAA television plan limited output and restrained the ability of any institution to make a sale of television rights outside of the plan. In finding that rule of reason analysis controls, the Opinion observed, *inter alia*, that:

It would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

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Applying a rule of reason analysis, the Court held that the NCAA's arrangement limited output and fixed prices, leaving the college football industry unresponsive to consumer preference in exactly the manner the BCS system prevents a playoff or the true consensus national champion desired by the public. The Court found several anticompetitive consequences of the arrangement, *i.e.*, the NCAA's television plan placed a ceiling on the number of games member institutions could televise, and artificially limited the quantity of televised college football available to broadcasters and consumers. Recognizing the price fixing and output restrictions, the Court eschewed a detailed market analysis and directly addressed the NCAA's asserted procompetitive justifications, which Justice Stevens characterized as a cooperative "joint venture" that assisted in the marketing of broadcast rights, protecting gate attendance, and maintaining a competitive balance within the college football structure. The Court rejected these justifications and found that they violated Oklahoma's and Georgia's inherent freedom to compete. The Court therefore affirmed the appellate court decision.

Subsequent antitrust opinions have used the rule of reason standard to analyze other combinations in college athletics under the Sherman Act. In *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), the Tenth Circuit Court of Appeals held that an NCAA rule that limited the annual compensation of entry-level coaches violated Section 1. Like *Board of Regents*, the Court applied a "quick look" rule of reason test that did not undertake a detailed market analysis.

In *Law*, the NCAA articulated three procompetitive justifications for imposing salary limits. It first suggested that limiting one of the coaching positions to an entry-level position

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“will create more balanced competition by barring” wealthier teams from hiring another experienced coach. The Court rejected this defense because the NCAA failed to offer evidence that entry-level applicants held the job, and that “the rules will be effective over time in accomplishing this goal.” Second, the NCAA indicated that the bylaw would help member schools cut costs. This argument was similarly rejected because the Court found no substantiated proof that such measures would be successful in reducing deficits reported by many colleges. Third, the NCAA reasoned that the bylaw helped “maintain competitive equity” among competing schools by “preventing wealthier schools from placing a more experienced and higher-priced coach in the position.” The Court also rejected this latter assertion because the NCAA offered no proof “that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities.”

The Tenth Circuit also rejected the NCAA’s argument that the plaintiffs failed to fully establish a relevant product market and found that the “NCAA misapprehends the purpose in antitrust law of market definition which is not an end unto itself but rather exists to illuminate a practice’s effect on competition.” *Id.* at 1020. The Court found that, like in *Board of Regents*, there was no need for elaborate industry analysis where there is “an agreement not to compete on price or output.” *Id.* The Court of Appeals thus affirmed the district court’s order granting a permanent injunction barring the NCAA from reenacting such compensation limits. *Id.* at 1024.

In *Metropolitan Intercollegiate Basketball Association v. NCAA*, 339 F. Supp.2d 545 (S.D.N.Y. 2004) (“*MIBA IP*”), MIBA, an association of five New York area colleges that

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organized the National Invitation Tournament (the "NIT"), sued the NCAA over several current NCAA rules that allegedly violated Sections 1 and 2 of the Sherman Act. The thrust of the plaintiff's argument was that the Commitment to Participate Rule, along with the other rules, was a violation of the Sherman Act in that the rules operated to prevent the NIT from competing with the NCAA tournament to attract a competitive field of teams.

In denying the NCAA's motion for summary judgment on the antitrust claims, the District Court found that the plaintiff had made a sufficient showing that the relevant market was Division I men's college basketball postseason tournaments and that the NCAA earns monopoly profits and has the power to exclude. The Court also noted that the Commitment to Participate Rule adversely affected competition by depriving colleges and fans of a potentially attractive postseason tournament choice, and the possibility of participation in an additional tournament. It was left for trial, however, to determine if the plaintiff could prove anticompetitive effects or if the NCAA could prove pro-competitive justifications under the rule of reason analysis. The case was then settled without further opinions.

Unsuccessful antitrust claims in intercollegiate athletics typically involve individual student-athlete conduct or matters without significant commercial implications. For example, in *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992), a college football player brought an action alleging that the NCAA's no-draft, no-agent rules violated the Sherman Act. The Seventh Circuit affirmed the district court's dismissal of the plaintiff's complaint, finding that although the plaintiff cited examples of antitrust law violations, such as group boycott, price fixing, and

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restriction of output, the plaintiff failed to allege the anticompetitive effects of the NCAA rules. In *Smith v. NCAA*, 139 F.3d 180, 184-85 (3d Cir. 1998), *vacated on other grounds by NCAA v. Smith*, 525 U.S. 459 (1999), the Third Circuit held that NCAA rules governing eligibility for participating in collegiate sports are not commercial.

B. The Presence of Monopoly Power In The "Invisible" BCS

The BCS is not a corporation or other entity formalized by filing in any jurisdiction. It is not a party to the proposed ESPN Television Agreement, although BCS Properties, LLC, a Delaware limited liability company, is a party. The ESPN Agreement states that the BCS is not a joint venture (*i.e.*, "ESPN recognizes that there is no Bowl Championship Series entity or BCS entity," § 11.2). The BCS has refused to give the Attorney General of Utah its internal organizational materials which are claimed to be confidential. There are, however, BCS rules, meetings, membership and voting rules, structures, etc. (*See* Appendix A). The BCS does have, and has exercised, every indicia of monopoly power in the relevant markets described below. It controls access to all of the BCS Bowls and its television rights and revenues. By rule, the AQs will have at least 60% of the slots in these Bowls and in practice they have at least 80%. It secured that power by virtue of agreements among ostensibly competing conferences and Bowls. The BCS has in turn negotiated contracts with television networks providing for a single contract without price competition among the BCS Bowls. The BCS established the rules for entry into BCS Bowls, effectively excluding (all or in part) the non-AQ conferences from the market. Its intent to acquire and maintain its monopoly power is manifest.

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Every element of monopolization is here present. Every element of attempt to monopolize and conspiracy to monopolize is present. Clearly antitrust lawyers have sought to create a structure in which the monopolizing entity somehow lacks legal capacity in an effort to avoid Sherman Act liability. It seems appropriate to pierce that fiction and establish the principle that a dominant cartel cannot avoid liability by obfuscating its legal status.

C. The Relevant Markets

Board of Regents and Law provide strong support for a contention that market definition is not critical for maintenance of an action against the BCS. If necessary, however, there are two relevant product markets that would be germane to a Section 1 or 2 analysis. Under well-settled precedent, the National Championship Game would be a separate market for antitrust purposes because there are no reasonable interchangeable substitutes. It is a single game that determines college football's national champion, and the other bowl games are not reasonable substitutes for the National Championship Game. Sports fans' interest in seeing this game will not be satisfied elsewhere and all schedules of sports games are adjusted to avoid competing. In fact, the stated purpose of the BCS is to determine the national champion of college football.

Another possible relevant market is the five BCS Bowls together, Rose, Fiesta, Sugar and Orange, including the National Championship Game. The amounts of money involved dwarf all other post-season bowls by many orders of magnitude. Television contracts including the currently proposed ESPN contract focus separately on those games. Eligibility rules and benefits of participation are different from other bowls. In *International Boxing v. United States*, 358

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U.S. 242, 250-51 (1959), the Supreme Court held that championship fights are a separate market from non-championship fights because of the huge payout differential. Since that is also the case regarding the BCS Bowls, the five BCS games constitute a market separate and apart from all other bowl games.

The impact of the control and the monopolization of any of these markets by the BCS is apparent and the market effects are manifest. We note that this is not a market created by the BCS and it is not a market defined by its own product. Rather, it is the subject of the restraint which is probative of its treatment as a market, if necessary. *See MIBA II*, 339 F. Supp.2d 545. Post-season college football existed long before the BCS and the BCS is a combination that was created to control the vast revenues flowing from this market.

D. The Participants In The BCS Represent Entities With Competing Economic Self-Interests.

The BCS, Big Ten, Big East, Pac-10, SEC, ACC and Big XII, each of their member universities, the University of Notre Dame, the NCAA, the Major Bowls and the television broadcasters are separate entities for antitrust purposes and are not a single actor under *Copperweld v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) and its progeny.

A prior effort by the NCAA to treat itself and its member institutions as a single actor in connection with a post-season tournament was rejected. *See, e.g., Metropolitan Intercollegiate Basketball Association v. NCAA*, 337 F. Supp.2d 563 (S.D.N.Y. 2004) ("*MIBA I*"). The NCAA there claimed that because the NCAA membership has a unified interest in the success of the NCAA college basketball tournament, it is a single actor when it regulates the tournament and

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should be exempt from Sherman Act § 1 scrutiny. The District Court rejected this argument and held, *inter alia*, that:

The NCAA members are separate entities who clearly exist as independent institutions of higher education. These institutions each agree to abide by the rules of the NCAA on an annual basis. If a member institution violates a rule, it is faced with the prospect of NCAA sanctions. The fact that these individual members participate in the NCAA Tournament does not turn the membership into a single actor. Therefore, the NCAA's argument that it should be treated as a single entity under a *Copperweld* analysis is unpersuasive. *Id.* at 570.

Board of Regents, decided eight days after *Copperweld*, held that while "a certain degree of cooperation is necessary" to preserve "the type of competition that [the NCAA] and its member institutions seek to market," a plan that "prevents member institutions from competing against each other" does not escape antitrust scrutiny even though all of the institutions were members of the NCAA and the NCAA asserted that it was acting with the unified goal of marketing broadcast rights, protecting gate attendance, and maintaining a competitive balance within the college football structure. 468 U.S. at 99, 117.

The same logic applies here. The BCS is comprised of the six original member conferences and its goal is to guarantee a championship game for the Football Bowl Subdivision by protecting the traditional bowl system without a playoff. The individual member institutions formed the conferences to provide a program of intercollegiate football, and the conferences are devoted to maximizing football-related revenue for their members (*i.e.*, the Big Ten states that its mission is the "collection of revenue from various sources and remission to member schools

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athletic departments"). The conferences recognize that they are "independent." See Oversight Hearing, Appendix C, Statement by John Swofford, Commissioner of ACC and BCS Coordinator, p. 3). In the proposed ESPN contract, there is a provision that each conference is a separate entity. Similarly, the schools that comprise each of the six conferences act independently. Like in the *MIBA I* case, the fact that the six conferences and their member institutions participate in the BCS does not make them a single actor under the antitrust laws. Further, each Bowl and the television broadcasters are clearly independent actors.

The recent decision in *American Needle Inc. v. National Football League*, 538 F.3d 736 (7th Cir. 2008) related to a marketing arrangement of the National Football League is not comparable to the BCS in purpose or effect of operation. The skepticism expressed in the Division / FTC *amicus curiae* brief to the Supreme Court opposing *certiorari* further militates against consideration of that decision on the issue of a possible single entity claim here. *Certiorari* was granted by the Supreme Court on June 30, 2009.

E. The BCS Power To Exclude Has Been Used To Create Significant And Intolerable Anticompetitive Effects And Consumer Harm.

The usurpation by the BCS of the National Championship Game which was added in 2006 has served to preclude the widely supported playoff system. Even BCS member schools are denied opportunities, as illustrated by the bizarre use of a Big XII rule to select Oklahoma over Texas in this year's National Championship Game despite Texas's decisive victory over Oklahoma. The public is denied the benefits of a college football champion selected by the competition used to choose champions in all other collegiate sports. The number of post-season

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games and the related attendance and broadcasting revenues of such a competition are thereby limited, with no corresponding benefit from these artificial limitations on output.

It is likely that this curious system is the result of the historical anomaly of the football bowls being in existence and gaining importance before college playoffs began to gain popularity in 1938. The BCS began with the assumptions that agreement of the Major Bowls was a key part of the system, and the agreement of the Bowls was more important than a playoff system, which could diminish their significance. The BCS Bowls benefit further from the absence of price competition. In fact, a playoff system could easily preserve the bowls and increase choices for the public and opportunities for participants. (See March 4, 2009 MWC Proposal, Appendix G).

The six AQ conferences which are members of the BCS cartel have guaranteed to themselves six of the eight original, and now, in practice, eight of the ten, spaces in the most lucrative post-season games. The opportunities for non-BCS schools to participate are therefore severely limited. The data in Appendices D and F show that in practice, the effect of the structure and agreements has been to prevent any non-BCS school from an opportunity to qualify for the National Championship Game and to dramatically limit access to these lucrative bowls so that appearances by non-BCS teams occur only in the most extreme circumstances. Undefeated non-BCS teams were not able to compete for a national championship, contested between teams with lesser records.

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The direct economic impacts on the MWC and other conferences are dramatic. Illustratively, despite outstanding on-field performance by its members, MWC post-season revenues were a small fraction of those of BCS conferences, *i.e.*, despite having a higher inter-conference record than the ACC and the Big Ten, the MWC received approximately \$18.1 million of BCS distributions from 2005-2008, while the ACC received approximately \$71.7 million and the Big Ten approximately \$89.7 million during that period. Those numbers do not reflect ancillary economic and other benefits of being in a BCS conference.

Teams in the six AQ conferences know that every year that they will participate in the most prestigious bowl games, guaranteeing revenue, and conference exposure. This permits the conferences to make economic decisions with great certainty. Coaches from BCS conferences have the leverage of guaranteed revenues and bowl access to out-recruit non-BCS coaches, attain blue-chip athletes and, thus, attain a competitive edge over non-BCS teams. Michael Dumond, "*An Economic Model of College Football Recruiting Process*," *The Journal of Sports Economics* (2007) ("Teams that consistently win but are not members of the BCS are still not able to attract the quality of recruits as does a team that is a perennial loser but is also a member of a BCS conference."). Coaches, like blue-chip athletes, also want to retain positions at schools where they can perform consistently at the top level of competition and exposure. Thus, once a talented football coach achieves success at a non-BCS school, a coach is likely to take the first opportunity and migrate to a BCS school.

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BCS schools are able to build stadiums, create state-of-the art practice facilities, purchase top-of-the-line equipment, and fund upgrades to existing facilities. Chad McEvoy, "*Predicting Fund Raising Revenues in NCAA Division I-A Intercollegiate Athletics*," *The Sport Journal* (2009) (a BCS conference school is able to raise at least \$2.5 million more than a non-BCS school in athletic funding).

F. The Justifications Asserted For The BCS System Do Not Meet The Burdens Imposed By *Board Of Regents And Law*.

The Statement of BCS Coordinator Swofford and other statements provide insight into the arguments likely to be asserted by the BCS in defense of any antitrust claim. None are tenable, much less persuasive.

The BCS has claimed that a playoff system would cut into the classroom time of student athletes, particularly into the second semester. The facts are that: (i) playoffs are held at every other level of NCAA competition and would likely occur during the holidays when class is not in session; (ii) the NCAA recently added a twelfth game to the college football schedule; (iii) the NCAA basketball tournament involves more schools over a longer period of time; and (iv) the number of students impacted is small. We also note that there was no problem in extending the traditional New Year's Bowls well into January to accommodate the National Championship Game and the playoff could be completed in a relatively comparable period.

The BCS's advocates also contend that a playoff format would undercut the premium on success over the entire course of the regular season, *i.e.*, the motivation to win as many games as possible would be replaced with a sense of complacency because a team's only incentive would

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be to remain eligible for the playoffs. This argument does not, however, carry weight because a playoff limited to eight or sixteen teams would ensure that institutions win as many games as possible in order to qualify for such playoffs and have the best seeding possible in such a playoff.

The BCS's advocates contend that a playoff system would undermine the tradition and revenues of bowl games which benefit their communities. Under the MWC proposal, for example, the Major Bowl games will have national championship ramifications every year and act as the first round of a playoff. The non-BCS-bowls, which are generally played in December, should not be affected because the playoffs would be played in January the following year.

G. There Are Less Restrictive Alternatives Than The BCS Which Can Produce An Actual National Champion And Reduce Foreclosure.

The final rule of reason step considers whether the ostensibly desirable objectives can be achieved through less restrictive means than were used by the cartel. *Law*, 134 F.3d at 1019. This analysis does not require the least restrictive restraint available, but instead turns on whether the conduct is reasonably necessary to realize the justifications.

As is clear from the recent Oversight Hearing and proposed legislation, the most popular alternative is to replace the bowl system with a playoff system consisting of an eight, twelve or sixteen team playoff format. This would present non-BCS schools with opportunities that could never happen under the current BCS arrangement.

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In fact, in its March 4, 2009 proposal (Appendix G), the MWC proposed reforms to the BCS in order to make the system more equitable in terms of revenues received by universities, provide an equal opportunity for institutions outside of the six AQ conferences to compete for the national championship and establish a playoff system that will better select a national champion. Below is a chart comparing the proposed reforms to the current system:

<u>What Needs to be Determined</u>	<u>Current BCS System</u>	<u>BCS Reform Proposal</u>
Revenue Distribution among the Conferences	Six Conferences Each Receive Millions More than the Other Five Conferences Each Year, Regardless of Performance	Calls for Equitable Revenue Distribution, Based on Performance of Conferences
Which Conferences Automatically Qualify for BCS Bowl Games Every Year	Non-Performance-Based Standard Bowl Tie-Ins and Agreements	Performance-Based Standard Results of Inter-Conference Games Against Automatic-Qualifying Conferences
The National Champion (Once the Regular Season is Completed)	Selects 2 Teams to Compete for the National Championship More than 50 Teams Are Effectively Eliminated Before the Season Begins Numerous Outstanding Conference Champions are Eliminated at the End of the Season Because Only Two Teams are Permitted to Compete for the National Championship	Selects Top 2 Teams to Compete for the National Championship No Teams are Eliminated Before the Season Begins Allows the National Champion to be Determined On the Field by the Players, Rather than Off the Field by Computers and Pollsters
The BCS Standings (Which Universities Receive BCS Bowl Berths)	Pollsters -- Some Admit they Rarely Watch the Teams they are Evaluating Computers -- Complex,	Committee -- Tasked with Gathering and Analyzing All Pertinent Data Before Making Decisions

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	Confusing Formulas	
Composition of the ECS Presidential Oversight Committee	Six Conferences and Notre Dame Each Have a Separate Vote Other Five Conferences Share Only One Vote	Each Conference has its Own Vote, as does Notre Dame

It is not the only way to achieve the salutary goals of designating a national champion and increasing output without the exclusionary effects of the BCS but this proposal does demonstrate the availability of less anticompetitive means to achieve the desired ends. The proposal has been ignored.

Conclusion

This is not simply a sports issue but it involves a significant commercial enterprise controlling hundreds of millions of dollars in annual revenue which is vital to the schools. All of the programs need these revenues to fund football, but also to help fund the many other men's and women's athletic programs that are so much part of the fabric and experience of college life. And this funding comes at a time when universities are strapped for cash needed for these programs and many other educational initiatives. These universities are constrained from asserting these claims.

The greed of some has also clouded the message of sportsmanship, competition and interests of the student-athletes. Rather than give the salutary message of equal opportunity, competitive reward and fair play, the competition has become all about the money. Great

**TROUTMAN
SANDERS**

Senator Herb Kohl
Senator Orrin G. Hatch
July 7, 2009
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academic institutions have abandoned their fundamental goals and ideals and concern for law in order to maximize their share of this enormous revenue stream. Fair play should be returned to college football.

List of Appendices

In the attached appendices, and consistent with our intent that we not waive any rights or privilege, we present materials which supplement the earlier statements and dramatically establish the anticompetitive effects of the exclusionary structure of the BCS.

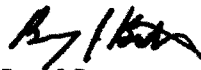
1. Membership and Governance of the BCS, Selection Criteria of the BCS and History of the BCS -- Appendix A.
2. Article by Professor Andrew Zimbalist of Smith University, *Assessing Antitrust Case Against the Bowl Championship Series*, Global Competition Policy (May 2009) -- Appendix B.
3. Prepared Statements submitted to U.S. House of Representatives Energy and Commerce Committee Subcommittee on Commerce, Trade and Consumer Protection for May 1, 2009 Hearing titled "The Bowl Championship Series: Money and Issues of Fairness at Publicly Funded Universities," including Statement by Craig Thompson, Commissioner of the MWC, and defense of the BCS system by John Swofford, Commissioner of the ACC and BCS Coordinator - Appendix C.

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4. Data which illustrate the amounts of money involved and the adverse economic impact of the BCS system on the MWC -- Appendix D.
5. Letter from Senators Hatch and Bennett to BCS leaders regarding inequality of the current BCS system -- Appendix E.
6. Data illustrating the lack of correlation between success in competition and benefits of the revenues and prestige controlled by the BCS -- Appendix F.
7. March 4, 2009 MWC alternative proposal with supporting data -- Appendix G.
8. Data on the financial impact of the current BCS system -- Appendix H.
9. Articles criticizing the current BCS system -- Appendix I.

Sincerely,



Barry J. Brett
Roy Morrow Bell

Enclosures

**APPENDICES TO JULY 7, 2009
TROUTMAN SANDERS
LETTER TO SENATE
JUDICIARY COMMITTEE
SUBCOMMITTEE ON
ANTITRUST, COMPETITION
POLICY AND CONSUMER
RIGHTS**



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BCS Selection Procedures

Updated: December 12, 2008, 5:53 PM EST

Bowl Championship Series

Automatic Qualification, At-Large Eligibility and Selection Procedures, 2007-2010 Games

Automatic Qualification

1. The top two teams in the final BCS Standings shall play in the National Championship Game.
2. The champions of the Atlantic Coast, Big East, Big Ten, Big 12, Pac-10 and Southeastern conferences will have automatic berths in one of the participating bowls after the 2008 through 2013 regular seasons.
3. The champion of Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference or the Western Athletic Conference will earn an automatic berth in a BCS bowl game if either:
 - A. Such team is ranked in the top 12 of the final BCS Standings, or
 - B. Such team is ranked in the top 16 of the final BCS Standings *and* its ranking in the final BCS Standings is higher than that of a champion of a conference that has an annual automatic berth in one of the BCS bowls.

No more than one such team from Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference shall earn an automatic berth in any year. (Note: a second team may be eligible for at-large eligibility as noted below.) If two or more teams from those conferences satisfy the provisions for an automatic berth, then the team with the highest finish in the final BCS Standings will receive the automatic berth, and the remaining team or teams will be considered for at-large selection if it meets the criteria.

4. Notre Dame will have an automatic berth if it is in the top eight of the final BCS Standings.
5. If any of the 10 slots remain open after application of provisions 1 through 4, and an at-large team from a conference with an annual automatic berth for its champion is ranked No. 3 in the final BCS Standings, that team will become an automatic qualifier, provided that no at-large team from the same conference qualifies for the national championship game.
6. If any of the 10 slots remain open after application of provisions 1 through 5, and if no team qualifies under paragraph No. 5 and an at-large team from a conference with an annual automatic berth for its champion is ranked No. 4 in the final BCS Standings, that team will become an automatic qualifier provided that no at-large team from the same conference qualifies for the national championship game.

At-Large Eligibility

If there are fewer than 10 automatic qualifiers, then the bowls will select at-large participants to fill the remaining berths. An at-large team is any Football Bowl Subdivision team that is bowl-eligible and meets the following requirements:

- A. Has won at least nine regular-season games, and
- B. Is among the top 14 teams in the final BCS Standings.

<http://www.bcsfootball.org/cfb/story/5898222/BCS-Selection-Procedures?print=true> 5/7/2009

No more than two teams from a conference may be selected, regardless of whether they are automatic qualifiers or at-large selections, unless two non-champions from the same conference are ranked No. 1 and No. 2 in the final BCS Standings.

If fewer than 10 teams are eligible for selection, then the Bowls can select as an at-large team any Football Bowl Subdivision team that is bowl-eligible, has won at least nine regular-season games and is among the top 18 teams in the final BCS Standings subject to the two-team limit noted above and also subject to the following: (1) if any conference has two or more teams in the top 14, then two of those teams must be selected and (2) from the teams ranked 15-18, a bowl can select only a team from a conference that has fewer than two teams in the top 14.

If expansion of the pool to 18 teams does not result in 10 teams eligible for selection, then the pool shall be expanded by blocks of 4 teams until 10 eligible teams are available subject to the two-team limit noted above and also subject to the following: (1) if any conference has two or more teams in the top 14, then two of those teams must be selected and (2) from the teams ranked 15 or lower, a bowl can select only a team from a conference that has fewer than two teams in the top 14.

Relative to the two preceding paragraphs, all teams ranked in the top 14, other than those from conferences which have already had two teams selected, must be included in the bowl selections.

Note: in order to participate in a BCS Bowl game, a team (i) must be eligible for post-season play under the rules of the NCAA and, if it not an independent, under the rules of its conference and (ii) must not have imposed sanctions upon itself prohibiting participation in a post-season game for infractions of the rules of the NCAA or the rules of its conference.

Team-Selection Procedures

The bowls will select their participants from two pools: (1) automatic qualifiers, all of which must be selected, and (2) at-large teams, if fewer than 10 teams qualify automatically. The following sequence will be used when establishing pairings:

1. The top two teams in the final BCS Standings will be placed in the National Championship Game ("NCG").
2. Unless they qualify to play in the NCG, the champions of selected conferences are contractually committed to host selected games:

Atlantic Coast Conference-Orange Bowl
Big Ten Conference-Rose Bowl
Big 12 Conference-Fiesta Bowl
Pac-10 Conference-Rose Bowl
Southeastern Conference-Sugar Bowl

3. If a bowl loses a host team to the NCG, then such bowl shall select a replacement team from among the automatic-qualifying teams and the at-large teams before any other selections are made. If two bowls lose host teams to the NCG, each bowl will get a replacement pick before any other selections are made. In such case, the bowl losing the No. 1 team gets the first replacement pick, and the bowl losing the No. 2 team gets the second replacement pick. If the Rose Bowl loses both the Big Ten and Pac-10 champions to the NCG, it will receive two replacement picks.

A bowl choosing a replacement team may not select any of the following:

- A. A team in the NCG;
- B. The host team for another BCS Bowl;
- C. When two bowls lose host teams, then the bowl losing the number one team may not select a replacement team from the same conference as the number two team, unless the bowl losing the number two team consents.

4. After steps No. 1, 2 and 3 have been completed, any bowl with an unfilled slot shall select a team from the automatic qualifiers and/or at-large teams in the following order:

- A. The bowl played on the date nearest to the National Championship Game (for 2009, Fiesta Bowl) will pick first;
- B. The bowl played on the date second-nearest to the National Championship Game (for 2009, Sugar Bowl) will

<http://www.bcsfootball.org/cfb/story/5898222/BCS-Selection-Procedures?print=true> 5/7/2009

pick second;

C. The bowl hosting the game that is played in the time slot immediately after the Rose Bowl game (for 2009, Orange Bowl) will pick third.

The rotation noted in paragraphs A, B and C is as follows:

January 2007 games: Sugar, Orange, Fiesta

January 2008 games: Orange, Fiesta, Sugar

January 2009 games: Fiesta, Sugar, Orange

January 2010 games: Orange, Fiesta, Sugar

All teams earning automatic berths must be selected.

5. After completion of the selection process as described in Paragraph Nos. 1-4, the conferences and Notre Dame may, but are not required to, adjust the pairings taking into consideration the following:

- A. whether the same team will be playing in the same bowl game for two consecutive years;
- B. whether two teams that played against one another in the regular season will be paired against one another in a bowl game;
- C. whether the same two teams will play against each other in a bowl game for two consecutive years; and
- D. whether alternative pairings may have greater or lesser appeal to college football fans as measured by expected ticket sales for the bowls and by expected television interest, and the consequent financial impact on Fox and the bowls.

The pairings may not be altered by removing the Big 10 Champion or Pac-10 champion from the Rose Bowl.

Tie-Breaking Procedure

The following steps will be used to resolve any ties in the standings after the computation is carried out to full decimal points:

1. Look to head-to-head result;
2. If the tie is not resolved by paragraph No. 1, then evaluate results against the highest-ranked common opponent in the BCS standings;
3. If the tie is not resolved by paragraph Nos. 1-2, then calculate tied teams' place in BCS Standings using all six computer providers (i.e., do not throw out the high and low computer rankings) and the Harris and Coaches polls;
4. If the tie is not resolved by paragraph Nos. 1-3, then draw.

BCS Standings

The Harris Interactive College Football Poll, USA Today Coaches Poll and computer rankings each comprise one-third of the BCS Standings. To derive the three percentages, each team is assigned an inverse point total (25 for No. 1, 24 for No. 2, etc.)

The two poll percentages are calculated by dividing each team's point total by a maximum 2850 possible points (Harris) and 1525 possible points (USA Today). The computer rankings percentage is calculated by dropping the highest and lowest ranking for each team and then dividing the remaining total by 100 (the maximum possible points).

The BCS Average is calculated by averaging the percentage totals of the Harris Interactive Poll, USA Today Poll, and computer rankings. The teams' BCS Averages are ranked to produce the BCS Standings.

The six computer ranking providers are Anderson & Hester, Richard Billingsley, Colley Matrix, Kenneth Massey, Jeff Sagarin and Peter Wolfe. Each computer ranking provider accounts for schedule strength within its formula.

The BCS Standings are used for:

<http://www.bcsfootball.org/cfb/story/5898222/BCS-Selection-Procedures?print=true> 5/7/2009

- * Determining the two teams that qualify to play in the BCS National Championship Game;
- * Determining any other automatic qualifiers; and,
- * Establishing the pool of eligible teams for at-large selection.

The BCS Standings are released eight times each season, including the final Standings on selection Sunday. The National Football Foundation compiles and releases the Standings each week.

Harris Interactive College Football Poll

To provide the initial pool of potential panelists for the Harris Poll before the 2005 regular season, each Conference submitted the names of 30 qualified individuals; Harris Interactive randomly selected 10 panelists from among the names submitted by each Conference. Notre Dame submitted a list of six qualified individuals, from which Harris randomly selected three. Army and Navy together submitted a list of three qualified individuals from which Harris selected one.

When a person leaves the panel, the conference that originally nominated the individual nominates three others to take the spot, one of whom is randomly selected.

The first Harris poll is released on the last Sunday in September each season.

Standards for Future BCS Automatic Qualification

The champions of the Atlantic Coast, Big East, Big 10, Big 12, Pac-10 and Southeastern Conferences will have annual automatic qualification for a BCS game after the regular seasons of 2008 through 2013, based on mathematical standards of performance during the 2004-2007 regular seasons.

The 2008-2011 regular seasons will be evaluated under the same standards to determine if other conferences will have annual automatic qualification for the games after the 2012 and 2013 regular seasons. The champions of no more than seven conferences will have annual automatic berths.

If the BCS continues under the same or similar format, conferences will be evaluated on their performances during the 2010-2013 regular seasons to determine which conferences will have automatic qualification for the bowls that will conclude the 2014-2017 regular seasons.

The evaluation data includes the following for each conference (1) the ranking of the highest-ranked team in the final BCS standings each year, (2) the final regular-season rankings of all conference teams in the computer rankings used by the BCS each year and (3) the number of teams in the top 25 of the final BCS standings each year.

Conference agreements with bowls will continue. The Pac-10 and Big Ten champions will host the Rose Bowl if their teams are not in the BCS national championship game. Likewise, the Southeastern Conference champion will host the Sugar Bowl, ACC champion will host the Orange Bowl and Big 12 champion will host the Fiesta Bowl.

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BCS Standings

Updated: November 25, 2008, 4:03 PM EST

Compilation of Standings

Since the 2000 regular season, the BCS Standings have been compiled by the National Football Foundation and College Hall of Fame.

The Standings include three components: USA Today Coaches Poll, Harris Interactive College Football Poll and an average of six computer rankings. Each component will count one-third toward a team's overall BCS score.

All three components shall be added together and averaged for a team's ranking in the BCS Standings. The team with the highest average shall rank first in the BCS Standings. The BCS Standings will be used for:

1. Selecting the teams that will participate in the national championship game.
2. Determining any other automatic qualifiers; and,
3. Establishing the pool of eligible teams for at-large selection.

Polls

In the Harris Interactive College Football Poll and USA Today Coaches Poll, a team will be evaluated on the number of voting points it receives in each poll. A team's Harris Interactive score will be its points in the poll divided by its total possible voting points (if 114 voters, then $2850=114 \times 25$). The same formula will apply to the USA Today Coaches poll and its total voting points (if 63 voters, then $1575=63 \times 25$).

The number of actual voters, which can vary, is figured into the computation on a weekly basis in stating each team's percentage of a possible perfect score.

Computer Rankings

Six computer rankings will be used: Jeff Sagarin, Anderson & Hester, Richard Billingsley, Colley Matrix, Kenneth Massey and Dr. Peter Wolfe. Points will be assigned in inverse order of ranking from 1-25. A team's highest and lowest computer ranking will be discarded in calculating its computer rankings average. The four remaining computer scores will be averaged and the total will be calculated as a percentage of 100.

-
- [BCS Standings Archive](#)
 - [BCS Standings Database](#)
 - [BCS Computer Rankings](#)
 - [Harris Interactive Poll](#)
 - [USA Today College Coaches Poll](#)

Read this article at:

<http://www.bcsfootball.org/cfb/story/5898232/BCS-Standings?print=true>

5/7/2009



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The BCS is ...

Updated: March 13, 2008, 5:26 PM EST

The BCS is ...

- The Bowl Championship Series (BCS) is a five-game arrangement for post-season college football that is designed to match the two top-rated teams in a national championship game and to create exciting and competitive matchups between eight other highly regarded teams in four other games.
- The bowl games participating are the Tostitos Fiesta Bowl, FedEx Orange Bowl, Rose Bowl, Allstate Sugar Bowl and the BCS National Championship Game which will be played each year at one of the bowl sites.
- The BCS is managed by the commissioners of the 11 NCAA Division I-A conferences, the director of athletics at the University of Notre Dame, and representatives of the bowl organizations. The conferences are Atlantic Coast, Big East, Big Ten, Big 12, Conference USA, Mid-American, Mountain West, Sun Belt, Pacific 10, Southeastern and Western Athletic.
- The conference commissioners and the Notre Dame athletics director make decisions regarding all BCS issues, in consultation with an athletics directors advisory group and subject to the approval of a presidential oversight committee whose members represent all 117 Division I-A programs.
- The five BCS games are part of the overall bowl structure. All bowl games provide meaningful season-ending opportunities to teams.
- As one conference commissioner said, "the celebration that occurs among the student-athletes, coaching staff and fans at the end of each bowl games is an indication of the importance of all bowl games."
- The BCS places great premium on the regular season of college football. Football weekends are an important ingredient in the overall college experience-going well beyond simply what occurs in the athletics department. A significant amount of the revenue that supports all athletic programs is generated by regular-season football. And so it is of great importance that the regular season remains strong and vibrant.
- The top two teams were matched in bowl games infrequently before the BCS, when conferences were contractually obligated to certain games and there was no flexibility to attempt to match the top teams.
- The BCS conferences have a contract with Fox Sports to televise the Fiesta, Orange and Sugar Bowls through 2010 and the National Championship Games through 2009. ABC has an agreement to continue to televise the 2010 National Championship Game and the Rose Bowl through 2014.

Schedule of Games, January 2009

January 1 - FedEx Orange Bowl
 January 1 - Rose Bowl Presented by Citi
 January 2 - Allstate Sugar Bowl
 January 5 - Tostitos Fiesta Bowl
 January 8 - FedEx BCS National Championship Game (Miami)

Automatic qualification

1. The top two teams in the final BCS Standings will play in the national championship game.

<http://www.bcsfootball.org/cfb/story/5900172/The-BCS-is-...?print=true>

5/7/2009

2. The champions of the Atlantic Coast, Big East, Big Ten, Big 12, Pac-10 and Southeastern Conferences automatically qualify for BCS games each year.

3. One team from among the champions of Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, or the Western Athletic Conference automatically qualify for a BCS game if either: A. Such team is ranked in the top 12 of the final BCS Standings, or, B. Such team is ranked in the top 16 of the final BCS Standings and its ranking in the final BCS Standings is higher than that of a champion of a conference that has an annual automatic berth in one of the BCS bowls.

4. Notre Dame will automatically qualify for a BCS bowl if it is in the top eight of the final BCS Standings.

5. If any of the 10 slots remain open after application of provisions 1 through 4, and an at-large team from a conference with an annual automatic berth for its champion is ranked No. 3 in the final BCS Standings, that team shall become an automatic qualifier.

6. If any of the 10 slots remain open after application of provisions 1 through 5, and if Step No. 5 has not been applied and an at-large team from a conference with an annual automatic berth for its champion is ranked No. 4 in the final BCS Standings, that team shall become an automatic qualifier.

7. If any slots remain unfilled after the placement of all teams qualifying for an automatic berth, then the bowls shall choose their participants from the "pool of eligible teams" (see below.)

Pool of Eligible Teams

If berths are available after the automatic qualifiers have been identified, then the bowls shall select at-large participants from the "pool of eligible teams," which shall include any Division I-A team that is bowl-eligible and meets the following requirements:

A. Has won at least nine regular-season games, not including exempted games, and

B. Is among the top 14 teams in the final BCS Standings

The BCS is Working

The BCS is succeeding. The nation's No. 1 and No. 2 teams met only eight times in bowl games in the 57 seasons between 1936 and 1992, when the "bowl coalition" (a predecessor of the BCS) was created. No. 1 and No. 2 have met eight times in the 15 years since 1992. In the nine-year history of the BCS, the AP's No. 1 and No. 2 have met six times.

The BCS is not ...

- It is not a playoff system. It is nothing more than attempt to match the No. 1 and No. 2 teams within the bowl system and to create exciting matchups in four other bowl games.
- It is also not an exclusive system that rewards only a few. The University of Utah in 2005, Boise State University in 2006 and the University of Hawaii in 2007 demonstrated that a team from a conference without an annual automatic berth can have access to a BCS bowl game. The selection process has been further adjusted to allow even more such access in the future.

Revenue

Before the BCS was created, conferences without automatic berths in the "major" bowl games received no revenue from those games. In the first nine years of the BCS system, more than \$70 million was distributed to conferences that do not have an annual automatic berth in the system.

Economic Impact

The total economic impact in the host cities from the five BCS games in January 2008, was estimated at more than \$1.2 billion.

A word about a playoff

The NCAA membership has not proposed the creation of a playoff.



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Bowl Championship Series FAQ

Updated: July 20, 2007, 12:27 PM EST

Frequently asked questions about the BCS:

What is the BCS, anyway?

The BCS is not an entity. Instead, it is an arrangement of five bowl games that are managed by the 11 Division I-A conferences and the University of Notre Dame together with the local bowl committees.

When was the Bowl Championship Series formed?

Prior to the 1998 football regular season, the FedEx Orange, Nokia Sugar, Rose and Tostitos Fiesta Bowls joined with the Atlantic Coast, Big East, Big 12, Big Ten, Pacific-10 and Southeastern Conferences and the University of Notre Dame to form the Bowl Championship Series (BCS). In 2004, Conference USA, Sun Belt, Mid-American, Mountain West and Western Athletic conferences joined the BCS.

What is the BCS' current contract arrangement?

The BCS operates with several contracts in play:

1. The BCS agreement with 11 conferences, Notre Dame and three bowl games,
 2. A contract between the Big Ten, Pac-10, the Rose Bowl;
 3. A Rose Bowl-ABC contract;
 4. A contract between the BCS conferences and Notre Dame with Fox Sports.
-

How does the BCS standings formula work?

The BCS standings formula consists three components, each weighted equally: the USA Today Coaches Poll, the Harris Interactive College Football Poll and an average of six computer rankings (Anderson & Hester, Richard Billingsley, Colley Matrix, Kenneth Massey, Jeff Sagarin and Peter Wolfe).

How does the Harris Interactive National College Football Poll work?

The Harris Interactive College Football Poll ranks the Top 25 teams each week from late September through the end of the regular season. The Harris panel is comprised of former coaches, student-athletes, administrators and media representatives with a goal of 114 participants. The Division I-A conferences and independent institutions nominate prospective panelists and the Harris Interactive randomly selects the actual panel. The panel is a statistically reliable representation of all 11 Division I-A conferences and independent institutions. Harris Interactive will post the poll results to its website each Sunday. For the final poll in December, individual votes are made public.

<http://www.bcsfootball.org/cfb/story/5900394/Bowl-Championship-Series-FAQ?pri...> 5/7/2009

What about the process for determining which conferences receive automatic BCS bowl bids in the future. How does that process work?

Each conference will be evaluated over a four-year period based on the three elements: the average rank of the highest ranked team, the average rank of all conference teams, and the number of teams in the top 25. Bowls' contractual agreements with host conferences will remain in place.

How has access been improved for schools from conferences that do not have automatic berths?

From the very beginning, the BCS bowls have been open to all Division I-A conferences and institutions. Members of those conferences whose champions don't have annual automatic bids to the BCS bowls now have an even greater chance of qualifying for one because:

- A conference champion will play in a BCS game if it is ranked among the top 12 teams in the final BCS standings. Previously, a team had to finish in the top six to earn an automatic berth.
- The 2006 expansion of the BCS field from eight to ten teams doubled the number of potential at-large spots from two to four. Any Division I-A program can qualify for at-large consideration if it wins nine or more games and is ranked 14 or higher in the BCS standings.

What does the TV deal with FOX entail?

Fox Sports has an exclusive four-year agreement covering all broadcasting and sponsorship rights for the Tostitos Fiesta Bowl, FedEx Orange Bowl and Allstate Sugar Bowl from 2007 through 2010. Fox also has the same rights for the BCS National Championship Game in 2007, 2008 and 2009. In addition to television rights, the contract also covers national radio rights; Internet rights; all sponsorship rights, including naming rights, signage opportunities; ancillary programming on Fox and/or FSN; and, jointly with the conferences and the bowls, rights for exploit merchandising opportunities.

Why doesn't the BCS employ a national playoff for Division I-A football?

This may sound like semantics, but it is much more. The BCS isn't an entity; it is merely an event that the conferences and Notre Dame manage along with the bowls in order to create a matchup between the No. 1 and No. 2 team in a bowl game.

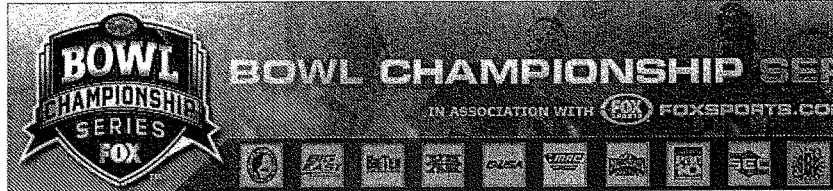
The entity responsible for such things as college sports championships, the college presidents and chancellors that comprise the NCAA, have expressed no support for a playoff.

In order for an NCAA Division I-A Football Championship to be established, the NCAA Division I membership must consider such a proposal through its normal legislative process. As of this date, legislation to establish a I-A championship has not been considered by the membership.

Through the years there have been several efforts through NCAA channels to address the subject. In 1976, a proposal to establish a Division I-A football championship was introduced on the recommendation of a special committee that had studied the feasibility of a playoff. This proposal, however, was withdrawn and there was no discussion on the Convention floor. A resolution was presented during the 1988 Convention that stated the Division I-A membership did not support the creation of a national championship in the sport of football, which passed by a vote of 98 in favor, 13 opposed and one abstention. In 1994, a blue-ribbon panel was formed to gather information regarding the viability of establishing a Division I-A football championship. The panel forwarded a report to the NCAA Presidents Commission; however, it was decided that the NCAA would not pursue a Division I-A championship.

When Southeastern Conference commissioner Mike Slive was asked about a playoff, his response was as follows: "There really is no interest exhibited presently by our presidents or chancellors or many others in having a playoff. "I try to think about it in terms of, 'what is in the best interest of college football?' I think three principles need to be applied. One is that college football is part of higher education, part of the academic mission of our institutions and that's an important piece of the puzzle that's always going to be there. Two, football has a wonderful regular season, an exciting regular season that's maybe the best regular season of all sports. Three, we've had a wonderful 100-year relationship with the bowl system.

"So the postseason has to meld those three systems into something that is good for college football."



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BCS Chronology

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795 days ago

A look at the chronology of the BCS:

Before 1992

Bowls have had affiliation agreements relationships with conferences for many years. Most notably, the Big Ten and Pac-10 champions met in the Rose Bowl every year from January 1947 until the inception of the BCS. Other conferences developed similar relationships with other bowls-for example, the Big Eight Conference with the Orange, Southeastern with the Sugar and Southwest with the Cotton. Those bowls selected the best available teams to play their affiliated conference champs.

The relationships proved valuable to both the bowls and the conferences. Because of these affiliations, a berth in a particular bowl became the reward for a conference championship. The close ties between institutions in a conference and a particular bowl encouraged fans to travel to the host city and helped the bowls develop solid economic bases from which they have supported many educational, charitable and community initiatives. Today, conference-and-bowl affiliations remain a vital part of college football.

However, the prevalence of conference-bowl affiliation arrangements usually precluded matchups between highly ranked conference champions because the champion of one conference might be committed to participate in one bowl game and the champion of another conference might be committed to play in another game. Thus the bowl system was not particularly suited to matching the top two teams in a national championship game.

1992-Bowl Coalition

After a lengthy series of meetings in 1991 and early 1992, the commissioners of several conferences and representatives of Notre Dame, along with four bowl committees, created the Bowl Coalition agreement. The Coalition provided a structure which enabled the champions of the Big East Conference and Atlantic Coast Conference and Notre Dame to meet either the champion of the Big Eight (in the Orange Bowl), Southeastern (Sugar Bowl) or Southwest (Cotton Bowl) conferences.

In addition, if the champions of the Big East or ACC or Notre Dame had been

- BCS has a strong lobby
- Keep college football as it is
- BCS moving to ESPN in 2011
- Hey to the chief: BCS better than ple
- BCS system best for college football

- Florida beats Oklahoma to win BCS
- AP Top 25: Gators are No. 1, Utes s
- Texas rallies past Ohio State in Fies
- Utah stuns Alabama in Sugar Bowl
- USC beats Penn State in Rose Bow
- Virginia Tech tops Cincinnati in Orar
- Oklahoma's Bradford wins Heisman

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the 2009 B
Champions
Price: 23.



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ranked No. 1 or 2 at the end of the regular season, they would have met in the Fiesta Bowl for the national championship. Their vacated spots in either the Orange, Sugar or Cotton Bowls would have been filled from a pool of at-large teams made up of the number two teams from the Atlantic Coast, Big East, Big Eight, Pac-10 and Southwest conferences. To guarantee those at-large teams a post-season home, the conferences contracted with the Gator and John Hancock Bowls to provide three additional slots for number two teams.

