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Kathryn Kisska-Schulze

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ARTICLES

THIS IS OUR HOUSE! – THE TAX MAN COMES TO COLLEGE SPORTS

KATHRYN KISSKA-SCHULZE*

I. INTRODUCTION

On December 22, 2017, President Trump signed into law the Tax Cuts and Jobs Act (TCJA).[1] The TCJA marks the most comprehensive revolution to the U.S. Tax Code since Congress passed the Tax Reform Act of 1986.[2] As taxpayers begin to calculate the impact of the TCJA on their forthcoming Individual Income Tax Returns, businesses, employers, and higher educational institutions must evaluate the tremor that this law could have on their bottom lines.

As part of its sweeping overhaul, the TCJA directly targets reform applicable to tax-exempt organizations, including the majority of U.S. colleges and universities. The speed at which the TCJA came to fruition, without due Congressional or public deliberation, ignited swift criticism in academic literature and news commentary.[3] Numerous mistakes and ambiguities have been noted in the final legislation, prompting trade groups to request Treasury guidance.[4] Subsequently, the Treasury issued Notice 2018-43, inviting public

* J.D., LL.M. (taxation), Assistant Professor, School of Accountancy, College of Business, Clemson University.

1. *See* H.R. 1, 115th Cong. (2017-2018).

2. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

3. *See, e.g.*, Heather M. Field, *A Taxonomy For Tax Loopholes*, 55 HOUS. L. REV. 545, 580 (2018) (quoting critics of the TCJA who argue that the law was signed with "reckless speed"); Victor Fleischer, *The State of America's Tax Institutions*, 81 L. & CONTEMP. PROBS. 7, 7 (2018) (noting the surprise tax bill that turned into "must pass" legislation following President Trump's election); and Norman Lencz, *First Look at the Tax Cuts and Jobs Act*, CPA J. (May 2018), https://www.cpajournal.com/2018/05/21/first-look-at-the-tax-cuts-and-jobs-act-4/ (noting the magnitude of unanswered questions regarding the applicability of the new TCJA rules given the speed at which the legislation was passed).

4. *See, e.g.*, *U.S. Chamber Comments Regarding Regulatory Guidance Under Public Law No. 115-97*, U.S. CHAMBER COM. (Mar. 7, 2018), https://www.uschamber.com/comment/us-chamber-comments-regarding-regulatory-guidance-under-public-law-no-115-97; *Request for Immediate Guidance Regarding IRC*

recommendations for consideration in the 2018-19 Priority Guidance Plan which includes a specific focus on the TCJA.[5] This recent invitation prompted immediate response.[6]

Changes embedded in the TCJA that affect higher education include imposing a 21% excise tax on salaries paid in excess of $1 million to the five highest compensated employees, imposing a 1.4% excise tax on the net investment income of applicable educational institutions, and eliminating the tax provision allowing donors to take an 80% charitable deduction on contributions that include a right to purchase college athletic seating.[7] Although these changes could result in new tax burdens on any U.S. institution of higher education, the college sports arena took a direct tax hit for the first time in almost thirty years.[8]

Prior to 2018, college athletics had historically enjoyed favorable federal tax treatment due to the tax-exempt status of universities, athletic departments, and the National Collegiate Athletic Association (NCAA).[9] In 1976, Congress declared the fostering of "national or international amateur sports competition" as a charitable purpose.[10] In conjunction, the Internal Revenue Service (IRS)

Section 199A – Deduction for Qualified Business Income of Pass-Through Entities (Pub. L. No. 115-97, Sec. 11011), AM. INST. CPAS (Feb. 21, 2018), https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20180221-aicpa-sec-99a-qbi-comment-letter-faq.pdf; *Request for Guidance on Questions Raised by New Tax Law*, AM. HOSP. ASS'N (May 1, 2018), https://www.aha.org/system/files/2018-05/180501-cl-aha-office-tax-policy.pdf.

5. *See Public Comment Invited on Recommendations for 2018-2019 Priority Guidance Plan*, I.R.S., https://www.irs.gov/pub/irs-drop/n-18-43.pdf (last visited May 9, 2019) (Notice 2018-43).