The Coalition was in place for the bowl games after the 1992, 1993 and 1994 regular seasons.

In the previous 56 years of post-season play, the number one and number two teams had met only eight times. Given its narrow parameters and aims, the Coalition arrangement was quite successful-it paired the top two teams in two of the three years that it existed. But it had limitations. It could not, for example, pair the champions of the Big Eight and SEC in any bowl game. And because neither the Big Ten nor Pacific-10 champions participated, the Coalition could not pair either of those champions with an opponent from another conference.

The Coalition was a nine-year contractual agreement, subject to review every three years. After the first three years, in January 1995, at the same time that a number of the existing conference-bowl affiliation arrangements also expired, the parties agreed to end the agreement in favor of an improved system-the Bowl Alliance.

1995-Bowl Alliance

In 1995, the relationships between the conferences (except the Big Ten and Pac-10) and the bowls were modified in order to retain the historic bowl venues while increasing the likelihood of matching the No. 1 and No. 2 teams in the country.

The Alliance system was designed to allow the champions of the Atlantic Coast, Big East, Big Eight, Southeastern and Southwest Conferences along with an at-large team to be matched in the three alliance bowls-Fiesta, Sugar and Orange. A second at-large team was added beginning with the 1996 regular season when the Big 12 Conference replaced the old Big Eight and Southwest Conferences.

The Bowl Alliance instituted two major changes which enhanced the opportunity to produce a national championship game. It eliminated conference-champion tie-ins in the three bowls, which gave those bowls the flexibility to choose the best matchups. And it included two at-large spots which were open to all Division I-A teams that won at least eight regular season games or were ranked in the top 12 or no lower than the lowest-ranked conference champion participating in the Alliance.

None of the participating conference champions was committed to play in any bowl game as they had been in the past under the conference-bowl affiliation arrangements. This selection procedure permitted the Alliance bowls to match conference champions in games that would not have been played under the previous conference-bowl affiliation arrangements. For example, after the 1995 regular season, the Alliance arrangement created a national championship game in the Fiesta Bowl between the only two unbeaten teams in the nation, Nebraska and Florida.

The Alliance continued for three seasons - the bowl games after the 1995, 1996 and 1997 regular seasons.

1997

Highlights: 2009 BCS Championship

Tim Tebow and Percy Harvin put on a show as Florida topped Oklahoma for the BCS title.



More BCS Football Video

- BCS Championship trophy presentation
- Highlights: 2009 Fiesta Bowl
- Highlights: 2009 Sugar Bowl
- Highlights: 2009 Rose Bowl
- Highlights: 2009 Orange Bowl

Although the Alliance was successful, the conference commissioners and chief executive officers began discussions about the possibility of integrating the Big Ten and Pac-10 champions into a bowl arrangement that would allow for an annual pairing of the top two teams in the nation. The Big Ten, Pac-10 and Rose Bowl agreed that the Rose Bowl would host a national championship game in rotation with the other bowls, and that the Big Ten or Pac-10 champions would not play their traditional game in Pasadena on New Year's Day if the teams were ranked No. 1 or No. 2. Similarly, the Fiesta, Orange and Sugar Bowls enthusiastically supported the new approach, which was informally called the "Super Alliance." Later, of course, it became the Bowl Championship Series.

From the beginning, the BCS was designed to pair the two top-rated teams in a national championship game and to create competitive matchups among highly regarded teams in three other games as part of the bowl system. However, it was not intended that the next six ranked teams automatically would be either paired in the other three bowls, or even guaranteed participation. The bowls were to be provided flexibility to exercise freedom of selection that would create locally attractive games to enhance ticket sales.

A new mathematical formula, the BCS standings, was created to determine the participants. The standings consisted of four elements: subjective polls of writers and coaches, the average of three computer rankings (Sagarin, Seattle Times and New York Times), the teams' records, and a strength-of-schedule index based on the records of a team's opponents and its opponents' opponents.

The champions of the six founding conferences (Atlantic Coast, Big East, Big Ten, Big 12, Pac-10 and Southeastern) were awarded annual automatic qualification.

Also, any Division I-A independent team or champion of the Western Athletic Conference, Conference USA or any other Division I-A conference qualified for a berth if it ranked sixth or higher in the BCS standings. If such a team did qualify by finishing sixth or higher, Notre Dame also would qualify if it was ranked in the top 10 in the final BCS standings or had won at least nine games. If more than two teams met the standard, the bowls would select their participants from among the qualifiers.

If berths remained open after all automatic qualifiers were identified, the bowls would select their participants from a pool of eligible at-large teams. The pool was comprised of all Division I-A teams that won at least eight games and were ranked among the top 12 teams in the BCS standings.

A four-year rotation of BCS championship game sites was established: Fiesta Bowl, then Sugar, Orange and Rose.

The system marked the return of regional consideration regarding team selection, which had been absent in the Alliance. Unless the bowl was hosting the national championship, or the teams qualified to play in the national championship in another bowl, the conference champions were assigned to play in the following designated bowls:

Big Ten - Rose Bowl
 Pac-10 - Rose Bowl
 Big 12 - Fiesta Bowl
 Southeastern - Sugar Bowl
 ACC or Big East - Orange Bowl

ABC and the BCS signatories signed a four-year agreement to televise the games of January 1999, 2000, 2001 and 2002.

1998

The conferences agreed that if a BCS bowl lost a host team to the national championship game, then that bowl would be the first to select a replacement team. If two BCS bowls lost their host teams, the bowl losing the No. 1 team would have the first at-large selection, followed by the bowl losing the No. 2 team.

If a conference had a runner-up team in the national championship game, its actual champion was not guaranteed a berth in another BCS game.

The first BCS standings were published on November 17. The standings were published four times, with the final version released on selection Sunday, December 6.

The conferences agreed that if a second team from one of the six automatic-qualifying conferences was selected for a BCS game, the conference would receive \$6 million for its appearance.

1999

Five more computer rankings were added, making a total of eight in the standings. The new five were Billingsley, Dunkel, Massey, Matthews/Scripps Howard and Rothman. Each team's highest seven rankings were averaged to determine the computer component of the standings.

Beginning with the 1999 regular season, each conference was subject to review and possible loss of its automatic-qualifier status should the conference champion not have an average ranking of 12 or higher over a four-year period.

The criteria for eligibility for at-large consideration was changed from eight victories to nine victories.

The release of the first BCS standings was moved earlier, from November 17 to the Monday after the games of October 23.

The interest income credited to each conference was used to pay the operating expenses of the arrangement.

2000

The National Football Foundation began compiling the BCS standings.

The television contract with ABC was extended to cover the games of 2002-2006.

2001

Beginning with the 2001 regular season, the Dunkel rankings and New York Times poll were no longer used in the BCS standings. Rankings from Dr. Peter Wolfe and Wes Colley were added, leaving a total of eight. Each team's highest and lowest computer ranking was disregarded, then the remaining six were averaged to determine the computer component of the standings.

To further emphasize the importance of a team's strength of schedule, a fifth component, "quality wins," was added to the standings formula. Teams with

regular-season victories over opponents ranked in the top 15 of the BCS standings received bonus points—from 1.5 points for a victory over the top-ranked team to 0.1 points for a victory over the team ranked No. 15.

The commissioners voted that the highest-ranked at-large team, if ranked either third or fourth in the BCS standings, would receive an automatic berth, if a spot was available after all other automatic qualifiers were awarded berths.

The length of halftime was reduced from 22 to 20 minutes.

It was agreed that each participating institution's home radio market could include all stations in the home state and those out-of-state stations that were located within a 75-mile radius of the campus that carried at least 50 percent of the institution's regular-season games.

The BCS standings were released at 10:30 p.m. Eastern time, each Monday, and were distributed to the print media earlier to allow preparation of news stories.

2002

The commissioners agreed that margin of victory was not an appropriate element in the standings and accordingly removed the Matthews and Rothman rankings from the formula. The New York Times ranking returned, resulting in a total of seven computer rankings for the 2002 season. Only the lowest score was eliminated before averaging the remaining six computer rankings.

The conferences purchased game-cancellation insurance for the income from the BCS bowls effective with the games after the 2002 regular season.

The commissioners agreed that a team on probation would be included in the BCS standings with an asterisk noting that it was not bowl-eligible.

It was decided that if the No. 1 and No. 2 teams in the BCS standings were from the same conference but neither was the conference champion, since no conference could be represented by more than two teams, the conference champion was eliminated from consideration.

Similarly if an automatic-qualifying conference had a team ranked No. 1 or No. 2 in the BCS standings and a second team ranked No. 3 or No. 4, none of which was the conference champion, the conference champion would be excluded from consideration.

2003

The first BCS standings were released on the third Monday in October. ESPN had the exclusive right to release the standings at 6 p.m. Eastern time each week.

It was agreed that the Orange Bowl would begin selecting its host conference (either ACC or Big East) before the start of the season, effective with the 2004 regular season.

The selection procedures were changed in two ways, effective with the 2003 regular season:

- If an automatic-qualifying conference had a team ranked either No. 1 or No. 2 in

the BCS standings and a second team ranked either No. 3 or No. 4, neither of which was the conference champion, and the conference champion was ranked No. 5 or lower, the team ranked No. 3 or No. 4 would not be eligible for a berth in the BCS.

- If a bowl lost the No. 1 team to the championship game, then the replacement team could not be a team from the same conference as the team ranked No. 2 was also a conference champion, unless the bowl hosting the No. 2 team consents.

The Presidential Oversight Committee and Athletics Directors Advisory Committee were instituted to be a part of the governance of the BCS.

2004

The commissioners requested that the American Football Coaches Association and the Associated Press delay the release of their first polls until the first week of October so that the polls would contain data reflecting only the results of the current season. The two organizations were unable to do so.

As the result of a landmark February meeting, the chief executive officers representing all 11 Division I-A conferences and Notre Dame increased the opportunities for Division I-A Institutions to participate, adjusted revenue distribution formulas to recognize the participation of institutions that were not founders of the BCS and agreed in principle to eliminate any adverse consequences of branding that may have unintentionally resulted from the previous contractual arrangements.

A fifth BCS bowl game, the National Championship Game, would be implemented for the four-year cycle beginning with the 2006 regular season. The game would be played on a rotating basis at the site of the Fiesta, Sugar, Orange and Rose Bowls one week after the other four bowl games. The previous rotation-Fiesta, then Sugar, Orange, Rose-was continued.

The composition of the Presidential Oversight Committee was revised to include one member from each of the conferences with an annual automatic berth, and two at-large positions, one of which must be filled by a representative of Conference USA, the Mid-American Conference, the Mountain West Conference or the Sun Belt Conference.

In aggregate, Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference and the Western Athletic Conference were guaranteed nine percent of the annual BCS net revenue for the 2006-2009 regular seasons. Also, if a member of one of those conferences played in one of the BCS games, the group would receive an additional nine percent.

The following changes were made in the automatic-qualification criteria, effective with the 2006 regular season:

- A conference champion from Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference or the Western Athletic Conference would earn an automatic berth if it was (a) ranked in the top 12 of the BCS standings or (b) ranked in the top 16 of the BCS standings and its ranking was higher than that of a champion of one of the annual automatic-qualifying conferences. If more than one team achieved such a ranking, the automatic berth would go to the team with the higher ranking and the other team(s) would be eligible for at-large selection by the bowls.
- Notre Dame would earn an automatic berth if it was ranked No. 8 or higher in the BCS standings.

It was agreed that the original six conferences would receive annual automatic qualification through the 2007 regular season. Standards, based on overall conference competitiveness in the 2004, 2005, 2006 and 2007 regular seasons, were created to determine which conferences should have annual automatic berths for their champions for the 2008 and 2009 regular seasons. The champions of no fewer than five and no more than seven conferences would have berths.

The commissioners made the following changes in the standings formula, effective with the 2004 regular season:

- The strength-of-schedule, team-record and quality-win components were removed, inasmuch as those elements were also reflected in the computer rankings.
- The standings formula was adjusted to include the average of the computer rankings, the AP media poll and the USA Today coaches poll, each weighted one-third.
- The New York Times computer rankings were removed, and so the standings formula would be the average of six computer rankings.
- A team's highest and lowest computer rankings would be discarded when figuring a team's computer poll average. Points would be assigned in inverse order of ranking from 1-25; the four remaining computer scores would be averaged and the total would be calculated as a percentage of 100.
- The standings formula would no longer average the weekly rank of each team in the media and coaches' polls. Instead, a team would be evaluated based on the voting points it received in each poll—a team's AP score would be its points in the poll divided by a possible 1,800 voting points (1,500 voting points in the coaches poll.)

The standings were released to all media agencies at 2 p.m. each Monday.

In November, Fox Sports was awarded the rights to the Fiesta, Orange and Sugar bowls after the 2006, 2007, 2008 and 2009 seasons and the National Championship Game after the 2006, 2007 and 2008 regular seasons. ABC was awarded the rights to the National Championship Game after the 2009 regular season and to the Rose Bowl games after the 2006-2009 seasons.

2005

In light of an announcement by the Associated Press that it would no longer permit the use of its poll as a component of the BCS standings, the Harris Interactive College Football Poll was created as a replacement, beginning with the 2005 regular season.

Army and Navy were each allocated a participation fee of \$100,000 for making themselves available to participate in a BCS bowl game if selected effective for the 2008 regular season, in recognition of the investment the academies continue to make in their football programs, the programs' historical significance and the unique contribution the institutions make to higher education.

It was also agreed that Notre Dame would receive an annual fee of \$1.3 million from the BCS in the years when its team does not participate in one of the games, and \$4.5 million when its team does participate.

Big 12 commissioner Kevin Weiberg, Big Ten commissioner Jim Delany, University of Mississippi president Robert Khayat and three bowl representatives

appeared before a subcommittee of the House of Representatives Energy and Commerce Committee in December.

Relative to whether it was appropriate for the group managing the BCS to set policy in areas such as NCAA action banning certain Native American mascots and uniform logos, it was the unanimous position of the Presidential Oversight Committee that the group had no such regulatory function and that the matter should be referred back to the NCAA to be handled through its bowl licensing process.

It was agreed to incorporate an NCAA public service announcement in the BCS game telecasts if possible.

The Sugar Bowl was moved to Atlanta in the aftermath of Hurricane Katrina.

2006

It was agreed that the BCS standings would be released on Fox's National Football League telecasts on Sunday afternoons.

The Harris poll was retained as an element of the BCS standings through the 2009 regular season.

The criteria for selection as an at-large team were revised from nine victories and a ranking in the top 12 of the final BCS standings to nine victories and a ranking in the top 14.

The conferences continued dividing the cost of the game-cancellation insurance among the conferences based upon the percentage of revenue that each conference receives from the BCS games in a particular year.

Temple University, a Division I-A independent, was awarded a \$100,000 participation fee for making its team available for the BCS for the 2006 regular season.

The Tom Mickle Internship was established in the office of the bowl hosting the National Championship Game each year, in memory of the late Executive Director of Florida Citrus Sports who was instrumental in forming the BCS.

BCS Coordinators

1998-2000 – Roy Kramer, Southeastern Conference
 April 2000-2002 – John Swofford, Atlantic Coast Conference
 April 2002-2004 – Mike Tringhese, Big East Conference
 April 2004-January 2006 – Kevin Weilberg, Big 12 Conference
 January 2006-Present – Mike Slive, Southeastern Conference

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Assessing the Antitrust Case Against the Bowl Championship Series

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Smith College



Assessing the Antitrust Case Against the Bowl Championship Series

Andrew Zimbalist¹

I. INTRODUCTION

In an uncertain world, one predictable event is that the Bowl Championship Series ("BCS") perennially engenders widespread skepticism and strident criticism. In 2008-09, Florida (13-1) beat Oklahoma (12-2) to win the putative college football national championship. No one disputes that Florida and Oklahoma were among the nation's best teams, but Utah (13-0), USC (12-1), and Texas (12-1) all feel they deserved a shot at the title. Indeed, Texas even beat Oklahoma in a regular season game.

This year, the president of the United States is also weighing in. President Obama stated: "If I'm Utah, or if I'm USC or if I'm Texas, I might still have some quibbles. That's why we need a playoff."

In place since 1998, the BCS purports to determine the national champion in college football, while preserving the century-old system of postseason bowl games. To make its determination of which teams go to the championship game, the BCS employs the *USA Today* Coaches Poll, the Harris Interactive College Football Poll, and an average of six computer rankings.

II. HISTORICAL BACKGROUND

The Rose Bowl became the first college bowl game in 1902. It became a regular annual event in 1916. Most major bowl games have been in place since the 1930s.

College bowl games generally are organized and controlled by local chambers of commerce, convention and tourist bureaus, and assorted businesses. The bowl games' understood purpose is to generate business for the local economy, which they usually do to some extent because the majority of attendees come from out of town. The bowls have contracts with individual conferences that provide for conference champions, runner-ups, or other designated teams to participate in the bowl each year.

Under the old system, each bowl did not know the quality of the teams it would be getting until the end of the season. The conference champion associated with a particular bowl may have had a relatively low national ranking and the opposing team may have been no better. TV networks found themselves in the uncomfortable position

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of reserving a prime spot for a bowl and paying top rights fees, yet facing the possible prospect of two teams ranked below the top ten going against each other.

The other significant consequence of these arrangements was that it was next to impossible to structure a national championship. Between 1935 and 1991, the top-two ranked teams met each other in a bowl game only eight times. It would have had to have been a coincidence that the top two teams were in the two conferences playing in a given bowl game.

The effort to structure a national championship proceeded in stages. The "Bowl Coalition" was formed in 1991, followed by the "Bowl Alliance" in 1994, and then the Bowl Championship Series in June 1996 to take effect in the 1998-99 season. The basis for the BCS was a deal among the Big East Conference, the Atlantic Coast Conference ("ACC"), the Big 12 Conference (a merger of the Big 8 Conference with 4 teams from the Southwest), the Southeastern Conference ("SEC"), the Big 10 Conference, the Pac-10 Conference, Notre Dame University, the Rose Bowl, and the American Broadcasting Co. ("ABC"), (which had broadcasting rights to the Rose Bowl). Beginning with the 1998-99 season, the national championship game would rotate among the four bowls and ABC would have broadcast rights for all four games over a seven-year period (for which the network paid the estimated modest sum of \$700 million, or \$25 million per game which was roughly 2.5 times the average 1996 rights fees for the four games).

Although many fans welcomed the heightened prospect of a national championship game in college football, the BCS came under sharp attack and close scrutiny from many observers. To its critics, the BCS, instead of promoting the highest level of postseason competition, seemed to be promoting the economic fortunes of its members and the elite college bowls, to the exclusion and detriment of other Division IA (now known as the Football Bowl Subdivision, or "FBS") schools.

As the ongoing inequities in the system were revealed and challenged politically, the BCS administrators have tweaked their plan. Between 1998 and 2008, the BCS selection process has become incrementally more open and the revenue distribution marginally less unequal. Thus, the system to date has avoided legal challenges or congressional action. Nevertheless, the BCS system remains fundamentally closed and acutely unequal.

III. THE SKEWED ECONOMICS OF THE BCS

While the BCS has edged toward more inclusiveness since 1998, the selection criteria of the elite bowl system today remain significantly skewed. Beginning with the 2006-07 season, a fifth BCS bowl was added — the self-proclaimed national championship, which would be played between the No. 1 and No. 2 ranked teams, according to a statistically dubious, BCS-established formula. The venue for this game

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would be rotated among the existing four BCS bowls. The existing BCS bowls would continue on the same basis; that is, the champions of the six BCS conferences (ACC, Big East, Big Ten, Big 12, Pac-10, and SEC) would have automatic berths. The teams from the five non-BCS conferences in the FBS (Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference, and the Western Athletic Conference) could earn an automatic berth if either: (a) the team ranks in the top 12 of the final BCS standings, or (b) the team ranks in the top 16 of the final BCS standings and its ranking is higher than that of the champion of one of the BCS conferences. However, no more than one team from a non-BCS conference can earn an automatic berth in any given year.

The BCS bowls are not only the most prestigious, but they are the most lucrative. Teams that appear in one of the five BCS games in 2008-09 took home \$18 million to their conference. Since the six BCS conferences are guaranteed at least one participant in the series, they are guaranteed this sum of money (on average this comes to \$1.57 million per school guaranteed). If one of the six BCS conferences has a second team in a BCS game, then it receives \$4.5 million for the second team.

Overall, during the first 11 years of the BCS system, there have been 90 appearances by BCS conference teams and only 4 appearances by non-BCS conference teams, three of which occurred during the last three years. Over the last three seasons, total payouts from the BCS bowls have amounted to \$410.1 million, of which \$355.1 million (or 86.6 percent) has gone to BCS conferences.

In addition to the BCS payouts, the BCS conferences have numerous tie-ins (guaranteed appearances) with other bowls: the SEC has a total of 9 bowl ties, as do the ACC and Big 12, while the Big 10 and Pac 10 each have 7 tie-ins. Overall, in 2008-09, 44 BCS teams (including Notre Dame) and 24 non-BCS teams played in postseason bowl games. Significantly, the average payout from the 29 non-BCS bowls in 2008-09 was \$1.4 million per participating team, while the payout from the five BCS bowls was \$14.2 million per team. The total payout from all bowl games in 2008-09 was \$224.6 million, of which \$187.7 million (or 83.6 percent) went to the BCS schools.

While the incremental reforms to the BCS selection process have allowed the BCS conferences to allege that their system is open to all, the outcomes in participation and in revenue bear no resemblance to an open system. Given the fact that the BCS conferences with 54.6 percent of the FBS teams receive approximately 87 percent of the BCS revenues, it is hardly surprising that the BCS teams are able to maintain their competitive superiority. The revenues are used to build the biggest and best facilities, provide the best academic support networks, hire the most renowned coaches, and conduct the most extensive and expensive recruitment drives.

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The postseason revenue advantage for the BCS schools is thereby extended to a regular season revenue advantage. Among other things, the BCS schools play in larger stadiums; this, together with their greater prestige, enables them to make the case that when they play non-BCS schools during the regular season, they should play disproportionately at the BCS team's home field. The non-BCS team receives a modest guarantee fee and the BCS team retains the lion's share of the gate, concessions, catering, signage, and parking revenue from the game. In fact, between the 2002-03 and 2008-09 seasons, 80.7 percent of the 751 games between BCS and non-BCS teams were played on the BCS field.

The inequality is further aggravated by the presence of a clear home field advantage. In the 570 regular season matchups between BCS and non-BCS teams from 2002-03 to 2008-09 that were played at the BCS home field, the BCS won 493 for a .865 winning percentage. In the 181 matchups played at the non-BCS home field during this period, the BCS won 113 for a .624 winning percentage. Thus, despite the occasional superlative performance of a standout team (e.g., the regular season records of Tulane, 11-0 in 1998, Boise State, 12-0 in 2006, Hawaii, 12-0 in 2007, Utah, 12-0 in 2008, plus a decisive BCS bowl victory against Alabama), the prejudicial selection and revenue rules of the BCS appear to be bifurcating the FBS subdivision of Division 1 and engendering a caste system.

IV. ANTITRUST CONSIDERATIONS

Does the BCS violate U.S. antitrust laws and is it vulnerable to an antitrust challenge? As anyone familiar with the record of antitrust litigation in this country knows, there is always substantial uncertainty in such matters. Part of the uncertainty results from the merits of the case, but a significant part of it results from the venue of the challenge, the judge and the jury selected, and the skills of the lawyers bringing the case.

To assess the antitrust substance involved with the BCS system, it makes sense to consider the 1984 Supreme Court decision in *Board of Trustees of the University of Oklahoma v. NCAA*.² In this landmark case, the University of Oklahoma sued the NCAA over its national TV contract, in which the NCAA limited the number of appearances on national television to a maximum of three for any team and arranged for each participant to receive the same payment, whether it was a popular game such as Oklahoma playing Michigan or an obscure game such as Appalachian State playing Temple. The decision in this case against the NCAA established much of the relevant jurisprudence for understanding the antitrust treatment of college sports.

First, the Supreme Court made clear that horizontal restraints on output (and price) are condemned. Second, the Court found that "The NCAA creates a price

² *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).

structure that is unresponsive to viewer demand." The Court further stipulated that: "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law." The Court concluded: "Today we hold only that the record supports the District Court's conclusion that, by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted, rather than enhanced, the place of intercollegiate athletics in the Nation's life."

As it pertains to the BCS, these are the key precepts from the 1984 decision. They lead to the following fundamental question. Can it be shown that there is a horizontal combination that restricts output, distorts prices, and drives resource allocation away from maximizing consumer welfare?

That there is a horizontal combination among the 65 BCS schools is not in question. The only question is whether this combination is incidental and necessary to developing a national championship; and, if it is, whether it is the least restrictive form this combination can take. Let us consider these various elements in turn.

Does the BCS create a reduction in output? The answer here depends on to what the BCS is compared. If it is compared to an 8- or 16-team playoff system, it seems manifest that there is a reduction in output. The two issues here are: (a) whether the extension of the postseason into January for a minority of teams would compel a reduction of regular season games by one and (b) whether the total eyeballs watching and the total revenue generated by the postseason would increase. The first issue would become irrelevant either if there were no regular season reduction in the number of games or if the market was defined to include only competition for the national championship. The latter appears plausible given the 1959 Supreme Court decision in *International Boxing v. United States*,³ that championship fights are a separate market from non-championship fights because of the huge payout differential.

The second issue is empirical, but *a priori* does not appear to be a serious concern. Many television industry mavens have estimated substantial growth in rights fees by a move to either an 8-game or 16-game playoff from the current BCS arrangement. Depending on the playoff system, a doubling or more of television revenue is often estimated.

If the playoff was effectively organized, it seems that the only practical issue would not be whether it attracted more eyeballs and created more overall revenue, but whether, given the diminished share of the overall take going to the BCS schools, it generated more net revenue for the BCS schools.

The BCS response to this argument would probably be that the wrong standard is being applied. The BCS should not be compared to some future hypothetical playoff

³ *International Boxing club v. United States*, 358 U.S. 242 (1959).

system, but rather to the system that prevailed prior to the organization of the BCS. Prior to 1992, there was no national championship game, and the top two ranked teams rarely played each other at season's end. The BCS precursors (the Bowl Coalition and the Bowl Alliance) improved on this situation and the BCS added the Pac-10 and Big 10 conferences into the mix, giving still greater legitimacy to the national championship. Since that time, the BCS has made it marginally easier for non-BCS schools to play in a BCS bowl. Hence, the BCS can argue that each step it has taken has been toward opening competition, rather than shutting it down. From this perspective, the BCS is pro-competitive.

This is a substantial argument. Yet, the previous system was itself a network of exclusive dealing contracts that also probably violated the antitrust laws, so going from one anticompetitive system to another does not make the latter pro-competitive.

The question remains whether the BCS is engaging in ongoing exclusionary acts to curtail greater competition. Four antitrust claims might be advanced against the BCS in this regard. The first is a Section One claim of unlawful boycott or concerted refusal to deal, i.e., a collective action by a group of competitors for the purpose of excluding or otherwise interfering with a potential competitors' access to the market in which they compete. For such a claim to prevail, the plaintiff must prove harm to competition and consumer welfare, not just harm to an individual competitor. The second is a Section Two, or attempt to monopolize, claim. Given the Supreme Court's finding in *International Boxing v. United States*, the case could be made that the BCS is attempting to monopolize the market of college championship football. Here, the argument could be that the BCS conferences are allowing access to the market, but they are not doing it in an objective, non-discriminatory manner. As such, they have the specific intent to exercise monopoly control over this market.

The third claim is related and usually represents a more problematic legal path to pursue. It could be argued that the BCS is an essential facility and without fair access to the facility, it is impossible for potential competitors to enter the market. The fourth claim might be challenging the rule that limits the non-BCS conferences to one automatic appearance in a BCS bowl as a restraint of trade. Such a rule will produce inferior BCS matchups if the second non-BCS school is stronger than one of the selected BCS teams.

The BCS may also be vulnerable to claims of price fixing. Each of the five BCS bowl games, including the national championship, carry the same payout to the participating teams. This is despite the fact that the national championship game regularly has the strongest ratings by a healthy margin and some of the remaining BCS games have considerably higher ratings than others, yet the payout is identical to all bowls regardless of ratings or attendance.

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There remains the question of whether there are less restrictive alternatives available to the current BCS system. It seems there are several compelling, less restrictive alternatives. The most obvious is to have the National Collegiate Athletic Association ("NCAA") run a national championship tournament, as it does in basketball and in Division IAA (FCS), Division II, and Division III football, among playoffs in all its other championship sports. The Division III gridiron championship, for instance, began in 1973 as a single elimination tournament with four teams. It became an eight-team single elimination tournament in 1975 and the current format has 16 teams. Division IAA also has a 16-team playoff.

Of course, the NCAA is also a cartel. In this instance, however, it is a more open and inclusive one. An NCAA-organized national championship would not only produce a less ambiguous champion, it would generate more output and more revenue, and it would allow for a more equal distribution of the spoils across all 1100-plus schools in the NCAA.

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	NEWS FROM		
	Congressman Bobby L. Rush		
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FOR IMMEDIATE RELEASE

May 1, 2009

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**Statement by the Honorable Bobby L. Rush, Chairman
 Energy and Commerce Committee Subcommittee on
 Commerce, Trade and Consumer Protection
 Hearing: "The Bowl Championship Series:
 Money and Issues of Fairness at Publicly Funded Universities"**

May 1, 2009

WASHINGTON — "The subcommittee will come to order. Crowning a national champion in college football has long been controversial. Whether it was decided by the Associated Press sportswriters' poll or by the current Bowl Championship Series, fans and sports-talk radio have always argued over which teams deserved to be ranked Number 1. While, personally, I favor some sort of playoff system to determine a national champion—as does the President of the United States—I understand and appreciate the history and tradition of the bowl system.

"However, criticism of the BCS goes beyond just a mere sporting interest in determining the team that most deserves to be national champion. This is about money, and it's about money at taxpayer-funded colleges and universities. College football is big business, and the BCS strikes many critics as unfair from a financial perspective.

"There are 11 athletic conferences that make up Division 1 college football. Under the current BCS system, 6 of those conferences—the ACC, SEC, Big East, Big 12, Big 10, and Pac-10—are *guaranteed* \$18 million each to distribute among their schools; while the 5 other, non-automatic

- more -

conferences – the Sun Belt, WAC, MAC, Conference USA, and Mountain West – only receive \$9.5 million *combined*. Notre Dame, an independent school, automatically receives \$1.3 million all by itself.

“How is this fair? How can we justify this system during tough economic times when states are slashing their budgets and cutting spending on education? Let me be clear that we are not examining a trivial matter at today’s hearing. Colleges and universities are funded by taxpayer money, and we have to ask whether or not the big, dominant conferences are engaged in uncompetitive behavior and negotiating contracts at the expense of smaller conferences and their schools. In other words, are the big guys getting together and shutting out the little guys?

“Such disparity in revenue distribution would arguably be justifiable were the schools from automatic conferences simply better than schools from the non-automatic conferences. But for the past several years, this has clearly not been the case. Just last year, both the ACC and the Big East failed to produce a single team in the Top 10 of the BCS standings, while the Mountain West and the WAC each had a team in the top 10 – Utah and Boise State. Yet, both the ACC and Big East received almost \$19 million each in BCS revenue, while the Mountain West received only \$9.8 million; and the WAC received \$3 million. On its face, this does not seem fair or tied to actual performance on the field.

“Nonetheless, I want to keep an open mind on this matter and hear from our distinguished panelists today. I am eager to hear from Commissioner Swofford and Mr. Fox, and their views on why the way BCS revenue is currently distributed is fair and equitable to taxpayer-funded colleges and universities. I want this to be a deliberative hearing and a robust exchange of ideas. The BCS recently signed a new television contract with ESPN reportedly worth \$125 million a year, starting in 2011. I will be interested to know how the BCS intends to distribute this considerable sum of money to colleges and universities across the country.

“Lastly, I want to thank my good friend, the distinguished Ranking Member and former Chairman of the full Committee, Mr. Barton, for his work on this matter. Mr. Barton has some very strong opinions on this subject, and I appreciate his passion and commitment to exploring this issue. Mr. Barton has introduced legislation on this issue—legislation that I have co-sponsored—and I hope that we can discuss this bill as well.

“I want to thank all of our witnesses for appearing before us today, and I appreciate their travel to the nation’s capital on relatively short notice. I yield back the balance of my time.”

###

STATEMENT OF GENE BLEYMAIER
DIRECTOR OF ATHLETICS, BOISE STATE UNIVERSITY

COMMITTEE ON ENERGY AND COMMERCE, SUBCOMMITTEE ON COMMERCE,
TRADE & CONSUMER PROTECTION

HEARING ON THE BOWL CHAMPIONSHIP SERIES: MONEY AND OTHER ISSUES OF
FAIRNESS FOR PUBLICLY FINANCED UNIVERSITIES

May 1, 2009

Chairman Rush and members of the Subcommittee, I am Gene Bleymaier, Director of Athletics at Boise State University. Thank you for inviting me here today to speak about the Bowl Championship Series ("BCS").

The issues I would like to address with you today are the following:

COMPETITIVENESS

Boise State's football team is the winningest program in the country over the past 10 years, with a winning percentage of .843 and an overall record of 108 wins and 20 losses!

In the past 10 years, Boise State football has:

- The nation's best conference winning percentage at .933, 70 wins and 5 losses
- The nation's best home winning percentage at .970, 64 wins and 2 losses

In the past 5 years, Boise State has finished the regular season undefeated three times, in 2004, 2006 and 2008!

Boise State ranks #8 overall in the country for the best all-time winningest football program – winning over 70% of their games.

Boise State has had no fewer than 5 games televised nationally each of the past 3 years.

ACCESS

Despite Boise State's incredible success on the playing field, the Broncos have only been invited to a BCS Bowl game once following the 2006 season.

Annually, 10 teams are rewarded with opportunities to participate in the 5 BCS games.

In 2004, the Broncos went undefeated and finished the season ranked 9th in the BCS. While Boise State did not get invited to the BCS, Michigan, ranked 13th and Pittsburgh, ranked 21st did.

- Boise State 9th excluded
- Michigan 13th BCS
- Pittsburgh 21st BCS

In 2006, Boise State went undefeated and finished the season ranked 8th in the BCS and was invited to the Fiesta Bowl to play Oklahoma. Boise State defeated Oklahoma in one of the greatest games ever played.

In 2008, the Broncos went undefeated again and finished the season ranked 9th in the BCS. While Boise State did not get invited to the BCS, Ohio State, ranked 10th, Cincinnati ranked 12th and Virginia Tech ranked 19th did.

- Boise State 9th excluded
- Ohio State 10th BCS
- Cincinnati 12th BCS
- Virginia Tech 19th BCS

Three times in the past five years Boise State has won all of its games and in the current system, never came close to playing in the national championship game. The BCS system not only restricts access but essentially precludes schools from playing in the national championship.

The BCS system is exclusionary and limits access to BCS Bowls to the benefit of Automatic Qualifying (AQ) Conferences and to the detriment of non AQ Conferences. The automatic qualifying criteria bestowed on the 6 AQ Conferences should be adjusted, altered or eliminated.

REVENUE DISTRIBUTION

The BCS revenue distribution formula and AQ qualifying criteria is heavily weighted toward rewarding the AQ Conferences and not rewarding the non AQ Conferences.

The AQ Conferences (65 schools) plus Notre Dame annually receive over 90% of the BCS revenues unless a non AQ Conference school (51 schools) qualifies for a BCS game.

If a non BCS school plays in a BCS game, the non AQ Conferences receive 18% of the revenue and the rest – 82% goes to the AQ Conferences and Notre Dame.

Annually, non AQ Conferences are only guaranteed 9% of the total revenue to split among 51 institutions.

BCS Revenue distribution:

AQ Conferences and Notre Dame (66 schools) = 91%
Non AQ Conferences (51 schools) = 9%

If non AQ Conference schools play in a BCS game another 9% is added to the non AQ conferences distribution.

GOVERNANCE

The BCS does not afford Conferences equitable representation on the BCS Presidential Oversight Committee which is the body that governs the BCS.

- The Automatic Qualifying Conferences (65 schools) receive 6 votes.
- Notre Dame receives one vote.
- The non automatic qualifying conferences (51 schools) receive 1 vote total!

65 schools have 6 votes

51 schools have 1 vote

Notre Dame has 1 vote

This voting distribution is unfair, inequitable and totally unmanageable. One president cannot adequately represent 51 institutions in five different conferences.

The NCAA sponsors 88 Championships in almost every sport, but they do not sponsor the biggest one – the Championship of the Football Bowl Subdivision (FBS) formerly Division 1A. The 6 AQ Conference commissioners and the athletic director at Notre Dame control the BCS and the national championship for major college football. (FBS)

This group has devised a system that gives them approximately 90% of the proceeds and essentially excludes over 50 institutions from playing for the National Championship.

The BCS system needs to be more equitable financially, more accessible and provide institutions with fair representation.

Thank you for the opportunity to share these concerns with you today.

STATEMENT OF DERRICK FOX
President and Chief Executive Officer, Valero Alamo Bowl
FOOTBALL BOWL ASSOCIATION
May 1, 2009

Mr. Chairman, members of the Subcommittee, and Ranking Member Barton, my name is Derrick Fox. I am the former Chairman and currently At-Large Board Member of the Football Bowl Association. I am also President and Chief Executive Officer of the Valero Alamo Bowl in San Antonio, Texas. I am here today representing the thirty-four members of the Football Bowl Association, a group that includes every post-season Bowl game from the members of the Bowl Championship Series (BCS) to the smallest of the post-season events. They range in age from the Rose Bowl, which has been in existence for nearly 100 years, to the one-year old EagleBank Bowl, which took place here at RFK Stadium last December.

Our association has been in existence for more than a quarter century and we have grown as the number of Bowls has grown.

Your purpose in holding this hearing – the third Congressional hearing on this subject in less than six years – is to examine financial issues dealing with post-season college football. My purpose in appearing before you today is to tell you, as I said in 2005, that the current Bowl system, for whatever flaws it may have, is more than just alive and kicking.

It is a system which benefits – in its current form – more than six thousand student-athletes, 12,000 band members, between 75,000 and 100,000 performers and millions of fans and community members. It is a system that attracts more fans than the Super Bowl, World Series, NBA Finals and NHL Stanley Cup – combined! We have done it again and again and intend to continue. If the result of what you are examining is to create a formalized post-season college football playoff – whether it's made up 16 teams and 15 games, eight teams and seven games or

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even four teams and three games – it is our firm belief that you will cause the demise of the current system.

You will end up substituting games for events.

Mr. Chairman and members of the Subcommittee, let me describe to you first the current status of the Bowls and what they mean to the communities and schools and then what I firmly believe would happen with the advent of a post-season college football playoff.

CURRENT POST-SEASON STRUCTURE

In this past post-season, a total of 34 Bowl Games were played in 29 communities across the United States (and one in Canada) during the months of December and January. Five cities hosted two games¹. In the past year, these 34 games attracted nearly 1.8 million fans, an average of 55,186 at each game or 87% of capacity. Seven of the games drew more than 100% capacity, while nine others drew in excess of 90%. Even in these difficult economic times, average bowl attendance was up by 11% over the previous year. Television ratings were up by ten percent over 2007-08.

We must be doing something right.

But what we are doing right is not just for ourselves.

Benefits to the Communities

What does it mean to the 29 communities where the games are held? For one thing, since almost all the post-season Bowl Games are put on by charitable groups and since up to one-quarter of the proceeds from the games are dedicated to the community, local charities receive tens of millions of dollars every year.

¹ Glendale-Tempe (Phoenix), New Orleans, Orlando, San Diego, and Miami.

Excluding the television and print exposure that these communities require, it has been estimated that the Bowl games generate well in excess of a billion dollars in annual economic impact. As I said before, we don't put on games; we put on events. Fans make the Bowl experience a holiday experience, spending up to a week in the community, supporting pre- and post-Christmas business in hotels, restaurants, and visitor attractions. And this doesn't even take into account events such as the Tournament of Roses Parade or other events, centered around the game itself.

Moreover, the title sponsor or presenting sponsor of a Bowl Game frequently is a commercial institution headquartered in the host city, whose integration into the community -- and vice versa -- is enhanced by the game itself.

Benefits to the Institutions

This past year, 68 institutions participated in Bowl Games. That's over half of the major programs. Some of the opponents of the current system have complained that this is too many, but who is to make that judgment? What is wrong with rewarding winning teams with a post-season trip for the players and fans?

But the raw numbers of participants do not reveal the whole story. In the 2008-09 Bowl Game season, nearly a quarter of a billion dollars was paid out to the participating institutions, many of whom, under conference-rules, shared that payout with other schools. In other words, schools that don't even qualify for the Bowls have a stake in Bowl Game revenue. In fact, more than 100 institutions shared in the Bowl Game payouts this past year. These team payouts generally are used to pay for scholarships for athletes in sports programs that are without broad marketplace support (*i.e.*, "non-revenue sports"). Moreover, it's expected that the payouts will

increase this year and, over the next ten years, it's estimated that the Bowl Game payouts to institutions will total more than \$2.5 billion.

Intangible benefits also flow to the institutions. Bowl Game appearances generate contributions to the institution and even increases in applications. From the Athletics Department standpoint, it can lead to additional season ticket sales, licensing income, and media exposure and contracts. (Donations often increase as a result of Bowl success – *i.e.*, boosters enjoy Bowl trips and schools can seek more funds, plus, the following year, the level of contributions to gain access to priority seating, for example, will increase.)

Benefits to the Fans and Players

Fans that travel to the Bowl Games enjoy the spectacle of college football, often combined with a late-year vacation, whether it's in Florida, Texas, California or any of the other dozen states where Bowl Games are played in the U.S.

But it's not just those college football fans who revel in the Bowl Game experience. This past season, in addition to the student-athletes, band members, cheerleaders, and halftime performers, alumni and administrators and all those in the host communities took part.

Anyone who criticizes the current Bowl Game structure should note the following comment from *The Tampa Tribune* a few years ago, before the 2005 Wisconsin-Georgia Outback Bowl:

"Maybe no one outside of Wisconsin and Georgia much cares who wins this game, but so what? A lot of people came to town, soaked up some sun, ate some good food, had a ball. At the end of it all, they play a football game and somebody wins. Actually everybody wins. Imagine that."

Indeed.

A PLAYOFF WOULD CAUSE MORE HARM THAN GOOD

I won't go into how each of the playoff scenarios would harm the current system, except to say that the bloggers of the Internet and the gurus of sports talk radio are incessant in their calls for a college football playoff, believing that it could magically appear. They don't consider how it would appear and what would be the potential negative effect of creating a playoff. They neither know about nor care about the fact that those billions – yes, billions – of dollars of economic impact are generated by the existing system.

It is our firm belief that if a playoff is created, the television dollars in the post-season will flow to that playoff. Likewise, the sponsorship dollars. And when that happens, the mid-tier bowls and most assuredly, the smaller bowls will simply go out of business. Those who don't like the current system will say that's the way of the world. But it's not and the government shouldn't have any role in promoting it.

Let me address a situation with which I am quite familiar, being both President and Chief Executive Officer of the Valero Alamo Bowl in San Antonio. Periodically, we have an Economic & Fiscal Impact Analysis done for our event. The most recent study was done for the game 14 months ago, between Penn State University and Texas A&M. This was not some "back-of-the-envelope" estimate, but rather a 30-page intensive analysis performed by the combined efforts of two respected sets of economists, Strategic Marketing Services of Memphis, TN and SportsEconomics of Oakland, CA.

After completing 480 surveys representing 1220 people, they concluded that there were more than 55,000 "incremental visitors" coming into San Antonio for the game, who spent an average of just over \$740 during their stay. They stayed, on average, for 3.8 days, spending \$195 per day, plus an additional \$142 for tickets and other costs inside the Alamodome. These

“visitors” included not only the fans of the competing schools, but the teams themselves, and a full contingent of media covering the game. Their expenditures include lodging, food and beverage, transportation, rental cars, retail, and entertainment.

According to the study, the direct economic impact to the City of San Antonio was \$42.6 million; the total economic impact to the City of San Antonio – including the recognized “multiplier effect” – was \$73.7 million; and the incremental tax impact to the City of San Antonio – “taxes collected as a result of the event’s operations and non-local visitors traveling to the City that would not have accrued to the region if it were not for the presence of the event being measured” – was \$2.7 million. (These include sales and use taxes, hotel occupancy taxes, and alcoholic beverage taxes; in many cases – but not San Antonio – it would also include rental car taxes.)

The visitor totals include what was spent at the event and what was spent at hotels, restaurants, retail, car rental, and so forth. There is also organizational spending by the event organizers to run the event.

(Indeed, even in your own backyard, here in Washington, D.C., where one of the two newest Bowls – the EagleBank Bowl – was put on for the first time last December, organizers cite to more than 2,000 room nights being sold during a slow time for the hospitality and tourism industry, and hundreds of thousands of dollars going to regional vendors as well as benefits to charities “serving the nation’s wounded warriors and the underprivileged youth of D.C.”)

Additionally – and this has no quantifiable economic number – the Economic and Fiscal Impact Analysis cites the “psychic impact” of putting on the event. As the report says:

Psychic impact is the emotional impact that is generated by hosting significant regional, national, or international events. Cultural [and sports] events often are

part of the fabric of a community....Sports or other cultural events are often a common connection that provides entertainment and conversation at the office or in the neighborhood, for instance. Most other industries do not provide the same degree of emotional impact.

Why do I cite all of this? The reason is simple: we don't simply put on a game, we put on an event, which runs the better part of a week. It involves not only the game, but a Kickoff Luncheon, the Team Fiesta and Pep Rally, the Great Party, a Golf Tournament, the Fellowship of Christian Athletes Breakfast, Team Days at Sea World, hospital visits, and more. Create a playoff and, if the post-season games do not evolve to home games on college campuses, you will create a one-day, in-and-out experience – if that – to replace the current Bowl system. And, if that, we would have to explain to the local communities what has happened.

The proponents of a playoff system neither understand nor want to learn that the economics of the current system is one of events, not just games. By analogy, they would have us become the NIT to the NCAA Basketball Championship, which would result in lost attendance, lost sponsorship, lost television, and the end of the Bowls.

CONCLUSION

No system is perfect. The Bowls are not perfect and the Bowl Championship Series is not perfect. But certainly, the concept of a playoff – as attractive as it may sound from the "experts" on sports talk radio – is rife with dangers for a system that has served collegiate athletics pretty well for the past one hundred years.