6. *See, e.g.*, *Recommendation for 2018-19 Guidance Priority List (Notice 2018-43)*, AM. INST. CPAS (June 14, 2018), https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20180614-aicpa-2018-2019-priority-guidance-plan-list.pdf; *Recommendations for 2018-2019 Priority Guidance Plan (Notice 2018-43)*, NAT'L BUS. AVIATION ASS'N (June 13, 2018), https://nbaa.org/wp-content/uploads/advocacy/letters/20180613-NBAA-2018-2019-Priority-Guidance-Request-IRS.pdf; *Second Set of Recommendations for 2018-2019 Priority Guidance Plan*, A.B.A. SEC. TAX'N (June 15, 2018), https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/061518comments.authcheckdam.pdf; *SIFMA Recommendations for 2018-2019 Guidance Plan*, SEC. INDUSTRY & FIN. MKTS. ASS'N (July 16, 2018), https://www.sifma.org/wp-content/uploads/2018/07/SIFMA-Recommendations-for-2018-2019-Priority-Guidance-Plan.pdf.

7. *See* H.R. 1, 115th Cong. §§ 13702, 4960, 4968, 13704 (2017-2018).

8. In 1991 the IRS issued a technical advice memorandum imposing a UBIT on corporate title sponsorship payments to college football bowl games. *See* I.R.S. Tech. Adv. Mem. 91-47-007 (Aug. 16, 1991) (referred to as the "Mobil Cotton Bowl Letter").

9. *See* Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1 UTAH L. REV. 35, 51 (1987) (noting that college sports hold an "exalted tax position"); *see also* William A. Drennan, *Taxing Commercial Sponsorships of College Athletics: A Balanced Proposal*, 73 OHIO ST. L. J. 1353, 1373 (2012) (documenting that tax law has treated nonprofit athletic organizations and college athletic programs as integral parts of the tax-exempt college).

10. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1520, 1730 (1976) (codified as amended at I.R.C. § 501(c)(3) (2017)).

has been reluctant to impose income taxes on student-athletes' athletic scholarships (formally referred to as grants-in-aid).[11] Although the IRS has twice attempted to impose taxes on college sports with respect to radio and broadcasting rights and corporate sponsorships, such efforts were met with intense public distain and ultimately redacted.[12]

The signing of the TCJA into law indicates that Congress is now targeting certain areas of higher education, including the college sports arena, for tax purposes.[13] While public reaction previously influenced the IRS's decisions to redact the agency's efforts to tax college sports, the TCJA may not so swiftly or easily be thwarted.[14] Amid mounting legal issues currently enveloping college athletics,[15] higher educational institutions must prepare for the financial impact that the TCJA could have on their athletic programs moving forward. The purpose of this Article, then, is to: (II) provide a history of the big business of college sports and early efforts to impose federal taxation on the industry; (III) review the applicable TCJA sections that may have a direct or indirect effect on U.S. college athletics; and (IV) conclude that universities and their athletic departments must begin to account for and strategize plans to protect themselves from the financial impact of the TCJA.

II. A HISTORY OF THE BUSINESS AND TAX TREATMENT OF COLLEGE SPORTS

College sports have become a pervasive presence in U.S. higher education since the mid-nineteenth century when Harvard University competed against Yale University in the first intercollegiate crew competition.[16] Even during the earliest years of unregulated competitive sports, universities grappled with intense pressures to be competitively victorious, remain amateur amidst

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11. *See* Gary C. Randall, *Athletic Scholarships and Taxes: Or a Touchdown in Taxes*, 7 GONZ. L. REV. 297, 299 (1972); *see also* Kathryn Kisska-Schulze & Adam Epstein, *The Claim Game: Analyzing the Tax Implications of Student-Athlete Insurance Policy Payouts*, 25 JEFFREY S. MOORAD SPORTS L. J. 231, 269 (2018).

12. *See* Nathan Wirtschafter, Comment, *Fourth Quarter Choke: How the IRS Blew the Corporate Sponsorship Game*, 27 LOY. L.A. L. REV. 1465, 1472-73 (1994) and accompanying footnotes; *see also* I.R.S. Tech. Adv. Mem. 91-47-007.

13. Kisska-Schulze & Epstein, *supra* note 11, at 271.

14. There is currently no proposed legislation in either the House or Senate to amend the Tax Cuts and Jobs Act as it relates to the college sports arena.

15. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (per the U.S. Supreme Court, states may now legalize sports gambling); *see also In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., No 4:14-m-02541-CW (N.D. Cal. 2018) (challenging the NCAA's practice of student-athlete scholarship capping).