It's easy to express support for a playoff concept which has never been tested; all of your assumptions and theories work out perfectly. On the other hand, however, the Bowls have already withstood the test of time and have not been found wanting.

With the current structure of the Bowl Games, you protect the importance of the college football regular season and, as importantly, you have twenty-nine communities committed to providing not just the financial support, but a quality experience for the thousands of players and fans who attend each Bowl Game.

The current Bowl Game system does reward over 6,800 student-athletes, creates more than \$1 billion in annual combined economic impact to the host sites, donates a quarter of a billion dollars annually back to higher education, and gives millions more to charitable endeavors in their own communities.

It is a system that works well, benefits so many, and ought not to be under attack.

Thank you for the opportunity to be here today.

2004-2008 Bowl Payouts for the Conference Champion

• Comparison of bowl payouts for the ACC and Big East Conference Champion compared to the MWC and WAC Champion

• ACC Champion (5 BCS Games)	\$87,900,000
• Big East Champion	\$87,900,000
• MWC Champion* (2 BCS Games)	\$38,700,000
• WAC Champion** (2 BCS Games)	\$36,700,000

*Bowl: Las Vegas (twice), Fiesta and Sugar Bowls.
 **Bowl: Fiesta, Fiesta and Sugar Bowls.



Comparison of Revenue Distributed From the BCS

• Between 2004 and 2008, the BCS distributed the following revenues:

- SEC \$101,428,683
- ACC & Big East \$ 87,728,702
- MWC \$ 32,661,983
- WAC \$ 23,502,000

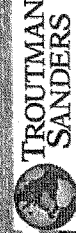
Summary of Revenue Distribution as reported on the NCAA website.



Profitability

- The BCS affiliation may be essential to the profitability of a college football program
- A 2005 Study* reported that the BCS Conferences were the only conferences with profitable football programs.
 - ✓ Each of the Non-BCS Conferences lost money in their football programs

*This study is based on data from before 2005.



2005 Report on Profitability of Football Programs

Average Profitability of Collegiate Division I Athletic Programs (by Conference)

Conference	Total	Football	Men's Basketball	Women	Other
SEC	\$ 3,914,750.00	\$18,435,830.00	\$2,973,417.00	\$(4,102,583.00)	\$8,391,917.00
Big Ten	\$ 5,811,364.00	\$12,211,640.00	\$5,219,455.00	\$(5,844,000.00)	\$(5,775,727.00)
Big Twelve	\$ 5,978,417.00	\$ 9,553,667.00	\$2,033,250.00	\$(3,652,750.00)	\$(1,955,750.00)
Pac Ten	\$ 1,994,000.00	\$ 6,841,800.00	\$2,479,000.00	\$(4,368,200.00)	\$(2,958,600.00)
ACC	\$ 2,291,000.00	\$ 4,442,667.00	\$5,100,000.00	\$(3,498,889.00)	\$(3,752,778.00)
Big East	\$(2,122,750.00)	\$ 2,797,250.00	\$ 779,700.00	\$(3,881,800.00)	\$(1,817,900.00)
Mountain W.	\$ 1,014,000.00	\$ (70,500.00)	\$1,391,875.00	\$2,318,750.00)	\$ 2,011,375.00
Conf USA	\$(1,304,500.00)	\$ (538,100.00)	\$1,627,800.00	\$2,414,200.00)	\$ 20,000.00
MAC	\$(1,195,462.00)	\$ (1,198,308.00)	\$ (304,154.00)	\$(3,518,354.00)	\$ 1,825,154.00
Other	\$ (1,000,000.00)	\$ (749,000.00)	\$ (255,429.00)	\$(1,048,714.00)	\$ 1,269,143.00
Total	\$ (1,000,000.00)	\$ (410,300.00)	\$ 510,700.00	\$(2,334,600.00)	\$ 831,700.00

Source: Neil Terry & Crescente Ramirez, "Student-Athlete Regulation And Profitability in Collegiate Athletics," *Academy of Educational Leadership Journal* (2005)



**TROUTMAN
SANDERS**

Regular Season College Football Television

- **Being in a BCS Conference has a direct impact on the TV contracts negotiated by the Conferences.**
- **There is a gross disparity in revenue from TV contracts negotiated by BCS v. the Non-BCS conferences**



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Regular Season TV Revenue

- According to one source, TV revenue from the 2008 season was:

Big Ten	\$214 Million
SEC	\$205 Million
Big 12	\$79.5 Million
ACC	\$66.9 Million
Pac-10	\$53.2 Million
Big East	\$40 Million

Source: MACbbs, Gross Revenue by Conference, 2008 Season, Feb. 28, 2009, available at <http://www.macbbs.com/showthread.php?t=259645>

These figures have not been verified; other sources reflect \$43 Million in TV revenue for the Pac 10.



Regular Season TV Revenue

MWC	\$12.0 Million*
CUSA	\$11.3 Million
WAC	\$4 Million
MAC	\$1.4 Million
Atlantic 10	\$1 Million

Source: NCAABBS, Gross Revenue by Conference, 2008 Season, Feb. 28, 2009, available at <http://www.ncaabbs.com/showthread.php?tid=250945>

*These revenues have not been verified.

This figure is based on the MWC contract with CSTV which is reported as a 10-year, \$120 Million contract.





NEWS RELEASE

ORRIN HATCH

United States Senator for Utah

May 8th, 2009

Media Contact(s): Mark Eddington or Andrea Saul, (202) 224-5251

HATCH, BENNETT LETTER TO BCS LEADERS

Washington – U.S. Sens. Orrin Hatch (R-Utah) and Bob Bennett (R-Utah) today sent a letter to Commissioner John Swofford and Chairman David Frohmayer of the Bowl Championship Series (BCS) to express their concerns regarding the BCS and call on its leaders to reexamine and improve the current system.

“It is our understanding that the BCS is contemplating a four-year extension of its current broadcasting contract that will lock in the current system. In light of growing concern among elected officials regarding the BCS system, not to mention the complaints of millions of college football fans and consumers throughout the country, we have serious concerns about what appears to be an attempt to preserve the status quo for the foreseeable future,” wrote Hatch and Bennett in the letter.

“The financial ramifications of these inequities are very significant. As you know, many, if not the majority, of schools rely on the profitability of their football programs to fund other athletic programs, enhance their facilities, offer scholarships, and improve their academic programs. A fairer system would significantly raise the revenue received by all participating universities and it is our hope that such a system can be created.”

The Senate Antitrust Subcommittee, on which Senator Hatch is the Ranking Member, plans to hold hearings on the antitrust implications of the BCS later this year. In their letter, the Utah senators also indicated that further government intervention or investigation into these matters can be avoided by voluntary action on the part of the BCS.

The full letter is below, signed copy attached:

May 8, 2009

Mr. John D. Swofford
Commissioner
Atlantic Coast Conference
4512 Weybridge Lane
Greensboro, NC 27407

Mr. David B. Frohmayer
Office of the President
1226 University of Oregon
Eugene, OR 97403-1226

Dear Commissioner Swofford and Chairman Frohmayer:

We are writing to express our concerns regarding the college football Bowl Championship Series
http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Print&PressRelease_id=21cc07ff-1... 5/14/2009

("BCS"). It is our hope that, given the high-profile controversy surrounding the BCS in recent years that you will use the upcoming negotiation of the extension of the broadcasting contract as an opportunity to reexamine and improve upon the system.

The current BCS system has been shown to be flawed with respect to access to BCS bowl games, the continued denial of a fair opportunity for teams to compete for the national championship, and the manner in which significant broadcasting revenue is distributed. As you are undoubtedly aware, journalists, university officials, and fans of college football throughout the country have criticized the BCS almost since its inception. Recently, President Barack Obama and a bipartisan group of Members from both the House and Senate have raised questions about the BCS.

The inadequacies of the current BCS system extend far beyond the inequities on the field. Universities that compete in BCS bowl games and have an opportunity to compete for the national championship garner increased visibility for their institutions. In addition, many teams that have never qualified for a BCS game are able to receive a substantial share of the revenues generated by the BCS simply by virtue of their membership in the favored member conferences. At the same time, nearly half of all the teams in Division I football are forced to share a far smaller portion of the revenues even if a team from their conference is able to overcome the odds and play their way into a BCS game. Therefore, those schools that do not hail from the BCS's preferred conferences begin each season at competitive and financial disadvantage.

The financial ramifications of these inequities are very significant. As you know, many, if not the majority, of schools rely on the profitability of their football programs to fund other athletic programs, enhance their facilities, offer scholarships, and improve their academic programs. The BCS gives every school in its automatic-bid conferences a leg up in these areas, leaving nearly half the schools, in most respects, on the outside looking in. A fairer system would significantly raise the revenue received by all participating universities and it is our hope that such a system can be created.

Notwithstanding these demonstrated inequities, it is our understanding that the BCS is contemplating a four-year extension of its current broadcasting contract that will lock in the current system. In light of growing concern among elected officials regarding the BCS system, not to mention the complaints of millions of college football fans and consumers throughout the country, we have serious concerns about what appears to be an attempt to preserve the status quo for the foreseeable future.

In addition, it would be helpful to learn whether, prior to seeking to extend the current system, other alternatives were considered. In addition, we would like more information regarding the process by which any potential changes to the system were discussed and considered among the membership in the BCS. Finally, we wish to know how an extension of the current system can be justified in light of its demonstrated inequities.

Though such options have been widely discussed, it is our hope that this situation can be resolved with a minimum of government involvement. That being said, the revenues generated by the BCS are unprecedented, making its impact on interstate commerce undeniable. In addition, there may be legitimate legal questions regarding what appear to be coordinated exclusionary tactics by the originators of the BCS. These tactics appear to be having a negative and inequitable impact on a number of our nation's colleges and universities.

It is our sincere belief that further government intervention or investigation into these matters can be avoided by voluntary action on your part. Indeed, we hope that you will take action to preserve competitiveness and fair play in college football and do what is best for consumers as well as for our nation's schools.

- **In 2008, Cincinnati and Virginia Tech, ranked 12th and 19th, got BCS bids over Boise State, ranked 9th in the Nation.**

- ✓ Boise State went to the Poinsettia Bowl (\$750,000) v. Virginia Tech and Cincinnati which went to the Orange Bowl with an \$18.6 Million payout per team

- **In 2008, Utah, the only undefeated team following the Bowls, was never considered for the fictional National Championship.**



The "Best" Teams Are Often Excluded

- The BCS Conference Champion is guaranteed a BCS Bowl, while the Non-BCS Champion is excluded.
- In 2004, ACC champion, Pittsburgh, finished 21st and Big Ten Champion finished 13th; yet both obtained BCS Bids over Boise State ranked 9th in the Nation.
 - ✓ Boise State went to the Liberty Bowl (\$1.5 Million) v. the BCS Bowls that paid \$16.2 for each Bowl appearance
- In 2005, Florida State, ranked 22nd, obtained a BCS bid over TCU ranked No. 14th in the Nation.
 - ✓ TCU went to the Houston Bowl (payout of \$1.5 Million)
 - ✓ Florida State went to the Orange Bowl (payout of \$16.5 Million)

15





AIR FORCE	NEW MEXICO	UNLV
BYU	SAN DIEGO STATE	UTAH
COLORADO STATE	TCU	WYOMING

CRAIG THOMPSON, COMMISSIONER

The Mountain West Conference submits the following proposal (the "MWC Proposal") to reform the Bowl Championship Series ("BCS") to its fellow Football Bowl Subdivision ("FBS") conferences and the University of Notre Dame. The MWC Proposal covers the 2010 through 2013 seasons.¹ The MWC Proposal addresses the inequities under the current BCS system and enables the national championship to be decided (1) in the proper location – on the field of play, and (2) by the appropriate parties – the players.

1. Determining Which Conferences are Automatic-Qualifying Conferences

- a. **Criteria for a conference to automatically qualify** – An FBS conference will be an "AQ Conference" (its champion will automatically qualify each year for a BCS bowl berth) if over a two-season period the conference (1) has played a minimum of twenty inter-conference regular-season games against the six current AQ Conferences, and (2) has a minimum winning percentage of .400 in these games.²
- b. **Conferences that have earned automatic qualification** – As indicated in Table 1 of the Appendix, the ACC, Big East, Big Ten, Big 12, MWC, Pac-10, and SEC conferences will be AQ Conferences for the 2010 through 2013 seasons based on their performance during the previous two seasons.³

Note 1: As indicated in Table 2 of the Appendix, even if the criteria used in paragraph 1(a) were employed over a four-season period (instead of a two-season period), and even if the criteria included bowl games against the current AQ Conferences as well, the same seven conferences listed in paragraph 1(b) above would qualify as AQ Conferences.

Note 2: Over the past five postseasons, only the Pac-10 (.750), MWC (.700), SEC (.636) and Big 12 (.545) have winning records against AQ Conference teams.

¹ This period coincides with the four-year term of the proposed ESPN agreement.

² A conference that has played fewer than 20 such games can be an AQ Conference if its winning percentage would still be at least .400 if it had lost the remaining games needed to reach the 20-game benchmark. For example, a conference with a 10-9 record would be an AQ Conference because even if it had lost a 20th inter-conference game, its 10-10 record and .500 winning percentage would be sufficient.

³ One or more of the four remaining FBS conferences can become AQ Conferences before 2013 if they satisfy the criteria under paragraph 1(a).

2. Determining Other Universities that will Earn BCS Bowl Berths

- a. A new committee is created – The BCS Standings will no longer be based upon computer formulas and pollsters. Instead, a 12-member selection committee (“Committee”) comprised of one representative from each of the 11 FBS conferences and one representative from Notre Dame will determine these standings. This Committee will carefully study and evaluate the teams over the course of a season before determining the rankings. The Committee will rank the Top 25 teams at the end of each regular season, and these rankings will constitute the final BCS Standings.
- b. The Committee will determine the remaining BCS bowl teams – Notre Dame and a champion of a non-automatic-qualifying conference (“Non-AQ Conference”) may automatically qualify for a BCS bowl berth in a given year, depending upon their rankings in the final BCS Standings in that year. The minimum rankings in the final BCS Standings that Notre Dame or a Non-AQ Conference champion must have to automatically qualify for a BCS bowl in a given year will not change from that required under the current system. The Committee will also select the remaining BCS bowl teams based on the final BCS Standings.

3. Determining the National Champion

- a. Five BCS bowls – The Rose Bowl, Fiesta Bowl, Orange Bowl, Sugar Bowl, and a new fifth BCS bowl game (the “Fifth BCS Bowl”) will be played the first week of January. The Fifth BCS Bowl will be awarded to a bowl that currently hosts a non-BCS game. Requests for proposals will be solicited from other bowls.
- b. Ranking the BCS bowl teams – Using the Committee’s Top 25 standings, the Committee will rank the BCS bowl teams from 1 to 10.
- c. Two lowest-ranked BCS bowl teams will play in Fifth BCS Bowl – The two lowest-ranked BCS bowl teams will play in the Fifth BCS Bowl, and their seasons will end at the conclusion of that game.
- d. Top eight BCS bowl teams will play in the Rose, Fiesta, Orange or Sugar Bowls – The other eight BCS bowl teams (the “Top Eight BCS Bowl Teams”) will play in either the Rose Bowl, Fiesta Bowl, Orange Bowl, or Sugar Bowl (the “Top Four BCS Bowl Games”).
- e. Preserving bowl tie-ins – To the extent that the champions of the ACC, Big Ten, Big 12, Pac-10, and SEC are Top Eight BCS Bowl Teams, they will play in their respective bowl tie-ins.⁴

⁴ If the champion of the ACC, Big Ten, Big 12, Pac-10, or SEC is one of the two lowest-ranked BCS bowl teams, that team will play in the Fifth BCS Bowl.

- f. **Choosing the remaining match-ups for the Top Four BCS Bowls** – The Committee will choose the games in which the remaining Top Eight BCS Bowl Teams will play.⁵
- g. **Semi-Finals and National Championship Game** – The winners of the Top Four BCS Bowl Games will each play in a semi-final game (the “Semi-Finals”) approximately one week after their bowl games conclude.⁶ The winners of the Semi-Finals will play in the National Championship Game approximately one week after the Semi-Finals.
- h. **Hosts for the Semi-Finals and the National Championship Game** – The Rose, Fiesta, Orange, Sugar and Fifth BCS Bowls will be given the first opportunity to host the Semi-Finals on a rotating basis. If these bowls are not interested in hosting the Semi-Finals, requests for proposals will be solicited from other bowls. The Rose, Fiesta, Orange, and Sugar Bowls will host the National Championship Game once every four years in addition to the game they host the first week of January.

4. Other Matters

- a. **Presidential Oversight Committee** – The composition of the BCS Presidential Oversight Committee will be modified to include one voting member from each FBS conference and Notre Dame.
- b. **Revenue calculations** – An equitable revenue calculation will be determined once all revenue, including from television and the bowls, is known.

⁵ In making these determinations, the Committee will seek to avoid regular-season rematches, and, to the extent reasonably practicable, pairing any of the top three-ranked teams against each other.

⁶ The Committee will determine the pairings for the Semi-Finals. The Committee will designate that the highest-ranked team remaining play the lowest-ranked team remaining in one of the Semi-Finals, with the other two teams playing in the other Semi-Final, unless the Committee determines that a very strong justification exists for a different pairing.

APPENDIX**TABLE 1**

Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
Conference	Record
MWC	16-13 (.552)
ACC	22-18 (.550)
Big Ten	10-9 (.526)
Pac-10	10-9 (.526)
Big East	14-15 (.483)
Big 12	12-14 (.462)
SEC	13-16 (.448)
WAC	6-28 (.176)
MAC	11-57 (.162)
Sun Belt	5-43 (.104)
C-USA	4-44 (.083)

TABLE 2

Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008)	
Conference	Record
Pac-10	32-20 (.615)
SEC	43-36 (.544)
Big East	36-38 (.486)
Big 12	35-37 (.486)
MWC	29-32 (.475)
ACC	45-52 (.464)
Big Ten	29-37 (.439)
WAC	13-62 (.173)
MAC	17-109 (.135)
C-USA	11-92 (.107)
Sun Belt	6-78 (.071)

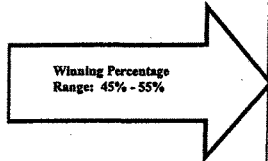
Comparison of Current BCS System and the BCS Reform Proposal

<u>What Needs to be Determined</u>	<u>Current BCS System</u>	<u>BCS Reform Proposal</u>
Revenue Distribution among the Conferences	Six Conferences Each Receive Millions More than the Other Five Conferences Each Year, Regardless of Performance	Calls for Equitable Revenue Distribution, Based on Performance of Conferences
Which Conferences Automatically Qualify for BCS Bowl Games Every Year	Non-Performance-Based Standard Bowl Tie-Ins and Agreements	Performance-Based Standard Results of Inter-Conference Games Against Automatic-Qualifying Conferences
The National Champion (Once the Regular Season is Completed)	Selects 2 Teams to Compete for the National Championship More than 50 Teams Are Effectively Eliminated Before the Season Begins Numerous Outstanding Conference Champions are Eliminated at the End of the Season Because Only Two Teams are Permitted to Compete for the National Championship	Selects Top 8 Teams to Compete for the National Championship No Teams are Eliminated Before the Season Begins Allows the National Champion to be Determined On the Field by the Players, Rather than Off the Field by Computers and Pollsters
The BCS Standings (Which Universities Receive BCS Bowl Berths)	Pollsters -- Some Admit they Rarely Watch the Teams they are Evaluating Computers -- Complex, Confusing Formulas	Committee -- Tasked with Gathering and Analyzing All Pertinent Data Before Making Decisions
Composition of the BCS Presidential Oversight Committee	Six Conferences and Notre Dame Each Have a Separate Vote Other Five Conferences Share Only One Vote	Each Conference has its Own Vote, as does Notre Dame

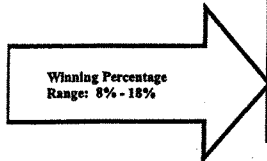
**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD**

2007 - 2008

Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
<u>Top Seven Conferences by Percentages</u>	
Conference	Record
MWC	16-13 (.552)
ACC	22-18 (.550)
Big Ten	10-9 (.526)
Pac-10	10-9 (.526)
Big East	14-15 (.483)
Big 12	12-14 (.462)
SEC	13-16 (.448)



Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
<u>Other Four Conferences by Percentages</u>	
WAC	6-28 (.176)
MAC	11-57 (.162)
Sun Belt	5-43 (.104)
C-USA	4-44 (.083)



**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD**

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<u>Top Seven Conferences by Percentages</u>	
Conference	Record
Pac-10	32-20 (.615)
SEC	43-36 (.544)
Big East	36-38 (.486)
Big 12	35-37 (.486)
MWC	29-32 (.475)
ACC	45-52 (.464)
Big Ten	29-37 (.439)

Winning Percentage
Range: 44% - 62%

Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008)	
<u>Other Four Conferences by Percentages</u>	
Conference	Record
WAC	13-62 (.173)
MAC	17-109 (.135)
C-USA	11-92 (.107)
Sun Belt	6-78 (.071)

Winning Percentage
Range: 7% - 17%

BCS DISTRIBUTIONS – 2007-2008

Conference	Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	Aggregate BCS Distributions for 2007-2008
	<u>Top Seven Conferences by Percentages</u>	
MWC	16-13 (.552)	\$13,512,800
ACC	22-18 (.550)	\$36,965,634
Big Ten	10-9 (.526)	\$45,997,717
Pac-10	10-9 (.526)	\$36,997,717
Big East	14-15 (.483)	\$36,965,634
Big 12	12-14 (.462)	\$45,975,632
SEC	13-16 (.448)	\$45,997,717

Conference	Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	Aggregate BCS Distributions for 2007-2008
	<u>Other Four Conferences by Percentages</u>	
WAC	6-28 (.176)	\$12,394,000
MAC	11-57 (.162)	\$3,602,400
Sun Belt	5-43 (.104)	\$3,591,600
C-USA	4-44 (.083)	\$5,275,200

BCS DISTRIBUTIONS - 2005-2008

Conference	Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008) <u>Top Seven Conferences by Percentages</u>	Aggregate BCS Distributions for 2005-2008
Pac-10	32-20 (.615)	\$71,680,837
SEC	43-36 (.544)	\$85,180,836
Big East	36-38 (.486)	\$71,648,753
Big 12	35-37 (.486)	\$80,658,752
MWC	29-32 (.475)	\$18,092,400
ACC	45-52 (.464)	\$71,648,753
Big Ten	29-37 (.439)	\$89,680,836

Conference	Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008) <u>Other Four Conferences by Percentages</u>	Aggregate BCS Distributions for 2005-2008
WAC	13-62 (.173)	\$22,452,000
MAC	17-109 (.135)	\$ 6,617,200
C-USA	11-92 (.107)	\$ 8,811,600
Sun Belt	6-78 (.071)	\$ 5,994,800

NCAA Football Post-Season Format: Current System vs. BCS Reform Proposal

Current System

Date	Bowl
January 1	Rose Bowl
January 1	Fiesta Bowl
January 2	Orange Bowl
January 3	Sugar Bowl
January 8	National Championship Game (Phoenix)

BCS Reform Proposal

Date	Bowl
January 1	Rose Bowl
January 1	Fiesta Bowl
January 2	Orange Bowl
January 3	Sugar Bowl
January 4-6	"5th" BCS Bowl
January 8-9	Semi-Final 1 (Rose Winner vs. Fiesta Winner)
January 9-10	Semi-Final 2 (Orange Winner vs. Sugar Winner)
January 16-17	National Championship Game

Date	Bowl
January 1	Rose Bowl
January 1	Sugar Bowl
January 2	Fiesta Bowl
January 3	Orange Bowl
January 7	National Championship Game (New Orleans)

Date	Bowl
January 1	Rose Bowl
January 1	Sugar Bowl
January 2	Fiesta Bowl
January 3	Orange Bowl
January 4-5	"5th" BCS Bowl
January 8-9	Semi-Final 1 (Rose Winner vs. Sugar Winner)
January 9-10	Semi-Final 2 (Fiesta Winner vs. Orange Winner)
January 16-17	National Championship Game

Date	Bowl
January 1	Rose Bowl
January 1	Orange Bowl
January 2	Sugar Bowl
January 5	Fiesta Bowl
January 8	National Championship Game (Miami)

Date	Bowl
January 1	Rose Bowl
January 1	Orange Bowl
January 2	Sugar Bowl
January 5	Fiesta Bowl
January 6-7	"5th" BCS Bowl
January 8-9	Semi-Final 1 (Rose Winner vs. Orange Winner)
January 13-14	Semi-Final 2 (Sugar Winner vs. Fiesta Winner)
January 20-21	National Championship Game

Current System		BCS Reform Proposal	
Date	Bowl	Date	Bowl
January 1	Rose Bowl	January 1	Rose Bowl
January 1	Sugar Bowl	January 1	Sugar Bowl
January 4	Fiesta Bowl	January 4	Fiesta Bowl
January 5	Orange Bowl	January 5	Orange Bowl
January 7	National Championship Game (Pasadena)	January 6-7	"5th" BCS Bowl
		January 8	Semi-Final 1 (Rose Winner vs. Sugar Winner)
		January 11-12	Semi-Final 2 (Fiesta Winner vs. Orange Winner)
		January 18-19	National Championship Game

**FBS FOOTBALL TEAMS OVER THE PAST FIVE YEARS
THAT WERE UNDEFEATED IN THE REGULAR SEASON
YET DID NOT HAVE THE OPPORTUNITY TO COMPETE
FOR THE NATIONAL CHAMPIONSHIP**

2008

MWC – Utah (12-0)

WAC – Boise State (12-0)

2007

WAC – Hawaii (12-0)

2006

WAC – Boise State (12-0)

2004

MWC – Utah (11-0)

SEC – Auburn (12-0)

WAC – Boise State (11-0)

*Records listed do not include the result from bowl game.

BEFORE THE INCEPTION OF THE BCS

TEAMS THAT WON OR WERE IN NATIONAL TITLE CONTENTION

1991

Independent – Miami (12-0) – Won national title via polls.

1989

Independent – Miami (11-1) – Won national title via polls.

1987

Independent – Miami (12-0) – Won national title via polls.

1986

Independent – Penn State (12-0) – Won national title via polls.

Independent – Miami (11-1) – Lost to Penn State in Fiesta Bowl to finish second.

1984

WAC – BYU (13-0) – Won national title via polls.

1982

Independent – Penn State (11-1) – Won national title via polls.

SWC – SMU (11-0-1) – Finished second in the polls behind Penn State.

1982

Independent – Miami (11-1) – Won national title via polls.

1976

Independent – Pittsburgh (11-0) – won national title via polls.

2007 Report on the Impact the BCS has on Recruiting

- **BCS schools have a significant advantage in recruiting higher caliber players.**
- **BCS affiliation is a more significant factor for recruits than on-field success.**
 - ✓ BCS schools are able to recruit in a wider geographic market

Source: Michael Dumond, et al., "An Economic Model of College Football Recruiting Process," *The Journal of Sports Economics* (2007)

29



Even The Worst BCS Schools Have a Recruiting Advantage

- The least winning BCS schools recruit a higher percentage of top 100 recruits than the best winning Non-BCS Schools.
- "Teams that consistently win but are not members of the BCS are still not able to attract the quality of recruits as does a team that is a perennial loser but is also a member of a BCS conference."
 - ✓ Greater media exposure
 - ✓ Greater recruiting budgets
 - ✓ Greater name recognition

Source: Michael Duménil, et al., "An Economic Model of College Football Recruiting Process," *The Journal of Sports Economics*, (2007)



Contributions

- There was a direct correlation between football success and an increase in contributions to athletics departments.
- A BCS conference school is able to raise at least \$2.5 Million more than a Non-BCS School in athletic funding.

Source: Brian McEvoy, "Predicting Fund Raising Revenues in Division I-A Intercollegiate Athletics", *The Sport Journal*



Forbes: "It Can Pay To Lose In College Football"

- Forbes reported that the "Washington Huskies, with 2-9 record in 2005, still made \$31.7 Million.
 - ✓ That same year, Boise State won the WAC Conference and made only \$8.5 Million.
- "The reason for the disparity according to economists and football experts is the system by which bowl and television money is distributed."





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Antitrust And The BCS (Big Crooked System)

Law360, New York (February 19, 2009) -- Newly elected President Barack Obama has declared that he will bring change to Washington, D.C. However, to the interest of many sports fans and some antitrust law scholars, he may also attempt to bring change to college football gridirons.

President Obama has said that he intends to influence the Bowl Championship Series ("BCS") championship debate.

Perhaps President Obama takes his cues from ESPN.com, which, on the day of the president's inauguration, asked sports fans what they would fix first as president -- the designated hitter rule in MLB, enforcement of the traveling violation in the NBA, overtime rules in the NFL, or the BCS.

Of 38,776 voters polled in "SportsNation" voting, 79 percent chose fixing the BCS as their top priority. President Obama and the majority of SportsNation voters are not alone, as many legal experts have begun to question whether the BCS violates antitrust laws.

In 2008, the University of Utah finished its NCAA football season undefeated, 13-0, defeating four nationally ranked teams along the way, including fourth-ranked University of Alabama (Utah also finished 12-0 in 2004).

An undefeated season by any major Division I-A college football team is usually rewarded with a berth in the national championship game.

However, because Utah's conference, the Mountain West Conference, is not one of the six founding BCS conferences, as discussed further below, the BCS passed over Utah and instead selected 12-1 University of Florida (Southeastern Conference) and 12-1 University of Oklahoma (Big 12 Conference) to play for the national championship.

http://www.law360.com/print_article/86440

5/5/2009

The BCS excluded Utah from the national championship game for the second time in five years. According to the BCS, Utah's comparative strength of schedule prohibited it from ascending to one of the top two spots in the rankings, despite the fact that Utah may have had the best college football team in the United States this year.

The BCS' inequitable competition structure not only prohibits certain disfavored conferences and their teams from winning a national championship, but in so doing it also maintains and perpetuates the stranglehold of the major football conferences on extremely lucrative television and marketing revenues.

These revenues are unique to college football. Limited access to these revenues restricts both the athletic and academic progress of the schools with teams that participate in the so-called "weaker" Division I-A conferences, regardless of how well those schools play in any given year.

The BCS

The BCS was formed in 1998 by six NCAA Division I-A conferences: the Atlantic Coast, Big East, Big Ten, Big Twelve, Pac-10 and Southeastern Conferences (the "BCS conferences"). The goal was to create a national championship game within Division I-A college football without the necessity of a traditional multi-game playoff.

The BCS designed a mathematical formula for ranking teams, which initially included four elements: 1) a strength of schedule index; 2) subjective polls of coaches; 3) the average of three different computer rankings; and 4) team records.

Once the formula takes each team's statistics into account, a point value is assigned, and the top teams are ranked according to point value. At the end of the college football regular season, including any conference championship games (which not all conferences play), the top two teams in the BCS rankings play for the BCS National Championship in a lucrative, nationally televised game.

The BCS system selects not only the national championship game, but also the eight teams to be included in the four other non-championship BCS bowl games.

The six BCS conferences receive automatic bids to one of the BCS bowl games for their conference champion.

The remaining "at-large" berths are provided to teams ranked in the top fourteen that have at least nine wins, which are also usually teams from the six BCS conferences due to their exposure, notoriety, and strength of schedule.

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5/5/2009

Thus, the BCS conferences will always account for at least 8 of the 10 potential bowl game slots (two for the national championship game and at least six of the eight slots available in the four remaining bowl games).

Ultimately, only 66 of the 119 Division I schools compete for an automatic bid to play in one of the five BCS bowl games.

NCAA Division I-A teams that compete in Conference USA, the Mid-American, Mountain West, Sun Belt and Western Athletic Conferences ("non-BCS conferences") are not entitled to automatic BCS bowl game bids.

Non-BCS conference teams may be selected to play in one of the four non-championship BCS bowl games only if ranked among the top 14 teams by the BCS rankings and selected through the subjective, discretionary bowl game selection process.

Non-BCS conference teams are effectively excluded from the possibility of ever playing in the BCS National Championship game because the BCS rankings will likely never rank a non-BCS team in the top two teams; the BCS views a non-BCS conference team, even if undefeated, as having played too weak a schedule to be considered for the national championship game.

The six BCS conferences derive approximately \$18 million each annually solely from their association with the BCS, and each BCS conference that sends more than one team to a BCS bowl game receives an additional \$4.5 million.

In contrast, the non-BCS conferences receive a combined \$9 million (to share among themselves) for their agreement to acquiesce in the BCS structure, and receive some additional revenue sharing (also to share among themselves) only if a non-BCS team earns a BCS bowl game berth, with a majority of the additional revenue going to the conference that actually sends one of its teams to a BCS bowl game.

In other words, the BCS ensures that each BCS conference is guaranteed \$18 million, while each non-BCS conference is guaranteed only \$1.8 million. The strong get stronger by about 1000 percent each year.

Antitrust Scrutiny of the BCS

Utah Attorney General Mark Shurtleff conducted a review of the BCS' compliance with antitrust law and argues that teams not provided with an automatic BCS berth are at a competitive and financial disadvantage, stating that "from the very first day,

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5/5/2009

from the very first kickoff in the college season, more than half of the schools are put on an unlevel playing field. They will never be allowed to play for a national championship.”

Shurtleff most likely hopes that the BCS’ structure violates either Section 1 or Section 2 of the Sherman Antitrust Act, which outlaw unreasonable, collusive, and monopolistic conduct that unreasonably restrains competition.

Of course, the outcome of an analysis under either Section 1 or Section 2 frequently depends on the application of the strict “per se” analysis or application of the much more lenient “rule of reason” analysis, and, for the Section 2 analysis, a finding of market power in the relevant market (which may be all five BCS bowl games, or just the national championship game).

Two commentators have thoroughly analyzed potential antitrust violations by the BCS each concluding that a court would likely not find the BCS structure to violate the law.

Turning first to the Section 1 analysis, Southern Methodist University Law Professor and former Dean, C. Paul Rogers concluded that the rule of reason analysis would apply, instead of a per se analysis, because the BCS structure produces the pro-competitive effect of a bona fide national championship game even in the absence of a playoff, something that did not exist for consumers prior to the BCS.

C. Paul Rogers, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust and the Winner Take All Syndrome*, 18 Marq. Sports L. Rev. 285 (2008).

Brett Fanasci agrees with Rogers by hypothesizing that the rule of reason analysis must apply to any Section 1 claim because without the BCS, the BCS Conferences would not have broken from their traditional bowl games and no national championship game would even be available to the relevant consumers — college football fans.

See Brett P. Fanasci, *An Antitrust Analysis of College Football’s Bowl Championship Series*, 50 Loy. L. Rev. 967 (2004).

Other important pro-competitive effects generated by the BCS, as argued by Fanasci, include: (1) an increase in the total revenues available to all Division I-A college football conferences and schools from pre-BCS formats; (2) enhanced

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importance of each regular season game; (3) increased fan appeal; and (4) a better opportunity for a non-BCS conference team to play in one of the major bowls.

Both commentators agree that the pro-competitive effects of the BCS outweigh the alleged anticompetitive harm caused by the BCS, such as the continued disparity between revenues available to BCS and non-BCS programs and the restriction on the number of Division I-A teams that may compete for a bowl game berth, or a spot in the national championship game (which limits fan interest as related to the non-BCS schools).

Turning to the Section 2 analysis, Rogers concludes that even if the BCS is shown to have market power in the relevant market (much more likely if the relevant market is the national championship game as opposed to all five BCS bowl games), the BCS lacks the requisite intent to monopolize because the BCS does not absolutely exclude the non-BCS Conference teams from the national championship game — technically, any Division I-A team ranked in the top two will play in the game regardless of conference.

Even though it is nearly impossible for a non-BCS conference team to achieve a top two ranking, the BCS does not completely foreclose the opportunity.

Rogers opines that, even if the BCS has market power, its conduct is not sufficiently anticompetitive so as to violate Section 2, as required by *Copperweld v. Independent Tube Corporation*, 467 U.S. 752 (1984) or *American Tobacco Company v. United States*, 328 U.S. 781 (1946).

Notwithstanding Rogers' well-reasoned Section 2 analysis, Utah fans and Boise State fans (Western Athletic Conference, 13-0 in 2006) can attest to the fact that although they witnessed their teams finish undefeated for a combined three seasons, they've never witnessed their team achieve a top two BCS ranking. Even the BCS cannot deny that an undefeated record may be hard to improve upon.

If Antitrust Law Allows It ...

Many legal scholars, Mr. Shurtleff, and college sports fanatics simply wonder why it appears that the national champion is decided not by pure competition, but instead by complex agreements among select schools and television networks which essentially exclude the underdog non-BCS conference teams from ever winning a title.

The Fresno States (Western Athletic Conference, 2008 NCAA national baseball champion) and Davidsons (Southern Conference, NCAA Tournament Elite Eight) of the college world exemplify the competitive attitude that America embodies: anything is possible with hard work, dedication, preparation, and perseverance, even for an extreme underdog.

These stories are nearly impossible in college football, thanks to the BCS. Instead, the BCS teaches the larger BCS conference schools not to fear the underdog, but just to conspire against them (and to protect their interest in lucrative television deals). As the musical artist "Spoon" declares in its hit song, "you got no fear of the underdog, that's why you will not survive!"

Just because antitrust law may not invalidate the BCS structure — thanks to pretty demanding pleading requirements for Sherman Act claims — does not mean that the BCS is the best, or most appropriate, way to determine a college football national champion.

President Obama agrees that not all teams have an equal opportunity of reaching the national championship game: "If you've got a bunch of teams who play throughout the season and many of them have one loss or two losses, there's no clear, decisive winner," President Obama declared on 60 Minutes after he won the election. "We should be creating a playoff system."

President Obama apparently recognizes that an organization that succeeds in preventing smaller-market conference schools from competing for a national championship, especially when those schools have better records and more decisive wins than their larger-market counterparts, is inequitable and sends the wrong message to America's college students, fans and society.

With other high-ranking political officials concurring — including seven United States Representatives who have introduced legislation requiring a playoff or threatened hearings on the matter — this debate may soon move further from the academic world and closer to the political battleground.

The University of Florida was this year's BCS National Champion, having defeated the University of Oklahoma in the Fiesta Bowl. If Florida played Utah, the outcome may have been no different, but certainly more legitimate. A prolonged antitrust analysis is unnecessary to arrive at this seemingly obvious conclusion.

--By Ruth T. Dowling and Joseph A. Farside Jr. of Edwards Angell Palmer & Dodge

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LLP

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Fixing the BCS Mess

By Alan W. Dowd
Thursday, December 6, 2007

Filed under: Culture

College football should bow to reality and devise a workable playoff system, says ALAN W. DOWD.

As expected, the announcement of college football's Bowl Championship Series (BCS) lineup has sparked controversy. The BCS National Championship Game will match Louisiana State, a team with two losses, against Ohio State, a team with one loss. But there are no fewer than nine other two-loss teams, one other one-loss team (Kansas), and one undefeated team (Hawaii) in college football's top division. Who's to say which two-loss team is better? The BCS bosses and their computers, that's who. BCS defenders say the system has done what it promised to do: guarantee a Number 1 versus Number 2 title game. But the BCS promised to determine a definitive national champion. It will fail to do that this year—just as it failed last year and the year before that and the year before that.

Why? Simply put, participants in the BCS "national championship" are determined not by head-to-head competition, but rather by computer rankings and the collective judgment of a "randomly selected" panel of former players, coaches, administrators, and current and former media (as assembled by the polling firm Harris Interactive). Just imagine deciding the World Series or the Super Bowl in such a manner! The BCS simply leaves too much power in the hands of pollsters and computer programs.

But that begs another question: why don't the NCAA, conference commissioners, and university presidents scrap the BCS and create a multi-team playoff system and thus prevent this annual wintertime mess?

Some say the answer is academics: a playoff schedule would take "student athletes" out of the classroom and keep them away from the study table. But that argument rings hollow. After all, if academics are really that important, why do university presidents allow their students to play games on "school nights"? ESPN broadcasts live college football games on Sunday nights, Tuesday nights, Wednesday nights, Thursday nights, and Friday nights—and it probably would broadcast them on Monday nights were it not for "Monday Night Football."

Others claim that a playoff format would destroy the traditional bowl system, which has been around for roughly a century. The Rose Bowl was first held in 1902; the Orange Bowl, the Sugar Bowl, the Cotton Bowl, and the Sun Bowl came about in the 1930s.

The antiquated system ensures that nearly three dozen teams will end the season on a high note, rather than just one. In addition to selecting the national title game matchup, the BCS distributes teams among the top four bowl games. But is it really worth continuing the BCS charade just so 32 schools can be "bowl winners"?

In truth, the bowl system generates enormous revenue, especially for the six major athletic conferences—the Southeastern Conference, the Atlantic Coast Conference, the Big Ten, the Big Twelve, the Big East, and the Pac Ten—and their member schools. In the 2006-07 season, conferences and schools took home nearly \$250 million from bowl games. In 2007-08, the payout is expected to be even greater. Each school fielding a team in one of the corporate-branded BCS bowls—the Rose Bowl Presented by Citi, the FedEx Orange Bowl, the Allstate Sugar Bowl, the Tostitos Fiesta Bowl, and the Allstate BCS Championship Game (held at the Sugar Bowl site)—is guaranteed to bring home \$17 million for its conference.

But here's the thing: an authentic college football playoff system could generate far more in revenue, at least if the NCAA men's basketball tournament is any guide. So money can't be the only reason for preserving the bowl system. The other big reason is power, namely, the power of the Big Six conferences to run the system and reap most of the revenues. As Sports Illustrated writer Tom Layden has observed, the BCS "is essentially a house game" dominated by the Big Six and Notre Dame (whose football team does not belong to a conference). "These 63 colleges have a setup whereby they control the championship system and its incumbent revenue." In other words, the NCAA—the governing body of college athletics—is largely locked out of the process. So are the dozens of schools that have the misfortune of not being affiliated with the Big Six and of not being named Notre Dame.

The BCS "house game" has prompted external scrutiny. In 2003, after seasons that saw highly ranked teams from the Mountain West Conference and Conference USA left out of the BCS, the Senate Judiciary Committee convened hearings. The president of Tulane University, Scott Cowen, called the BCS an "anticompetitive" and "unnecessarily restrictive and exclusionary system that results in financial and competitive harm" to the 54 schools it locks out. Democratic Senator Joe Biden criticized it as "un-American" and "rigged," while Republican Senator Orrin Hatch said it tramples on "basic fairness" and leaves dozens of schools at "a financial and competitive disadvantage." In 2005, the House of Representatives held similar hearings.

When the non-Big Six schools raised antitrust concerns and hinted at taking legal action, the BCS bosses responded by adding a fifth game to their postseason pageant and thus making a little more room for the forgotten 54. As a result, we have been treated to some spectacular David-versus-Goliath moments from the likes of Boise State and Utah. What we haven't gotten is a genuine national championship.

But there is a simple solution: big-time college football easily could hold a tournament at the four major bowl sites. Neither computers nor coaches nor columnists can fairly and objectively decide which two-loss team is the best. But a playoff can.

The model, of course, would be the NCAA basketball tournament. Americans love "March Madness" because of its surprises, tradition, drama, and emotion. But we also love its honesty and simplicity: conference champions are guaranteed a ticket to the tournament; another batch of teams is invited from an at-large pool by a committee of experts; and then those teams compete in a single-elimination tournament for the right to be called "national champion." The real madness is trying to determine a champion in

any other way.

A 16-team college football playoff would be just as straightforward and simple. Eleven spots in the field of 16 could be filled automatically by each conference champion, which would make room for Cinderella teams from smaller conferences such as the Mountain West Conference, Conference USA, the Western Athletic Conference, and Mid-American Conference. The remaining five spots could be filled by at-large teams, which would usually comprise runners-up from the six superpower conferences.

A committee comprised of athletic directors, NCAA officials, and former coaches could select the at-large schools, seed the teams from one to 16, and balance the placement of teams by strength and region, just as the NCAA Basketball Tournament Selection Committee does each March. The football committee could use computers, polls, and power rankings as tools in the selection process, rather than surrendering the selection process to them (as the BCS does).

Under this system, any team that won its conference championship would have a chance to compete in the national championship tournament—something the BCS fails to ensure. College football could unleash its answer to March Madness—call it “December Delirium.”

Starting on the first Saturday in December, after the conference championships were played, the top eight seeds would host a first-round game. A week later, on the following Saturday, the four BCS bowl sites would each host a game to determine college football's Final Four. A week later, one of those bowl sites would host the national semifinals, with one game played on Friday night and the other played on Saturday night. Finally, sometime on or after New Year's Day, one of them would host a real national championship game.

Those teams that didn't qualify for the tournament could still compete in other bowl games, which could be held prior to January 1 (as most of them already are). Since most of the tournament would be held during winter break and on weekends, the loss of classroom time would be negligible. In fact, the football tournament would cut into less classroom time than the NCAA basketball tournament does. Schools in the NCAA's lower divisions somehow manage to balance a football playoff system with classroom commitments; so could the top-division schools.

BCS defenders might respond that such a playoff would render college football's regular season meaningless. Many have argued that the BCS transforms the entire season into a kind of single-elimination tournament, thereby producing high drama and high-quality football. But this argument doesn't wash. This season, for example, Louisiana State lost twice and Ohio State lost once, yet they will now be playing for the national championship. Hawaii didn't lose at all, but it doesn't get a chance. What kind of single-elimination tournament is that?

Even with a playoff system, college football's regular season would still mean a great deal, just as the regular season still matters in college basketball. But even if playoffs did dilute the regular season, it would be preferable to have a “meaningless” regular season followed by a meaningful postseason, rather than what the BCS has spawned—a meaningful regular season followed by a meaningless postseason.

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Image by Getty Images.

STATEMENT OF PAUL MICHAEL KAPLAN, ESQ., PARTNER, ARENT FOX LLP
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BEFORE THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON
ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS

HEARING ON THE BOWL CHAMPIONSHIP SERIES: IS IT FAIR AND IN
COMPLIANCE WITH ANTITRUST LAW?

July 7, 2009

College football's highest level is universally recognized as providing some of the most exciting games in all of sports, and it has become a part of our American culture. Unfortunately, it is also universally recognized for its operation of one of our country's most brazen monopolies and unlawful restraints on trade. The Bowl Championship Series' controlling group (the "BCS Control Group")¹ has implemented a complicated scheme designed to hoard for itself the vast majority of the hundreds of millions of dollars in revenues associated with post-season college football games, and to ensure that its competitors are denied meaningful access to those games and to the monies associated therewith. This conduct constitutes a classic monopoly and an unlawful restraint on trade and therefore runs afoul of Sections 1 and 2 of the Sherman Act, as described in greater detail below.

The offending conduct concerns far more than just the game of college football. At its core, it involves big money payouts and lucrative media contracts, and in nearly all respects is no different from (and, according to existing legal precedent, should be treated no differently than) any other traditional monopoly. The competitive opportunities and monies unfairly denied by the BCS Control Group to its competitors affect those universities' athletic programs, academic programs, scholarship offerings, and facilities, among many other things. The impact of the offending conduct in this case is even greater than the impact caused by classic monopoly cases like *AT&T*, *Microsoft* and *Lorain Journal*. For example, because many of both the BCS Control Group universities and the victim universities are 501(c)(3) organizations, taxpayers are forced to subsidize this monopoly and then suffer its consequences. Moreover, universities that are unfairly denied opportunities and revenues will face greater obstacles to meeting their Title IX obligations. Of course, the traditional types of harm, *e.g.*, harm to consumers as a result of restricted output, higher costs, and curtailed competition, are also present.

In short, the BCS Control Group has created a scheme (or, as a similar scheme was characterized in the *Board of Regents* case discussed below, a "cartel") that has effectively distorted the market, but despite its open and notorious conduct, has until now been given a free pass to persist in its unjustified exclusionary acts. As Assistant Attorney General Christine Varney has recently noted: "As antitrust enforcers, we cannot sit on the sidelines any longer – both in terms of enforcing the antitrust laws and contributing to sound competition policy as part of our nation's economic strategy." (May 11, 2009, Remarks of Christine A. Varney, Assistant

¹ The BCS Control Group consists of the University of Notre Dame, and the following football conferences: the ACC, Big East, Big Ten, Big 12, Pac-10 and SEC.

Attorney General Antitrust Division, U.S. Department of Justice, as Prepared for the Center for American Progress).

It is our opinion² that the government, including the Department of Justice, Antitrust Division (the "Division"), should take action against the BCS Control Group to: (1) end the unlawful system by which the BCS Control Group ensures that its competitor conferences have no fair opportunity to access the hundreds of millions of dollars in revenues of major post-season college football games; and (2) secure relief which provides fair and equitable access to these games and the revenue and other benefits associated with them.

FACTUAL BACKGROUND

Most of the universities that participate in the highest division of college football (currently known as the Football Bowl Subdivision ("FBS"), formerly known as Division I-A) have been playing the sport for many decades. Prior to the formation of the Bowl Championship Series ("BCS") in 1998, and its precursors which were in existence for a few years each in the 1990s, a handful of football conferences never acted jointly to control the post-season's most important and lucrative games. Rather, some conferences had individual agreements providing them with tie-ins to play in a certain bowl, which tie-ins sometimes changed over time. And no conference, or independent university, was designated as a lower tier conference or team.

As a result, prior to the BCS and its precursors, every university that participated in the highest division of college football, including institutions that were not then members of what are now referred to as the Automatic Qualifying Conferences, had an opportunity to compete for the national championship. For example: BYU, then a member of the WAC conference, won a national title in 1984; Miami, which was then an independent, won several titles in the 1980s and early 1990s; and Pittsburgh and Penn State, which were also independents, won titles in the 1970s and 1980s, respectively.

But, as discussed below, those days where any team had an opportunity to win the national championship ended with the implementation of the BCS. The BCS was formed to control the most lucrative postseason bowl games for FBS universities, which bowl games are referred to as the BCS bowls. Each year, there are five BCS bowl games, consisting of the Rose Bowl, Orange Bowl, Sugar Bowl, Fiesta Bowl and the BCS National Championship Game.

Of the eleven FBS Conferences, six are designated by the BCS as Automatic Qualifying Conferences ("AQ Conferences"). These conferences' champions automatically qualify for a BCS bowl game every year, regardless of how they perform on the field. The other five

² The views expressed herein are based, in part, upon over 25 years of practice in and study of antitrust law. In particular, Mr. Kaplan has advised domestic and foreign financial institutions and corporations on antitrust aspects of mergers and acquisitions, and has advised a broad range of industries on general antitrust matters and litigation. Mr. Kaplan has taught an advanced antitrust course at Fordham Law School since 1991. For more detail concerning Mr. Kaplan's experience, please see the biography at Attachment 8 hereto. The Mountain West Conference (the "MWC"), a college football conference consisting of nine public and/or non-profit universities (the United States Air Force Academy, Brigham Young University, Colorado State University, University of New Mexico, San Diego State University, Texas Christian University, University of Nevada – Las Vegas, University of Utah, and University of Wyoming) has retained Arent Fox LLP to offer our opinions on the issues being explored by the Committee.

conferences are called Non-Automatic-Qualifying Conferences (“Non-AQ Conferences”) because these conferences’ champions do *not* automatically qualify each year for a BCS bowl game.

Accordingly, the BCS has essentially designed a system in which the clear connotation, and perception created, is that there are two types of conferences: strong conferences that receive automatic berths into the BCS bowls, and weak conferences that do not. But that perception created by the BCS does not square with reality, as conferences such as the Mountain West have performed very well over the past several years, yet the BCS continues to designate them as a Non-AQ Conference. See Attachment 1. The reason for this is simple: the BCS designations are not based on performance on the field, but rather bowl-ties and agreements off the field.

Nevertheless, as a result of the designations of AQ Conferences and Non-AQ Conferences, the media reinforces the perception that there are two tiers of conferences, which the media refers to as BCS Conferences (i.e., AQ Conferences) and Non-BCS Conferences (i.e., Non-AQ Conferences). Of course, the Non-AQ Conferences are part of the BCS as well, and are therefore BCS Conferences, but because of their designation as, effectively, second-class by the BCS Control Group, they are viewed by the media and the public as being outside of the BCS. One AQ Conference coach commented last season that the only “real” conferences are the AQ Conferences. Such denigrations of Non-AQ Conferences and their teams make it impossible for Non-AQ Conference teams that perform well to be taken seriously, and therefore to compete for equitable access to the BCS National Championship Game, as well as the other BCS bowl games, and the revenue, publicity, advertising, and the many other benefits that should flow from being a qualified team in a competitive market.

Adding to the inequity, the current BCS system uses confusing and secretive computer formulas, and pollsters who are often either biased or uninformed, to determine the BCS standings (and the top 2 teams in the final BCS standings play in the BCS National Championship Game). As for the pollsters, a number of them acknowledge that they rarely, if ever, watch some of the teams they are evaluating. When several of the voters in the Harris Interactive Poll, which helps determine the BCS standings and, ultimately, the title-game match-up, were asked about the University of Utah last season, the responses were as follows:

- “I did not see them play [in the regular season],” Bobby Aillet said.
- “I didn’t see any live games,” Lance McIlhenny said. “I just [saw] highlights.”
- “I just thought that the Mountain West is not as tough a conference [as others],” McIlhenny, a former SMU player, said. “Apparently I was wrong.”
- “I don’t recall if I saw them play specifically during the regular season,” David Housel said. “I don’t remember a specific game.”
- “I wouldn’t say I probably was wrong. I was wrong,” said Housel, a former Auburn athletic director who had the Utes ranked 10th.

As MWC Commissioner Craig Thompson stated in his May 1, 2009 testimony to Congress:

Teams from conferences such as the Mountain West are viewed far less often by many pollsters than teams from the current AQ Conferences. What's more, pollsters have no obligation to ensure they have all the necessary information to make the most sound judgments. In essence, their votes can easily be based on long-held perceptions, rather than knowledge. Moreover, there is a pre-season poll bias in favor of the AQ Conferences, and against the Non-AQ Conferences. The Associated Press (which was previously a component of the BCS standings) has never ranked a Non-AQ team higher than #15 in the preseason poll during the BCS era. The preseason AP and Coaches' Polls have ranked three or more Non-AQ teams just once – despite the fact that at least three Non-AQ teams were ranked in the previous season's final polls five out of 10 years. In both 2003 and 2004, five Non-AQ teams were ranked in the final AP and Coaches' Polls. Given this bias, Non-AQ Conference teams garner far less points in the preseason polls each year than they do in the final polls. Because these teams start so far back in the polls, they are at a tremendous disadvantage.

See Attachment 3. Accordingly, the BCS system first denigrates the Non-AQ Conferences and then it utilizes often ill-informed or biased pollsters to select the two teams for the BCS National Championship Game.

And given that the BCS limits the number of teams that can compete for the national championship during the post-season to just two universities, it is virtually impossible for a Non-AQ Conference team to be selected as one of those two teams. When these universities are constantly being referred to as Non-BCS, and some even claim they do not come from "real conferences," it is a virtual certainty that pollsters will not value such teams high enough to place them in the top two of the final BCS standings. The combination of designating certain conferences as Non-AQ, or lesser, conferences, and then permitting only two teams to compete for the title, dooms these teams to also-ran status, year-in, year-out, regardless of how they perform.

In 2008, for example, Utah, the MWC Conference champion, was undefeated, and had a better record than any of the 65 AQ Conference teams. And, the MWC had a better inter-conference record against AQ Conference teams than any of the other 10 conferences. Yet, Utah had to watch two one-loss AQ Conference teams play for the title. Moreover, this result is not an aberration. No Non-AQ Conference team has ever been permitted to play for the national championship since the BCS' inception.

In short, none of the 51 teams that play in Non-AQ Conferences can, for all practical purposes, ever win a BCS national championship given how the current system is constituted. These teams are, in effect, eliminated from the national championship even before their seasons begin.

Not only are Non-AQ Conference teams, for all practical purposes, frozen out of the national championship game, but collectively they are vying for at most one berth (out of 10) in the five lucrative BCS bowls. In contrast to the AQ Conference champions, the Non-AQ Conference champions must earn their berth in a BCS bowl by meeting certain standards. But even if they do satisfy this criteria, practically speaking, only one of those Non-AQ universities will actually have an opportunity to play in a BCS game. As a result of this system, high ranked Non-AQ Conference teams (like Boise State in 2008) are left on the outside looking in whereas poorly ranked AQ Conference champions (like Virginia Tech in 2008) get an automatic berth in a BCS bowl.

Accordingly, the BCS system is designed to ensure that each year (i) there will be no Non-AQ Conference teams in the national championship game, and (ii) at most one such team will play in a BCS bowl game (out of the ten slots available). It does not matter who is better on the field, the AQ Conferences and Notre Dame have effectively locked-up both slots in the national championship game each year, and nine out of the ten slots in the BCS bowl games.

The revenue inequities are equally stark. During the past four seasons, the AQ Conferences have received more than \$492 million in BCS revenue (87.4% of the total), while the Non-AQ Conferences have received less than \$62 million (12.6% of the total). More specifically with respect to MWC, in light of its performance on the field, the revenue disparities that it faces are stunning:

- In 2008, the MWC had the best inter-conference record against AQ Conference teams. In addition, the MWC had three teams ranked ahead of ACC champion, 19th-ranked Virginia Tech, which only participated in a BCS bowl because of the ACC's bowl tie-in with the Orange Bowl.
- The MWC had two teams ranked ahead of Big East Conference champion, 12th-ranked Cincinnati, which also only received a BCS bowl berth because of its deals off the field.
- The MWC champion, Utah, was chosen by the Sugar Bowl ahead of Cincinnati, and Utah certainly would have also been chosen ahead of Virginia Tech for a BCS bowl game, were it not for the latter's tie-in with the Orange Bowl.
- The Sugar Bowl in which Utah played had far higher television ratings than the Virginia Tech v. Cincinnati Orange Bowl.
- Notwithstanding all of the above, the ACC and the Big East each received \$18.6 million from the BCS for 2008, whereas the Mountain West received only \$9.8 million.
- As Attachment 2 indicates, the Mountain West has performed well over the past four years against the six AQ Conferences. Yet, over that same period, on average the Mountain West has received \$60 million dollars less from the BCS than the six AQ Conferences, as the Mountain West has received \$18 million and those others have averaged \$78 million.

The above-described competitive and revenue inequities cause tremendous harms to the Non-AQ Conferences. For example, these schools are placed at a great disadvantage with respect to recruiting. Most prospective players would like to have an opportunity to compete for a national championship, or at the very least play in a BCS bowl. The Non-AQ schools are effectively barred from the former, and they are put at a tremendous disadvantage with respect to access to the latter. These schools also have a more difficult time retaining successful coaches who also would like to compete for national championships and regularly play in BCS bowls.

In addition, because of the revenue discrimination which has a significant exclusionary effect, these universities are at a disadvantage with regard to providing:

- Improved academic programs (additional academic advisors, additional tutors, upgrades to computer laboratories, summer school opportunities).
- Increased scholarships (both number and value).
- Increased medical support (additional athletic trainers, payment of student health care costs).
- Improved team travel (minimize missed class time).
- Facility improvements.

Other athletic programs are impacted as well by the inequities. For example, without the substantial guaranteed revenues provided to the AQ Conference universities, Non-AQ institutions often have more difficulty complying with Title IX requirements.

In addition, Non-AQ Conference universities are denied by the BCS of the opportunity for increased media attention and recognition. The increased visibility for universities that play in a BCS bowl game can lead to increased enrollment applications. Therefore, universities that are discriminated against with respect to opportunities to play in such games are denied opportunities to grow their student and, ultimately, alumni bases. Moreover, institutions that win the national championship generally receive increased donations and additional revenue from sale of merchandise. Non-AQ schools are effectively barred from having an opportunity to receive these benefits.

Consumers are also harmed. They do not get an opportunity to see the best teams play in the biggest bowls. Moreover, the post-season is far less exciting under the current system because only one game has national championship implications, rather than numerous games under a playoff.

The regular season is also less exciting under the current scheme. Objectively speaking, far more regular season games would have national championship implications where an eight-team playoff was held after the conclusion of the regular season, than is true today with the current system. In fact, there are more than 100 games that would have had national championship implications in 2008 under the BCS Reform Proposal (which is the proposal

submitted by MWC to the BCS, and included an eight-team playoff), but did not have such implications under the current system.

The non-BCS bowls would not be harmed by the BCS Reform Proposal, as those games are played primarily in December, well before any playoff games. Moreover, as the BCS has elevated some bowl games over others, and created a national championship game, the non-BCS bowls have nevertheless continued to increase in number. The reason for this is simple: teams that do not reach the highest level still want to play in non-BCS bowls, the bowls still want to host the games, ESPN and other networks still need to fill their programming lineup, and the sponsors (of which there are over 1,000 for all bowls combined) still want to sponsor these games. The same reasoning would apply if a few playoff games are added. Moreover, the BCS bowls would benefit from a playoff because their games would then have national championship implications every year, rather than once every four years.

Finally, without government intervention it is extremely unlikely that the system will change in any meaningful way. The BCS Presidential Oversight Committee, which governs the BCS, is comprised of eight members: six from the AQ Conferences (i.e., one vote per each AQ Conference), one from Notre Dame, and only one member – and therefore vote – representing all five Non-AQ Conferences collectively (i.e., each Non-AQ Conference has only one-fifth of one vote). Given this dynamic, it is easy to understand how the BCS Control Group can easily, and will likely, maintain full control of the system, with all of its violations, absent intervention.

THE BCS CONTROL GROUP'S CONDUCT VIOLATES THE SHERMAN ACT AND WILL CONTINUE TO DO SO ABSENT GOVERNMENT INTERVENTION

As described above, the BCS Control Group's scheme is designed and operated by those with monopoly power to restrain competition, restrict output and fix prices to ensure that they keep for themselves the vast majority of the hundreds of millions of dollars available in connection with college football. As discussed, the BCS Control Group continues its cartel by creating new barriers to entry into the market while exploiting existing barriers, with the apparent aim of ensuring that its monopoly control will continue in perpetuity. This system is not merely unfair and unjust as a matter of common sense and basic principles of justice and fair play, but it is illegal under Sections 1 and 2 of the Sherman Act.

Senators Hatch and Bennett have succinctly summarized the flaws in the BCS Control Group system as follows:

The inadequacies of the current BCS system extend far beyond the inequities on the field. Universities that compete in BCS bowl games and have an opportunity to compete for the national championship garner increased visibility for their institutions. In addition, many teams that have never qualified for a BCS game are able to receive a substantial share of the revenues generated by the BCS simply by virtue of their membership in the favored member conferences. At the same time, nearly half of all the teams in Division I football are forced to share a far smaller portion of the revenues even if a team from their conference is able to overcome the odds and play their way into a BCS game. Therefore, those schools

that do not hail from the BCS's preferred conferences begin each season at competitive and financial disadvantage.

(May 8, 2009 Letter to Swofford and Frohnmayer, Attachment 4 hereto). What is perhaps most shocking is that the BCS Control Group has admitted that its scheme is a deliberate mechanism to entice the favored conferences by foreclosing or restricting their competitors' access to the revenues and games. See *Testimony to Congress*, Commissioner Swofford, May 1, 2009, Attachment 5 hereto; Letter from Swofford and Frohnmayer to Senators Hatch and Bennett, dated June 9, 2009, Attachment 6 hereto.

The BCS Control Group's Monopoly Plainly Violates Section 2 Of The Sherman Act

In the years immediately preceding the current administration there was a trend against enforcing Section 2 and in favor of self-correction and self-policing. That trend has been definitively reversed as a matter of Department of Justice policy. On May 11, 2009, Assistant Attorney General Christine Varney noted that "the pendulum [has] swung too far from Thurman Arnold's legacy of vigorous enforcement," self-correction has not occurred, and "we now see numerous markets distorted." (Varney Remarks at p. 4). To correct this problem, Ms. Varney vowed that "[g]oing forward, the Department is committed to aggressively pursuing enforcement of Section 2 of the Sherman Act in furtherance of the principles embodied in these [precedential court] cases" (*Id.* at p. 14) and called for "vigorous enforcement [to] play a significant role...to ensure that markets remain competitive." (*Id.* at p. 4).

The BCS Control Group scheme is a glaring example of an uncorrected illegal monopoly, and one that, without the proper correction: (1) implicates access to hundreds of millions of dollars presently controlled by only a few conferences via unlawful restrictions on competition; (2) impacts our 501(c)(3) universities and their students and taxpayers, among others; and (3) detrimentally affects universities in their ability to carry out their obligations under Title IX to female student-athletes. Applying Sherman Act standards to the BCS Control Group scheme, it is apparent that such scheme violates Section 2, but with the proper oversight can be corrected, so as to further the goals of 501(c)(3) educational institutions.

The elements necessary to prove the existence of a monopoly are met in this case. In the FBS college football arena, the BCS Control Group has monopoly power and has used its power to willfully and intentionally exclude competition, create and maintain barriers to entry into the market, control prices and restrict output, and ultimately to hoard the vast majority of profits unto itself. Moreover, the BCS Control Group scheme contains the same components and follows the exact same pattern that has been repeatedly held in a long line of cases as an illegal monopoly and violative of Section 2. What follows is a description of how, under that precedent, the BCS Control Group scheme must be considered a monopoly and should be terminated.

I. The Elements Of A Section 2 Violation

a. Monopoly Power In The Relevant Market

In order to establish a Sherman Act Section 2 violation, the following elements must be proven: “(1) possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). In applying these elements, courts assess a participant’s market power by first determining the extent and degree of the participant’s power to affect prices and/or output in a particular and defined market; then the court determines whether such market power amounts to monopoly power, and if so, whether that monopolist’s power is maintained through proper and competitive means, or through illegal and anticompetitive means.

As to the first element, a party possesses monopoly power when it has “the power to control prices or exclude competition.” *United States v. E.I. du Pont Nemours and Co.*, 351 U.S. 377, 391-92 (1956). In addition, the courts have long-established that monopoly power “may be inferred from a predominant share of the market,” *United States v. Grinnell Corp.*, 384 U.S. at 571 (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)), and have held across a broad category of markets and industries that overwhelming market power is indicative of monopoly power. See e.g., *Grinnell*, 384 U.S. 563 at 571 (noting that 87% of the accredited central station service in the fire and burglar alarm market is indicative of monopoly power); *United States v. Dentsply*, 399 F.3d 181, 188 (3d Cir. 2005) (concluding that a “persistently high market share between 75% and 80% on a revenue basis,” qualified Dentsply as a monopolist in the market for prefabricated artificial teeth); *Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50 (1951) (finding that Lorain maintained a complete newspaper monopoly over local advertising and covered through its distribution 99% of area families). Another important point is that courts look not to just formalistic legal notions and concepts in defining the relevant market and market power, but they look at the “economic reality of the market at issue” and “economic substance” of complained-of arrangements to address whether these arrangements are indeed anticompetitive in nature and in reality. *United States v. Dentsply*, 399 F.3d at 189.

As for determining the relevant market, the *du Pont* Court established that the relevant market for purposes of the Sherman Act is the market which contains the individual product and its reasonably interchangeable products that can be used by consumers for the same purposes. 351 U.S. at 394. In other words, the relevant market takes into account the products exchanged in that market, along with their relatively-easily substituted alternatives, to assess what type of power a participant is able to exert in that market. Particular to the college football context, in *National Collegiate Athletic Assoc. v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 111 (1984), the Court incorporated its earlier holding in *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959), and defined the relevant market for college football as a national market, divided into the separate national markets for championship events and non-championship events. *Id.* at 112. The Court explained that “intercollegiate football telecasts generate an audience uniquely attractive to advertisers,” and “competitors are unable to

offer programming that can attract a similar audience.” *Id.* at 112. Importantly, the Court’s definition foreclosed the argument that there are reasonably attractive or available substitutes to satiate this market demand.

b. Illegal Acquisition Or Maintenance Of Monopoly Power

Having set out the standards for monopoly power in the relevant market, the second requirement to establishing Section 2 liability is to demonstrate that a monopolist has acquired or maintained its monopoly position through illegal and anticompetitive means aimed at eliminating competition in the relevant market. In defining the parameters for monopoly liability, courts have been careful to note that possessing dominant and even monopoly power by itself is not automatically violative of Section 2. Section 2 liability also turns on whether the participant uses or maintains its monopoly power illegally by engaging in anticompetitive conduct that “reasonably appears to be a significant contribution to maintaining monopoly power.” *United States v. Dentsply Intl, Inc.*, 399 F.3d at 187. Simply stated, the courts look to whether an entity has achieved or continues to operate its monopoly through illegal anticompetitive means, instead of through business ability or superior product and operations. A monopolist may not use its monopoly power to “foreclose competition, gain a competitive advantage, or to destroy a competitor.” *Id.* at 186. It must compete on the merits and maintain its market share and competitive advantage through “legitimate business practices, and a superior product.” *Conwood Co., L.P. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002). When an entity attempts to control a market through predatory behavior and anticompetitive tactics, the Sherman Act provides a mechanism for extirpating the monopoly and returning the market to competitive balance.

For example, in *Conwood*, there was significant evidence that the defendant United States Tobacco Company (USTC) engaged in anticompetitive tortious behavior by destroying its competitors’ on-site advertising materials, instituting exclusive agreements with retailers, and misrepresenting important market data to retailers, all with the goal of “maintaining its monopoly power.” *Id.* at 788. The court affirmed the jury’s verdict against USTC, noting that such anticompetitive actions committed by the monopolist “rose above isolated tortious activity and was exclusionary without a legitimate business justification.” *Id.* at 795.

Similarly, in *Dentsply*, the dominant manufacturer had historically enjoyed a significant market share and maintained monopoly power in the market for prefabricated artificial teeth. However, the court concluded that this monopoly was not maintained through competition on the merits, but through a series of exclusionary distribution agreements and artificially-created barriers to entry, such that Dentsply was able to “effectively choke[] off the market for artificial teeth, leaving only a small sliver for competitors.” *Id.* at 196.

Grinnell Corp. v. United States, 384 U.S. 563 (1966) also involved a dominant manufacturer who maintained monopoly power to the exclusion and detriment of its competitors and the market in general. Grinnell maintained 87% market share in the fire alarm and burglar alarm system market, through a series of mergers, acquisitions, restrictive agreements, and predatory pricing practices. *Id.* at 576. The Court found that it was without question that 87% market share constituted monopoly power, and that Grinnell used this monopoly power to

“exclude competitors and fix prices.” *Id.* The Court also found that Grinnell had accomplished its position not through natural growth and development, but that it “built its empire” with a blatantly anticompetitive purpose. *Id.* at 574.

2. *The BCS Scheme Is A Classic Monopoly*

Applying these standards to the instant case, there is no question that the BCS Control Group maintains a complete monopoly over BCS Bowl post-season market similar to the monopolies in *Conwood*, *Dentsply*, and *Grinnell*.

a. The BCS Control Group Has Monopoly Power In The Relevant Market

The relevant market is national in scope, as has been definitively established by *Board of Regents*, and is a point which the BCS Control Group essentially concedes. More specifically, there are two potentially relevant national markets at play: (i) the BCS bowl market; and (ii) the national championship game market. It is beyond question that the BCS Control Group has monopoly power within each of these markets, for it controls the *only* means and access to the BCS bowl games and to the BCS National Championship Game.³ The BCS Control Group improperly uses its control to exercise monopoly power in both relevant markets, by (i) severely limiting the Non-AQs’ access to the BCS bowl games; and (ii) precluding the Non-AQs from obtaining the title “national champion,” in the ways described in detail throughout this statement.

b. The BCS Control Group Illegally Acquired And Maintains Its Monopoly

The BCS Control Group system runs afoul of Section 2 because the BCS Control Group established and maintains this monopoly power not through business acumen and merit, but through sheer brute economic coercion and illegal anticompetitive means, as discussed in detail throughout this statement. In sum, there is *no* competition in the market for operation of the BCS bowl post-season – the BCS Control Group is the only entity which charges itself (and has been allowed to operate) to manipulate access to the most lucrative and sought-after post-season games and the national championship game. The BCS Control Group is a self-established and self-serving entity which originated its own rules, established its own members, and utilizes a system of illusive polls and computer models to control⁴ access to hundreds of millions of dollars in revenue which *it alone* administers and secures for its chosen few conferences. This is the quintessential definition of a monopolist. *See du Pont*, 351 U.S. at 394 (“[W]hen a product is

³ In fact, based upon case law precedent like *Board of Regents* coupled with statements made on the BCS’s own website, the relevant market over which the BCS has monopoly control may well expand to the entire football season, including its regular season games and the BCS bowl games. *See, e.g.*, <http://www.bcsfootball.org/bcsfb/background> (quoting West Virginia Coach Rich Rodriguez’s statement that “In [FBS] football...[o]nce you lose one game, you’re mostly out. If you lose two, you’re definitely out. We got 12 playoff games. Teams take that approach...You stub your toe, you can never get back in”). It is clear then that the current system both impacts and reduces interest in the regular season games as well.

⁴ The self-perpetuating cycle of the unfair system is evident in anecdotal evidence from many pollsters who consider non-AQ programs and teams as part of “lesser conferences” and who do not even make the effort to watch games that do not include AQ Conference teams. Because these pollsters do not value highly Non-AQ Conferences, these conferences cannot garner enough support to climb the polls, and therefore continue to hold the unwarranted title of a being a “lesser conference.” The financial and other anti-competitive effects of this title are severe. And, as discussed herein, the BCS Control Group’s scheme ensures that those pollsters’ views never change.

controlled by one interest, without substitutes available in the market, there is monopoly power.”).

With respect to the market for college football national championship games, the BCS Control Group acquired and continues to maintain its monopoly control through a combination of two components of its system. First, it created a two-tier system of conferences, some of which automatically qualify for BCS bowl games (i.e., AQ Conferences) and some of which do not (i.e., Non-AQ Conferences). By creating this class system, it sends the message that AQ Conferences are always strong, and Non-AQ Conferences are always weak, even though that message is false. Yet, that message gets even further reinforced by AQ Conference officials, such as the University of Alabama coach, who last year stated that AQ Conferences are the only “real” conferences. The media picks up on this as well, and refers to AQ Conferences as the only “BCS Conferences” even though in actuality all of the FBS conferences are BCS Conferences. Second, the BCS Control Group limits the number of teams who can compete for the national championship once the regular season ends to two. Given the denigration by the BCS of the Non-AQ Conferences, it is hardly surprising that pollsters never value Non-AQ Conference teams sufficiently high to rank them in the top 2 of the final BCS standings, which is what is required for a team to compete for the national championship under the BCS system.

Last season, the MWC had the best inter-conference record against AQ Conference teams, and Utah, the MWC champion, had a better record than all 65 AQ Conference teams. Yet, Utah – like every other Non-AQ Conference team since the inception of the BCS – was nevertheless denied the opportunity to compete for the title.

With respect to the market for BCS bowl games, the BCS Control Group acquired and continues to maintain its monopoly control as follows. Of the ten available berths in the BCS bowl games, the AQ Conferences automatically receive six of those slots, one each for their respective conference champions, regardless of the record or ranking of those teams. In addition, because the BCS Control Group denigrates the Non-AQ Conferences, and because the BCS bowls who select the remaining at-large teams for their games need to continue to curry favor with the BCS Control Group (or otherwise those BCS bowls may no longer be one of the BCS bowls when their contract comes up for renewal), at least three of the four remaining berths are awarded to AQ Conference teams or Notre Dame each year. That is, since the inception of the BCS, no more than one Non-AQ Conference team has ever received a BCS bowl berth in a given year. The BCS Control Group effectively ensures itself of at least 90% (i.e., 9 out of 10) of the coveted slots each year. As a result, high-ranked Non-AQ Conference teams, such as Boise State in 2008, are left out of the BCS bowls, whereas teams such as Ohio State, Cincinnati and Virginia Tech are included despite their lower rankings.

The BCS Control Group’s conduct fits squarely in the same mold with the defendants in *Lorain Journal*, *Grinnell*, *Aspen Skiing*, and *Conwood*, who were all held to violate the Sherman Act through their varying degrees of blatantly anticompetitive and predatory activity. The defendants in these cases acquired monopoly power within a market, and then engaged in various anticompetitive means to maintain that monopoly.

c. The BCS Control Group's Scheme Wholly Lacks Any Legitimate Business Justification

There are no pro-competitive attributes to the BCS Control Group system. More than fifty universities are effectively foreclosed by the BCS Control Group's artificial barriers from participating in the BCS National Championship Game and greatly limited in their access to the BCS bowl market altogether. There is no legitimate justification for artificially limiting who plays in the BCS National Championship Game or the BCS bowl games in the manner in which the BCS Control Group does so. Rather, it is simply exclusionary behavior that benefits only the BCS Control Group.

The BCS Control Group claims that its system is justified by market forces and preferences, and that instituting an alternative playoff system would (1) produce a less exciting regular season; and (2) would result in the elimination of the post-season bowls. *See Testimony to Congress*, Commissioner Swofford, May 1, 2009. These contentions are completely unfounded as discussed later herein. Moreover, even if there somehow was merit to these contentions, which themselves border on frivolous, the system is still exclusionary and harms competition. The BCS Control Group's activities go beyond simply a private entity making business choices and being rewarded by market forces. While a private entity certainly may organize as it wishes, and may choose how to operate its business and with whom it transacts business, this right – like most – is qualified. *See* May 11, 2009, Remarks of Christine A. Varney, at p. 11. A business may not exploit its market power to the detriment of competitors.

For example, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), the dominant market leader and owner of a major skiing facility (Ski Co.) attempted to justify its decision to unilaterally terminate a revenue sharing agreement and severely limit its competitors' access to its slopes by arguing that as a legitimate business, it had the right to terminate the revenue-sharing arrangement, that it owed no duty to cooperate with or contract with its competitors, and that it could realize efficiency gains by terminating the agreement. *Id.* at 600-01; 608-09. The Court affirmed the jury verdict against Ski Co., noting that the absence of a duty to transact business with another firm does not give a monopolist an unqualified right to destroy competitors through anticompetitive and predatory behavior. *Id.* at 600-01. The Court affirmed the jury's verdict that Ski Co. was willing to "sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival," thus running afoul of the antitrust laws. *Id.* at 610-11.

Courts have long recognized that there is a major separation between business growth and the acquisition of illegal monopoly power—and have enforced the Sherman Act when it is clear that a firm is doing more than simply exercising good business judgment, but is actually taking steps to exclude others from the market in efforts to completely dominate the market. A monopolist (or any competitor) crosses the line and becomes liable for anti-competitiveness when it engages in predatory activities with the intent and goal of stifling competition. *See United States v. Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001) ("The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."). In *Microsoft*, the court summarized "a

century of case law” to explain that the “The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.” *Id.* at 58 (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)). Indeed, anticompetitive monopolistic conduct, proper characteristics of the BCS Control Group’s conduct, is precisely the type of conduct the Sherman Act was intended to eliminate.

Here, the BCS Control Group fortifies its monopoly by perpetuating barriers to entry and access to the market, and by promoting policies which will ensure that the market remains uncompetitive. The BCS Control Group uses off-field agreements and biased polls and computer systems which, although they have the appearance of propriety, really serve to solidify and perpetuate the elusive nature of a non-AQ team or non-preferred conference team participating in the BCS post-season. The fact that the BCS Control Group effectively excludes Non-AQ Conference teams from the BCS National Championship Game, and limits their number of berths in BCS bowl games to a maximum of one (out of ten) per year is *prima facie* evidence of illegal monopoly behavior. The BCS system unnaturally limits output to the market, eliminates competition among potential and actual market participants, and artificially inflates prices (revenue) at the expense of the lucky few who do receive the lion’s share of the revenue generated from the BCS bowl games.

In fact, the BCS Control Group’s anticompetitive behavior is eerily similar to the NCAA’s behavior in *Board of Regents* – behavior that the Court found clearly anticompetitive. The NCAA devised a scheme to coerce every member program to blindly adopt its broadcasting plan, without complaint and without free choice. The NCAA stood to benefit handsomely from the exclusive network revenue contracts, and from its dominant power over the entire college football national broadcast system. The Court struck down this scheme, holding that it was blatantly anticompetitive, and constituted an unreasonable restraint because the exclusive plan (1) placed a ceiling on the number of televised football games; (2) set an artificial limit on the number of games available to broadcasters and consumers; and (3) limited member institutions’ freedom to negotiate their own television broadcast contracts. *Id.* at 98-99.

The BCS Control Group is no different than the NCAA in *Board of Regents*. It has instituted an exclusive system, packaged it up, and offers it to member schools as a take it or leave it plan or contract of adhesion. The system seriously limits output and access to the most coveted and lucrative post-season games, and artificially inflates the price that would prevail if the market for these post-season games were competitive. Importantly, too, the victims of this system are numerous, and include the national market of consumers who enjoy college football; the non-AQ teams, along with their fans, schools, programs, and staff; and the taxpayers who must absorb the costs of supporting an illegal monopoly. There is even some element of harm to the AQ teams, who, even though they enjoy a massive share of the spoils of the BCS system, would also benefit from the BCS Reform Proposal because the crowned champion would be universally recognized as the true champion, and the AQ conferences would surely benefit from the increased output and revenue that would result from a multifold increase in viewership, fan interest, and scope that the full national market could bring.

In addition, and obviously, the BCS Control Group has not operated ignorant of its exclusionary system. On the contrary, the BCS Control Group thrives by this exclusionary system, for its revenue and clout continues to grow year after year. Since 1998, the BCS Control Group has not achieved this momentous growth by competing on the merits—it has achieved it through the sheer determination to maintain its monopoly by anticompetitive means. Courts and political bodies have cautioned against allowing arrogant monopolists to flaunt their economic power in the face of the average consumer who is harmed by the lack of competition and access in certain markets. The Court of Appeals for the Second Circuit has acknowledged that “[n]o monopolist monopolizes unconscious of what he is doing.” *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945) (“Alcoa meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to ‘monopolize’ that market, however innocently it otherwise proceeded.”). The BCS Control Group has not been unconscious of its momentous growth in power and revenue, and even amidst overwhelming disapproval from fans, college football players and programs, Congress, the Division, and even the President of the United States⁵ — the BCS Control Group still refuses to relinquish control over its monopoly.

Government involvement in this case is of paramount importance, especially in light of the Division’s recently announced focus on aggressively investigating antitrust activity which has been allowed to brew unchecked in recent years. This re-invigorated policy parallels the major goals of the antitrust laws themselves—to eradicate anticompetitive activity for the benefit of all would-be competitors and consumers. From the earliest days of antitrust prosecution, it was well established that “antitrust laws protect competition, not competitors.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). As such, the mantra of antitrust enforcement has been the goal to “terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.” *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 250 (1968). Over time, the courts have announced new policies and innovations to deal with monopolies and anticompetitive markets, but have never wavered from this underlying goal. Even when dealing with one of the largest monopolies in the history of the country, the Court reiterated that “Antitrust remedies . . . must ‘effectively pry open to competition a market that has been closed by defendants’ illegal restraints.” *United States v. AT&T (Modified Final Judgment)*, 552 F. Supp. 131, 150 (D. D.C. 1982). Though administrations and policies change, these underlying fundamentals of the antitrust laws do not, and these laws are meant to continue protecting competition and consumers and ensure a competitive marketplace.

⁵ ESPN.com News Services, “We welcome dialogue on what’s best for college football,” Nov. 18, 2008 (quoting President-elect Obama: “If you’ve got a bunch of teams who play throughout the season, and many of them have one loss or two losses, there’s no clear decisive winner. We should be creating a playoff system. It would add three extra weeks to the season,” he said at the conclusion of a wide-ranging interview. “You could trim back on the regular season. I don’t know any serious fan of college football who has disagreed with me on this. So, I’m going to throw my weight around a little bit. I think it’s the right thing to do”), available at <http://sports.espn.go.com/ncf/news/story?id=3708348>.

The BCS Control Group Scheme Also Violates Section 1 Of The Sherman Act

The BCS Control Group's conduct violates Section 1 of the Sherman Act because it constitutes a "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce...." 15 U.S.C. § 1.

As a threshold matter, the BCS Control Group is an association which restricts the ability of member institutions to compete against each other for price, access, and output in connection with football games and the associated revenues, and the BCS Control Group scheme therefore constitutes "a horizontal restraint – an agreement among competitors on the way in which they will compete with one another." *Board of Regents*, 468 U.S. at 99.

The appropriate standard by which to evaluate the BCS Control Group's conduct under Section 1 is the *per se* rule, rather than the Rule of Reason. As explained by the Supreme Court in *Board of Regents*:

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high...In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.

Id. at 100.

The *Board of Regents* Court noted that the NCAA "plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable," and that the contests being marketed by the NCAA would be "completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." *Id.* at 101-102. As a result, the Court found that the NCAA's role in creating certain restraints within college football was "essential" and therefore evaluated the NCAA's conduct under the Rule of Reason rather than as a *per se* violation. Here, as in *Board of Regents*, the essential entity is the NCAA, rendering the BCS Control Group *non-essential*; therefore, the *per se* rule applies to the conduct of the BCS Control Group.

In this case, the NCAA still exists as the entity governing college football, including the FBS. The NCAA is available to, and in fact does, provide the necessary regulations governing the FBS. The NCAA's rules (available at http://web1.ncaa.org/web_files/champ_handbooks/football/2008/psfootball_handbook.pdf) establish the "minimum standards that have been adopted by the NCAA" concerning the college football post-season. Those rules include provisions governing athlete eligibility, officiating, and other essential aspects of the game and its organization. The NCAA has similar, extensive rules governing college football's regular season (available at <http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/sports+and+championship/football/playing+rules/index>).

The BCS Control Group, unlike the NCAA, is therefore *not* essential to the organization and marketing of college football – particularly given the presence and role of the NCAA in that respect. To the contrary, the BCS Control Group serves no role other than to ensure that output is restricted, and that its controlling group gets preferred treatment, preferred access to games (and the associated publicity and revenue), and the vast majority of the revenues. The BCS Control Group’s conduct is not essential, but instead is illegal. As the offending party in the present case, the BCS Control Group’s conduct should be evaluated as a *per se* violation, and not under the Rule of Reason.

1. BCS Control Group’s Conduct Is A Per Se Violation of Section 1

A *per se* violation is one in which the conduct at issue is so plainly anticompetitive as to be *per se*, or conclusively, unreasonable. See, e.g., *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150. Examples of *per se* violative conduct include horizontal price-fixing and horizontal output restraints between competitors:

Agreements of a type that always or almost always tends to raise price or to reduce output are *per se* illegal...Typically these are agreements not to compete on price or output. Types of agreements that have been held *per se* illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. The courts conclusively presume such agreements, once identified, to be illegal, without inquiring into their claimed business purposes, anticompetitive harms, procompetitive benefits, or overall competitive effects.

U.S. Dep’t of Justice and Federal Trade Comm’n, *Antitrust Guidelines for Collaborations Among Competitors*, Sec. 3.2 (April 2000). Thus, where there is a *per se* violation, the complaining party need only prove that the practice occurred, and is not required to affirmatively demonstrate its competitive unreasonableness, while the defendant is precluded from attempting to justify the restraint as being reasonable. *Id.* Moreover, in the *per se* context, there is no need to examine market definition or market power. See *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (“No ‘proof of market power’ is required where the very purpose and effect of a horizontal agreement is to fix prices to as to make them unresponsive to a competitive marketplace...Thus, where a practice has obvious anticompetitive effects – as does price-fixing – there is no need to prove that the defendant possesses market power”).

The BCS Control Group’s conduct constitutes a classic *per se* violation of Section 1. As established by *Board of Regents* and discussed above, the restraint is horizontal in nature. The BCS Control Group’s conduct constitutes price-fixing, and therefore, as in *Catalano v. Target Sales*, 446 U.S. 643 (1980), violates Section 1 under a *per se* analysis. In *Catalano*, the court considered a claim by beer retailers that wholesalers had violated the Sherman Act by agreeing to stop providing short-term credit to retailers. The court held that the agreement was a *per se* violation of Section 1, reasoning that an agreement to terminate the practice of giving credit is tantamount to an agreement to eliminate discounts and thus falls squarely within the traditional *per se* rule against price fixing. *Id.* at 648.

In the present case, the system is designed to fix prices so that the revenues that the Non-AQ Conferences can obtain from the BCS bowl games will always be significantly less than the revenues that the AQ Conferences can obtain from those same games, irrespective of performance or participation in those games. In 2008, for example, MWC, the ACC and the Big East each had one team play in a BCS bowl game. But in the final BCS standings, MWC had three teams ranked higher than the ACC champion, Virginia Tech, and two teams ranked higher than the Big East champion, Cincinnati. Moreover, the Sugar Bowl in which Utah participated received far higher television ratings than the Virginia Tech vs. Cincinnati Orange Bowl. Yet, the Big East and the ACC each received \$18.6 million from the BCS for 2008, whereas the MWC received only \$9.8 million.

In addition, as Attachment 2 indicates, the Mountain West Conference has performed well over the past four years against the six AQ Conferences. Yet, over that same time period, on average the Mountain West Conference has received \$60 million dollars less from the BCS than the six AQ Conferences, as the Mountain West has received \$18 million and those others have averaged \$78 million. There is no justification for this disparate allocation (for example, on-field performance); rather, it is simply a part of the overall scheme, which fixes the prices such that AQ Conferences always receive the lion's share of the revenues.

Moreover, the system permits the preferred schools to raise prices for their own games, both with respect to their fans and their advertisers, because the desirability of their games is artificially inflated as a result of the scheme. The AQ Conferences, by virtue of the scheme, drive up the prices they command for tickets to their games, concessions, licensing, merchandise, television appearances and advertising revenues. At the same time, the Non-AQ Conferences are correspondingly limited in the prices and revenues they are able to obtain, such that they can never compete at the same level with the AQs. Moreover, in what is becoming a troubling trend, the flawed BCS scheme has already made its way into discussions of college *basketball*, which has absolutely no relevance or relation to the BCS scheme.⁶ This serves both to strengthen and expand the current illegal caste system. Thus, the BCS Control Group's conduct is *per se* violative of the Sherman Act.

The BCS Control Group's conduct is anticompetitively restricting output in violation of Section 1. The BCS Control Group's scheme limits the number of BCS bowl games available to Non-AQ Conferences, from which they can draw revenue and other tremendous benefits. The number of games that are elevated to the highest status under the BCS system are restricted to the five BCS bowl games, limiting the number of teams that can participate to only ten. As previously described, the way in which the ten participating teams are selected is through a scheme of confusing and secretive computer formulas and biased polls, in conjunction with tie-in agreements that exist between the Bowls and individual conferences.

⁶ Indeed, sports commentators have noted the absurdity of the BCS scheme by applying it to the college basketball arena. For example, in a 2006 article, Gary Parish noted that if the BCS scheme applied to college basketball, "17 of the 20 Final Four [college basketball] teams from [2002-2006] would have been omitted from a shot at the title," and none of the actual title winners in each of those years would have even been permitted to play in the title game under BCS rules. See <http://www.cbssports.com/collegebasketball/story/9848727>.

The Non-AQ Conferences' output, i.e. the number of BCS bowl games they can play, is blatantly and artificially limited because, as a practical and intended result of the scheme, only one of the ten available spots in BCS bowl games is actually available to the Non-AQ Conferences, regardless of the quality of their teams. For example, even if two or more Non-AQ teams qualify for BCS bowl participation based upon their seeding and regular season performances, only *one* of those teams will be granted a BCS bowl slot, guaranteeing more slots (and therefore more output and greater revenue) for the AQ Conference teams.⁷ And the National Championship Game and its associated benefits is, as previously described, entirely off-limits to Non-AQ Conferences.

The results of this system are that output is restricted because: (1) Non-AQ Conference teams are limited in the number of BCS bowl games in which they can play; (2) the Non-AQ Conferences face insurmountable barriers of entry into being considered among the "elite," and in fact are relegated to permanent underclass status, even though some of the Non-AQ Conferences' actual on-field quality of performance may equal or exceed that of some of the AQ Conferences; (3) fans and other interested viewers are denied the games they want to see, because certain teams are either effectively precluded from participating, or their access is, at best, severely limited; and (4) the quality of the product is diminished because, even when the AQ Conferences' champions are weaker and the Non-AQ Conferences' champions are stronger, the weaker AQ team is guaranteed entry into a BCS bowl game and the overall quality of and interest in the game is diminished.

This case therefore is in keeping with prior cases in which the conduct at issue was deemed an illegal restraint, and a *per se* violation of Section 1 of the Sherman Act. *See, e.g., Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 225 (2d Cir. 2004) (holding that plaintiffs sufficiently alleged a *per se* violation of the Sherman Act, where it was alleged that a settlement agreement between four major domestic cigarette manufacturers and numerous states, together with state statutes, prevented other competing manufacturers from expanding their output); *In Re Cardizem CD Antitrust Litigation*, 332 F.3d 896, 908 (6th Cir. 2003) (holding that an agreement between the producer of a patented drug and a competing producer of a proposed generic version of the drug, in which the incumbent producer agreed to make quarterly payments of \$10 million to the generic producer in return for its agreement to hold its generic drug off the market for a defined period of time, "was, at its core, a horizontal agreement to eliminate competition in the market for [the drug] throughout the entire United States, a classic example of a *per se* illegal restraint of trade").