16. *See* John R. Thelin & Jason R. Edwards, *College Athletics – History of Athletics in U.S. College and Universities*, STATEU., http://education.stateuniversity.com/pages/1846/College-Athletics-HISTORY-ATHLETICS-IN-U-S-COLLEGES-UNIVERSITIES.html (last visited May 9, 2019).

pressures to commercialize college athletics, and maintain the highest levels of safety and fairness.[17] Concerns surrounding the dangers of college football prompted then-President Theodore Roosevelt to meet with representatives from Yale, Harvard, Princeton University, and other football schools over a century ago.[18] Following that meeting, reformation and regulation of college sports began to take shape with the establishment of the NCAA.[19]

Early sports competition between colleges and universities were bolstered by fierce rivalries and strong traditions.[20] From its inception in 1906, the NCAA pronounced that college sports were to be grounded on the bedrock principle of amateurism.[21] This basic tenant was later fueled by the NCAA's crafting of the term "student-athlete" in an effort to curb early workers' compensation claims by injured college athletes against their universities.[22] However, scholars have argued that the primordial *student-before-athlete* model fails to recognize the evolving financial forces backing modern day college athletics, prompting amateur athletics to morph into what is now a big business in the U.S.[23]

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17. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000).

18. Kristen R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003) (the meeting between President Roosevelt and university representatives took place in 1905).

19. *See* Jeff Wallenfeldt, *National Collegiate Athletic Association*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/National-Collegiate-Athletic-Association (last visited May 9, 2019). The NCAA formed in 1906 under the name Intercollegiate Athletic Association; the agency later adopted its current name in 1910. *Id.*

20. *See* Danny Flynn, *100 Best Traditions in College Football*, BLEACHER REP. (Sept. 14, 2012), http://bleacherreport.com/articles/1334063-the-100-best-traditions-in-college-football.

21. *See Amateurism*, NCAA, http://www.ncaa.org/student-athletes/future/amateurism (last visited May 9, 2019).

22. *See* The Editorial Board, Opinion, *The O'Bannon Ruling: 'Student-Athlete' Is History*, N.Y. TIMES, Aug. 13, 2014, https://www.nytimes.com/2014/08/14/opinion/the-obannon-ruling-student-athlete-is-history.html. *See, e.g.*, Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953); *see also* Univ. of Denver v. Indus. Commission of Colorado, 335 P.2d 292 (Colo. 1959) (holding that private agreements may neither violate public policy nor abrogate statutory requirements or conditions affecting the public policy of the state. Nemeth, whose compensation had been awarded incrementally and who asked for additional workers' compensation due to a change in his condition, was granted a reopening of his case.); State Compensation Ins. Fund v. Indus. Commission, 314 P.2d 288 (Colo. 1957) (denying benefits to the widow of a student-athlete killed during a football game).

23. *See* Timothy Davis, *Intercollegiate Athletics: Competing Models and Conflicting Realities*, 25 RUTGERS L.J. 269, 278 (1994). Academic scholars have questioned whether student-athletes are actually students who participate in sports, or instead athletes that go to class when their athletic schedules allow for it due to the exploitation of student-athletes by college athletics programs. *See, e.g.*, Kathryn Kisska-Schulze, *Analyzing the Applicability of IRC § 162 on the Pay-for-Play Model*, 16 VA. SPORTS & ENT. L.J. 190, 191 (2017) (analyzing the salient identity of the student-athlete in college sports); Jason Gurdus, Note, *Protection Off of the Playing Field: Student Athletes Should be Considered University Employees for Purposes of Workers' Compensation*, 29 HOFSTRA L. REV. 907, 929 (2001) (concluding that student-athletes are arguably employees of the institutions they play for); Robert A. McCormick & Amy Christian McCormick, *The Myth*

A. The Big Business of College Sports

Long-gone is the NCAA's earliest "tradition" of amateurism in college sports. Today, college football and basketball programs are a big business.[24] Boosters and alumni donate millions of dollars to bolster the athletic programs of their alma maters.[25] In 2015, the Council for Aid to Education documented that college athletic departments raised over $1 billion in donations that year.[26] Alumni contributions, combined with ticket sales, branding, television, radio, and Internet broadcasting rights, endorse significant revenue earnings for elite college sports programs.[27] Following its win at the 2016-17 College Football National Championship, for example, Clemson University unveiled its completed $55 million football complex just in time for the 2018 National Signing Day.[28] Similarly, in 2017 the University of Kansas announced a $350 million dollar athletics facility campaign, with a Jayhawks alumnus pledging the first $50 million towards the project.[29] Twenty-seven universities now meet the $100 million revenue mark from earnings derived from college athletic programs.[30]

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of the Student-Athlete: The College Athlete as Employee, 81 WASH L. REV. 71, 86 (2006) (arguing that the NCAA's insistence on characterizing student-athletes as amateurs masks the reality that universities employ players); Justin C. Vine, Note: *Leveling the Playing Field: Student Athletes Are Employees Of Their University*, 12 CARDOZO PUB L. POL'Y & ETHICS J. 235, 266 (2013) ("allowing their academics to play second fiddle").