2. Rule of Reason Analysis Also Demonstrates The BCS Control Group's Section 1 Violation

Even if the Rule of Reason analysis applies here, the BCS Control Group's conduct violates the Sherman Act. In fact, the *Board of Regents* court noted that analysis under the Rule of Reason as opposed to the *per se* rule "does not change the ultimate focus of [the] inquiry.

⁷ A Non-AQ team has the opportunity for a pseudo-automatic berth in one of the BCS bowl games if it either (i) ranks in the top 12 of the final BCS standings; or (b) ranks in the top 16 of the final BCS standings and its ranking is higher than that of the champion of one of the AQ Conferences. However, if more than one Non-AQ meets the stated criteria, only one will actually be guaranteed to participate, and the others will be excluded.

Both per se rules and the Rule of Reason are employed to form a judgment about the competitive significance of the restraint.” *Board of Regents*, 468 U.S. at 103 (internal citation and quotation omitted).

As shown, the anti-competitive effects of the BCS Control Group’s scheme are severe. There are innumerable ways in which the BCS Control Group’s behavior is anticompetitive. For example (though not by way of limitation), price competition among the BCS bowls is non-existent as a direct result of the monopoly, and with the exception of the Rose Bowl, only a single television contract negotiated by the BCS is available to BCS bowl participants. There is no ability on the part of individual teams or bowls to negotiate separate revenue or television agreements in connection with the BCS bowls.

Under the Rule of Reason analysis, once the anti-competitive effect of the conduct in question is shown, the burden shifts to the alleged violator – here, the BCS Control Group – to prove that its conduct has pro-competitive justifications. *Board of Regents*, 468 U.S. at 113 (acknowledging that the presence of “anticompetitive behavior place[s] upon [the alleged violator] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market”).

The pro-competitive justifications that the BCS Control Group is likely to make are wholly without merit, and do not meet the high burden necessary to avoid liability under Section 1. The purportedly pro-competitive justifications made to date by the BCS Control Group fall into two categories: (1) asserting that the market demands such a result; and (2) criticizing the alternative proposals. Of course, the latter is not a pro-competitive justification at all, and therefore must be disregarded. The BCS Control Group must, in order to satisfy its burden – which burden rests exclusively with the alleged violator – to prove the pro-competitive justifications of its conduct, therefore rely entirely on its argument that the “market demands” the current scheme. That burden is simply not met by such an argument. As demonstrated, the BCS scheme actually serves to curtail competition, not promote it. Moreover, it is absurd and plainly self-serving to suggest that the market “demands” an inequitable and monopolistic system. It simply does not.

Fans are clamoring for a fairer system, which would provide all teams with a chance to compete for the championship. Last year, Utah was higher ranked than Big East champion Cincinnati, Utah was selected before Cincinnati by a BCS bowl, and Utah’s bowl game received far higher ratings than Cincinnati’s bowl game. Yet, the BCS paid the Big East almost twice as much as the MWC (\$18.6 million for the Big East to \$9.8 million for the MWC). To say that the market demanded that result is fatuous. Equally false is the claim that the market demanded in 2008 that any Big East team, or that 19th-ranked, four-loss Virginia Tech, play in a BCS bowl, when undefeated Boise State was left out.

Indeed, the BCS Control Group’s argument that the market demands this system hearkens back to the former AT&T monopoly, which AT&T attempted to justify by suggesting that its monopoly was necessary, and that chaos would ensue absent such a monopoly. Of course, AT&T’s arguments were ultimately rejected, the situation was rectified, chaos did not

ensue, and it was proven that AT&T's monopoly was not necessary for the maintenance of a functioning and competitive telecommunications market.

In addition, the BCS Control Group's suggestion that the current scheme is pro-competitive because it is more fair than previous systems with respect to determining a national championship is both incorrect and irrelevant. The present scheme is less competitive than its predecessors because prior to the BCS and its precursors, it was not uncommon for teams to win the national championship who were then not a part of what is now the AQ Conferences. In contrast, the BCS now effectively precludes any Non-AQ Conference teams from winning the national championship. The BCS Control Group's claim is also irrelevant because even if the system were more competitive under the present scheme, under antitrust jurisprudence, a Sherman Act violator is not legally excused from its anticompetitive conduct simply because that conduct – though violative of the Sherman Act – may be less violative than in the past.

Thus, the BCS Control Group's likely pro-competitive justifications must be rejected for same reasons as in *Board of Regents*. There, the court found that:

The NCAA's argument that its television plan [was] necessary to protect live attendance [was] not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw the live attendance when faced with competition from televised games...The television plan protects ticket sales by limiting output – just as any monopolist increases revenues by reducing output.

Board of Regents, 468 U.S. at 116-7. Here, the BCS Control Group's scheme and their resistance to any form of a playoff or other modification of the revenue system is designed *not* to protect integrity of game, but rather out of a desire to protect their monopoly position and their own grossly-disproportionate revenue stream by eliminating competition.

Similarly, in *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998), the Tenth Circuit rejected the NCAA's proffered procompetitive justifications because the NCAA offered no proof that its restrictions "enhance competition, level an uneven playing field, or reduce coaching inequities." Here, as discussed, the BCS Control Group's restrictions actually eliminate competition, skew the playing field, and increase coaching inequities, among other things. There is no procompetitive effect of its monopoly.

The final element under the Rule of Reason asks whether there are less restrictive alternatives to the present conduct. *Id.* at 1019. Presently the most popular alternative to the BCS scheme is to institute some form of a playoff system, which would afford Non-AQ Conferences an equitable chance to participate in the BCS bowls and compete for the national title. In its March 4, 2009 proposal (Attachment 7 hereto), the MWC proposed one version of such a playoff system. While that proposal is certainly not the only means to reaching a competitive end, the proposal does demonstrate the availability of less restrictive and anti-competitive ways of structuring the FBS post-season.

The BCS Control Group has rejected the MWC proposal, and has argued that a playoff system would render the regular season less exciting, adversely impact the student-athletes' academics, and result in the elimination of bowls. The BCS Control Group is incorrect on all three points. First, every game with national championship implications in 2008 under the current system would also have had national championship implications under the MWC proposal, whereas there are over 100 additional games that would have had national championship implications in 2008 had the playoff system been in effect. Second, as Commissioner Thompson previously testified, a playoff system "could enhance the student-athlete experience, while also allowing universities to set a positive example – without negatively impacting academics," and could be designed to extend the season by no more than eight to ten days, and then only for two teams. Finally, as demonstrated by the MWC proposal, there is simply no need for any BCS bowls to be eliminated under a playoff structure; to the contrary, a playoff system may well encourage the addition of new BCS bowls to the post-season lineup.

Intervention By The Government Is Appropriate And Necessary

Confronted with the fact that its conduct is a violation of the Sherman Act as a matter of basic antitrust law, the BCS Control Group may attempt to change the focus and avoid enforcement by suggesting that the government should have no role in college football. This argument is a red herring and should be rejected. In fact, the government's enforcement of the Sherman Act in connection with this matter is of paramount importance.

As a threshold matter, that college sports – and in particular college football – are subject to the same antitrust laws applicable to any other business enterprise is a well-established matter of law. The United States Supreme Court in *Board of Regents* specifically established that federal antitrust laws apply to rules governing economic aspects of college football. Having noted the price fixing and output restrictions resulting from the NCAA's conduct in that case, the *Board of Regents* Court eschewed a detailed market analysis, directly addressed and rejected the NCAA's asserted pro-competitive justifications, and affirmed the appellate court's decision holding that the NCAA's scheme was a "classic cartel." Subsequent antitrust opinions involving combinations in college athletics have further facilitated prosecution of sports-related antitrust violations by applying a "quick look" rule of reason test and eliminating the need for a detailed market analysis in connection with the economic aspects of college sports. *See, e.g., Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998).

Decisions like those in *Board of Regents* and *Law* make eminent sense, and highlight the need for enforcement in the instant case. This is because, in addition to the types of harm generally present in classic antitrust cases, there are special harms to consumer welfare that flow from antitrust violations affecting college athletics.

First, it must be remembered that this matter is about more than college athletes and their fans. It is a multi-million dollar business, and one in which the bulk of those hundreds of millions of dollars is disbursed to the BCS Control Group, which artificially limits the number of games (*i.e.*, output) while restricting the ability of its competitors to access those games and effectively compete, as described in greater detail above. Thus the types of harm always present

in monopoly situations – restrictions on output, fixed prices, higher costs and curtailed competition – are present here, and are precisely what the Sherman Act and case law precedent, as recently affirmed by the Division’s policy statement, are designed to redress.

However, because our universities and their students are a part of this picture, there are special consumer harms not typically present in classic antitrust cases, including the following:

- The universities’ positions (both the AQ and Non-AQ schools) as 501(c)(3) organizations mean that taxpayers are both subsidizing the monopoly and suffering from its consequences.
- Under Title IX, these universities are obligated to provide equal intercollegiate athletic opportunities for men and women. Compliance with Title IX requires these universities to provide facilities, equipment and supplies, schedule games, allocate travel and per diem allowances to female athletes, obtain coaching, provide medical and support services – all of which require substantial funding. Those schools that receive a disproportionately smaller share will necessarily struggle to meet their Title IX requirements, regardless of the ability of their male or female teams.
- In addition, lack of access to the “elite” games curtails the opportunities of student-athletes at Non-AQ universities to display their athletic prowess, thereby limiting their ability to attract the attention of professional teams and pursue what might otherwise be a fruitful career in professional sports.

A key factor requiring the intervention of the government, including the Division, is that the BCS Control Group operates its scheme with impunity, apparently ignoring the relevant antitrust laws or unilaterally exempting itself from their mandates. Aside from the legal analysis, one need not be a lawyer to see that the system is unjust, and indeed, it is widely acknowledged among sports fans, commentators and scholars that the system constitutes an antitrust violation. *See, e.g.*, Article by Andrew Zimbalist, economist at Smith College, entitled *Assessing Antitrust Case Against the Bowl Championship Series*, Global Competition Policy (May 2009) (available at <http://econpapers.repec.org/paper/smtwpaper/2009-01.htm>); House Resolution 68, at www.thompson.gov (supporting the “reject[ion] [of] the BCS system as an illegal restraint of trade that violates the Sherman Anti-Trust Act”). In addition, countless fan websites and blogs are devoted to decrying the inequities of the present scheme. *See, e.g.*, Website entitled “We Demand Playoffs,” available at <http://www.wedemandplayoffs.com/>.

Yet absent enforcement, the unmistakable message will be that the multi-million dollar business of college athletics is given a free pass when it comes to enforcement of the Sherman Act. President Obama has publicly criticized the present system and advocated for a playoff. *See* interview and press coverage at <http://sports.espn.go.com/nfl/news/story?id=3697109>; http://latimesblogs.latimes.com/sports_blog/2009/01/obama-wants-pla.html. Swofford’s specific response to President Obama’s push for a lawful and equitable system is tellingly dismissive:

“For now, our constituencies—and I know he understands constituencies—have settled on the current BCS system, which the majority believe is the best system yet to determine a national champion while also maintaining the college football regular season as the best and most meaningful in sports.”

See <http://sports.espn.go.com/nfl/news/story?id=3708348>. Of course, the BCS Control Group has rigged its voting system to ensure that its competitors' vote is marginalized as a small fraction of the entire vote. And on June 24, 2009, the BCS Control Group rejected the alternative plan submitted by the Mountain West Conference and opted to continue operating as a monopoly in the same fashion it has been. It is clear then that unless specific government action is taken to redress the problem, the BCS Control Group will ignore President Obama and the Sherman Act in favor of maintaining their riches and monopoly control.

In any event, the Division has recently made its policy clear concerning enforcement of the Sherman Act: “vigorous” and “aggressive” enforcement, and removal of any “free pass to undertake predatory or unjustified exclusionary act.” We respectfully submit that, given both its magnitude, impact and high-profile nature, this case must be addressed if the Division’s policies and the Sherman Act are to be taken seriously. As Senator Hatch has noted in a recent article for *Sports Illustrated*: “If the government were to ignore a similar business arrangement of this magnitude in any other industry, it would be condemned for shirking its responsibility.” And as the *Board of Regents* court noted:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Board of Regents, 468 U.S. at 104. Preservation of fair and open competition among our universities and college athletes is therefore of great importance, and must be maintained. Ultimately, the BCS Control Group’s scheme constitutes a classic monopoly and antitrust violation under Sections 1 and 2 of the Sherman Act (albeit with some additional, distinct harms), and should be extirpated.

* * *

Thank you for your consideration of this matter. We remain available to provide further information and analysis as needed.

ATTACHMENT 1**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD****2007 - 2008**

Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
<u>Top Seven Conferences by Percentages</u>	
Conference	Record
MWC	16-13 (.552)
ACC	22-18 (.550)
Big Ten	10-9 (.526)
Pac-10	10-9 (.526)
Big East	14-15 (.483)
Big 12	12-14 (.462)
SEC	13-16 (.448)

**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD****2005 - 2008**

Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008)	
<u>Top Seven Conferences by Percentages</u>	
Conference	Record
Pac-10	32-20 (.615)
SEC	43-36 (.544)
Big East	36-38 (.486)
Big 12	35-37 (.486)
MWC	29-32 (.475)
ACC	45-52 (.464)
Big Ten	29-37 (.439)

ATTACHMENT 2**BCS DISTRIBUTIONS – 2007-2008**

Conference	Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008) <u>Top Seven Conferences by Percentages</u>	Aggregate BCS Distributions for 2007-2008
MWC	16-13 (.552)	\$13,512,800
ACC	22-18 (.550)	\$36,965,634
Big Ten	10-9 (.526)	\$45,997,717
Pac-10	10-9 (.526)	\$36,997,717
Big East	14-15 (.483)	\$36,965,634
Big 12	12-14 (.462)	\$45,975,632
SEC	13-16 (.448)	\$45,997,717

BCS DISTRIBUTIONS – 2005-2008

Conference	Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008) <u>Top Seven Conferences by Percentages</u>	Aggregate BCS Distributions for 2005-2008
Pac-10	32-20 (.615)	\$71,680,837
SEC	43-36 (.544)	\$85,180,836
Big East	36-38 (.486)	\$71,648,753
Big 12	35-37 (.486)	\$80,658,752
MWC	29-32 (.475)	\$18,092,400
ACC	45-52 (.464)	\$71,648,753
Big Ten	29-37 (.439)	\$89,680,836

May-08-2009 03:39 PM Committee on the Judiciary (202)224-8249

United States Senate
WASHINGTON, DC 20510

May 8, 2009

Mr. John D. Swofford
Commissioner
Atlantic Coast Conference
4512 Weybridge Lane
Greensboro, NC 27407

Mr. David B. Frohnmayer
Office of the President
1226 University of Oregon
Eugene, OR 97403-1226

Dear Commissioner Swofford and Chairman Frohnmayer:

We are writing to express our concerns regarding the college football Bowl Championship Series ("BCS"). It is our hope that, given the high-profile controversy surrounding the BCS in recent years that you will use the upcoming negotiation of the extension of the broadcasting contract as an opportunity to reexamine and improve upon the system.

The current BCS system has been shown to be flawed with respect to access to BCS bowl games, the continued denial of a fair opportunity for teams to compete for the national championship, and the manner in which significant broadcasting revenue is distributed. As you are undoubtedly aware, journalists, university officials, and fans of college football throughout the country have criticized the BCS almost since its inception. Recently, President Barack Obama and a bipartisan group of Members from both the House and Senate have raised questions about the BCS.

The inadequacies of the current BCS system extend far beyond the inequities on the field. Universities that compete in BCS bowl games and have an opportunity to compete for the national championship garner increased visibility for their institutions. In addition, many teams that have never qualified for a BCS game are able to receive a substantial share of the revenues generated by the BCS simply by virtue of their membership in the favored member conferences. At the same time, nearly half of all the teams in Division I football are forced to share a far smaller portion of the revenues even if a team from their conference is able to overcome the odds and play their way into a BCS game. Therefore, those schools that do not hail from the BCS's preferred conferences begin each season at competitive and financial disadvantage.

The financial ramifications of these inequities are very significant. As you know, many, if not the majority, of schools rely on the profitability of their football programs to fund other athletic programs, enhance their facilities, offer scholarships, and improve their academic programs. The BCS gives every school in its automatic-bid conferences a leg up in these areas, leaving nearly half the schools, in most respects, on the outside looking in. A fairer system would significantly raise the revenue received by all participating universities and it is our hope that such a system can be created.

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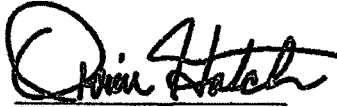
Notwithstanding these demonstrated inequities, it is our understanding that the BCS is contemplating a four-year extension of its current broadcasting contract that will lock in the current system. In light of growing concern among elected officials regarding the BCS system, not to mention the complaints of millions of college football fans and consumers throughout the country, we have serious concerns about what appears to be an attempt to preserve the status quo for the foreseeable future.

In addition, it would be helpful to learn whether, prior to seeking to extend the current system, other alternatives were considered. In addition, we would like more information regarding the process by which any potential changes to the system were discussed and considered among the membership in the BCS. Finally, we wish to know how an extension of the current system can be justified in light of its demonstrated inequities.


Though such options have been widely discussed, it is our hope that this situation can be resolved with a minimum of government involvement. That being said, the revenues generated by the BCS are unprecedented, making its impact on interstate commerce undeniable. In addition, there may be legitimate legal questions regarding what appear to be coordinated exclusionary tactics by the originators of the BCS. These tactics appear to be having a negative and inequitable impact on a number of our nation's colleges and universities.

It is our sincere belief that further government intervention or investigation into these matters can be avoided by voluntary action on your part. Indeed, we hope that you will take action to preserve competitiveness and fair play in college football and do what is best for consumers as well as for our nation's schools.

Sincerely,



Orrin G. Hatch
United States Senator



Robert F. Bennett
United States Senator

cc:

Bill Hancock, Bowl Championship Series
Dr. Charles Steger, Virginia Tech
Mr. Mark Nordenberg, University of Pittsburg
Mr. Robert Khayat, University of Mississippi
Dr. Graham Spanier, Penn State University
Father John Jenkins, University of Notre Dame
Mr. Harvey Perlman, University of Nebraska
Dr. John Peters, Northern Illinois University
Craig Thompson, Mountain West Conference
Michael Tranchese, Big East
Tom Hansen, Pac 10
James Delany, Big Ten
Mike Slive, Southeastern Conference
Dan Beebe, Big Twelve
Wright Waters, Sun Belt Conference
Briton Banowsky, Conference USA
Karl Benson, Western Athletic Conference
Rick Chryst, Mid-American Conference

June 9, 2009

Honorable Orrin G. Hatch
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Honorable Robert F. Bennett
United States Senate
431 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Hatch and Bennett:

We write in response to your May 8 letter concerning the Bowl Championship Series ("BCS"). We appreciate your interest in college football and share your enthusiasm for it. We believe that its regular season is the most exciting and vibrant in American sports, and the game's dramatic growth in recent years demonstrates that it is healthy and meeting its primary aims of contributing to the educational experience of student-athletes and others, enhancing the overall atmosphere on our college and university campuses for every student and providing an important vehicle for connecting with university alumni and friends.

The BCS has brought enormous benefits to intercollegiate football. It has made the regular season the most meaningful at any level, amateur or professional, of American sport. It also has created for the first time a guaranteed opportunity for the top two teams in the nation to play against one another in a bowl game. Additionally, it has enhanced the historic bowl system, which provides meaningful post-season opportunities for student-athletes and fans alike. Every college and university that competes in the NCAA Football Bowl Subdivision ("FBS") has an opportunity to participate in post-season play in a manner that did not previously exist and certainly would not exist were the BCS to disappear. In short, it has been a beneficial innovation for the game and for every football-playing institution in the FBS.

Your letter purports to identify two "flaws" in the BCS arrangement. We strongly disagree with those characterizations and address each of them in detail below.

It is important to remember that the BCS was not built upon virgin ground but was an outgrowth of long, individually established relationships between certain college football conferences and certain bowl organizations, which are generally independent, community-based entities. Before the BCS and its two predecessor arrangements, the Bowl Coalition and the Bowl Alliance, the bowls had not often been able to match the two highest-ranked teams at the end of the season. Indeed, that occurred only nine times between the end of World War II and 1991. Since the post-season following the 1992 season, the BCS and its predecessors have created

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eleven such games. Moreover, the BCS and its predecessors have permitted the bowls to make team selections after completion of the regular season, rather than earlier, as was the case in prior years, thus ensuring what we believe are better and more exciting pairings for fans and bowl communities alike. A history of the BCS, its predecessor arrangements, and the rationale for various features of them, is contained in Commissioner Swofford's written statement submitted in conjunction with hearings held on May 1 by the Subcommittee on Commerce, Trade and Consumer Protection of the House Energy and Commerce Committee. A copy of that statement is enclosed for your convenience.

We highlight only a few points that are relevant to the matters that your letter appears to raise:

Access to BCS Bowl Games and the BCS National Championship Game. Your letter states that the BCS denies some institutions a "fair opportunity to compete for the national championship" and "access" to BCS bowl games. With respect to the BCS National Championship Game, the top two teams in the final BCS Standings play in that game each year regardless of conference affiliation or independent status. Any team that finishes in the top two is automatically a participant in the game. Thus, we do not understand how any college or university is denied a "fair opportunity" to compete for the national championship. While it is not easy to finish first or second, the standard is the same for everyone.

The top two teams are determined by a combination of two polls and six computer rankings. With respect to the polls, the BCS Standings incorporate the Harris Interactive College Football Poll and the *USA Today*/American Football Coaches Association ("AFCA") Poll. Panelists for the Harris Poll are drawn from among members of the media, retired coaches and athletic administrators, and former student-athletes. Each of the eleven FBS conferences nominates persons to be included on the Harris panel, and the Harris organization then randomly selects ten people from each conference's nominees. Each of the eleven conferences is represented equally, to ensure a statistically valid and unbiased poll. The panel for the AFCA Poll is determined by the coaches association itself and consists of 61 active coaches. The AFCA Poll is one of the oldest and most respected rankings of college football teams and is widely accepted by fans and media. Finally, the computer rankings providers base their rankings on their own mathematical analyses of results, strength of schedule, and other relevant factors. We believe that the BCS Standings provide a fair and unbiased ranking of teams as they stand at the end of the regular season. That belief is bolstered by the fact that the Associated Press Poll of sportswriters and other media members, which is independent of the BCS Standings and has not been used in the BCS Standings in any way since 2004, usually has a very close correspondence to the final BCS Standings. While there may be some marginal differences in any given set of rankings, only one time in the eleven years that the BCS arrangement has existed has the Associated Press Poll produced a national champion different from the winner of the game between the teams ranked first and second in the final BCS Standings. Certainly this

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past season, the Associated Press Poll released after the regular season had the same teams in the top two spots as the final BCS Standings.

With respect to "access" to other BCS bowls, we understand your letter to refer to the fact that the BCS arrangement guarantees annual automatic berths in the BCS Bowls to the champions of six conferences while other conferences do not have such a guarantee for their champions. The rationale for the guaranteed slots is set forth in detail in Commissioner Swofford's enclosed statement, but it can be summarized simply: Without the guaranteed slots neither the BCS nor any other post-season format of which we can conceive would exist. Before the BCS and its predecessors, each of the conferences with an annual automatic berth for its champion already had such an individually negotiated berth in one of the BCS Bowl games or had been offered an attractive and valuable berth by another bowl. To make the BCS (and its predecessors) possible, each of those conferences either had to alter its traditional bowl arrangement or forego a very attractive offer from another bowl. Participation in the BCS is voluntary. None of those conferences can reasonably be expected to make such sacrifices and yet get nothing in return. In short, the guaranteed slots simply compensate each of those six conferences either for the changes to their traditional bowl arrangements or for foregoing valuable and attractive arrangements so that a national championship game and other exciting and interesting matchups between highly ranked teams are possible.

None of the five conferences that do not have annual automatic berths for their champions in the BCS bowls has been called upon to make any sacrifice or forego any valuable and longstanding relationship to make the BCS (or any of its predecessors) possible. They have not been required to alter established relationships with any BCS bowl or to forego very attractive and lucrative relationships offered by other bowls. Thus, far from harming those conferences, the BCS arrangement benefits them because it provides them with unprecedented access to the BCS bowls. Before the creation of the BCS, teams that are currently members of those conferences participated in the four BCS bowls only six times between 1947 and 1991. Since the 2004 regular season, four teams from those conferences have played in those games.

Today, the highest-ranked champion from one of those conferences will play in a BCS bowl if it is (i) ranked in the top twelve of the final BCS Standings or (ii) ranked in the top sixteen of the final BCS Standings and ranked above a conference champion from one of the conferences with an annual automatic berth. Also, any teams from those conferences are eligible for selection by a BCS bowl if they are ranked in the top fourteen of the final BCS Standings. Of course, as stated above, if any team from one of those five conferences is ranked first or second in the final BCS Standings, it will play in the BCS National Championship Game. Furthermore, in 2004 the eleven conferences developed a set of performance standards under which one of those five conferences may earn an annual automatic berth for its champion. Absent the BCS, none of these opportunities would exist for those conferences without automatic berths. Under the BCS, therefore, the opportunities available to those conferences are significantly expanded

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over what they have previously been able to obtain on their own or what they would be able to obtain on their own were the BCS arrangement to end.

Financial Distributions. Regarding financial distributions, we again respectfully disagree with the characterization that conferences without annual automatic berths are at a disadvantage. Last year provides a good example. The share paid to each conference with an annual automatic berth for its champion was slightly less than \$18.7 million, with an additional payment of \$4.5 million to a conference that placed a second team in one of the BCS games. The five conferences without annual automatic berths in the BCS arrangement were paid slightly less than \$19.3 million last year to divide as they saw fit. They would also have received an additional \$4.5 million for each additional team placed in the games. Those five conferences could have allocated to the Mountain West Conference the same amount as any other conference with a participating team. They have chosen not to do so.

Based on the testimony of Mountain West Commissioner Craig Thompson at the May 1 House hearing, under the distribution formula adopted by the five conferences, the Mountain West Conference received \$9.7 million for participating in a BCS game. Had Utah not been in the Sugar Bowl last season, presumably it would have filled its conference's commitment to play in the Las Vegas Bowl, which, according to NCAA figures, would have paid the two participating teams combined a total of \$1.8 million. If that revenue is split equally among the two teams, then the Mountain West earned from the BCS arrangement more than ten times what its champion would have received based on the highest-paying bowl arrangement that the conference was able to attract on its own. Furthermore, based on Mr. Thompson's testimony, the other four conferences, none of which placed a team in a BCS game, each received on average slightly less than \$2.4 million. It is our understanding that such amount exceeds the amount paid to any of those conferences by any other bowl game in which a member team actually participated.

In reality, then, the five conferences whose champions do not have annual automatic berths in the BCS bowls receive far more in revenues from the BCS each year than they are able to generate individually. The payments to them reflect not any financial "inequity" but a subsidy.

Other Information Requested. We want to provide some additional information of which you may not be aware. First, with respect to the BCS television and bowl arrangements, the group concluded an agreement with ESPN for the 2011-14 BCS bowl games in December 2008. That contract has been signed by the University of Notre Dame and by every conference except the Mountain West. We hope that the Mountain West will sign and have invited it to do so. In addition, the Big Ten and Pacific-10 conferences have an existing agreement with the Pasadena Tournament of Roses Association and ABC through 2014. That agreement was entered into in 2005 and obligates the champions of those two leagues to play in the Rose Bowl through January 2014 except when one appears in the BCS National Championship Game. That contract is premised on the current BCS format, which was agreed to by all eleven conferences in 2004.

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Second, with respect to the consideration of alternative formats, in the spring of 2008, all eleven conferences and Notre Dame considered the possibility of a so-called "Plus One" format, which would have added one game after an initial round of bowls. The outlines of the format were discussed by conferences at their internal meetings, and there was not sufficient support among them to warrant any change. Indeed, several conferences made clear that they could not support such a format. Therefore, the group decided to proceed with television negotiations on the basis of the current format for BCS games to be played through January 2014. Only thereafter, in March 2009, did the Mountain West put forward its proposal.

The process that was used with respect to the "Plus One" consideration is similar to the one being used to address the Mountain West proposal. During the spring, each conference holds meetings among its member institutions. University presidents, faculty representatives, athletics directors and coaches are involved in the various meetings. Each conference will consider the Mountain West proposal when it convenes, and we expect that each conference commissioner will report on internal conference deliberations when the group of commissioners gathers in June. Thereafter, we expect that the commissioners will report to the group of university presidents who oversee the BCS arrangement. We have no doubt that each conference will give the Mountain West proposal due consideration and that each will determine its views doing precisely what conferences and their membership have traditionally done – analyzing what is best for that individual league and its member institutions.

As we have stated repeatedly, we consistently review the BCS arrangement and are always looking for ways that it may be improved. The BCS is not perfect, and we have not claimed that it is. However we have not yet found an alternative structure that is economically workable, preserves the bowl games, maintains the singular importance of the regular season, fits within the academic calendar in place at most universities, meets other significant educational and athletic concerns related to extension of the FBS football season, and can garner the support of all of the conferences and universities. The BCS satisfies these criteria and enables college football to bring the season to a fitting conclusion with the crowning of a national champion.

Finally, your letter mentions "legal questions." We assure you that we and our legal counsel have worked hard to ensure that the BCS arrangement complies with all applicable laws.

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We very much appreciate your interest in college football and hope that our letter and the enclosure provide you with clarifying information.

Sincerely,

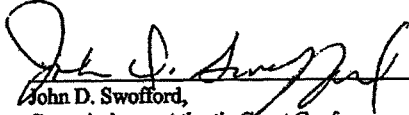


Dave Frohnmayer,
President, University of Oregon

John D. Swofford,
Commissioner, Atlantic Coast Conference

We very much appreciate your interest in college football and hope that our letter and the enclosure provide you with clarifying information.

Sincerely,



David B. Frohnmayer,
President, University of Oregon

John D. Swofford,
Commissioner, Atlantic Coast Conference

Enclosure

Honorable Herb Kohl

COMMENTARY ON BOWL CHAMPIONSHIP SERIES
July 2009

On behalf of the presidents and chancellors of the Western Athletic Conference, I would like to express our appreciation to Chairman Kohl, Senator Hatch, and the members of the Senate Judiciary Subcommittee on Anti-Trust, Competition Policy and Consumer Rights, for holding this hearing and giving us an opportunity to present our views.

The time has come for the Bowl Championship Series (BCS) to apply the same values generally espoused and celebrated by American higher education to the most recognizable pastime and the biggest business on many university campuses -- intercollegiate football. There is considerable irony in the fact that in the highest temple of political correctness, American higher education, the BCS pays homage to the false idols of monopoly, inequity and greed at the expense of fairness, access and competition. We believe the BCS is a fundamentally flawed system that is unfair in its access, governance and revenue distribution.

Historically, there were a handful of power brokers in intercollegiate football that showed up year after year for postseason play in the traditional bowl games, and in those days few questioned the system. However, the landscape of college football has changed dramatically over the years, especially for mid-major programs, due to the limitations on scholarships, increased marketing opportunities and the bounty of televised games that appear weekly as a result of the universities of Oklahoma and Georgia suing the National Collegiate Athletic Association (NCAA) in 1984 over its television plan, because it violated antitrust laws. There is no question that the margin of difference in strength and talent among Division 1 college football teams across the nation has diminished greatly in recent years.

So you would think that when Boise State opens its football season against the University of Oregon on September 3, the dream of a national championship would beat in the heart of every player, coach, alumnus and fan. Instead, there will only be a faint pulse thanks to the constraints placed upon us by the BCS. An estimated 6,000 student-athletes play for football teams that have no realistic chance of competing in a BCS bowl, given the hurdles placed in the path of the non-BCS conferences and teams.

How can this happen when the NCAA sponsors 88 championships in almost every sport from bowling to water polo? The glaring exception is football. The NCAA does not sponsor a championship for the Football Bowl Subdivision -- formerly Division I-A. This so-called championship has fallen into the hands of the commissioners of the six BCS automatic qualifying conferences. They wrote the exclusionary BCS rule that created six automatic qualifying conferences -- Atlantic Coast, Southeastern, Big East, Big Ten, Big 12, and Pac-10 -- and gives to the six conference commissioners

the authority to send their respective champions to a BCS bowl regardless of how their won/loss records stack up against the champions of the non-automatic qualifying conferences -- Conference USA, Mid-American, Western Athletic, Sun Belt, and Mountain West.

To take a page from recent history, in 2004 Boise State went undefeated and finished the season No. 9 in the BCS, yet was excluded from a BCS bowl while No. 13 Michigan and No. 21 Pittsburgh qualified. In 2006, Boise State went undefeated and finished the season ranked No. 8 in the BCS and was invited to the BCS Fiesta Bowl where the Broncos defeated Oklahoma in one of the greatest games ever played. In 2008, Boise State went undefeated and finished the season No. 9 in the BCS, yet was passed over for a BCS bowl while No. 10 Ohio State, No. 12 Cincinnati and No. 19 Virginia Tech were all chosen for BCS bowls.

In 2008, the University of Utah made the most convincing case for BCS reform when the Mountain West Conference school completed a 12-0 regular season, but was not given the opportunity to compete for the national championship. Utah was eliminated by a system -- not a team -- and further proved its championship status in a convincing BCS bowl victory over Alabama.

Exclusionary rules that produce such unfair results can only be made by a governance structure as unfair as the result, and that is certainly the case when it comes to the Presidential Oversight Committee of the BCS. George Orwell, aiming at the hypocrisy of those who claim equality for all, but reserve power for a small elite, is famous for his Animal Farm quote, "All animals are created equal, but some animals are more equal than others." So it is with the BCS power structure. The 65 schools in the automatic qualifying conferences have six votes, one for each conference, but the 51 schools in the non-automatic qualifying conferences have ONE vote total. And in a gesture to days gone by, Notre Dame has one vote as an independent all to itself.

Nowhere is the inequality of the BCS system more evident than in revenue distribution. The formula is heavily weighted toward the automatic qualifying conferences that are guaranteed a spot in a BCS game and walk away with the \$18 million payout that goes with it. The automatic qualifying conferences and Notre Dame receive 90 percent of the \$132 million generated by the BCS bowls, a monopoly that if uncovered in the business world would be cause for a Department of Justice antitrust investigation. If a non-automatic conference qualifies for a BCS game, 82 percent of the revenue goes to the automatic qualifying conferences and Notre Dame while the non-automatic qualifying conferences receive 18 percent of the revenue. Annually, non-automatic qualifying conferences are only guaranteed 9 percent of the total revenue to split among 51 schools. If there is a bottom line to the current BCS position, it is the monopolistic control the BCS has over the millions of dollars earmarked for the chosen few.

Again, we greatly appreciate the Subcommittee's interest in exploring the monopolistic practices and inequitable revenue distribution inherent in the BCS's current structure. As the presidents and chancellors of the nine institutions within the Western Athletic Conference, we strongly support changes to that structure to align the values of fairness and access so often invoked in higher education with the policies and practices of the BCS.

By Bob Kustra, President, Boise State University on behalf of the presidents and chancellors of the Western Athletic Conference from Fresno State, University of Hawai'i, University of Idaho, Louisiana Tech University, University of Nevada, Reno, New Mexico State University, San Jose State University and Utah State University.

**STATEMENT OF WILLIAM L. MONTS III
BEFORE THE ANTITRUST SUBCOMMITTEE
OF THE SENATE JUDICIARY COMMITTEE**

July 7, 2009

Chairman Kohl, Senator Hatch, and members of the Subcommittee, I am William Monts. I am a partner with the law firm of Hogan & Hartson, LLP in Washington, D.C., and have practiced in the firm's Antitrust, Competition, and Consumer Protection group for nearly twenty years, primarily litigating antitrust cases. For roughly 18 years, I have had the privilege of working on various matters related to the post-season in college football. For several years, we presented the Cotton, Fiesta, Orange, and Sugar Bowls in connection with the Bowl Coalition, the first arrangement that attempted to facilitate a pairing between the top two teams in the nation in a bowl game. Since 1994, we have advised the Atlantic Coast Conference, Big East Conference, Big Ten Conference, Big 12 Conference, Pacific-10 Conference, Southeastern Conference, and University of Notre Dame first in connection with the old Bowl Alliance and now with the Bowl Championship Series ("BCS"). It is an honor to appear before the Subcommittee today to discuss antitrust analysis of the BCS.

I have thought a great deal about the issues that bring us here today over the past 18 years. My interest in college football is not merely as a lawyer. I have been a fan of the game all my life. I grew up in South Carolina in a family of college football fans. My grandfather played football at Clemson University in the late 1920s and early 1930s. I spent many fall Saturdays during my grade school and high school years traveling the roughly 140 miles from my home in Columbia to the foothills in northwestern South Carolina to watch the Tigers play. I worked in the Yale athletic department during my college years, much of that time spent promoting the football program. These experiences in my formative years gave me a great appreciation for the history and traditions of the game. So I speak to you today not merely as someone who has thought about the issues as a legal advisor but as an avid fan who loves the game, understands where it is has been, and has studied the history, economic, and legal developments that have affected it. All of that informs my statement today.

**ANTITRUST ANALYSIS OF THE BCS MUST BEGIN WITH AN UNDERSTANDING
OF THE HISTORY OF THE GAME**

No antitrust analysis of the BCS can begin until one has an understanding of the development and history of the game. Perhaps the signal feature that defines college football more than any other sport in America is the primacy of its regular season. Unlike professional football, college football has been organized not as a single league but in several distinct conferences, each of which is comprised of several universities. Historically, each conference's membership consisted of institutions that were relatively close geographically and had similar academic and athletic standing. Each of these conferences produces a distinct brand of football and crowns its own league champion. Great rivalries have developed between institutions within these leagues, which has enhanced conference games and their respective championship races to the benefit of fans. Throughout the history of the game, the goal for the vast majority of schools playing at the highest level of college football has been to win their conference championships.

For both economic and legal reasons brought about by the United States Supreme Court's decision in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), that is not likely to change.

To the extent that there has been any post-season in the game, it has been created not by the conferences themselves or by the National Collegiate Athletic Association ("NCAA"), the governing body for intercollegiate athletics, but by independent organizations located around the country that have sponsored college football "bowl" games during the holiday season. The purpose of these bowl games has largely been two-fold. From the perspective of the organizers, they are designed to create economic benefits for the host community by attracting visitors who will fill hotels and restaurants and take advantage of other attractions in an area during a period when business would otherwise be slow. From the perspective of the participating universities, they reward teams for a successful regular season. Teams travel to a city to do more than play a game. Players, coaches, and fans stay in the host city for several days enjoying its attractions as well as festivals, parades and other functions. Bowls, then, are not merely games but events that celebrate college football.

The growth of bowl games owes much to the close relationships that have developed between various conferences and bowls. Through individually negotiated arrangements, certain bowls hosted certain conference champions each year. These arrangements enabled bowls to promise their patrons highly regarded teams annually, thus enhancing their "product." Similarly, these arrangements provided a tangible prize to schools for winning a conference championship, thus enhancing the championship races conducted by their conferences.

One final aspect of the history of the game that must be considered is the concept of a "national championship." Because college football consists of many different leagues, no single conference can crown a "national champion" or what might be thought of as a "champion of champions." From the earliest years of the game – even before the development of conferences – there were rankings of teams by third parties based on regular season performance. At the end of the regular season, sponsors of these rankings would crown a "national champion." Today, the most widely recognized of these rankings are the Associated Press poll of sports writers and other media members, which began in 1936, and the American Football Association poll that was originally published by United Press International in 1950 and is today published by *USA Today*. These two polls still crown national champions today. For many years they crowned "national champions" based solely on regular season results. Beginning in the late 1960s or early 1970s, however, they began conducting polls after the bowl games, meaning that the bowls began to play a role in crowning a "national champion."

With this development, it became clear that the crowning of a "national champion" by the polls could be facilitated if the two highest ranked teams in the nation could be paired in a bowl contest. Yet the historical bowl system had never been very good at doing that. Only nine times between the end of World War II and the 1991 season had the top two teams in the polls been matched in a bowl game. With the spate of conference formation, expansion, and realignment prompted by the *NCAA* decision and the demise of the College Football Association, a group of major football-playing institutions that collectively sold television rights for a number of universities until the early 1990s, the likelihood of the bowls being able to create such a matchup diminished even further. At that point, a number of the major bowls expressed concern that their games may not be able to match highly ranked teams against one another. Several conferences

had the same concerns. Thus, the participants in college football – the bowls and the conferences, along with the University of Notre Dame, one of the few remaining independents, began an evolutionary process designed to enhance the possibility of creating a pairing between the top two teams in a bowl game. Those efforts led first to the Bowl Coalition, then the Bowl Alliance, and today the BCS. Each of these arrangements built upon its predecessor, but the architects of each took the only rational approach to their development. They took the game with its existing assets and relationships – bowls, conference-bowl affiliation agreements, and polls – as they found them and fashioned systems that would use those assets to facilitate the crowning of a “national champion.”

As a matter of practical necessity, I have only covered this history in abbreviated fashion. The history of the game, and the economic and legal developments that have shaped it, are far more detailed than presented here. No antitrust analysis of the BCS arrangement can be undertaken without a full grasp of this historical record.

THE BCS ARRANGEMENT COMPLIES WITH THE ANTITRUST LAWS

A. Some Threshold Considerations.

The principal federal antitrust statute, the Sherman Act, has two main provisions: section 1 of the Act, 15 U.S.C. § 1, prohibits any “contract, combination . . . or conspiracy” – in other words, agreements – in restraint of trade. Section 2 of the Act, 15 U.S.C. § 2, prohibits monopolization or attempted monopolization of trade or commerce and conspiracies to monopolize. I am going to limit my remarks to analysis of the BCS under section 1 of the Sherman Act for two reasons. *First*, it is my understanding that the focus of this hearing is a claim that the BCS is an unlawful agreement because of (a) its effect on certain conferences and (b) the revenue distribution. *Second*, the alleged anticompetitive harms that are focus of the criticism are the same regardless of whether one analyzes the arrangement under section 1 or section 2. Since the standards governing antitrust liability under section 2 are generally more stringent than those under section 1, if the BCS passes muster under section 1, then, in my view, it easily passes muster under section 2 as well.

Before delving into the analysis in more depth, a few other prefatory remarks are worth noting. As the Supreme Court has stated, the purpose of the antitrust laws is to protect competition, not competitors. In other words, the Sherman Act does not exist to shelter some *producers* of goods and services from competition, even aggressive competition, from other producers of goods and services or to equalize marketplace outcomes or redistribute income. Rather, the Sherman Act guards the competitive process so that *consumers* benefit from competition. The Act, therefore, bars agreements that restrict marketwide output of goods and services because such agreements result in higher prices or reduced quality of goods and services to consumers.

In addition, there are a number of threshold issues that are often decided in antitrust cases under section 1. Most notably, there is the question of agreement. Under the Supreme Court’s decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), section 1 of the Sherman Act prohibits only commercial agreements that restrain trade among independent economic entities. Applying the *Copperweld* rule to sports leagues has led to much debate over

the years. While sports leagues usually consist of independent franchises that compete on the field, they cannot produce the league product, namely, games and a championship season, individually. That is true both at the professional and collegiate level. NFL franchises cannot produce a championship season or even single games on their own. But for the cooperation of the teams, there would be no NFL football. Thus, there is a threshold question about whether sports leagues have the requisite multiplicity of independent economic actors to create a section 1 agreement. The BCS, or for that matter any alternative post-season arrangement designed to determine a national champion in college football, stands on the same footing. It can only exist by virtue of cooperation among the various conferences, universities, and bowls. No single conference, institution, or bowl organization can produce a national championship arrangement, no matter how it is structured, on its own.

The Supreme Court has recently granted certiorari in a case, *American Needle, Inc. v. Nat'l Football League*, No. 08-661, that concerns the application of the *Copperweld* doctrine to sports leagues. The Court will hear the case next term, and its decision should cast considerable light on the question. Any antitrust challenge to the BCS would have to confront this issue at the outset. For purposes of my remarks today, however, I will assume for the sake of argument that the BCS consists of the requisite number of independent actors and thus is the product of an agreement subject to section 1 of the Sherman Act.

I will also assume for the sake of argument that the BCS is considered a commercial arrangement so that it is subject to reach under the Sherman Act. Furthermore, for purposes of my remarks, I will set aside any other threshold arguments that might be raised in favor of the arrangement, although a court would have to address all of these matters in any litigation.

If we assume that the BCS arrangement is the product of a section 1 agreement, then it will be analyzed as a joint venture among the various conferences and institutions. Joint venture arrangements are reviewed under the rule of reason. As I noted, the BCS creates a product – an annual national championship game between the top two teams in the nation and other bowl games between highly ranked teams – that no conference or institution (or bowl organization for that matter) could create on its own. These types of arrangements must be analyzed under the rule of reason in which a court looks at all of the facts, history, and circumstances surrounding an agreement to determine whether it restricts output and harms consumers. The usual shorthand description is that an antitrust court looks at the procompetitive benefits of the arrangement and its anticompetitive effects, if any, and declares the agreement unlawful only if the complainant shows that latter outweigh the former.

Rule of reason analysis can be complex because it involves a number of difficult economic determinations and requires review of considerable economic evidence. The first step is usually to define the relevant market in which competition has allegedly been restrained. Once the relevant market is defined, the next step is a determination whether the parties to the challenged agreement have market power in that relevant market. Market power is the ability profitably to raise prices to consumers above those that would exist in a competitive market. As a number of courts note, unless the antitrust defendants have market power in a properly defined relevant market, the challenged agreement has no ability to harm competition and thus is not unlawful. These initial steps in the rule of reason analysis would be controversial in any litigation. Yet to simplify the analysis and focus today on what I understand to be the major

criticisms of the BCS, I will set those matters aside for purposes of my remarks. Instead, I will again assume for the sake of argument that an antitrust plaintiff could define a *proper* relevant market and show that the parties to the BCS agreement have market power in that market.

Even with these significant concessions, the BCS still passes muster under the antitrust laws. Let me now turn to the analysis of the competitive effects of the arrangement to show why this is so.

B. The BCS Has Substantial Procompetitive Benefits.

The procompetitive benefits of the BCS arrangement are readily apparent. I will not attempt to catalog all of the benefits, but will highlight four ones.

First, the BCS creates an annual national championship game. Until the formation of the BCS, college football had never had any mechanism for guaranteeing an annual match up of the two highest-ranked teams in a bowl game to decide the national championship. The BCS creates such a game only because the conferences and institutions that have historically turned out highly ranked teams annually in the hunt for the national championship participate in it.

This game is a boon both for consumers and for college football generally. In looking at the college football post-season from the antitrust perspective, the immediate “consumers” of the teams are the bowl organizations who host games and the television networks who buy the rights to broadcast the games. Bowls use teams as “inputs” to produce their “output,” which are games. Television networks use bowl games as a form of programming that they show to viewers, who are fans of the game and who are the ultimate “consumers” of the product. Without the BCS, there would be no annual national championship game, and thus no such product for the bowls, television networks, and ultimately the fans. There would be a game between the top two teams in the nation only if a bowl game were able to arrange such a matchup on its own. That occurred by happenstance in the old bowl system and would be even less likely were the BCS to disappear. Thus, the creation of an annual national championship game is a procompetitive benefit of the arrangement.

Second, the BCS arrangement enhances the quality of non-championship BCS bowls by allowing them to delay their team selections until completion of the regular season. In the bowl system that existed before the 1992 season, most bowls, including the Orange and Sugar Bowls, had at least one open slot that they hoped to be able to fill with highly ranked and attractive teams. The Fiesta Bowl had two open slots.

To ensure that they did not miss out on attractive teams, bowls with open slots would often effectively commit to pick highly ranked teams after seven or eight games in the season. The problem, of course, was that a team that was highly ranked after seven or eight games might lose two or three of its final games and thus be far less attractive to the bowl and the fans at the end of the regular season than it had appeared during the middle of the year. Nonetheless, because other attractive teams had paired off with other bowl games, a bowl often had no choice but to select the team to which it had effectively committed. These early commitments led to games that were not as attractive to fans or television viewers and did not have as much effect on the final rankings as might have been the case had team selection been delayed.

Today, because of the BCS and its predecessors, the major bowl games are able to delay their team selections until after the regular season, thus ensuring that they are made on the basis of a full season's results. This aspect of the BCS is procompetitive because it provides the bowls and television networks and thus ultimately the fans of the game with better matchups than would otherwise exist without it.

Third, by creating a national championship through the bowls, the BCS preserves and strengthens that broad-based bowl system and thus maximizes the number of post-season playing opportunities for student-athletes and the number of post-season college football games for bowls, television networks, and fans.

Fourth, it preserves and enhances the college football regular season and thus allows conferences and institutions to reap maximum benefits from their regular season games and sale of their regular season television rights. Today, college football is praised almost universally as having the most exciting and meaningful regular season in all of American sport. Attendance at games has grown substantially since the formation of the BCS, and that growth is attributable to the fact that the BCS arrangement and the existence of a broader-based bowl system makes virtually every regular season game meaningful. No other sport in the United States can make that claim.

C. The BCS Has No Anticompetitive Effects.

There are two concerns that critics seem to identify as anticompetitive effects of the BCS arrangement. *First*, there is a claim that the arrangement "excludes" certain conferences from the BCS bowls and the national championship game. *Second*, there is a contention that the arrangement is anticompetitive because the revenues derived from it are not shared equally. Neither of these is an anticompetitive effect for reasons I shall describe below, but at the outset, both suffer from a significant flaw – they have no connection to the purposes of the antitrust laws. Antitrust law protects consumers by preventing agreements that restrict output and either raise prices or reduce quality. Neither of these arguments shows that output has been restricted or that consumers have been harmed in any fashion.

Indeed, one market fact demonstrates this point better than any economic or legal reasoning. Before formation of the BCS, college football had tried to enhance the possibility of creating a national championship game in a bowl through two short-lived arrangements: the Bowl Coalition and the Bowl Alliance. While both arrangements increased the possibility of the bowls matching the top two teams in a game, they did not guarantee such a matchup annually. The principal flaw in both was the lack of participation of the Big Ten and Pacific-10 conference champions. Both of those conferences had committed their champions to play in the Rose Bowl annually under a separate contract. Without those two champions, the Coalition and Alliance arrangements could not create a national championship game in 1994, 1996, or 1997 because in all three years, either the Big Ten or Pacific-10 champion ranked first or second and was unable to play in a different bowl against a team from another conference.

ABC Sports had the rights to telecast the Rose Bowl in those years, just as it does today, and under its agreement with the Tournament of Roses, the operator of the Rose Bowl, it had been promised an annual matchup between the Big Ten and Pacific-10 champions. To make the

original BCS possible, ABC not only agreed to alter its arrangement with the Tournament of Roses but also purchased the rights to the Fiesta and Orange Bowls for substantially more than had been paid by those bowls' previous broadcasters. ABC also increased the rights fees for the Sugar Bowl game, which it had previously telecast. Now, as I previously noted, the immediate "consumers" of teams in the college football post-season are bowls and television networks. Had the BCS restricted output in any way, ABC would have been a victim of the arrangement. Rather than encouraging the formation of the BCS, ABC would have simply insisted that the Tournament of Roses and Big Ten and Pacific-10 conferences live up to their contract obligations. Consumers who are harmed by anticompetitive agreements do not readily go along with them, especially when they have enforceable contract rights that could otherwise prevent the harm. The fact that ABC was willing to alter its agreement with the Tournament of Roses and to pay additional rights fees to make the BCS possible demonstrates that the arrangement benefits consumers and does not restrict output.

The general retort of BCS critics when this point is raised is that, *if there were some other cooperative arrangement*, usually some hypothetical "playoff," then these harms to competitors could be avoided. That argument fails because it starts from the wrong baseline. When antitrust law looks at whether output has been restricted and consumers injured, it does not measure that putative harm by comparing the challenged agreement to some hypothetical world that (a) has never existed and (b) would not exist but for a different and more restrictive form of cooperation between the parties to the challenged agreement. Rather, antitrust law measures output restriction by comparing what exists under the challenged agreement versus what would exist in the absence of the challenged agreement – that is, in a world in which the parties to the challenged agreement did not cooperate but competed against one another. In college football, we do not have to guess what the post-season would look like in the absence of the BCS; we know. We would return to the old bowl system. Any antitrust argument, therefore, that is built on the contention that the alternative to the BCS is a playoff system or some other post-season arrangement other than the old bowl system rests on a demonstrably false assumption.

1. The BCS Enhances "Access" to the BCS Bowls to the Mountain West and to Every Conference without an Annual Automatic Berth.

With the proper analytical baseline, it is clear that the claim that any conference without an annual automatic berth is "excluded" from a BCS bowl or denied fair opportunity to compete for the national championship is incorrect. Prior to the formation of the BCS and its predecessor arrangements, each college football conference competed with the others for bowl slots for their respective champions and other teams. Absent the BCS, the five conferences without annual automatic berths would seek the best bowl arrangements that they could make on their own. There is no market evidence that any of the current BCS bowls would jettison their current host teams to take the Mountain West champion or the champion from any other league without an annual automatic berth. In fact, if any one of those bowls wanted to have a champion from one of those leagues on an annual basis, it could either demand such team as part of the arrangement or select such a team each year with one of its at-large picks. The fact that no bowl has done so is further market evidence that those conferences are not being denied BCS bowl berths that would otherwise come their way.

Teams in those five conferences are, in essence, “free agents.” They are able to participate in a BCS bowl when selected or when they qualify for an automatic berth, but they also have the opportunity to contract with any of the 29 other bowls games that are not part of the BCS for a host arrangement for their respective champions. Presumably those conferences seek such bowl arrangements aggressively and do their best to obtain the most attractive and lucrative bowl arrangements for their teams. In other words, they compete as every other conference for bowl berths. Under the antitrust laws, the courts are likely to view the bowl affiliation contracts that they make for their champions outside the BCS arrangement as the best that they can arrange. For the Mountain West Conference, the best alternative bowl arrangement is the Las Vegas Bowl. Without the BCS, Utah, the Mountain West champion last year, would have presumably played in Las Vegas Bowl because that is what its conference contracted for it to do. Thus, the BCS has not “excluded” the Mountain West champion from any bowl game; it has offered the Mountain West an enhanced opportunity. It guarantees to the Mountain West and to every other conference without an annual automatic berth an opportunity to play in a bowl game *that it would not otherwise have*.

The “exclusion” argument is usually coupled with an attack on the guaranteed slots in BCS bowls for six conference champions. This argument also fails because those slots are necessary if the BCS is to exist at all. Each of the conferences with a host arrangement in a BCS bowl would be able to get such a slot or a comparable one on its own. None of those conferences is going to forego such an arrangement to make the BCS possible unless it gets from the BCS at least what it could obtain without the BCS. Furthermore, the BCS bowls desire to have these teams host their games. These host arrangements give them teams with strong fan followings to anchor their games that are from conferences with records of historical achievement that offer some assurance to bowl patrons and regular ticket purchasers that the bowl is likely to have a highly ranked squad in its game annually. In short, without the guaranteed slots, there would be no BCS, no national championship game, and none of the additional guaranteed bowl opportunities that the arrangement creates for the five conferences without annual automatic berths.

The claim that the BCS agreement “excludes” certain conferences from the national championship game likewise has no basis in fact. There is only one standard for playing in the BCS National Championship Game: a team must be ranked first or second in the Final BCS Standings. The teams that do so play in the national championship game regardless of conference affiliation. In the absence of the BCS, of course, there is no BCS National Championship Game. Instead, each bowl will compete to host the most attractive teams that it is able to get. Maybe a bowl will be able to pair the top two teams periodically; the historical track record, however, is not promising. Certainly, there is no guarantee of such a game. In any event, without the BCS, the national champion will be crowned solely by the polls. Indeed, an undefeated team, such as Utah this year, could finish second in the nation in the polls after the regular season, win its bowl game, and still not win the national championship because another team that ranked first in the polls after the regular season played in a different bowl game and also won. There is no evidence of which I am aware that would show that the old bowl system without the BCS would enhance the possibility of a team in one of the five conferences winning a national championship, and certainly the Mountain West, for all of its recent criticism of the BCS, has not suggested a return to that structure.

2. The Revenue Distribution to the Five Conferences Vastly Exceeds What They Would Get in the Absence of the BCS.

The second anticompetitive effect asserted by BCS critics is the alleged disparate revenue distribution. According to the critics, because the BCS revenues are not divided equally, certain conferences and institutions cannot compete as effectively as others. As the "access" discussion demonstrates, none of the five conferences without annual automatic berths would earn from the bowl system the revenues that are available to them today from the BCS. Since they could not obtain these revenues on their own, the BCS revenue distribution is not a detriment to them but a subsidy.

From an antitrust perspective, however, the revenue distribution argument is irrelevant. As Judge Frank Easterbrook has pointed out, a "claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up." *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994). The issue, again, is output. Unless the BCS arrangement restricts marketwide output, there is no antitrust violation. The revenue distribution arrangements *within a joint venture arrangement*, such as the BCS, have no effect whatsoever on market output. The revenue derived from the BCS reflects the income of the arrangement. Either the arrangement is lawful, in which case the revenue distribution among members of the venture is of no consequence under antitrust law, or it is not. If it is not, the remedy is to enjoin the arrangement in the first instance, and there will be *no revenue* whatsoever to divide.

D. No Antitrust Remedy Can Improve the Market Position of Any of the Conferences that are the Focus of this Hearing.

Finally, even if one were to concede everything that the BCS's antitrust critics assert and assume a violation, that avails them nothing. At the end of the day, the remedy for a violation of section 1 of the Sherman Act is an injunction against the challenged agreement. Thus, even if the BCS were found unlawful, the only remedy a court would impose would be to prohibit the agreement on a going-forward basis. There could conceivably be treble damages remedies available to parties harmed in their business or property by the arrangement, but for the reasons that I have already mentioned, none of the five conferences would fall into that category because they have, in fact, benefited financially from the arrangement. The harmed parties from a damages perspective could only be the BCS bowls and television networks, none of whom are complaining about the arrangement. Indeed, they all want to be a part of it.

But assuming for the sake of argument that the BCS were declared unlawful, what would the complaining side get? Certainly, the BCS arrangement would cease. The agreement creating it would be enjoined. But no court is going to create a playoff system or some other alternative post-season arrangement out of whole cloth. With rare exception, injunctions are prohibitory, not mandatory. They halt unlawful conduct but rarely mandate different conduct. Furthermore, antitrust courts do not sit as super-regulators or as public utility commissions drafting contracts for parties, determining the structure of the post-season (including the selection procedures, automatic qualification provisions, and the like), establishing venues for the games, negotiating telecasting and other media arrangements, allocating costs and parceling out profits, if any, ordering teams and conferences to participate in the judicially-created arrangement, and then

enforcing all of this handiwork. That is not the function of antitrust courts but of central planners. The Supreme Court has twice in the last several years admonished the lower courts to avoid such judicial misadventures.

Concerns about such an effort would not be rooted solely in the antitrust laws. To be sure, nothing in the federal antitrust laws grants the authority for such broad mandatory injunctive remedies. But more significant problems exist. The effect of a judicial decree attempting to create a playoff or some other alternative post-season structure and to enforce compliance with it, although nominally directed against conferences, would in actual effect operate directly against universities. After all, universities, not conferences, field football teams. Most institutions in the NCAA Football Bowl Subdivision are state universities. States are not "persons" under the Sherman Act, and even if they were, a federal antitrust decree with mandatory conduct requirements enforceable under penalty of contempt directly against state institutions would raise significant constitutional issues.

So what would be the end result? Even if an antitrust plaintiff filed a case against the BCS arrangement, spent millions of dollars and several years litigating these numerous issues, overcame the substantial factual and legal hurdles that I have described, and ultimately prevailed, the prize for those Herculean efforts would be a return to the old bowl system in which every conference negotiates bowl arrangements for itself. For BCS critics, that would have to rank as one of the greatest pyrrhic victories in the history of antitrust litigation.

Let me address one other point on this matter. I have heard certain BCS critics claim that an injunction against the BCS might indeed worsen the lot of the five conferences without annual automatic berths, but that it may impel all conferences to create a playoff system to replace it. That I suggest to you is sheer folly.

The BCS is a very mild form of cooperation. It does not harm television networks or bowls and does not upset traditional conference-bowl relationships. It is not restrictive in the least. But if it were declared unlawful, it is very difficult to conceive of how a playoff system that requires cooperation among exactly the same conferences and institutions that have exactly the same market power could possibly survive antitrust scrutiny. A playoff would surely have a detrimental effect on the bowls, which are the immediate "consumers" of the teams, and the antitrust peril to a playoff in a world in which the BCS had been declared unlawful would be greater than the BCS faces today. In my view, no antitrust counselor would advise his or her client that the endeavor was risk-free. Instead, he or she would likely advise that the playoff was an invitation to private litigation from any injured or defunct bowls and perhaps from television networks as well.

This concern is grounded in real-world experience. The NCAA faced exactly such a claim with respect to the basketball tournament from the former operators of the National Invitational Tournament ("NIT"). The NIT brought an antitrust claim against the NCAA alleging that the Association's rule mandating that teams play in the NCAA basketball tournament when invited violated the Sherman Act. The claim survived a motion for summary judgment, at which point the NCAA settled the case by purchasing the NIT for a reported \$57 million. See *Metropolitan Intercollegiate Basketball Ass'n v. NCAA*, 339 F. Supp. 2d 545 (S.D.N.Y. 2004). The bowls would be in the exact same position as the NIT in a case against a

football playoff. In other words, that litigation playbook has already been written. But unlike the NIT case in which the NCAA faced suit from only one tournament operator, there are more than 20 bowl organizations in college football, each of whom might potentially have a claim. I doubt that any institution, conference, or group of conferences would have the stomach for multiple antitrust cases challenging a playoff in a legal environment in which the BCS has been enjoined. But even if I were wrong about that, if even one bowl could prevail on such a challenge, the central features that would make a playoff system workable would almost certainly be enjoined. In short, an adverse antitrust judgment against the BCS may well sound the death knell for a college football playoff regardless of the educational or institutional reasons that underlie why most university presidents oppose such a radical restructuring of the post-season today. When that is understood, antitrust criticism of the BCS from those who supposedly favor the interests of the conferences without annual automatic berths, with all due respect, makes no athletic or economic sense.

Once again, Mr. Chairman, Senator Hatch and members of the Subcommittee, thank you for the honor of permitting me to address these matters today. I look forward to answering any questions that you may have.

**STATEMENT OF HARVEY S. PERLMAN
BEFORE THE ANTITRUST SUBCOMMITTEE OF THE
SENATE JUDICIARY COMMITTEE**

July 7, 2009

Chairman Kohl, Senator Hatch, and Members of the Subcommittee, I am Harvey Perlman, Chancellor of the University of Nebraska-Lincoln. I have served in that position since April 2001 and was Interim Chancellor of the University for several months before that. I received both my undergraduate and law degrees from the University of Nebraska-Lincoln. I have been on the faculties of both the University of Nebraska and University of Virginia Law Schools and was dean of the University of Nebraska College of Law from 1983-1998. As the new chair of the group of university presidents who oversee the Bowl Championship Series ("BCS") arrangement, I appreciate the opportunity to appear here today to discuss this matter with you.

When I last appeared before the full Judiciary Committee to discuss the BCS in October 2003, I addressed many of the issues that I understand are the focus of today's hearing. Several changes have been made in the BCS since that time, but the arrangement has continued to bring substantial benefits for college football, enhancing both the bowl games and the regular season. It has the support of a broad majority of university presidents and, in my view, continues to be the fairest and most sensible way to determine a national champion in the Football Bowl Subdivision in light of the myriad academic, athletic, and economic considerations that face our institutions and the long-standing relationships between certain conferences and bowls that have been integral to the development and growth of college football.

I will address the major issues that I understand are central to opposition to the BCS in more detail below, but at the outset, there are some basic, pragmatic considerations that should be stated clearly. Lost in the criticism of the BCS or in the suggestion that the BCS is somehow an illegal agreement among competitors is one crucial and fundamental fact: No matter what system is used to crown a college football national champion (assuming that any such system exists at all), it must be the product of an agreement – one that wins the support of the vast majority of conferences and universities. No conference or university can be forced to participate in some arrangement that it does not find to be in its best interest. Thus, whether we use the BCS or some other arrangements, whatever emerges must be an agreement attractive enough to earn the voluntary participation of many different conferences and universities. In other words, there must be some agreement among the participants on how a champion is going to be determined. The only question is what form that agreement will take.

Why is that so? The answer is simple: Neither the public that watches the games nor the television networks and bowl organizations that provide the revenues that make any championship structure economically viable will consider any arrangement that does not include teams such as Oklahoma, Texas, Florida, Georgia, Penn State, Miami, Florida State, Notre Dame, West Virginia, USC, Ohio State, Michigan, and my own university, the University of Nebraska, to be viable. If those teams and their conferences cannot be persuaded to participate, there will be no national championship. With all due respect, this is not true of the other

conferences. And so, because no conference or institution can be compelled to participate, anyone who sets about to create a national championship arrangement must take into account numerous factors that will affect conferences and institutions individually. The BCS addresses those factors. It alone can obtain the requisite participation of all of those needed to make a viable championship structure precisely because it alone is able to meet the major concerns of each of the conferences and Notre Dame. In short, it is the format on which the 11 Football Bowl Subdivision conferences and Notre Dame have been able to agree.

If the antitrust laws prohibit such an agreement, then the only alternative is to return to the old bowl system that operated from 1902 until 1991. Each conference would negotiate its own bowl arrangements individually with the many bowls. While that system was relatively successful, it did not provide the assurance of a game between the two highest ranked teams. Rather the national championship was determined by the various press associations that provided rankings of their own. Significantly, it also did not result in broad access for all conferences to major bowl games or sharing of revenues among the participating conferences and universities. Each conference would earn bowl berths and revenues based solely on its individual attractiveness to bowls and television networks. For some conferences, that worked well. For others, it was demonstrably inferior to the BCS. For reasons that I do not understand, those in the latter camp are among the most vociferous critics.

In 2004 the concerns of the five conferences without annual automatic berths in the BCS bowls were addressed and additional access and revenues were provided to those conferences. After lengthy negotiations in which I was personally involved, an agreement was reached that provided the automatic qualifying conferences sufficient access and revenues to retain their participation and accorded the other five conferences additional access and revenues. In addition, a mechanism was provided that provided a pathway to becoming an automatic qualifier based on overall conference success in football. This was not an easy negotiation. We understood, and were confirmed in the marketplace, that the addition of the additional five conferences would not add substantial revenues to the overall BCS agreement. Our media partners indicated they would not substantially increase rights fees based on these changes, and in fact, the media rights fees for the BCS games on a per game basis for the 2007-2010 period are lower than those that were paid for the 2003-2006 cycle. Nonetheless, we thought that it was best for college football to make the change.

It is not possible to begin a rational discussion about college football's post-season and about the game in general until this background is understood. Those who seek a radical restructuring of the BCS or the post-season more broadly continue to ignore these basic realities. That is why Dave Frohnmayer, the recently retired president of the University of Oregon, my predecessor as chair of the committee of university presidents who oversee the BCS, and a former Attorney General of Oregon, correctly pointed out that the signal flaw in the many alternative post-season proposals is their lack of any plan that can command the participation of those who are necessary to make them work from an athletic or economic perspective.

With this background, let me turn to the issues that I understand are the focal points of the hearing today.

**THE BCS ALLEGEDLY DENIES "FAIR OPPORTUNITY" TO PARTICIPATE IN
CERTAIN BOWL GAMES**

When I last appeared before the full committee on this matter in October 2003, I addressed the subject of "access" to bowl games at length. What I said then remains no less true today. The BCS does not deny any conference or institution or student-athlete a "fair opportunity" to compete in certain bowl games or to play for a national championship; on the contrary, it enhances those opportunities far beyond what would exist were the BCS to disappear.

During my previous appearance, I placed this issue in the context of higher education generally. Each institution has strengths and weaknesses. Some have great economics departments; some are renowned for their instruction in English or the arts; some are well known for business and others for particular science departments. These pillars of strengths at each of our universities were created by conscious investments, great leadership, natural advantages, significant philanthropic donations, dumb luck, or a combination of these. All students, like student-athletes, can make individual choices among the strengths of the various institutions in which they could enroll and these choices may enhance or diminish their future opportunities. Athletic departments are no different from any other university department. Some are simply better than others for historical reasons or natural advantages. I am not aware, however, of any legal means to change that reality. These facts are no less salient today. We cannot all be above average in every endeavor.

What has changed, however, is the structure of the BCS. Since my last appearance, the opportunities for the five conferences whose champions do not have annual automatic berths in the BCS bowls have been substantially increased. In October 2003, a team from one of those conferences had to finish in the top six in the Final BCS Standings to be guaranteed a berth in one of the BCS bowl games. I was part of a group of presidents and conference commissioners that worked together in 2004 to expand the BCS arrangement to include a fifth game and to ease the standards to enable the champions of those conferences to earn an automatic berth and to be considered by a bowl on an at-large basis. Today, the highest-ranked champion of those five conferences earns an automatic berth in a BCS bowl game if either: (1) it is ranked in the top 12 in the Final BCS Standings or (2) it is ranked in the top 16 in the Final BCS Standings and ranked ahead of at least one champion of a conference that has an annual automatic berth. Such team may be selected at-large by a bowl if it is ranked in the top 14 of the Final BCS Standings. Since those standards took effect for the BCS games in January 2007, a champion from one of the conferences without an annual automatic berth has earned a slot in a BCS game every year. On top of this guaranteed access, teams from those five conferences will also play in the national championship game if they finish ranked first or second.

This level of participation for teams from those conferences in the BCS games is unprecedented. In the years from the end of World War II through the 1991 football season, teams from those leagues played in the current BCS bowls six times. In the last five years alone, teams from those leagues have played in the BCS bowls four times. In the next cycle of the BCS arrangement, the Rose Bowl will take a team from one of those conferences the first time that it has an open slot and a team from one of those conferences qualifies for an automatic berth. In the absence of the BCS arrangement, none of these opportunities would be *guaranteed* to those conferences. I suspect that those conferences fully understand that reality. That is why none of

them has ever suggested that the BCS be replaced by the old bowl system in which each conference would be left to fend for itself. Instead, they always seek – in fact, demand – the participation of the six conferences with annual automatic berths and the University of Notre Dame because the participation of those conferences and institutions is necessary to make such guaranteed opportunities available. Thus, the notion that the BCS denies “access” to any bowl game has no basis in fact.

Likewise, the claim that the BCS denies institutions a “fair opportunity” to compete for the national championship has no factual basis. Only two teams can play in the national championship game each year. That means that a team has to be ranked either first or second in the Final BCS Standings to qualify for the national championship. The standard is the same for everyone. Is that a difficult standard to meet? It surely is. But it is no less difficult for Notre Dame or for a team in one of the six conferences with annual automatic berths in the BCS games than it is for any of the teams in one of the other five conferences. There are certainly some years in which one team believes that it should be in the game rather than another. In other words, in some years there is greater consensus about which teams should play in the national championship game than there is in other years. That is hardly an indictment of the BCS. Any system for crowning a national champion necessarily will involve a limited number of teams. Therefore, selection controversies will always exist. No matter what system is in place, somebody is going to have to choose teams. There is no reason to believe that any alternative structure is going to produce any less controversial selections, and undoubtedly those disappointed because a particular team is left out will claim that *the replacement system* is biased against their favored squad or conference. Thus, the idea that we are going to create some system that eliminates controversy and is somehow “fairer” is also not grounded in reality.

The real issue with respect to “access” and opportunities to play for a national championship is to compare the BCS arrangement with what the post-season would look like if the BCS were to go away. For those five conferences without annual automatic berths, that should be an easy judgment. The BCS is vastly superior to any alternative scenario likely to secure the voluntary participation of the conferences necessary to make the system work, and there is no credible argument to the contrary. I do know that there are many presidents of universities who believe that the only realistic alternative to the current BCS arrangement would be a return to the former bowl system and not an expanded playoff system.

THE DISTRIBUTION OF BCS REVENUES IS FAIR

The other criticism that I understand animates this hearing is the distribution of revenues derived from the BCS arrangement. The five conferences that do not have annual automatic berths in the BCS bowls are guaranteed nine percent of the net revenues from the arrangement. In addition, when a team from one of those conferences plays in a BCS bowl, those conferences are paid an additional nine percent of net BCS revenues. In other words, when a team from a conference without an annual automatic berth for its champion plays in a BCS bowl, those five conferences share 18 percent of net BCS revenues. This is approximately the same share that an automatic qualifying conference would receive. For the 2008 season, those five conferences received about \$19.3 million to divide among themselves as they saw fit.

Why this revenue distribution should again be controversial is puzzling for a number of reasons, but three stand out. *First*, the five conferences that do not have annual automatic berths agreed to precisely this revenue distribution in 2004.

Second, if the BCS were to disappear, none of that revenue would exist. Each of the five leagues that do not have annual automatic berths in a BCS bowl would, like every other conference, have to compete for bowl arrangements and whatever payments that they could generate through individual endeavors. Outside the BCS, those conferences have not been able to attract the demand of bowls and their respective television networks that will pay them anything close to what they earn from the BCS arrangement. For example, last year had there been no BCS arrangement, Utah, the Mountain West champion, probably would have played in the Las Vegas Bowl under an agreement its conference has with that bowl. The Las Vegas Bowl paid its two participants a total of \$1.8 million according to its report to the NCAA. If that money was split evenly between the conferences of the two participating teams, then each conference received about \$900,000. By contrast, according to the Mountain West commissioner, the Mountain West received \$9.7 million of the approximately \$19.3 million that the five conferences shared last season. That means that the Mountain West got about 10 times more money from the BCS than it could obtain on its own. By any measure, this is a generous subsidy, considering that the overall revenue generated by the BCS was not enhanced by providing access to the five conferences without automatic bids. Again, it is hard to see how there is anything "unfair" about a payment of such an enormous subsidy.

Third, the \$19.3 million payment to the five conferences exceeded the share, which was slightly less than \$18.7 million, that was paid to each of the six conferences with an annual automatic berth in the BCS games. (Any conference with a second team in the BCS receives an additional \$4.5 million.) The five conferences without annual automatic berths agreed to divide the \$19.3 million among themselves. If any one of those conferences believes that it is entitled to more money, then it can attempt to persuade the other four conferences in that group that their own internal distribution formula is unfair and should be adjusted.

Even in years in which those conferences do not place a team in one of the BCS games, they share in substantial revenues from the BCS. Thus, every conference without an annual automatic berth in a BCS game benefits substantially from the BCS arrangement regardless of whether one of its teams plays in a BCS bowl. In the absence of the BCS, those payments would not exist, and those conferences would be left to make up that revenue through individual efforts. Again, given this reality, no one has ever explained how the BCS can possibly harm those conferences or how those conferences would possibly be better off without the BCS.

A few points are worth noting regarding what revenue means at the institutional level:

- Our total athletic budget at the University of Nebraska is approximately \$75 million, all of which is generated by the athletic department itself. The BCS revenue distribution amounted to about 2% percent of our overall athletic budget.
- At Nebraska, we played 8 home football games in 2008. Each of those games was a sell out, and we netted about \$3 million for each home game we played.

- The Big 12 Conference, of which the University of Nebraska is a member, received approximately \$23 million from the BCS arrangement this year because we were fortunate enough to have two teams play in BCS games. On average, that was approximately \$1.9 million per member institution. If only one Big 12 team had played in the BCS games, our distribution would have been about \$1.5 million per institution. The Mountain West received \$9.7 million, which is just less than \$1.1 million per member institution.

Given the size of athletic budgets and the sources from which our athletic revenues are derived, the BCS revenue distribution does not explain or drive competitive success of those schools that have traditionally been football powers. The differential in athletic budgets among universities in the Football Bowl Subdivision schools has nothing to do with the BCS, but rather with the differential commitments of fans and donors and the investments schools decide to make in their athletic programs. That will remain true in the future regardless of how the post-season is structured.

**ANY ALTERNATIVE POST-SEASON STRUCTURE WILL RAISE THESE SAME
ACCESS AND REVENUE ISSUES**

Finally, many assume that all of these issues would simply disappear if the BCS were replaced by some alternative system that is supposedly more "inclusive." The generally favored concept is some sort of amorphous multi-game, NFL-style "playoff." Yet when proponents of these ideas are challenged to put these proposals into a concrete form, only cursory study of the proposals is needed to demonstrate that the perceived flaws in the BCS exist in even greater numbers in these alternative structures.

No playoff would be all-encompassing. It would have only a limited number of teams. By definition then, every year, some teams who believe that they are deserving would be "excluded." In short, the "fair access" issue would still arise in this playoff world.

Moreover, the idea that guaranteed slots for certain conference champions will not be a part of a playoff or some alternative structure ignores reality. As I have noted, to make any alternative national championship structure possible, there must be the participation of certain conferences. With only one exception, since the end of World War II, the national champion has either been Notre Dame or is now a member of one of the six conferences that have annual automatic berths for their champions in BCS games. That lone exception occurred in 1984 when Brigham Young University won the national championship. Accordingly, no championship structure can be created without the participation of *all* of those six conferences and Notre Dame.

That reality has ramifications for the creation of an alternative arrangement. As I noted, participation of any of the necessary conferences in any post-season arrangement is voluntary. Each of those conferences today could, on its own, obtain a valuable bowl berth for its champion. The Big Ten and Pacific-10 have sent their champions to the Rose Bowl since January 1947. The Southeastern Conference has sent its champion to the Sugar Bowl since the mid-1970s. The Big 12 Conference, in which the University of Nebraska plays, has sent our champion to the Fiesta Bowl since the late 1990s. Before the formation of the Big 12, we were part of the Big Eight Conference, and for many years, the champion of the Big Eight played in

the Orange Bowl. Given the opportunities available to the Big 12 Conference, I can say confidently that none of the presidents of our league would support any alternative system that did not guarantee our league champion at least what we could obtain by our individual efforts. The other conferences with annual automatic berths have attractive bowl options as well. If a playoff or other structure is not going to guarantee the Big Ten and Pacific-10, for example, what they can obtain from the Rose Bowl, there is no incentive for those leagues to leave the Rose Bowl for some other alternative system.

The same is true with revenue distribution. We in the Big 12 would not participate in an alternative post-season format that did not guarantee us at least the same amount of revenue that we can get on our own from a bowl arrangement. Otherwise, we would not be carrying out the duties we owe our institutions. Thus, the alternative structure is going to have the same revenue allocation issues that critics claim make the BCS "unfair." In other words, like the putative "access" issue, this asserted problem would not go away with a change in post-season structure.

And I don't want you to think that money is the only driver here. My sense is that the Pasadena Tournament of Roses Association, whose volunteers and staff work tirelessly each year to present the Rose Bowl and all of the other events in the Tournament of Roses celebration, as well as the institutions of the Pacific-10 and Big Ten, who have enjoyed the long-standing tradition of having their champions play in the Rose Bowl, would forego considerable revenue rather than diminish further that tradition. And I know the Big 12 relationship with the Fiesta Bowl is built on considerably more than just revenue.

I also want to address one other refrain that I occasionally hear from BCS critics – namely that the arrangement "excludes" schools in the five conferences without annual automatic berths from any shot at a national championship before the season starts. That contention is inaccurate, but even if we indulge that assumption, it is impossible to understand how the situation would change with a playoff or some alternative structure. A playoff is not suddenly going to alter the quality of football programs at various universities or the overall strength of particular conferences; it is not going to alter regular season schedules or the prospects of any institution. If anything, it would make the likelihood of some Cinderella arising and winning the championship much less likely because any such team would have to win multiple games to be the national champion rather than a single game. The reasons that cause institutions to struggle now are not going to disappear because the format of the post-season changes. Their difficulties are not related to the structure of the post-season but to the qualities of the programs overall, which, as I noted, is a function of their commitments and investments in football and athletics generally. None of those fundamentals changes with the format of the post-season.

What would be changed is the character of college football as a whole. I catalogued the negative effects that are likely to result from a playoff in my testimony in 2003 and the reasons that most university presidents do not support such a post-season structure. Rather than repeat those here, I will highlight two issues that are pertinent to these access and revenue issues – effect on the bowls and fans and effect on the regular season.

Impact on Bowl Games and Fans. A multi-game playoff would substantially harm the existing bowl games and their communities that have been such great supporters of college

football over the years and impose unacceptable burdens on the many fans of the game. The bowl games simply cannot be ignored in any consideration of a playoff. Each game is run by a bowl committee that is itself an independent economic entity. Bowl committees do far more than sponsor football games. Each year, the bowls sponsor major events that showcase local communities and celebrate college football. They generate substantial economic benefits for their host metropolitan areas. A playoff would threaten all of these benefits because television and sponsorship dollars would flow away from the bowls and into the playoff. Many feel, and I personally agree, that a playoff would lead to demise of many, if not all, of the bowl games over time.

Bowl games also provide unique experiences for a number of student-athletes. Today, there are 34 bowl games that provide post-season opportunities for approximately 6,800 student-athletes. For many of these young men, participation in a bowl game is a highlight of their athletic careers. The bowl experience is not limited to three hours on a playing field in a different stadium. It encompasses much more. Bowl committees generally treat student-athletes to several days of events and activities designed to give them a flavor of the local community. These events permit student-athletes to enjoy attractions near the host city and often give them the opportunity to participate in charitable activities sponsored by the bowl committee. These games also allow student-athletes who do not win conference championships but have good seasons to enjoy the rewards of post-season play. If the bowl games disappear, so would those post-season opportunities. For those institutions that are not likely to make the playoff, which will be the vast bulk of the Football Bowl Subdivision, the constriction of post-season opportunities is far more likely to harm their programs than to make them more competitive on the field.

Playoff proponents sometimes suggest that these concerns could be alleviated by playing playoff games at the bowl sites. That will not work. Even the National Football League, whose playoff structure is often held out by many as the paradigm for a college football tournament, plays all of its post-season games, except the Super Bowl, at the home stadium of one of the participating teams. We would have to adopt the same model. We simply cannot ask our fans to criss-cross the country each weekend in December or January to watch their teams play at distant bowl locations. For example, we cannot expect fans of the University of Washington to go to the Cotton Bowl in Dallas for a first-round game one week, then to the Citrus Bowl in Orlando for a second-round game the following week, followed by a semi-final game in the Orange Bowl in Miami the following week, and a championship game in the Rose Bowl in Pasadena the following week. Few people have the time for such constant travel, let alone the financial resources necessary to cover air fare, hotels, meals, and other expenses attendant in such a whirlwind schedule.

Impact on the Regular Season. Finally, a playoff would have a detrimental impact on the college football regular season. Today, college football determines its national champion largely on the basis of play during the regular season. One of the attributes that gives the game great national appeal is that teams essentially play games of championship importance every Saturday in the fall. That is why college football fans, at least among the Big 12 and other major football-playing conferences, have for years packed mammoth arenas, many in small towns, every weekend. In September, my university will celebrate its 300th consecutive sell out of Memorial Stadium for home football games. The BCS enhances those games and makes games

from different conferences interesting and compelling to fans that might otherwise not have been attracted to a game. Insert a playoff and much of the drama of regular season rivalries would be gone. When undefeated Michigan plays undefeated Ohio State, as occurred in 2006, fans around the country watch with great anticipation because the outcome of that game may have a substantial impact on their favorite team's chances for a national championship. Create a playoff, and the game would not have the same significance. Both teams would be likely to be in the playoffs, and they could play each other again in a matter of weeks in a game that would be invested with greater importance because it would occur later on the calendar. The regular season would become an exercise seeding for a tournament bracket. The championship would be decided later in other games, which we would have arbitrarily invested with greater significance. Indeed, for all its excitement, that same criticism has been leveled at the NCAA basketball tournament. While fans undoubtedly enjoy "March Madness," the emphasis on a handful of games in March has made regular season basketball and conference championship races much less significant. As with most other university presidents, I do not believe that the great traditions of regular-season college football should be diminished or sacrificed in order to create a post-season structure that would invest a handful of games with great significance at the expense of many other games.

There is also an economic component that also bears on the structure of the post-season. The vast bulk of revenues from football for both individual institutions and individual conferences come from the regular season. That will remain true. Conferences are required by law to sell their regular season television rights individually. Any post-season arrangement that devalues the regular season, therefore, will result in lower television rights fees for individual conferences. No conference can support a post-season arrangement that reduces the value of its television packages. Those conferences will rightly demand that they be made whole. If, for example, a playoff requires the abandonment of conference championship games, a conference that has such a game today and is able to obtain revenue from it will not voluntarily participate in the playoff unless it is made whole. Similarly, if a playoff requires a reduction in the number of regular season games, then institutions that lose substantial dollars will have to be made whole as well. Given these costs, it is highly doubtful that a playoff can generate sufficient revenues to cover losses from the regular season, make any bowls that are harmed whole, and still generate the revenues equivalent to what the bowl system provides today. In short, those who believe that revenue distribution from the post-season today is "unfair" are likely to find that the situation is far worse under an alternative post-season structure than exists today.

In short, a multi-game, NFL-style playoff solves nothing for college football. This is why the BCS arrangement is a sensible and limited response. It provides the opportunity for a national championship game without producing all of the negative consequences listed above and without interfering with the academic calendar or impinging on the academic missions of our universities.

CONCLUSION

Simply stated, the BCS arrangement provides fans with an annual national championship game – something that would not exist without it – while providing greater bowl opportunities and revenue for every Football Bowl Subdivision institution. It has enhanced the game, and I have no doubt that it will continue to provide great benefits to college football and its fans in the

future. The BCS is not perfect, but since no perfect system exists, that hardly is a strike against it. It is vastly superior to the alternatives and has been good for the game.

Again, thank you for the opportunity to speak with you today about these matters.

**STATEMENT OF JOHN D. SWOFFORD
COMMISSIONER OF THE ATLANTIC COAST CONFERENCE**

Chairman Rush, Ranking Member Radanovich, and Members of the Committee, I am John Swofford. It is a pleasure to appear before you today to discuss college football, its post-season, and the Bowl Championship Series ("BCS").

I am Commissioner of the Atlantic Coast Conference ("ACC") and have served in that role since July 1997. Before then, I was Director of Athletics at the University of North Carolina, my alma mater, from 1980 to 1997. I have been privileged to spend my entire professional career in the administration of intercollegiate athletics. While in college, I was fortunate to play football for Coach Bill Dooley and had the opportunity to play in two post-season bowl games. Like virtually all student-athletes, I did not move on to the professional ranks. My football career ended when I received my undergraduate degree. But my own experiences in the 1970 Peach Bowl and 1971 Gator Bowl remain among the fondest memories of my athletic career. Both capped very successful seasons for the University of North Carolina and provided great rewards for my teammates and me. Not only did they allow us to test ourselves against fine teams from Arizona State University and the University of Georgia but also offered us the chance to enjoy the hospitality and attractions of the cities of Atlanta and Jacksonville for several days. Throughout my career as an athletic director and as a commissioner, I have worked to ensure that as many college football players as possible have had the same privileges to enjoy the post-season experience and build life-long memories that were accorded to me by my predecessors.

College football and its post-season can only be understood by knowing the history of the game. Rutgers and Princeton played in the first intercollegiate contest in 1869, and the game grew in popularity over the next several decades, as many schools began fielding teams and the rules of the game became standardized. In 1902, even before the formation of the National Collegiate Athletic Association, the Pasadena Tournament of Roses Association, which was then a relatively new organization that held an annual holiday celebration in Southern California, decided to invite the University of Michigan to play in a post-season game against Stanford in what became the first Rose Bowl contest. While that first game was not tremendously successful – it was halted in the third quarter with Michigan leading 49-0 – and was replaced over the next few years with other events, such as chariot races, college football continued to grow in popularity. The Tournament of Roses revived the idea of a post-season college game in January 1916, and the game became a remarkable success. The Rose Bowl has been played annually since that time, and in 1923 moved into a new stadium that still hosts the game. By the late 1920s, the Rose Bowl had grown into a national event, pairing a highly regarded team from a West Coast institution against a highly regarded team from a university in the eastern half of the United States.

In the 1930s, local civic organizations in New Orleans, Miami, and Dallas, joined by hotel and restaurant associations, chambers of commerce, tourism bureaus, and the like, began hosting post-season college football games and a number of ancillary events during the period between Christmas and New Year's Day. Noting the extraordinary success of the Tournament of Roses and the Rose Bowl game, these organizations decided that a college football game could be the centerpiece of a three or four-day event that would attract visitors to a community and fill

hotel rooms and increase patronage at restaurants and other hospitality establishments when business would otherwise be down because of the holiday season. Thus were born the Sugar Bowl, Orange Bowl, and Cotton Bowl, and those events have built traditions and forged places in their respective communities and in the nation's culture that continue to this day. In fact, the Cotton Bowl attracted more than 88,000 fans to its game this season, its largest crowd ever.

The purpose of bowl games in local communities has always been two-fold. First, they aim to generate economic benefits for their host regions by attracting visitors who will come and stay several days. Second, they support charities that provide services locally. Those missions remain largely unchanged. Today, there are 34 post-season college football games, including one in Canada, that generate more than a billion dollars annually in economic impact for their host cities, and return millions of dollars to numerous local charities and philanthropic organizations. They have also returned billions of dollars over the years to participating colleges and universities and provided scholarships and other financial assistance to countless students and student-athletes. The bowls are revered institutions locally and have become part of the fabric of the nation's holiday celebration.

Bowl games did not achieve this lofty status on their own. Over the years, a number of bowls developed individual working relationships with college football conferences. The oldest and longest-standing of these affiliations is between the Tournament of Roses and the Big Ten and Pacific-10 Conferences. Beginning in January 1947, those two conferences agreed to send their champions to play in the Rose Bowl game each year. For the last six decades, the Big Ten and Pacific-10 have sent highly-rated teams to play in the Rose Bowl game. Their fans have bought tickets, filled hotel rooms, and attended other events in conjunction with the Tournament of Roses, thus enabling the Rose Bowl to fill its stadium each year, attract the interest of fans across the nation and lure broadcasters willing to pay substantial rights fees to televise the game. In return, the opportunity to play for a berth in the Rose Bowl has dramatically increased the attractiveness of regular season championship races in the Big Ten and Pacific-10 Conferences. A Rose Bowl berth is the traditional prize for the league championship in those conferences. The Big Ten-Pacific-10 affiliation with the Rose Bowl is as vibrant today as it has ever been.

While it is the oldest of its type, the Rose Bowl arrangement is not the only such relationship. For more than 30 years, the Southeastern Conference ("SEC") has sent its champion annually to play in the Sugar Bowl in New Orleans. Like the Rose Bowl, the Sugar Bowl has benefitted from the passion of SEC fans. By the same token, with the Sugar Bowl as their goal, SEC teams have built a reputation for excellence that is well-known. In addition, for many years, the Cotton Bowl had a similar relationship with the old Southwest Conference, and the Big Eight Conference, whose membership is today part of the Big Twelve Conference ("Big 12"), for decades had a similar relationship with the Orange Bowl. The ACC began a relationship with the Florida Citrus Bowl (now the Capital One Bowl) in the late 1980s, and in the past 10 years we have enjoyed a similar relationship with the Orange Bowl. The Big 12 has a relationship today with the Fiesta Bowl. The existence of these conference-bowl affiliation arrangements has been integral to the success of college bowl games, and understanding them is crucial to understanding the history of the game as a whole.

Another important aspect of college football is that, unlike most professional sports, college football does not consist of one league but many separate leagues. The number of

conferences and the member institutions in each has changed often over the years with some leagues dissolving and new ones developing. Today, there are today 11 different leagues with 117 teams at the highest level of the game, the NCAA Football Bowl Subdivision. These conferences range in size from 8 teams to 13 teams. In addition, three teams, the University of Notre Dame, the United States Military Academy, and the United States Naval Academy, compete as independent institutions, meaning that they have chosen not to join any conference for football. Each of these leagues crowns its own champion and negotiates its own bowl relationships. Each conference also negotiates its own contracts for telecasting its regular season football games.

Because college football developed as numerous conferences rather than as a single unified league and has had a successful broad-based bowl system, the member institutions of the NCAA have not believed it necessary to create a championship of all leagues or what has long been referred to by the media and public as a "national champion." The presidents of the universities, through the NCAA, have studied the creation of such a championship many times over the years, but have consistently rejected it in favor of the traditional bowl arrangements.

While there were efforts to rank teams and determine "national champions" as far back as the late 1800s, perhaps the most well-known ranking began when the Associated Press created its college football poll in 1936. The American Football Coaches Association teamed with United Press International in 1950 to publish its own weekly ranking of teams from a panel of coaches. Both the coaches poll, which is now published by *USA Today*, and the AP poll gained wide acceptance by the public and media over the years, and at the end of each season, the highest-ranked team in each has often been declared the best in the nation and thus "national champion." For many years, both the AP and coaches polls determined the national champion based solely on the results of regular season games. By the late 1960s or early 1970s, however, both began to conduct polls after the bowl games, bringing added attention and focus on those games and giving them a role in determining a "national champion."

The organization of college football into multiple independent conferences is also crucial to understanding its economic underpinnings and why post-season arrangements have developed as they have. The starting point for discussing conferences as they exist today is the Supreme Court's 1984 decision in *NCAA v. Board of Regents* ("NCAA"). Before that time, the NCAA sold all television rights for regular season football. It strictly limited both the number of televised games and also the number of television appearances that any individual institution could make in a single year. Similarly, the NCAA plan did not permit individual universities or individual conferences to sell television rights, and the NCAA contract paid a set amount of money to an institution appearing in a televised game regardless of the attractiveness of the team or the game.

The Supreme Court's decision ended the NCAA television plan and effectively required all conferences and independents to sell their television rights individually. It would be difficult to overstate the effect of the decision both in terms of conference development and post-season arrangements. Before *NCAA*, a thriving group of traditional powers played football as independents. Among them were Notre Dame, Penn State, Florida State, Miami, Virginia Tech, and West Virginia, along with several others. With the exception of Notre Dame, however, none of those institutions individually was sufficiently attractive to television broadcasters to obtain a

national television contract. Thus, when the NCAA television plan ended, most of them were left with the option of joining a conference or facing the prospect of severely reduced television revenues. As a result, Florida State joined the ACC, Penn State joined the Big Ten and Miami, Virginia Tech, West Virginia and several other independents, such as Syracuse, Rutgers and Pittsburgh, joined together to form an entirely new football league, the Big East Conference. There were other changes as well. The Southwest Conference, which largely consisted of universities in Texas, dissolved and four of those schools joined with the members of the Big Eight Conference to form the Big 12.

This conference formation and expansion had a significant effect on the football post-season. The bowl system had never been very good at matching the top two teams in the nation. Only nine times between 1946 and 1991 were bowls able to pair the top two teams in the polls against one another largely because of conference-bowl affiliation arrangements. When there were a thriving group of independents, many of whom were highly-ranked, the bowls could occasionally pair one of those teams with against a highly-ranked conference champion in a matchup of one versus two. *NCAA* and the changes that it brought about altered that landscape substantially. Because many independents were joining conferences, they would now be subject to the conference-bowl affiliation agreements. Games such as Penn State-Miami in the 1987 Fiesta Bowl and Oklahoma-Miami in the 1988 Orange Bowl, both of which paired unbeaten and consensus top two teams, would not be possible in the future. This reality was of major concern to the bowls and to the conferences.

The issue reached a decision point in 1991 when the Blockbuster Bowl offered the ACC and the newly formed Big East Conference an affiliation arrangement that would have paid both conferences about \$7 million annually to commit their champions to that game. That offer was extraordinary at the time. Had the ACC and Big East accepted that offer, it would have been virtually impossible to match the top two teams against one another in a bowl game unless the top two teams were members of conferences that happened to have affiliation arrangements with the same bowl or one of the top two teams was an independent that could play against a team in a bowl that had an open slot.

The chances of either happening were very small for two reasons. If a bowl had affiliation arrangements with two conferences, it could match the top two teams only if the champions of those two leagues happened to be ranked first and second. That did not often happen. Further, when a bowl had an open slot, it often would effectively commit that slot to a highly-ranked team after seven or eight games in a season rather than waiting until the end of the year. A team highly-ranked after eight games might lose two or more of its final games and drop in the rankings. What appeared to be an attractive matchup earlier did not have as much significance when the full season was complete.

To address these issues, in 1991, several bowls and conferences formed the Bowl Coalition. The Bowl Coalition did not alter the conference-bowl affiliation arrangements. Instead, it did two things. First, to obtain the participation of the ACC and Big East, the participating bowls – the Cotton, Fiesta, Orange, and Sugar Bowls – promised guaranteed slots to the champions of those two conferences each year. The ACC and Big East would not have turned down the Blockbuster Bowl offer, which was economically more attractive, had the four bowls in the Coalition not offered them guaranteed slots that would provide them a certain bowl

berths for their respective champions. Second, to obtain the participation of Notre Dame, the four participating bowls agreed to select Notre Dame each year when it was eligible under certain criteria. The Coalition arrangement also created a selection order allowing those bowls to defer filling their open slots until the regular season ended.

Because the Bowl Coalition had no effect on existing conference-bowl affiliation arrangements, it could not guarantee a matchup between the two top-ranked teams. It could not, for example, match a top-ranked team in the Southeastern Conference against a second-ranked team from the Big Eight or Southwestern Conference because all of those conferences had committed their champions to different bowls. Similarly, because the Big Ten and Pacific-10 champions were annually committed to play one another in the Rose Bowl, neither could be paired against a team from a different conference in any bowl game regardless of ranking. Nonetheless, given these limitations, the Bowl Coalition was quite successful. Twice during its three years of operation, the Coalition arrangement matched the consensus top two teams in a national championship contest at a bowl game. Given that the bowl system had created only nine matchups of the top two teams from 1946 to 1991, the Coalition achieved more than its architects could have envisioned.

The next opportunity to increase the likelihood of a matchup between the top two teams came in 1995 with the formation of the Bowl Alliance. Many of the conference-bowl affiliation agreements were ending at that time and the Southwest Conference was dissolving. Rather than renewing the established agreements, the Fiesta, Orange, and Sugar Bowls, along with the ACC, Big East, Big 12, and SEC, agreed to allow the participating bowls to select teams in an order that would permit them to maximize the chances of pairing the top two teams. Again, none of the participating conferences would have committed to the Alliance arrangement without obtaining a guaranteed slot in one of those games. They would have simply renewed their existing affiliation agreements. Similarly, none of the participating bowls would have joined if the participating conferences had not committed their champions to play in their games because they could have entered affiliation arrangements with individual conferences that would have guaranteed them attractive teams. The Alliance operated for three years.

Although the Alliance was successful economically, it had two weaknesses. First, by abandoning the traditional conference-bowl affiliations, it sapped some of the strength of the bowls. For example, during the Alliance era, the SEC champion did not play in the Sugar Bowl annually as it had traditionally. For those three years, the Sugar Bowl could not tell its patrons that it was regularly slated to host SEC champion or any SEC team at all. Fans of SEC teams were not sure what bowl would host their champion. In short, the Alliance experiment reaffirmed both the economic and athletic value of the historic conference-bowl affiliation arrangements.

Second, and as important, the Alliance, like the Coalition, did not include the champions of the Big Ten or Pacific-10. Four times from 1991 to 1997, either the Big Ten champion or Pacific-10 champion finished the season undefeated and ranked first or second. Furthermore, each time that occurred, there was another team from another conference that was undefeated and either ranked first or second. Thus, it was clear that any attempt to ensure a game between the top two teams in the nation would require the participation of the Big Ten and Pacific-10 champions.

That requirement presented a significant challenge. The Big Ten and Pacific-10 champions had played against one another in the Rose Bowl since 1947. That arrangement was part of the fabric of those conferences and, as I noted, the prize for winning the conference championship. Giving up a guaranteed slot in the Rose Bowl to participate in a possible national championship game elsewhere was a substantial sacrifice for the Big Ten and Pacific-10, and some presidents and athletic directors at the member universities of those conferences thought it was simply too great a sacrifice to make. Similarly, the Tournament of Roses considered the idea with trepidation. The Rose Bowl had built its tradition and value to fans and broadcasters by offering the Big Ten and Pacific-10 champions every year. It was not anxious to alter that successful formula.

Nonetheless, after much discussion, the Big Ten, Pacific-10, and Tournament of Roses agreed to alter their arrangement in two important ways. First, the Big Ten or Pacific-10 champion would not be required to play in the Rose Bowl if it were ranked first or second and could play against a team ranked first or second in another bowl. Second, to give the Rose Bowl the opportunity to join the other participating bowls in hosting a national championship game once every four years, the Big Ten and Pacific-10 agreed not to play in the Rose Bowl if they were not ranked first or second.

These changes to the arrangement among the Big Ten, Pacific-10, and Tournament of Roses were the final pieces in the puzzle that established what is now known as the Bowl Championship Series. The BCS has for the first time in the college football history made it possible for the bowls to guarantee a matchup between the top two teams in the nation each year.

Those of us who were there at the BCS's creation and have seen it develop over the last 11 seasons can attest to its enormous success. We do not claim that it is perfect. Yet no alternative mechanism for determining a college football national champion will ever be perfect, without controversy, or without ambiguity. Indeed, those who advocate some different structure almost always do so in the abstract and with hindsight after having seen the season play out. This is not how athletic administration works. The rules and structure must be established before the games start and they must take account of a number of salient facts, most notably that college football consists not of one league but many leagues – each with its own character, traditions, bowl affiliations, and market value – and that the bowls are independent economic entities that have existed for many years and provide enormous economic benefits to their communities and substantial post-season opportunities not only to the top teams in college football but to almost every institution that has a successful season. Only five of the bowl games are part of the BCS. Twenty-nine others, however, generate tourism, economic impact and accompanying tax dollars for their cities and give approximately 5,800 young men, most of whom are not fortunate enough to play on conference championship teams or highly-ranked runner-up teams, the chance to enjoy a memorable post-season experience. No one has ever put forward an alternative plan of determining a national champion that addresses the numerous economic and athletic issues in any satisfactory way.

The BCS was not built on virgin ground; bowls had existed for more than 90 years when it was created. Even the most ardent advocates of an alternative system do not contend that the bowls should be abandoned or weakened. Thus, to make any post-season structure workable in college football, those of us who have the privilege and responsibility for administering the game

must take the assets that we have, account for the long-standing, valuable relationships that have existed for decades, and within the existing framework craft the best possible mechanism for determining a national champion.

The criticism of the current system usually falls into three categories. Let me address each of them in order.

One criticism is that the BCS guarantees bowl berths and money to certain conferences but not to others. This states the situation exactly backward. Before the formation of the BCS, each of the six conferences with an annual automatic berth in a BCS game had a very attractive guaranteed bowl slot for its champion or was able to obtain one individually. If the BCS were to disappear tomorrow, each of those conferences would return to the marketplace and obtain a similarly attractive bowl slot on its own through individual negotiation, most likely in one of the current BCS games. The primary loss would be a guaranteed annual bowl game pairing the top two teams in the rankings.

At the time the BCS was formed, none of those conferences would have committed to the arrangement had it not been promised a bowl slot at least as attractive as the one it could have obtained on its own. Moreover, it was clear that the BCS could never achieve one of its goals of annually matching the top two teams in the nation if it did not have the participation of those conferences and the University of Notre Dame. Since 1946 either Notre Dame or a team in one of the six conferences with an annual automatic berth for its champion in a BCS bowl has finished atop the final AP poll, except for 1984 when Brigham Young finished first. To make an annual game between the top two teams a reality, the architects of the BCS had to look at who had won national championships in the past and consider who was likely to play for them in the future. The historical record made that clear. They then had to address certain established relationships between bowls and the conferences in which those teams were members and persuade both those leagues and their affiliated bowls to try something new. No bowl or league, however, could reasonably have been expected to give up an established relationship unless the new arrangement guaranteed it at least the same benefits that it could obtain by itself. For the conferences, that meant guaranteed slots at least the equivalent of their then-existing affiliations, and for the bowls it meant guaranteed participation by teams that were at least as attractive as the ones that they were then getting from their conference affiliation arrangements. The BCS does nothing but provide those conferences that have annual guaranteed slots and the bowl games that hosted them precisely what they would obtain if it did not exist.

Of course, five other conferences in college football do not have annual automatic berths in BCS games. The BCS provides enormous benefits for them as well. For a number of reasons, none of those conferences had been able on its own over the years to obtain a bowl slot as attractive as, or that provided a financial payout approaching the level of, the other six conferences. Indeed, at the time of the formation of the BCS arrangement, there were roughly 18 bowl games and several of those five conferences did not have a guaranteed slot in any bowl game. The BCS arrangement expanded opportunities for those conferences in three ways:

First, it guaranteed the teams in those conferences that they would play in a national championship game if they were ranked first or second at the end of the season. That was in

sharp contrast to 1984 when Brigham Young was ranked first at the end of the regular season but played in the Holiday Bowl against a 6-5 Michigan team.

Second, the BCS arrangement guaranteed those conferences that a team ranked sixth or higher would play in one of the BCS bowls. That standard was relaxed a few years ago, resulting in even broader guaranteed participation. Today, a team in one of those five conferences is guaranteed a slot in a BCS bowl if it is a conference champion and either ranked in the top 12 at the end of the season or ranked in the top 16 at the end of the season and ranked above the champion of a conference with an annual automatic berth. This has created unprecedented opportunities for those conferences to compete in the BCS bowls. From the end of World War II through 2003, only six teams that are currently members of those conferences played in any of the BCS bowl games, and two of those were in the Fiesta Bowl's early years when it had an affiliation arrangement with the Western Athletic Conference. In the last five years, four teams from such conferences have played in BCS games.

Third, the BCS guarantees an annual payment to each of those conferences for making their teams available even when they do not qualify for the national championship game or are not selected for a BCS game and substantially more when one of those teams actually plays in a BCS game. Those revenues are far in excess of the amounts that any of those conferences has ever been able to obtain on its own from any post-season bowl game.

Thus, far from being "unfair," the BCS has provided bowl berths to those conferences that bring historical prestige, records of achievement, and marketplace value to the arrangement equivalent to what they would obtain on their own. For those conferences without annual automatic berths, it has expanded playing opportunities and economic benefits well beyond those that they have ever been able to obtain on their own. This has enabled those conferences to build their programs and to achieve national recognition that has heretofore not come their way. Utah's recently completed unbeaten season, Hawaii's Sugar Bowl appearance in 2008, and Boise State's fine run through the 2007 season are classic examples. In fact, Boise State only joined the NCAA Football Bowl Subdivision thirteen years ago. The ability to play in a BCS game has elevated a fledgling program and given it national exposure in a way that the prior bowl system never would have.

A second criticism of the current system is that it does not establish a national championship with any "certainty" or "finality." Most critics note that in some years, there may be several teams with a claim to being a deserving contender for the national championship game and that the only way to avoid controversy is to adopt some sort of multiple game playoff. As I noted, no structure will determine a championship with any "certainty." Someone will have to choose teams that will participate in a playoff, and because football can never have as many playoff slots as basketball, nor as many data points to evaluate teams, there will always be significant selection controversy. Moreover, the idea that a champion will be decided with "certainty" is at odds with reality. All playoff arrangements require some initial seeding of teams, which is an imprecise endeavor at best. Many different seedings could be established each year, and each may yield a vastly different result. Playoffs result in winners of tournaments that are seeded in a particular fashion and often after ignoring regular season results, as we have seen many times in the professional leagues. College football has chosen to go a different route,

largely because the bowl system has been effective in providing a post-season format that is more conducive to the overall missions of the participants.

Changes in the post-season cannot be considered in isolation. Intercollegiate athletics exists not as an independent function of universities but to further the education of the young men and women who participate in college sports, teaching such values as perseverance, loyalty, dedication, and teamwork. Nonetheless, it has an economic component that cannot be ignored. At most institutions, football is by far the highest revenue generator, and in many cases, it covers the vast bulk of the costs of the remainder of the athletic department. Thus, no school and no conference can possibly afford to take steps that would reduce the value of its football program. No matter how the post-season is structured now or in the future, each school will derive the lion's share of its football revenue from the regular season. This means that any revenue lost from regular season will have to be made up with incremental post-season revenues. Even if a playoff were to generate significant additional revenues over the current bowl system – itself a dubious proposition – it is highly unlikely to make up for losses suffered by conferences and institutions from a reduction in value of the regular season.

The BCS serves to maximize the value of regular season football by keeping the focus of the national championship chase on conference championship races and regular-season non-conference games. Indeed, since the creation of the BCS in 1998, college football has seen unprecedented growth in attendance and fan interest because the regular season games matter so much. For the 15 years before the BCS, attendance at all regular season college football games remained flat at approximately 25 million fans per year. Since the formation of the BCS, that number has grown each year, with a record 37.4 million fans attending games in 2008.

With respect to television, conferences have increased both their exposure and revenues. The BCS enhances television value because games that are important in one conference that might otherwise be of interest only regionally are exciting for fans nationwide. For example, in 2007, West Virginia and Pittsburgh played their traditional rivalry game on the last Saturday of the season. At the time, Pittsburgh was 3-8 and simply concluding what had been, to that point, a disappointing season. West Virginia was 10-1 and ranked number two in the nation. It had already sewn up the Big East championship, and in a playoff format, it would have already secured a spot in a tournament. While the traditional rivalry would have made the game interesting to fans of the two teams, had a playoff existed, West Virginia would have been playing for nothing more than seeding. Yet because of the BCS, West Virginia was vying for a slot in the BCS National Championship Game and thus the game had interest to fans around the nation. Fans of LSU, USC, Ohio State, and other highly ranked teams that were in the hunt for a spot in the BCS National Championship Game had reason to tune in to see whether West Virginia could win and secure a title shot. In other words, what might have been a game of regional interest at best became a game of national significance. That story is repeated in each conference every year as a result of the BCS arrangement. The BCS, therefore, has resulted in generating cross-conference interest in games and expands the viewing audience for regular-season conference television packages for each and every league in the Football Bowl Subdivision. That translates into higher rights fees for regular season football, which redounds to the advantage of each college and university. Broadcasters have noted the vibrancy of the game, and today, five major broadcasters carry regular-season college football – ABC, CBS, NBC, Fox cable outlets, and ESPN, which is a sister company of ABC. In addition, some other

national cable outlets, such as Versus, and a number of syndicators carry regular-season games. College football is healthier today than it has ever been in its history, including its golden era of the 1910s and 1920s when it had a far greater following than professional football.

Adoption of an alternative post-season format would dramatically alter that dynamic. While the NCAA Division I men's basketball championship tournament – March Madness – has been very successful, it has taken the spotlight away from regular-season basketball. The value of regular-season basketball for many leagues and institutions has declined substantially, and the number of national broadcasters has dwindled, as have regular season rights fees. In many cases, the incremental revenues from the NCAA basketball tournament have not been sufficient to offset the losses to individual institutions and leagues. A similar result in college football would be very difficult economically for all conferences and institutions, but particularly those with higher-value television packages and greater regular-season attendance. In an era in which schools increasingly face challenges because of state budget cuts, declines in donations, and great economic uncertainty generally, tinkering with proven success, especially given the experience from the basketball tournament, is not something on which many schools and conferences will gamble.

Third, the current system is often criticized by playoff proponents who contend that a playoff need not alter the great traditions of the game and that a bowl system can co-exist with a playoff format. This misconceives the nature of the bowls. Bowls are not merely games; they are events. Teams do not travel to them the day before the game and leave immediately afterward, as in the regular season. Rather, they go to the host city and stay as many as six days enjoying the hospitality of the bowl organizations geared for teams and fans. Fans travel to the games and stay for several days, thus generating economic benefits for the host city and allowing the bowl to attract local sponsors and support that help it fulfill its economic and charitable missions.

Bowls are particularly suited to the holiday period because fans generally have more free time and are able to spend several days away from home. No multi-game playoff can possibly be played within the short holiday period. Thus, using the bowls as playoff sites would be impractical. Sites must be chosen (and stadiums and hotels reserved) well in advance and well before teams are known. Therefore, there is no assurance that the participating teams and their fans will have any regional proximity to the bowl sites. Unlike in basketball where multiple games involving four or eight institutions can be played at a single site within a span of two or three days, and organizers need only fill arenas with 18,000 or so seats, major bowls have only one game that involves two institutions and must sell 60,000-70,000 tickets. We cannot reasonably expect fans to travel to distant locations around the country multiple times during the month of December or January and stay in each host city for three or four days. Our fans do not have the time, and most do not have the financial resources, to do so. Moreover, I am not aware of any football playoff in this country at any level in which all games are played at pre-determined neutral sites that may be thousands of miles from the homes of the participating teams.

Like all other football playoffs in the NCAA and the professional leagues, early-round games of any Bowl Subdivision playoffs would almost certainly be played at campus sites with only the final contest at a neutral site. As the playoff grows, sponsorship and television revenues

that historically have flowed into bowl games will inevitably follow, meaning that it will be very difficult for any bowl, including the current BCS bowls, which are among the oldest and most established in the game's history, to survive. Certainly the twenty-nine games that are not part of the BCS would be in peril.

These realities pose two very serious dilemmas for college football. First, the bowls and their host cities have been very good for the game. They have welcomed teams for many years, provided superb hospitality and experiences for student-athletes, supported the education of students through scholarship programs, and returned billions of dollars to the participating institutions. They have been loyal supporters, have helped build its traditions, and merit our full support.

Locally, they have become treasured assets in their communities. They generate economic impact that is substantial, and they provide numerous charitable benefits. There are many examples but just two make this point clearly. The two BCS bowl games played in New Orleans in January 2008 created an economic impact estimated at \$400 million. In a region still recovering from the ravages of Hurricane Katrina, the loss of such an economic engine could be devastating.

In terms of charitable contributions, the Orange Bowl is donating \$2.5 million to assist Miami-Dade County in renovating historic Moore Park, site of the first Orange Bowl game, to create a first-rate youth football facility, complete with grandstands and electronic scoreboard. Without the Orange Bowl's generosity, this project would not have come to fruition. While we are pleased that these facilities will be used to teach inner-city youth athletic skills, it is the mentoring, coaching, and influence from dedicated adult volunteers and the inculcation of shared values that will really make such a program invaluable. None of us in college football are anxious to jeopardize these or the many other charitable endeavors undertaken by all of the bowl games.

Second, as a conference commissioner, I have a duty not only to those teams in the ACC that are the most successful and that might compete for a national championship. Rather, my task is to help foster the success of all 12 ACC institutions. The bowl system allows each conference commissioner to do that. The ACC is fortunate to have relationships with nine bowl games today. Yet I know that in the absence of a bowl system, very few student-athletes and their fans would enjoy the chance to play in a post-season game. We must constantly be aware of the need to reward those student-athletes who by historical standards have had remarkably successful seasons. One example from last year makes that point. Vanderbilt from the SEC played in a bowl game last season for the first time in 26 years. The SEC is one of the toughest conferences in the nation. In recent seasons, Vanderbilt's football program has been steadily improving, but it has had to face traditionally powerful foes each year, such as Florida, Georgia, Tennessee, and Alabama. Last season, however, Vanderbilt won six games, which was a signal achievement for the university. Now six wins would not get a team anywhere close to a playoff berth, but the bowl system permitted those young men to enjoy an appropriate reward for what was an historic achievement at their university. That opportunity likely would not exist in a playoff world.

There are many such stories every season. In the ACC, Wake Forest, which has one of the smallest undergraduate enrollments of any university in the Football Bowl Subdivision, struggled to compete against very tough competition in football. Yet in 2006, the team had a superb season, won our conference championship for the first time in 36 years, and had the opportunity to play in a BCS game. The program has continued its success since that time. The bowl system permits institutions that have such success to reward their teams and fans and to celebrate their accomplishments in a way that no other post-season structure contemplates. That is the reason that it has existed for more than a century.

The BCS has built on that success and enhanced it. The number of bowl games – and, of course, the number of opportunities for student-athletes – has nearly doubled since the BCS began in 1998. Each year the NCAA receives additional applications from cities that wish to obtain licenses to host post-season games. One of the bigger difficulties that we have in college football today is producing enough winning teams to provide matchups for the number of entities that wish to host bowl games. That is a happy problem to have.

As I mentioned, the BCS is not perfect, and those of us who must administer it have never claimed it to be. Nonetheless, it has given this vibrant game the most exciting regular season in all of sports. Most important, it is the best system for crowning a national champion that can obtain the support of all of the conferences and institutions that are necessary to make such a championship possible. It fits well within our academic and athletic calendars, is fully consistent with the educational missions of our colleges and universities, and maximizes the number of post-season opportunities for our student-athletes, coaches, and fans. We are always open to suggestions to improve the BCS or the game of college football as a whole, but many are persuaded that it is the best arrangement for the game and one that provides the greatest benefits for every institution, athlete, and fan. The historical record fully supports that conclusion.

Again, thank you for the opportunity to address these matters.

STATEMENT OF CRAIG THOMPSON
COMMISSIONER, MOUNTAIN WEST CONFERENCE

COMMITTEE ON ENERGY AND COMMERCE, SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION

HEARING ON THE BOWL CHAMPIONSHIP SERIES: MONEY AND OTHER ISSUES OF
FAIRNESS FOR PUBLICLY FINANCED UNIVERSITIES

May 1, 2009

Chairman Rush and Members of the Subcommittee, I am Craig Thompson, Commissioner of the Mountain West Conference (the "Mountain West" or the "MWC"). Thank you for inviting me here today to speak about the Bowl Championship Series ("BCS").

The BCS was formed to control the most lucrative postseason bowl games for universities whose teams play college football in the Football Bowl Subdivision ("FBS"). Each year, there are five BCS bowl games, including the "BCS national championship game."

Of the eleven FBS Conferences, under the current BCS system six are referred to as Automatic-Qualifying Conferences ("AQ Conferences"). These conferences' champions automatically qualify for a BCS bowl game every year, regardless of their record or ranking. The other five conferences are called Non-Automatic-Qualifying Conferences ("Non-AQ Conferences") because these conferences' champions do not automatically qualify for a BCS bowl game. Instead they must meet certain BCS criteria to earn a BCS bowl berth, and if two such Non-AQ universities meet the standards in the same year, practically speaking, only one of those Non-AQ universities will actually have an opportunity to play in a BCS game.

On March 4, 2009, the Mountain West Conference submitted a proposal (the "BCS Reform Proposal") to modify the BCS system. Our conference took this important step for four reasons. We wanted to (1) propose a solution that addresses each of the five fundamental flaws with the BCS system; (2) enable all FBS universities to earn more revenue from college football, which additional funds can be used for important athletic and academic purposes; (3) ensure that higher education sends the appropriate messages to students and the public concerning fundamental fairness, equitable treatment, and the opportunity to reach your goals; and (4) increase the excitement of the college football season for universities and their fans.

After discussing each of these issues, I would also like to address a few related matters.

1. First Objective of the BCS Reform Proposal is to Propose a Solution that Addresses the Five Flaws in the BCS System

As the Mountain West Board of Directors stated in an April 1, 2009 letter to the BCS, "[t]he President and Vice President of the United States, members of Congress, college coaches and administrators, football players, sports columnists and fans have all criticized the BCS system, and have asked for change." Anyone who follows college football knows the BCS has been subject to a mountain of criticism, virtually since its inception. But the MWC believes that criticism without a solution solves nothing. Accordingly, we analyzed the current BCS system carefully and recognized there were five fundamental flaws with the current system:

- (1) The BCS Revenue Distribution is Grossly Inequitable
- (2) The BCS Relies on Non-Performance-Based Standards to Determine Automatic-Qualifying Conferences
- (3) The BCS is Based on a Flawed Premise, and Nearly Half of the FBS Teams are Eliminated from the National Championship Even Before the Season Begins
- (4) The BCS Uses Confusing Computer Formulas and Pollsters to Determine Rankings
- (5) The BCS Dictates Unbalanced Representation of Conferences on the BCS Presidential Oversight Committee

We then developed a proposal, the BCS Reform Proposal, which was tailored to address each of these flaws, as follows:

Flaw No. 1 The BCS Revenue Distribution is Grossly Inequitable

If two conferences each have exactly one team play in a BCS bowl game, should they each receive the same payout from the BCS that year? We think so.

Should it make a difference if one of those conferences has three teams ranked in the top 16 of the final BCS regular-season standings, whereas the other conference's champion is only ranked 19th? We don't think so. We believe the more equitable approach is that both conferences should still receive the same payout from the BCS for that year because they each had exactly one team play in a BCS bowl game. Of course, an argument certainly exists that the first conference, which had three teams ranked in the top 16, should receive a somewhat higher payout from the BCS than the second conference.

But what cannot be debated is this: there is no way the second conference – the one with its champion ranked 19th – should receive a higher payout than the first conference – the one with three teams in the top 16. And there is no way that such a higher payout should be approximately \$9 million more. Yet, that is exactly what occurs under the current BCS system.

For example, in 2008, the Mountain West and an AQ Conference each had one team play in a BCS bowl. But the Mountain West had three teams ranked in the top 16 in the final BCS regular-season standings, all of whom finished above the AQ Conference's champion and automatic qualifier – who finished ranked 19th. Yet, the AQ Conference still received almost \$9 million more from the BCS than the Mountain West. The AQ Conference received \$18.6 million while the Mountain West received only \$9.8 million.

In that same year, the Mountain West also had two teams ranked in the top 11 of the final regular-season BCS standings and another AQ Conference had none. That AQ Conference, like the Mountain West, had only one BCS bowl berth. Yet, that AQ Conference still received \$18.6 million, almost \$9 million more than the Mountain West.

Such economic disparities and anomalies cannot be justified and should not continue. Many have said the current BCS system ensures a permanent underclass. They are right.

The BCS Reform Proposal, on the other hand, calls for a more equitable distribution of revenue among all FBS conferences. Specifically, each conference that has exactly one team participate in a BCS bowl game in a given year should receive the same amount of revenue from the

BCS for that year.

Flaw No. 2 The BCS Relies on Non-Performance-Based Standards to Determine Automatic-Qualifying Conferences

Football is defined by performance on the field. Teams play the game to win. Yet, the current BCS system ignores that fundamental fact. Instead, it relies on non-performance-based standards to determine which conferences are AQ Conferences (i.e., conferences whose champions automatically qualify for a lucrative BCS bowl game each year regardless of how they perform that year). Specifically, the BCS uses bowl tie-ins and agreements to determine which conferences are AQ Conferences. Therefore, under the BCS system, pre-arranged agreements trump performance on the field with respect to automatic access to the BCS bowl games.

The BCS Reform Proposal, conversely, ensures that performance on the field – rather than non-performance-based criteria – is the primary factor in determining which teams qualify for lucrative BCS bowls. Under the BCS Reform Proposal, a conference has to win at least 40% of its inter-conference games against AQ Conference teams over a two-year period to become an AQ Conference.

Under this standard, seven conferences easily met the mark over the past two years. The percentages for these seven conferences ranged from a high of 55% (MWC) to a low of 45% (SEC). With respect to the four conferences that did not meet the mark, the percentages ranged from a high of 18% (WAC) to a low of 8% (C-USA).

Moreover, the range of percentages for both the top group and the bottom group are nearly identical even if a four-year time period is chosen and even if bowl game results are included. In that event, for the same top seven conferences, the percentages range from 62% (Pac-10) to 44% (Big 10). For the other four conferences, the percentages range from 17% (WAC) to 7% (Sun Belt).

Because the current system does not use actual performance on the field as the determining factor, a conference like the Mountain West is relegated to Non-AQ Conference status – even though its on-field performance demonstrates that it belongs with the other AQ Conferences. This discrimination has a tremendously negative economic and competitive impact on Mountain West universities.

Flaw No. 3 The BCS is Based on a Flawed Premise, and Nearly Half of the FBS Teams are Eliminated from the National Championship Even Before the Season Begins

The current BCS system is based on a fundamentally-flawed premise: that computers and pollsters can look at six or seven outstanding teams, all of whom have lost no more than one game (and few, if any, of whom have played each other), and decide which are the two best and should play in the national championship game. But, it is impossible to know which of those great teams are actually the best – unless they play each other. Computers don't know, pollsters don't know, and the BCS surely does not know.

Moreover, nearly half of the FBS teams are eliminated from the national championship even before the season begins. None of the 51 teams that play in Non-AQ Conferences can, for all practical purposes, ever win a BCS national championship given how the current system is constituted. These teams are, in effect, done before day one. A system that produces this result is patently unfair.

In 2008, for example, the MWC had the best inter-conference record (among all 11 FBS conferences) against AQ Conference teams. Utah, the Mountain West champion, had a better regular-season record, '12-0, than any of the 65 AQ Conference teams. Yet Utah did not have an opportunity to compete for the national championship. Utah was eliminated this past season not by a team, but by a system – the BCS. Indeed, no Non-AQ Conference team has ever been permitted to play for the national championship since the BCS' inception.

To remedy this flaw, the BCS Reform Proposal creates an eight-team playoff, with the major bowls constituting the quarterfinal games. The BCS Reform Proposal will only extend the season by a week and a half on average (and sometimes by as little as 8 days), and then only for two teams. The remaining 117 FBS institutions would likely finish their season before the beginning of the second semester. In contrast, the NCAA FCS, Division II and Division III Football Championships playoffs last 21, 28 and 29 days, respectively – in some cases conflicting with final exams.

Under the BCS Reform Proposal, deserving conference champions and other great teams will finally have an opportunity to compete for the national championship. Additionally, not one team will be done before their season has begun – let alone 51 teams. Thus, a true college football national champion will be settled by the players on the field – rather than by the pollsters and computers off the field.

Flaw No. 4 The BCS Uses Confusing Computer Formulas and Pollsters to Determine Rankings

The current BCS system uses confusing computer formulas and pollsters to determine the rankings that decide which teams qualify for the BCS bowls. The computer formulas are so complicated and confusing that the University of Texas requested that one of the BCS computer rankings providers come to Austin to provide them with guidance on the assumptions underlying the system. After they left, Texas coach Mack Brown reportedly stated that he was more confused than ever.

As for the pollsters, a number of them admit that they rarely, if ever, watch some of the teams they are evaluating. When some of the voters in the Harris Interactive Poll, which helps determine the BCS standings and, ultimately, the title-game match-up, were asked about the University of Utah, the responses were as follows:

“I did not see them play [in the regular season],” Bobby Aillet said.

“I didn't see any live games,” Lance McIlhenny said. “I just [saw] highlights.”

“I just thought that the Mountain West is not as tough a conference [as others],” McIlhenny, a former SMU player, said. “Apparently I was wrong.”

“I don't recall if I saw them play specifically during the regular season,” David Housel said. “I don't remember a specific game.”

“I wouldn't say I probably was wrong. I was wrong,” said Housel, a former Auburn athletic director who had the Utes ranked 10th.

Teams from conferences such as the Mountain West are viewed far less often by many pollsters than teams from the current AQ Conferences. What's more, pollsters have no obligation to ensure they have all the necessary information to make the most sound judgments. In essence, their votes can easily be based on long-held perceptions, rather than knowledge. Moreover, there is a pre-season poll bias in favor of the AQ Conferences, and against the Non-AQ Conferences. The Associated Press (which was previously a component of the BCS standings) has never ranked a Non-AQ team higher than #15 in the preseason poll during the BCS era. The preseason AP and Coaches' Polls have ranked three or more Non-AQ teams just once – despite the fact that at least three Non-AQ teams were ranked in the previous season's final polls five out of 10 years. In both 2003 and 2004, five Non-AQ teams were ranked in the final AP and Coaches' Polls.

Given this bias, Non-AQ Conference teams garner far less points in the preseason polls each year than they do in the final polls. Because these teams start so far back in the polls, they are at a tremendous disadvantage.

The BCS Reform Proposal calls for a replacement of the computers and pollsters with a 12-member selection committee similar to the Committee that determines the field for the college basketball championship. The committee members will be charged with gathering and analyzing all of the pertinent data before ranking the teams. The committee will closely follow the teams over the course of a season to rank them as accurately as possible. As Chair of the NCAA Division I Men's Basketball Committee several years ago, I am completely aware of the painstaking efforts made to ensure that the people deciding who receives bids have all the information they could possibly need. The basketball committee members take their responsibility very seriously. College football teams and their fans deserve no less.

Flaw No. 5 The BCS Dictates Unbalanced Representation of Conferences on the BCS Presidential Oversight Committee

The BCS dictates unbalanced representation of conferences on the BCS Presidential Oversight Committee, which is the body that runs the BCS. As of now, the five Non-AQ Conferences share only one vote, while the six AQ Conferences and Notre Dame each have their own vote.

The BCS Reform Proposal equalizes the representation of the FBS conferences on the BCS Presidential Oversight Committee by allotting every conference and Notre Dame exactly one vote.

The importance of adopting the BCS Reform Proposal is underscored by some of the harms arising from the current system's five flaws, which include limitations for football programs, other athletic programs, enrollment and student-athletes in conferences that do not enjoy automatic qualification.

Over the past four seasons, the AQ Conferences have received over \$492 million in BCS revenue (87.4% of the total), while the Non-AQ Conferences have received less than \$62 million (12.6% of the total). With respect to the football programs, this tremendous revenue disparity greatly impacts Non-AQ Conferences institutions' ability to compete effectively in the areas of recruiting, facilities, coaches' salaries and scholarships. By comparison, during the past five years, the six BCS AQ Conferences have received only 61% of the NCAA Division I Men's Basketball Tournament revenue.

Non-AQ Conferences are harmed in recruiting not only by the monetary differences but also by the lack of access to the national championship game. Some AQ Conference coaches have told recruits that if you go to a Non-AQ Conference school you'll have no chance to play in a national championship game.

Other athletic programs are impacted as well. Particularly in the current economic climate, Non-AQ Conference universities are challenged financially and may have insufficient funds to adequately support other athletic programs. Without the guaranteed revenues provided to the AQ Conference universities, these institutions find it more difficult to comply with Title IX requirements, which issues are exacerbated for those institutions that sponsor football.

The advantages that AQ Conference universities receive because of the inequities in the BCS system impact more than just athletics. Conferences who are guaranteed annual participation in BCS bowl games garner increased media attention and recognition for their member universities. The increased visibility for universities that play in a BCS bowl game can have a positive effect on enrollment applications. Accordingly, universities that are discriminated against with respect to opportunities to play in such games are denied opportunities to grow their student and, ultimately, alumni bases.

Student-athletes who compete in Non-AQ Conferences are also harmed by the BCS. There are over 6,000 such football student-athletes who do not have a realistic opportunity to compete for the national championship. This is the only sport among the 51 team championships the NCAA sponsors in three divisions where this is the case. In fact, every other division of college football has a playoff. In no other division of college football are student-athletes denied an opportunity to win it all – only here.

2. Second Objective of the BCS Reform Proposal is to Enable all FBS Universities to Earn More Revenue from College Football

The second objective of the BCS Reform Proposal is to provide far more revenue for all FBS universities, which can be used for athletic and academic purposes. The BCS Reform Proposal would result in considerable additional revenue for all FBS universities from two sources: television and bowls. The television revenue would increase substantially given the addition of three more bowl games. Such revenue would also increase because, under the BCS Reform Proposal there would be seven bowl games with national championship ramifications, rather than just one. New revenue would also be realized from the rights fees the extra bowls would certainly pay the FBS universities for those games.

In addition to the guaranteed revenues referenced above, this incremental extra funding would help meet both athletic and academic needs. The following are areas where additional funds could be utilized, including several which directly benefit student-athletes:

- Improved academic programs (additional academic advisors, additional tutors, upgrades to computer laboratories, summer school opportunities).
- Increased scholarships (both number and value).
- Increased medical support (additional athletic trainers, payment of student health care costs).

- Improved team travel (minimize missed class time).
- Facility improvements.
- Debt retirement (re-pay the university's general fund).
- Upgraded uniforms and equipment.
- Increased funding for Olympic sports (including possibly adding a sport to create more opportunities).

3. Third Objective of the BCS Reform Proposal is to Ensure that Higher Education Sends the Appropriate Messages to Students and the Public, and Supports a System that is Above Reproach

We believe that by remedying the five flaws in the current BCS system, the BCS Reform Proposal helps to ensure higher education is sending the appropriate messages to students and the public, and is acting beyond reproach. As educators, one of the primary objectives of universities is to ensure that their students graduate with a firm understanding of the principles of fundamental fairness and equitable treatment. Yet, support of the current BCS system is not consistent with those principles because it is fundamentally unfair and inequitable to (1) distribute revenue to similarly-performing conferences in an extremely inequitable manner; (2) use non-performance-based standards to determine which conferences' champions automatically play in BCS bowl games; and (3) purport to determine a "national" champion, yet effectively eliminate nearly half the FBS schools in the "nation" from the championship before the season begins.

In addition, students look to their leaders, including within their universities, to develop their outlook on issues. The correct message for higher education to send with respect to reaching one's goals should be as follows: if you work extremely hard and are successful in all of your endeavors, you will have a chance to reach any goal. But the current BCS system is inconsistent with this message. As noted above, nearly 6,000 students play for football teams that because of the BCS system have no realistic chance of winning the national championship no matter how hard they work, and no matter how successful they are on the field.

Higher education's position on issues – including this issue, which transcends sports – should be above reproach. As Senator DeWine stated at the 2003 BCS hearings, the BCS "needs to do more than survive legal scrutiny. It also must be fair." Similarly, as Scott Cowen, President of Tulane University, stated at the 2003 BCS hearings, a "system that requires the involvement of legal or legislative inquiry to determine its legality is not the kind of system our higher education institutions should have."

The Mountain West Board of Directors agrees with those views. The Board stated in its April 1, 2009 letter to the BCS that higher education should "reform the system before even more goodwill is lost and further resources are expended defending a system that the public overwhelmingly views as 'rigged' and 'corrupt.'" The time to do that is now – not five, 10 or 20 years from now. If you can fix something that is flawed, you don't wait.

The BCS is a highly-exclusive system that is derived from an interlocking arrangement with six conferences, the major bowls and a TV network, which group determines all pertinent aspects of the BCS system. Given these facts, it is hardly surprising that the system has received so much scrutiny. Virtually everyone seems to know it is fundamentally flawed. It is time for the BCS to acknowledge the need for change and take the appropriate steps to develop a more equitable system.

4. Fourth Objective of the BCS Reform Proposal is to Increase the Excitement of the College Football Season for Universities and their Fans

The final objective of the BCS Reform Proposal is to increase the excitement of the college football season for both universities and their fans. Under the BCS Reform Proposal, far more regular-season games will have national championship implications, making the regular season much more exciting. In fact, depending on how you perform the calculations, we estimate there will be at least 200% to 400% more regular-season games with national championship implications under the BCS Reform Proposal than there are under the current system. That's a lot of games. Representative examples of just a few of the games that would have had national championship implications under the BCS Reform Proposal, but did not under the current system in 2008, include Boise State at Oregon, Virginia Tech at Nebraska, Oregon State at Utah, Minnesota at Illinois, Oklahoma State at Missouri, BYU at TCU, TCU at Utah, Oklahoma State at Texas Tech, Boston College at Florida State, BYU at Utah, Fresno State at Boise State, West Virginia at Pittsburgh, Oregon State at Oregon and Boston College at Virginia Tech.

Additionally, the current system greatly hinders postseason excitement because, with the exception of the national championship game itself, no BCS bowl game affects which team captures the national championship. There are currently 34 postseason games, and only one of them has national championship implications. Under the BCS Reform Proposal, seven games would have national championship implications. The three-week playoff build-up to a national championship would also create tremendous excitement.

A Few Related Matters

1. Comparison of the BCS to the Prior System is Generally Irrelevant, Yet Still Telling in One Important Respect

The issue today is whether the current BCS system is flawed and needs to be modified due to the harms it is causing. The issue is not whether the current system is better or worse than the prior system.

Having said that, it is worth noting that the BCS system, by guaranteeing tremendous competitive and revenue advantages every single year to the AQ Conference teams at the expense of the Non-AQ Conference teams, is actually significantly worse than the old system in one very important respect. The BCS system ensures for as long as the system is in place that there will be "Haves" and "Have Nots."

Under the BCS system, as indicated earlier, bowl tie-ins and pre-arranged agreements (all of which favor the AQ Conference teams) trump performance on the field with respect to automatic access to the BCS bowl games, which are by far the most high-profile and lucrative games. Moreover, even where a Non-AQ Conference team plays in a BCS bowl game, its conference still receives many millions of dollars less than each of the AQ Conferences.

Under the old system, which was a more open system, a team like the University of Miami could come of out of nowhere as an independent and gain national prominence and win multiple championships. Other then-independent teams were able to do the same thing. Indeed, even

BYU won a national championship under the old system as a member of what is now a Non-AQ Conference. All of that occurred because the old system didn't effectively prevent teams who weren't in the major conferences from winning the championship, as the current system does for all practical purposes (with the exception of Notre Dame). But once again, the important point here is that the current system is flawed, and those flaws need to be addressed.

2. The BCS Reform Proposal's Impact on Academics and Student-Athletes

As discussed earlier, the BCS Reform Proposal could enhance the student-athlete experience, while also allowing universities to set a positive example – without negatively impacting academics. Increased revenues could be used for athletics or academic programs and scholarships. Taking action to establish a more equitable system would speak far more loudly than any words. The length of the season would not be significantly impacted, and students are generally on break (or at most in the first week of school) when the championship game would occur. Final exams would have been completed a month earlier. The minimal impact on academics, if any, would pale in comparison to that of March Madness – which involves 65 teams, at least four of whom are competing for more than three weeks during the middle of a semester.

In addition, the physical demands of the BCS Reform Proposal would not be an undue burden for the football student-athletes. The two teams in the championship game would play 15 or 16 games that season. Athletes younger, older and the same age as these athletes play approximately as many or more football games in a season. High school teams that reach the championship game can play up to 15 games a season in a number of states, while teams in other divisions of college football can play 16 games in a season if they make it to the national championship game. Unlike those other groups, football student-athletes in FBS conferences have approximately a month off before their BCS bowl games, resulting in far more rest during the season than any of these other athletes.

3. The BCS Reform Proposal Will Help the BCS Bowls While Not Harming the Non-BCS Bowls

For the BCS bowls, the BCS Reform Proposal will be a tremendous boon. Under the BCS Reform Proposal, the BCS bowl games will have national championship ramifications every single year (i.e., 100% of the time), instead of once every four years (i.e., 25% of the time). The Virginia Tech/Cincinnati Orange Bowl was the lowest-rated BCS bowl game ever. Is there any doubt that a quarterfinal Orange Bowl match-up between two of the top-eight-ranked teams would have been a far bigger attraction?

Simply put, the public is clamoring for these games, and between university fans and local citizens in the cities where the bowls are located, they, as well as the semifinals and finals, should have no trouble selling out. Indeed, the NCAA has far more ticket requests for its Final Four in men's basketball than it can even handle, and even the regional finals sell out every year. Yet, football is unquestionably more popular in this country than basketball.

As for the non-BCS bowls, they are generally played in December (with a couple of exceptions), whereas the playoffs under the BCS Reform Proposal would be in January of the following year. Therefore, people who watch the non-BCS bowls will still do so because there is absolutely no conflict between them and playoff games that will be played the following month. Moreover, the non-BCS bowls have reportedly thrived since the BCS' inception, even though the BCS added a national championship game. A couple of playoff games in January should not negatively impact those non-BCS bowls.

4. The BCS Reform Proposal Will, at a Minimum, Greatly Diminish the Controversies

Caused by the Current System

By addressing the glaring revenue and competitive inequities under the current system, the BCS Reform Proposal should put an end to the tremendous controversy swirling around the current system as to these matters. It will also greatly reduce any controversy relating to which teams should have an opportunity to compete for the national championship once the regular season ends. While the 9th place team under the BCS Reform Proposal may be disappointed they were not ranked 8th by the committee among the BCS bowl teams, and therefore were not in the playoff, that team is generally in a far different position than teams near the top of the standings are today.

For example, in 2008, if the BCS Reform Proposal had been in effect, Ohio State may have complained if it was left out of a playoff, but Ohio State's position under such a scenario would have been far different than what Texas, USC and Utah had to confront while being left out of an opportunity to compete for the title. Ohio State lost convincingly to USC and fell to Penn State as well in 2008. In contrast, many people thought one-loss USC was the best team in the country, one-loss Texas had beaten Oklahoma (who nevertheless played in the national championship game), and Utah was unbeaten and defeated the only team (Oregon State) that had beaten USC. March Madness has controversy each year over the last teams left out, but few are advocating a change to the system because the level of controversy is small. The same would be true under the BCS Reform Proposal, which would greatly reduce the level of controversy hovering over the BCS system today.

Thank you for the opportunity to speak with you today about these matters.



AIR FORCE	NEW MEXICO	UNLV
BYU	SAN DIEGO STATE	UTAH
COLORADO STATE	TCU	WYOMING

CRAIG THOMPSON, COMMISSIONER

The Mountain West Conference submits the following proposal (the "MWC Proposal") to reform the Bowl Championship Series ("BCS") to its fellow Football Bowl Subdivision ("FBS") conferences and the University of Notre Dame. The MWC Proposal covers the 2010 through 2013 seasons.¹ The MWC Proposal addresses the inequities under the current BCS system and enables the national championship to be decided (1) in the proper location – on the field of play, and (2) by the appropriate parties – the players.

1. Determining Which Conferences are Automatic-Qualifying Conferences

- a. **Criteria for a conference to automatically qualify** – An FBS conference will be an "AQ Conference" (its champion will automatically qualify each year for a BCS bowl berth) if over a two-season period the conference (1) has played a minimum of twenty inter-conference regular-season games against the six current AQ Conferences, and (2) has a minimum winning percentage of .400 in these games.²
- b. **Conferences that have earned automatic qualification** – As indicated in Table 1 of the Appendix, the ACC, Big East, Big Ten, Big 12, MWC, Pac-10, and SEC conferences will be AQ Conferences for the 2010 through 2013 seasons based on their performance during the previous two seasons.³

Note 1: As indicated in Table 2 of the Appendix, even if the criteria used in paragraph 1(a) were employed over a four-season period (instead of a two-season period), and even if the criteria included bowl games against the current AQ Conferences as well, the same seven conferences listed in paragraph 1(b) above would qualify as AQ Conferences.

Note 2: Over the past five postseasons, only the Pac-10 (.750), MWC (.700), SEC (.636) and Big 12 (.545) have winning records against AQ Conference teams.

¹ This period coincides with the four-year term of the proposed ESPN agreement.

² A conference that has played fewer than 20 such games can be an AQ Conference if its winning percentage would still be at least .400 if it had lost the remaining games needed to reach the 20-game benchmark. For example, a conference with a 10-9 record would be an AQ Conference because even if it had lost a 20th inter-conference game, its 10-10 record and .500 winning percentage would be sufficient.

³ One or more of the four remaining FBS conferences can become AQ Conferences before 2013 if they satisfy the criteria under paragraph 1(a).

2. Determining Other Universities that will Earn BCS Bowl Berths

- a. **A new committee is created** – The BCS Standings will no longer be based upon computer formulas and pollsters. Instead, a 12-member selection committee (“Committee”) comprised of one representative from each of the 11 FBS conferences and one representative from Notre Dame will determine these standings. This Committee will carefully study and evaluate the teams over the course of a season before determining the rankings. The Committee will rank the Top 25 teams at the end of each regular season, and these rankings will constitute the final BCS Standings.
- b. **The Committee will determine the remaining BCS bowl teams** – Notre Dame and a champion of a non-automatic-qualifying conference (“Non-AQ Conference”) may automatically qualify for a BCS bowl berth in a given year, depending upon their rankings in the final BCS Standings in that year. The minimum rankings in the final BCS Standings that Notre Dame or a Non-AQ Conference champion must have to automatically qualify for a BCS bowl in a given year will not change from that required under the current system. The Committee will also select the remaining BCS bowl teams based on the final BCS Standings.

3. Determining the National Champion

- a. **Five BCS bowls** – The Rose Bowl, Fiesta Bowl, Orange Bowl, Sugar Bowl, and a new fifth BCS bowl game (the “Fifth BCS Bowl”) will be played the first week of January. The Fifth BCS Bowl will be awarded to a bowl that currently hosts a non-BCS game. Requests for proposals will be solicited from other bowls.
- b. **Ranking the BCS bowl teams** – Using the Committee’s Top 25 standings, the Committee will rank the BCS bowl teams from 1 to 10.
- c. **Two lowest-ranked BCS bowl teams will play in Fifth BCS Bowl** – The two lowest-ranked BCS bowl teams will play in the Fifth BCS Bowl, and their seasons will end at the conclusion of that game.
- d. **Top eight BCS bowl teams will play in the Rose, Fiesta, Orange or Sugar Bowls** – The other eight BCS bowl teams (the “Top Eight BCS Bowl Teams”) will play in either the Rose Bowl, Fiesta Bowl, Orange Bowl, or Sugar Bowl (the “Top Four BCS Bowl Games”).
- e. **Preserving bowl tie-ins** – To the extent that the champions of the ACC, Big Ten, Big 12, Pac-10, and SEC are Top Eight BCS Bowl Teams, they will play in their respective bowl tie-ins.⁴

⁴ If the champion of the ACC, Big Ten, Big 12, Pac-10, or SEC is one of the two lowest-ranked BCS bowl teams, that team will play in the Fifth BCS Bowl.

- f. **Choosing the remaining match-ups for the Top Four BCS Bowls** – The Committee will choose the games in which the remaining Top Eight BCS Bowl Teams will play.⁵
- g. **Semi-Finals and National Championship Game** – The winners of the Top Four BCS Bowl Games will each play in a semi-final game (the “Semi-Finals”) approximately one week after their bowl games conclude.⁶ The winners of the Semi-Finals will play in the National Championship Game approximately one week after the Semi-Finals.
- h. **Hosts for the Semi-Finals and the National Championship Game** – The Rose, Fiesta, Orange, Sugar and Fifth BCS Bowls will be given the first opportunity to host the Semi-Finals on a rotating basis. If these bowls are not interested in hosting the Semi-Finals, requests for proposals will be solicited from other bowls. The Rose, Fiesta, Orange, and Sugar Bowls will host the National Championship Game once every four years in addition to the game they host the first week of January.

4. Other Matters

- a. **Presidential Oversight Committee** – The composition of the BCS Presidential Oversight Committee will be modified to include one voting member from each FBS conference and Notre Dame.
- b. **Revenue calculations** – An equitable revenue calculation will be determined once all revenue, including from television and the bowls, is known.

⁵ In making these determinations, the Committee will seek to avoid regular-season rematches, and, to the extent reasonably practicable, pairing any of the top three-ranked teams against each other.

⁶ The Committee will determine the pairings for the Semi-Finals. The Committee will designate that the highest-ranked team remaining play the lowest-ranked team remaining in one of the Semi-Finals, with the other two teams playing in the other Semi-Final, unless the Committee determines that a very strong justification exists for a different pairing.

APPENDIX**TABLE 1**

Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
Conference	Record
MWC	16-13 (.552)
ACC	22-18 (.550)
Big Ten	10-9 (.526)
Pac-10	10-9 (.526)
Big East	14-15 (.483)
Big 12	12-14 (.462)
SEC	13-16 (.448)
WAC	6-28 (.176)
MAC	11-57 (.162)
Sun Belt	5-43 (.104)
C-USA	4-44 (.083)

TABLE 2

Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008)	
Conference	Record
Pac-10	32-20 (.615)
SEC	43-36 (.544)
Big East	36-38 (.486)
Big 12	35-37 (.486)
MWC	29-32 (.475)
ACC	45-52 (.464)
Big Ten	29-37 (.439)
WAC	13-62 (.173)
MAC	17-109 (.135)
C-USA	11-92 (.107)
Sun Belt	6-78 (.071)

Comparison of Current BCS System and the BCS Reform Proposal

<u>What Needs to be Determined</u>	<u>Current BCS System</u>	<u>BCS Reform Proposal</u>
Revenue Distribution among the Conferences	Six Conferences Each Receive Millions More than the Other Five Conferences Each Year, Regardless of Performance	Calls for Equitable Revenue Distribution, Based on Performance of Conferences
Which Conferences Automatically Qualify for BCS Bowl Games Every Year	Non-Performance-Based Standard Bowl Tie-Ins and Agreements	Performance-Based Standard Results of Inter-Conference Games Against Automatic-Qualifying Conferences
The National Champion (Once the Regular Season is Completed)	Selects 2 Teams to Compete for the National Championship More than 50 Teams Are Effectively Eliminated Before the Season Begins Numerous Outstanding Conference Champions are Eliminated at the End of the Season Because Only Two Teams are Permitted to Compete for the National Championship	Selects Top 8 Teams to Compete for the National Championship No Teams are Eliminated Before the Season Begins Allows the National Champion to be Determined On the Field by the Players, Rather than Off the Field by Computers and Pollsters
The BCS Standings (Which Universities Receive BCS Bowl Berths)	Pollsters -- Some Admit they Rarely Watch the Teams they are Evaluating Computers -- Complex, Confusing Formulas	Committee -- Tasked with Gathering and Analyzing All Pertinent Data Before Making Decisions
Composition of the BCS Presidential Oversight Committee	Six Conferences and Notre Dame Each Have a Separate Vote Other Five Conferences Share Only One Vote	Each Conference has its Own Vote, as does Notre Dame

**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD**

2007 - 2008

Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
Top Seven Conferences by Percentages	
Conference	Record
MWC	16-13 (.552)
ACC	22-18 (.550)
Big Ten	10-9 (.526)
Pac-10	10-9 (.526)
Big East	14-15 (.483)
Big 12	12-14 (.462)
SEC	13-16 (.448)

Winning Percentage
Range: 45% - 55%

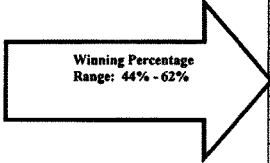
Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
Other Four Conferences by Percentages	
WAC	6-28 (.176)
MAC	11-57 (.162)
Sun Belt	5-43 (.104)
C-USA	4-44 (.083)

Winning Percentage
Range: 8% - 18%

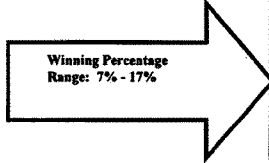
**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD**

2005 - 2008

Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008)	
<u>Top Seven Conferences by Percentages</u>	
Conference	Record
Pac-10	32-20 (.615)
SEC	43-36 (.544)
Big East	36-38 (.486)
Big 12	35-37 (.486)
MWC	29-32 (.475)
ACC	45-52 (.464)
Big Ten	29-37 (.439)



Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008)	
<u>Other Four Conferences by Percentages</u>	
Conference	Record
WAC	13-62 (.173)
MAC	17-109 (.135)
C-USA	11-92 (.107)
Sun Belt	6-78 (.071)



BCS DISTRIBUTIONS – 2007-2008

Conference	Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	Aggregate BCS Distributions for 2007-2008
	<u>Top Seven Conferences by Percentages</u>	
MWC	16-13 (.552)	\$13,512,800
ACC	22-18 (.550)	\$36,965,634
Big Ten	10-9 (.526)	\$45,997,717
Pac-10	10-9 (.526)	\$36,997,717
Big East	14-15 (.483)	\$36,965,634
Big 12	12-14 (.462)	\$45,975,632
SEC	13-16 (.448)	\$45,997,717

Conference	Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	Aggregate BCS Distributions for 2007-2008
	<u>Other Four Conferences by Percentages</u>	
WAC	6-28 (.176)	\$12,394,000
MAC	11-57 (.162)	\$3,602,400
Sun Belt	5-43 (.104)	\$3,591,600
C-USA	4-44 (.083)	\$5,275,200

BCS DISTRIBUTIONS – 2005-2008

Conference	Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008) <u>Top Seven Conferences by Percentages</u>	Aggregate BCS Distributions for 2005-2008
Pac-10	32-20 (.615)	\$71,680,837
SEC	43-36 (.544)	\$85,180,836
Big East	36-38 (.486)	\$71,648,753
Big 12	35-37 (.486)	\$80,658,752
MWC	29-32 (.475)	\$18,092,400
ACC	45-52 (.464)	\$71,648,753
Big Ten	29-37 (.439)	\$89,680,836

Conference	Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008) <u>Other Four Conferences by Percentages</u>	Aggregate BCS Distributions for 2005-2008
WAC	13-62 (.173)	\$22,452,000
MAC	17-109 (.135)	\$ 6,617,200
C-USA	11-92 (.107)	\$ 8,811,600
Sun Belt	6-78 (.071)	\$ 5,994,800

NCAA Football Post-Season Format: Current System vs. BCS Reform Proposal

Current System

Date	Bowl
January 1	Rose Bowl
January 1	Fiesta Bowl
January 2	Orange Bowl
January 3	Sugar Bowl
January 8	National Championship Game (Phoenix)

BCS Reform Proposal

Date	Bowl
January 1	Rose Bowl
January 1	Fiesta Bowl
January 2	Orange Bowl
January 3	Sugar Bowl
January 4-6	"5th" BCS Bowl
January 8-9	Semi-Final 1 (Rose Winner vs. Fiesta Winner)
January 9-10	Semi-Final 2 (Orange Winner vs. Sugar Winner)
January 16-17	National Championship Game

Date	Bowl
January 1	Rose Bowl
January 1	Sugar Bowl
January 2	Fiesta Bowl
January 3	Orange Bowl
January 7	National Championship Game (New Orleans)

Date	Bowl
January 1	Rose Bowl
January 1	Sugar Bowl
January 2	Fiesta Bowl
January 3	Orange Bowl
January 4-5	"5th" BCS Bowl
January 8-9	Semi-Final 1 (Rose Winner vs. Sugar Winner)
January 9-10	Semi-Final 2 (Fiesta Winner vs. Orange Winner)
January 16-17	National Championship Game

Date	Bowl
January 1	Rose Bowl
January 1	Orange Bowl
January 2	Sugar Bowl
January 5	Fiesta Bowl
January 8	National Championship Game (Miami)

Date	Bowl
January 1	Rose Bowl
January 1	Orange Bowl
January 2	Sugar Bowl
January 5	Fiesta Bowl
January 6-7	"5th" BCS Bowl
January 8-9	Semi-Final 1 (Rose Winner vs. Orange Winner)
January 13-14	Semi-Final 2 (Sugar Winner vs. Fiesta Winner)
January 20-21	National Championship Game

Current System

Date	Bowl
January 1	Rose Bowl
January 1	Sugar Bowl
January 4	Fiesta Bowl
January 5	Orange Bowl
January 7	National Championship Game (Pasadena)

BCS Reform Proposal

Date	Bowl
January 1	Rose Bowl
January 1	Sugar Bowl
January 4	Fiesta Bowl
January 5	Orange Bowl
January 6-7	"5th" BCS Bowl
January 8	Semi-Final 1 (Rose Winner vs. Sugar Winner)
January 11-12	Semi-Final 2 (Fiesta Winner vs. Orange Winner)
January 18-19	National Championship Game

**FBS FOOTBALL TEAMS OVER THE PAST FIVE YEARS
THAT WERE UNDEFEATED IN THE REGULAR SEASON
YET DID NOT HAVE THE OPPORTUNITY TO COMPETE
FOR THE NATIONAL CHAMPIONSHIP**

2008

MWC – Utah (12-0)

WAC – Boise State (12-0)

2007

WAC – Hawaii (12-0)

2006

WAC – Boise State (12-0)

2004

MWC – Utah (11-0)

SEC – Auburn (12-0)

WAC – Boise State (11-0)

*Records listed do not include the result from bowl game.

BEFORE THE INCEPTION OF THE BCS
TEAMS THAT WON OR WERE IN NATIONAL TITLE CONTENTION

1991

Independent – Miami (12-0) – Won national title via polls.

1989

Independent – Miami (11-1) – Won national title via polls.

1987

Independent – Miami (12-0) – Won national title via polls.

1986

Independent – Penn State (12-0) – Won national title via polls.

Independent – Miami (11-1) – Lost to Penn State in Fiesta Bowl to finish second.

1984

WAC – BYU (13-0) – Won national title via polls.

1982

Independent – Penn State (11-1) – Won national title via polls.

SWC – SMU (11-0-1) – Finished second in the polls behind Penn State.

1982

Independent – Miami (11-1) – Won national title via polls.

1976

Independent – Pittsburgh (11-0) – won national title via polls.

STATEMENT OF MICHAEL YOUNG
PRESIDENT, UNIVERSITY OF UTAH

BEFORE THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON ANTITRUST,
COMPETITION POLICY AND CONSUMER RIGHTS

HEARING ON THE BOWL CHAMPIONSHIP SERIES: IS IT FAIR AND IN COMPLIANCE
WITH ANTITRUST LAW?

July 7, 2009

Chairman Kohl, Senator Hatch, and Members of the Subcommittee, I am Michael Young, President of the University of Utah ("Utah"). Utah and eight other fine institutions of higher learning are members of the Mountain West Conference (the "Mountain West").

Thank you for inviting me here today to speak about the Bowl Championship Series ("BCS"), and more particularly whether higher education is acting in an equitable manner with respect to (i) competitive opportunities, and (ii) the distribution of revenues, among federally-funded universities under the BCS. Unfortunately, the answer to that question is no, and as a result Utah and the other members of the MWC, as well as many other universities across this nation, are being harmed.

I would not be here today if all universities had a realistic opportunity to compete for the national championship and if the BCS revenues were equitably distributed among the institutions. If those were the facts, and the only question was whether the correct teams were chosen to play in the championship each year, then the Commissioners of the eleven Football Bowl Subdivision ("FBS") conferences could adequately address any necessary tweaking to the BCS.

Unfortunately, however, those are not the facts and the BCS is perpetuating an unfair system that ensures the following:

- (1) Universities from certain favored conferences (known as "Automatic-Qualifying Conferences" or "AQ Conferences") are, for all practical purposes, guaranteed nine of the ten berths available in the most prestigious and lucrative bowls, known as the BCS bowls, regardless of their performance on the field.
- (2) Universities from the AQ Conferences are the only teams, along with Notre Dame, with any realistic opportunity to compete for the national championship each year.
- (3) Universities from AQ Conferences are guaranteed to receive the vast majority of the revenue from the BCS, regardless of their performance on the field of play.

Without a doubt, the BCS embraces favoritism, rather than fairness. As a result, the fifty-plus schools from the Non-AQ Conferences have to overcome tremendous odds to earn, for all practical purposes, the one available slot (out of ten) in the lucrative and prestigious BCS bowls. These other universities have no realistic chance – even before their seasons begin – to win a national championship. And these same universities receive only a very small percentage of the tremendous revenues the BCS distributes, no matter how well they perform on the field. As Mountain West Commissioner Craig Thompson correctly stated in his May 1, 2009 testimony to the House Subcommittee on Commerce, Trade and Consumer Protection, Committee on Energy and Commerce (the "May 1 Congressional Hearings"), the BCS creates a permanent underclass.

This is wrong. In this country, we should decide championships by competition and not by conspiracy.

Universities have a paramount responsibility to teach their students to be good citizens. They have a responsibility to model fairness and equity and to lead by example. This is true in all aspects of University life, but particularly true for college football which creates some of the greatest interest, enthusiasm and attention among our student bodies. College sports should promote fairness and equity and the fundamental American concept that anyone with the skills and drive to succeed can achieve the highest levels of greatness. Unfortunately, these are not the messages that are being sent by college football today. Instead, the BCS system, with its stranglehold on college football, sends the message that economic power, rather than athletic ability, is the key to success. Rather than promoting fairness and equity, the BCS system promotes the status quo, perpetuates a system of schools who have and those that do not, and virtually assures that many highly successful athletic programs will forever be excluded from the highest levels of recognition and financial gain. These are not the values we want our students to take away from their college experience.

In this testimony, I would like to explain why the current BCS bowl system is fundamentally unfair. I will then address some of the arguments BCS representatives have used in the past to justify its patently unfair system.

Competitive Inequities

BCS Bowl Participation Must be Earned on the Playing Field

The BCS mandates that every year, each champion from an AQ Conference automatically receives a berth in a lucrative and prestigious BCS bowl game, regardless of how well the conference champion performed that year. Conversely, conference champions from the other five conferences, known as the Non-AQ Conferences, and which include the Mountain West, must earn a berth in a BCS bowl game, based on their BCS ranking. Moreover, if two or more of those Non-AQ Conference champions meet the criteria established by the BCS, the BCS provides that only the highest-ranked of those Non-AQ Conference champions will be assured of receiving a BCS bowl berth. And for all practical purposes, all of the other Non-AQ Conference champions will be excluded from a BCS bowl, regardless of how well they performed. That is why Western Athletic Conference champion Boise State finished the regular season last year undefeated and ranked 9th, but still did not get an opportunity to participate in a BCS bowl while 10th-ranked, two-loss, Ohio State (which was not even a conference champion), 12th-ranked, two-loss, Cincinnati, and 19th-ranked, four-loss, Virginia Tech all did.

It is a fair question to ask whether there should be any AQ Conference designations at all under the BCS. That is, should all conference champions have to earn the right to play in a BCS bowl game, by performing very well that year? The argument for having no AQ Conference designations is simple: let the best teams that year play in the best and most lucrative bowls that year. Alternatively, an argument can be made that conferences who consistently demonstrate their strong performance should be entitled to have their champions automatically qualify for a BCS bowl.

While both of these positions might be defensible, the current position of the BCS is not. The current system mandates AQ Conference designations, but then has AQ Conferences determined not by performance on the field, but rather by bowl tie-ins and agreements off the field. If performance on the field were the governing criteria, the Mountain West would join the other six AQ Conferences as an AQ Conference. But because agreements trump performance on the field

under the BCS, the Mountain West is forced to remain a Non-AQ Conference under the new draft ESPN agreement.

The Mountain West's performance speaks for itself. Over the past two years, in inter-conference games against the AQ Conferences, the Mountain West had a better record than any of the 10 other conferences, including all six AQ Conferences. For the top seven conferences over that period, the winning percentages in such games ranged from a high of 55% (Mountain West) to a low of 45% (SEC).

Moreover, the range of percentages for the top group is nearly identical even if a four-year time period is chosen and even if bowl game results are included. In that event, for the same top seven conferences, which includes the Mountain West and the other six AQ Conferences, the percentages range from 62% (Pac-10) to 44% (Big 10).

But because the current system does not use actual performance on the field as the determining factor, a conference like the Mountain West is relegated to Non-AQ Conference status – even though its on-field performance demonstrates that it belongs with the other AQ Conferences. The chart in Attachment 1 shows the undeniable inequity in the system. Accordingly, if the BCS is to continue to have AQ Conference designations (and it is debatable whether it should), at the very least it must ensure that such status is earned through performance on the field, rather than bowl tie-ins and agreements off the field.

The BCS Has Provided FBS College Football with a Dubious Distinction – It is the Only Sport that Effectively Eliminates Nearly Half of its Teams from the Championship Even Before their Seasons Begin

If someone suggested that college baseball and college basketball change their operations to effectively eliminate nearly half of their participating teams from the national championship even before their seasons begin, that person would be soundly criticized and subject to tremendous ridicule. Similarly, if someone proposed a system for a new college sport in which 120 universities were to participate, and suggested that nearly half of those institutions would be, for all practical purposes, eliminated from the national championship even before their seasons begin, that person's idea would be met with tremendous derision. Yet, that is precisely what the BCS has in effect done. As Commissioner Thompson correctly stated in his recent Congressional testimony:

Under the BCS system, nearly half of the FBS teams are eliminated from the national championship even before the season begins. None of the 51 teams that play in Non-AQ Conferences can, for all practical purposes, ever win a BCS national championship given how the current system is constituted. These teams are, in effect, done before day one. A system that produces this result is patently unfair.

In 2008, the Mountain West had the best inter-conference record against AQ Conference teams. Utah had a better regular-season record, 12-0, than any of the 65 AQ Conference teams. Yet Utah did not have an opportunity to compete for the national championship. It simply doesn't add up. When your conference has the top inter-conference record against AQ Conference teams, and your university, from that same conference, has the top record in the country, you should have a chance to compete for the national championship. Yet, that did not happen.

Commissioner Thompson in his testimony at the May 1 Congressional hearing recognized: "Utah was eliminated this past season not by a team, but by a system – the

BCS.” In fact, no Non-AQ Conference team has ever had an opportunity to compete for the national championship since the BCS’ formation, and if Utah could not break the impregnable barrier in 2008, it is highly unlikely that any Non-AQ Conference team could ever do so under the current structure.

Ironically, while the BCS frequently claims that its system has greatly benefited Non-AQ Conference teams, as compared to the old system, it ignores the undeniable fact that prior to the BCS, universities that were then not from AQ Conferences frequently won the national championship, as Attachment No. 2 shows. The BCS is markedly inferior to the old system in this important respect: only the BCS effectively freezes out nearly half of its teams from competing for the title. And how it does this is fairly simple to understand.

The BCS system effectively tells the world, and more importantly the pollsters, that Non-AQ Conference teams should be viewed differently because only the AQ Conferences are worthy of an automatic bid to a BCS bowl. Therefore, according to the BCS, the Non-AQ Conferences must be weaker. Indeed, the media picks up on this and almost universally calls Non-AQ Conference teams “Non-BCS teams,” even though they are BCS teams. And why would anybody expect pollsters to choose a “Non-BCS team” to play in the BCS National Championship.

Coaches and administrators from AQ Conferences perpetuate the stereotype by frequently denigrating the Non-AQ Conferences. For example, last season Alabama’s head coach stated that his team was the only team from a “real” conference to finish the regular season undefeated, thereby implying that the Mountain West Conference (where Utah finished undefeated) and the Western Athletic Conference (where Boise State finished undefeated) were not “real” football conferences. It is hardly surprising given these perceptions, which are created and maintained by the BCS system and its coaches and administrators, that pollsters never value Non-AQ Conference teams high enough – no matter what they do – to be ranked in the top two at the end of the regular season. Obviously, national champions should be chosen as the result of on-field performance, rather than skewed popularity contests.

Also contributing to the problem is the fact that only two teams have an opportunity to compete for the national championship once the regular season ends. Regardless of one’s views regarding a playoff, the combination of limiting the number of teams who get to compete for a championship once the regular season ends to two, and relegating some conferences to Non-AQ Conference status (thereby indicating they are weaker or perhaps not even “real conferences”), leads to the inevitable exclusion of Non-AQ Conference teams from competing for the national championship. No other sport that I am aware of in college, high school, or even youth leagues effectively eliminates nearly half its teams before their seasons begin. FBS college football must find a way to eliminate this dubious distinction.

Revenue Inequities Must be Corrected

The revenue inequities under the BCS system are stark. For example, as I mentioned above, in 2008 the Mountain West had the best inter-conference record against AQ Conference teams. In addition, the Mountain West champion Utah was ranked 6th in the Final BCS standings, TCU was ranked 11th, and BYU was ranked 18th. All three of these teams were ranked ahead of the ACC champion, 19th-ranked Virginia Tech, which only participated in a BCS bowl because of the ACC’s bowl tie-in with the Orange Bowl. Moreover, both Utah and TCU were ranked ahead of the Big East

Conference champion, 12th-ranked Cincinnati, which also only received a BCS bowl berth because of deals off the field. In addition, the Mountain West went 6-1 in regular season games against the Pac-10 that year as well. And all four of these conferences, the Mountain West, the ACC, the Big East, and the Pac-10 each had exactly one team play in a BCS bowl game. Yet, the three AQ Conferences each received \$18.6 million from the BCS for that year, whereas the Mountain West received only \$9.8 million.

While these economic disparities can't be justified in any way, let alone by performance on the field, they are nevertheless locked-in by the BCS. The numbers are even more startling when the past two or four years are considered, as the charts in Attachment 3 reveal. The Mountain West has performed well over the past four years against the six AQ Conferences. Yet, over that same period of time, on average the Mountain West has received \$60 million dollars less from the BCS than the six AQ Conferences, as the Mountain West has received \$18 million and those others have averaged \$78 million. While the joke is that the BCS has 60 million reasons to keep its current system in place, it frankly is no laughing matter given the budgetary constraints facing all universities. To make matters worse, despite the Mountain West's strong performance over the past four years, unless changes to the BCS are made, the dramatic differences in disbursements will only increase, with no justification whatsoever and to the tremendous detriment of the Mountain West.

The BCS system needs to be modified to rectify the unjustifiable revenue inequities clearly demonstrated in Attachment 3. No matter what the few BCS defenders claim, the numbers simply don't lie -- and they tell a story that should not be allowed to continue.

Harms to Non-AQ Conference Universities as a Result of the BCS' Revenue and Competitive Inequities

The competitive and revenue inequities that are an integral component of the BCS system cause tremendous harms to the Mountain West Conference universities and many other institutions across the nation. These inequities create a permanent gulf between the schools who "have" and those "who have not." As Commissioner Thompson accurately stated in his May 1 testimony:

Over the past four seasons, the AQ Conferences have received over \$492 million in BCS revenue (87.4% of the total), while the Non-AQ Conferences have received less than \$62 million (12.6% of the total). With respect to the football programs, this tremendous revenue disparity greatly impacts Non-AQ Conferences institutions' ability to compete effectively in the areas of recruiting, facilities, coaches' salaries and scholarships. By comparison, during the past five years, the six BCS AQ Conferences have received only 61% of the NCAA Division I Men's Basketball Tournament revenue.

Non-AQ Conferences are harmed in recruiting not only by the monetary differences but also by the lack of access to the national championship game. Some AQ Conference coaches have told recruits that if you go to a Non-AQ Conference school you'll have no chance to play in a national championship game.

Other athletic programs are impacted as well. Particularly in the current economic climate, Non-AQ Conference universities are challenged financially and may have insufficient funds to adequately support other athletic programs.

Without the guaranteed revenues provided to the AQ Conference universities, these institutions find it more difficult to comply with Title IX requirements, which issues are exacerbated for those institutions that sponsor football.

The advantages that AQ Conference universities receive because of the inequities in the BCS system impact more than just athletics. Conferences who are guaranteed annual participation in BCS bowl games garner increased media attention and recognition for their member universities. The increased visibility for universities that play in a BCS bowl game can have a positive effect on enrollment applications. Accordingly, universities that are discriminated against with respect to opportunities to play in such games are denied opportunities to grow their student and, ultimately, alumni bases.

Student-athletes who compete in Non-AQ Conferences are also harmed by the BCS. There are over 6,000 such football student-athletes who do not have a realistic opportunity to compete for the national championship. This is the only sport among the 51 team championships the NCAA sponsors in three divisions where this is the case. In fact, every other division of college football has a playoff. In no other division of college football are student-athletes denied an opportunity to win it all – only here.

Commissioner Thompson also correctly summarized some of the many beneficial uses for additional revenue from the BCS, which would be available to the Mountain West universities (and many other institutions) if the system were operated equitably. As Commissioner Thompson stated, the following are areas where additional funds could be utilized:

- Improved academic programs (additional academic advisors, additional tutors, upgrades to computer laboratories, summer school opportunities).
- Increased scholarships (both number and value).
- Increased medical support (additional athletic trainers, payment of student health care costs).
- Improved team travel (minimize missed class time).
- Facility improvements.
- Debt retirement (re-pay the university's general fund).
- Upgraded uniforms and equipment.
- Increased funding for Olympic sports (including possibly adding a sport to create more opportunities).

Harms to Students from the BCS

As educators, one of our primary missions is to ensure that our students leave college with a firm grasp of the differences between right and wrong, and between equitable and inequitable treatment of others. Accordingly, in the classroom, our professors do far more than teach substantive content, they also help ensure that students leave college with the proper value system in place. If, however, we say one thing in the classroom, and do the opposite outside of it, at best we are sending mixed messages to our students and at worst we are teaching them that good values do not matter.

College sports are a particularly meaningful avenue for reaching and teaching our student populations. College football generates interest, enthusiasm and attention from the student body. College sports should promote fairness and equity and the fundamental American concept that anyone with the skills and drive to succeed can achieve the highest levels of greatness. Unfortunately, these are not the messages that are being sent by college football today.

We have a responsibility to teach and encourage our students to strive to make all playing fields in life level, and to give everyone the same opportunities to succeed. Yet, the BCS denies nearly half its universities a chance to compete for the championship, no matter how well they perform. The BCS changes the old saying, "if you can't beat them, join them" to this: "If you can't beat them, eliminate them." This is a bad message to send to our student populations.

Nearly 6,000 students are eliminated from competing for the championship in college football every year because the BCS continues to defend its system, making claims that every university gets unfairly treated *some* of the time. The problem with that analysis is that it ignores the fact that Non-AQ Conference institutions get unfairly treated *all* of the time because they have no realistic chance of competing in, let alone winning, the national championship.

Similarly, when a conference is achieving the same or greater success on the playing field but receives \$60 million less than other conferences who have the economic power to prevent equitable treatment, that sends the wrong messages to our students. The principles of fundamental fairness and equitable treatment can only live through the actions of this generation now, and the next generations in the years to come. We need to make sure that the youth in this country receive a consistent message on these important values. The BCS' treatment of the Non-AQ Conferences, to say the least, is a step in the wrong direction in our endeavor to ensure that our students leave college with the proper values.

Higher education institutions teach the right things in the classroom about these principles. Conferences and universities have a responsibility to live by these principles as well.

The BCS' Attempted Justifications for its System

In the May 1 Congressional hearings, Commissioner Swofford, on behalf of the BCS, attempted to justify the current system. In fairness, he had the unenviable task of trying to justify a fundamentally unfair system. Commissioner Swofford essentially provided three purported justifications for the current BCS system. First, he argued the current system is the only system supported by the marketplace. Second, he claimed that a more competitive championship process would render the regular-season games less exciting. Finally, he predicted a change to the current system would destroy the bowls. None of these justifications have any merit.

The BCS asserts the Current BCS System is Mandated by the Marketplace

The BCS asserts that the BCS system is the best and only system supported by the marketplace. This is clearly not true. The public outcry concerning the current BCS system as well as recent bowl experiences and common sense demonstrate that a fair and equitable system would meet the needs of, and be supported by, the marketplace.

In 2008, the University of Utah was selected to play in the Sugar Bowl, when the Sugar Bowl still had an opportunity to select Big East champion Cincinnati. The Sugar Bowl presumably selected Utah instead of Cincinnati because it believed the public (i.e., the marketplace) would be more interested in watching Utah play in a bowl game than Cincinnati. Undefeated Utah certainly would have also been selected by a bowl before four-loss ACC champion Virginia Tech was selected were it not for the ACC's tie-in with the Orange Bowl. In fact, the Utah vs. Alabama Sugar Bowl had far higher television ratings than the Cincinnati vs. Virginia Tech Orange Bowl. Despite a BCS system that devalues and underrates Non-AQ teams, the marketplace supported Utah's participation in the Sugar Bowl. This experience demonstrates that the marketplace favors and supports athletic achievement.

Similarly, the George Mason story in basketball showed that everybody loves the underdog. The marketplace is not demanding that all Non-AQ Conference teams be effectively eliminated from the national championship. And Non-AQ Conference teams perform well in BCS bowls when given an opportunity, winning three of the four games they have played, including Utah's demolition of Pitt and easy victory over Alabama, and Boise State's thrilling comeback against Oklahoma. It is not the marketplace that wishes to shun excellent Non-AQ Conference teams – it is the BCS itself. In short, the marketplace would support a BCS bowl system that rewards athletic achievement and opens the door to greater participation by deserving teams in the BCS bowls.

With respect to the distribution of BCS funds, the marketplace certainly does not require that when four conferences each have one team in a BCS bowl, three of the conferences (the Big East, ACC, and Pac-10) should receive \$18.6 million and the fourth conference (the Mountain West) should receive only \$9.8 million. Yet this is what occurred in 2008. Despite Utah's dominance on the playing field, the BCS paid Cincinnati's and Virginia Tech's conferences almost \$9 million more than the Mountain West. If ratings or desirability of the teams was the true determinant, the Mountain West would have received far more last year than the ACC or the Big East, instead of nearly \$9 million less. And, at the very least, the new ESPN agreement should seek to rectify that imbalance. Neither the marketplace, nor any other factor can justify the undeniable and extraordinary economic disparities among similarly performing conferences mandated by the BCS.

In sum, fairness dictates that the tremendous competitive and revenue inequities that plague the BCS system be eliminated.

The BCS claims that Changes in the BCS Bowl System Would Render the Regular Season Far Less Exciting

The BCS claims that the current system produces a far more exciting regular season because "every game is important," since it claims that each game can have national championship implications under its system. That is, if a team loses in September it may be eliminated from the national championship under the BCS. The BCS' argument, however, turns logic on its head and is objectively wrong. Under the BCS' logic, the most important games by far are those with

national championship implications. To that extent, I agree. But where the BCS' argument falls apart is in its assumption that more games have national championship implications under the current system, than would occur if more teams were given a real opportunity to compete for a spot in the national championship game.

In fact, quite the opposite is true. As the system is currently set up, and as explained previously, no Non-AQ Conference team has realistic hopes of competing in the National Championship Game. For those schools and their fans, every season begins with the understanding that no game has national championship implications for their teams.

Although the Mountain West's eight team playoff proposal is not the only option for reforming the current BCS system, the proposal further illustrates the fallacy of the BCS' argument. In 2008, for example, every game with national championship implications under the current system would also have had national championship implications under the BCS Reform Proposal. Conversely, there are more than 100 games that would have had national championship implications under the BCS Reform Proposal, that had no national championship implications under the current system. Attachment 4 contains 10 examples of such games.

Utah and Boise State, alone, would have had 24 regular-season games with national championship implications under the BCS Reform Proposal – instead none of their games had national championship implications under the current system. Moreover, the vast majority of games involving two-loss (and often three-loss) teams from AQ Conferences would have national championship implications under the BCS Reform Proposal, but not under the current system. Yet, implementing the BCS Reform Proposal would not be akin to the NCAA basketball tournament (where some teams know they are in the tournament early in the season), because under the BCS Reform Proposal few second-place conference finishers would qualify, whereas in college basketball often even sixth- and seventh-place conference teams earn a berth.

Accordingly, the BCS' repeated claims that the regular season is more exciting under the current system is belied by the facts, which show the opposite is true.

I believe there is more than one option for reforming the BCS in order to make the system more fair and equitable. The Mountain West Conference has proposed one such model, an eight-game playoff. Without insisting upon a playoff as the only solution, I would like to refute two of the BCS' other arguments against a playoff system.

The BCS Claims that a Playoff Would Result in the Elimination of the Bowls

The BCS claims that any type of playoff, such as the Mountain West's BCS Reform Proposal, will destroy virtually all of the bowls. This argument has no merit. Even with a short playoff in January, the teams that play in the non-BCS bowls, which are mostly in December, will still want to play in those games. The non-BCS bowls will still want to host those games, and ESPN and the other networks will still want to fill their programming line-up with those games. Moreover, there is every reason to believe that the sponsors of these bowls will continue to support them. In fact, there are well over 1,000 sponsors of bowl games. To think that they would or could all jump ship to sponsor a couple of extra games is naive at best.

In fact, when the BCS elevated the importance of some bowls (i.e., the BCS bowls) over other bowls, and created a National Championship Game, the non-BCS bowls did not fold. Instead, they continued to grow in number. These bowls are not harmed by having more important bowl games played in January, as everyone already realizes these non-BCS bowls play a different role. Moreover, I believe the BCS bowls would actually benefit from a playoff system, as each bowl would have national championship implications every year, rather than only once

every four years.

The BCS Claims that a Playoff Would Negatively Impact the Academic Mission

Although not currently its main focus, the BCS has argued that a short playoff would negatively impact academics. This argument is clearly a red herring. As Commissioner Thompson testified, "The BCS Reform Proposal will only extend the season by a week and a half on average (and sometimes by as little as 8 days), and then only for two teams. The remaining 117 FBS institutions would likely finish their season before the beginning of the second semester. In contrast, the NCAA FCS, Division II and Division III Football Championships playoffs last 21, 28 and 29 days, respectively – in some cases conflicting with final exams." In addition, Commissioner Swofford indicated at the May 1 Congressional hearing that the current system has no significant impact on academics, even though the final game may be played around January 10th. Under the BCS Reform Proposal, the final game will be played just shortly thereafter, between January 17th and 19th.

In fact, the impact upon academics from the BCS results not from when the last game is played, but from the message it sends to the students. For the reasons previously stated, I strongly believe that a fair and equitable system would promote academic values to our students and enhance the entire academic mission of our universities. Under the current BCS system, the public overwhelmingly believes that higher education has taken the lowest of roads. That is quite disturbing to me.

I have the utmost respect for my fellow university presidents, who I believe have similar views as myself when it comes to ethical matters. As the recently retired Chair of the BCS Presidential Oversight Committee, David Frohnmayer, correctly stated in a speech: "We can easily go too far - authority is seductive; we can reach a personal tipping point Some environments blind us to the human consequences of our actions- so we MUST be attuned to the consequences of our behavior ... [The] ethical life is hard work - knowing right from wrong requires diligence, self-scrutiny and looking into a very well-lit and refractive mirror." I believe the BCS should follow President Frohnmayer's advice from his speech and take a very hard look in the mirror at what it is doing -- and then take the steps necessary to make sure we are heading on the right path. Actions, after all, speak far louder than words.

Thank you for the opportunity to speak with you today about these matters.

ATTACHMENT 1**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD****2007 - 2008**

Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008)	
<u>Top Seven Conferences by Percentages</u>	
Conference	Record
MWC	16-13 (.552)
ACC	22-18 (.550)
Big Ten	10-9 (.526)
Pac-10	10-9 (.526)
Big East	14-15 (.483)
Big 12	12-14 (.462)
SEC	13-16 (.448)

**CONFERENCE STRENGTH BASED
ON PERFORMANCE ON THE FIELD****2005 - 2008**

Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008)	
<u>Top Seven Conferences by Percentages</u>	
Conference	Record
Pac-10	32-20 (.615)
SEC	43-36 (.544)
Big East	36-38 (.486)
Big 12	35-37 (.486)
MWC	29-32 (.475)
ACC	45-52 (.464)
Big Ten	29-37 (.439)

ATTACHMENT 2

BEFORE THE INCEPTION OF THE BCS

TEAMS THAT WON OR WERE IN NATIONAL TITLE CONTENTION

1991

Independent – Miami (12-0) – Won national title via polls.

1989

Independent – Miami (11-1) – Won national title via polls.

1987

Independent – Miami (12-0) – Won national title via polls.

1986

Independent – Penn State (12-0) – Won national title via polls.

Independent – Miami (11-1) – Lost to Penn State in Fiesta Bowl to finish second.

1984

WAC – BYU (13-0) – Won national title via polls.

1983

Independent – Miami (11-1) – Won national title via polls.

1982

Independent – Penn State (11-1) – Won national title via polls.

SWC – SMU (11-0-1) – Finished second in the polls behind Penn State.

1976

Independent – Pittsburgh (11-0) – won national title via polls.

ATTACHMENT 3**BCS DISTRIBUTIONS – 2007-2008**

Conference	Inter-Conference Regular-Season Records Against AQ Conferences (2007 - 2008) <u>Top Seven Conferences by Percentages</u>	Aggregate BCS Distributions for 2007-2008
MWC	16-13 (.552)	\$13,512,800
ACC	22-18 (.550)	\$36,965,634
Big Ten	10-9 (.526)	\$45,997,717
Pac-10	10-9 (.526)	\$36,997,717
Big East	14-15 (.483)	\$36,965,634
Big 12	12-14 (.462)	\$45,975,632
SEC	13-16 (.448)	\$45,997,717

BCS DISTRIBUTIONS – 2005-2008

Conference	Inter-Conference Regular-Season and Postseason Records Against AQ Conferences (2005 - 2008) <u>Top Seven Conferences by Percentages</u>	Aggregate BCS Distributions for 2005-2008
Pac-10	32-20 (.615)	\$71,680,837
SEC	43-36 (.544)	\$85,180,836
Big East	36-38 (.486)	\$71,648,753
Big 12	35-37 (.486)	\$80,658,752
MWC	29-32 (.475)	\$18,092,400
ACC	45-52 (.464)	\$71,648,753
Big Ten	29-37 (.439)	\$89,680,836

ATTACHMENT 4

2008 Season: There were More than 100 Games that Would Have Had National Championship Implications Under the BCS Reform Proposal, but Did Not Under the Current System (Here are Ten Examples of Such Games)

Oct 16 – TCU (6-1) vs. BYU (6-0)

Nov 1 – Oregon (6-2) at California (5-2)

Nov 1 – West Virginia (5-2) at Connecticut (6-2)

Nov 6 – Utah (9-0) vs. TCU (9-1)

Nov 8 – North Carolina (6-2) vs. Georgia Tech (7-2)

Nov 8 – Ohio State (7-2) at Northwestern (7-2)

Nov 8 – Cincinnati (6-2) at West Virginia (6-2)

Nov 15 – Florida State (7-2) vs. Boston College (6-3)

Nov 22 – Penn State (10-1) vs. Michigan State (9-2)

Nov 22 – Cincinnati (8-2) vs. Pitt (7-2)

2008 Season: Examples of Games that Had National Championship Implications under the Current System, but Would Not Have Under the BCS Reform Proposal

None