24. *See* Kelly Charles Crabb, *The Amateurism Myth: A Case for a New Tradition*, 28 STAN. L. & POL'Y REV. 181, 214 (2017); *see also* Kisska-Schulze & Epstein, *supra* note 11, at 249 (noting that the college sports industry generates more than $11 million in revenue annually).

25. Glenn M. Wong et al., *NCAA Division I Athletic Directors: An Analysis of the Responsibilities, Qualifications and Characteristics*, 22 JEFFREY S. MOORAD SPORTS L.J. 1, 2 (2015).

26. Brad Wolverton & Sandhya Kambhampati, *Colleges Raised $1.2 Billion in Donations for Sports in 2015*, CHRON. HIGHER EDUC. (Jan. 27, 2016), https://www.chronicle.com/article/Colleges-Raised-12-Billion/235058.

27. *See College Athletics Revenues and Expenses – 2008*, ESPN, http://www.espn.com/ncaa/revenue [http://www.kashefmajid.com/wp-content/uploads/2014/05/College-Athletics-Revenues-and-Expenses-ESPN.pdf] (last visited May 9, 2019).

28. *See* Cork Gaines, *Clemson's $55 Million Football Facility*, BUS. INSIDER (Jan. 8, 2019), http://www.businessinsider.com/photos-clemsons-football-facility-2017-10; *see also* Will Hobson, *At Clemson, Football Success Brings Windfall That Most Schools Only Dream Of*, WASH. POST, Sept. 21, 2016, https://www.washingtonpost.com/sports/colleges/at-clemson-football-success-brings-windfall-that-most-schools-only-dream-of/2016/09/21/2bdb12fa-791c-11e6-bd86-b7bbd53d2b5d_story.html?utm_term=.a4fde750167a (documenting that the success of the football program has "brought surging donations to the university").

29. Matt Galloway, *KU Unveils $350 Million Campaign to Renovate Memorial Stadium, Other Facilities*, TOPEKA CAP.-J., Sept. 22, 2017, http://www.cjonline.com/sports/hawkzone/2017-09-22/ku-unveils-350-million-campaign-renovate-memorial-stadium-other.

30. Cork Gaines, *Texas Tops the List of 27 Schools That Make the Most Money in Sports*, BUS. INSIDER (Nov. 25, 2017), https://www.businessinsider.com/schools-most-revenue-college-sports-texas-longhorns-2017-11.

While amateurism in college sports is both promulgated and enforced by the NCAA,[31] public betting on college sports events has become a lucrative business off the court. An estimated $10 billion was bet on the outcome of the 2018 NCAA March Madness basketball tournament, of which only $300 million was wagered legally.[32] Prior to the U.S. Supreme Court's recent decision in *Murphy v. NCAA*, only four states—Nevada, Delaware, Montana and Oregon—allowed legal sports betting.[33] However, in 2018, the U.S. Supreme Court overturned the Professional and Amateur Sports Protection Act (PASPA), now allowing states the opportunity to draft regulations for legalized sports betting, to include gambling on college athletic events.[34] With the legalization of sports wagering now an available option for each state, estimates reveal that between $160 billion and $400 billion could be gambled on college sporting events annually moving forward.[35]

Even the NCAA, a not-for-profit organization, is a highly profitable business venture that has grown exponentially since its inception.[36] Its licensing affiliate, Collegiate Licensing Company (CLC), has paid more than $200 billion in royalties to its collegiate partners, which includes the NCAA.[37] During its 2017 fiscal year, the NCAA reported $1.1 billion in revenue.[38] The majority of the organization's revenue—which is mainly dispersed to its executives and member athletic programs—derives from television and marketing rights.[39] In 2018 alone, the organization earned $857 million from Turner Broadcasting for

31. *See* NCAA, 2018-19 NCAA DIVISION I MANUAL art. 2, 2.9, at 3 (Aug. 1, 2018) ("The Principle of Amateurism").

32. Press Release, *97% of Expected $10 Billion Wagered on March Madness To Be Bet Illegally*, AM. GAMING ASS'N (Mar. 12, 2018), https://www.americangaming.org/new/97-of-expected-10-billion-wagered-on-march-madness-to-be-bet-illegally/.

33. *See* John Warren Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth?*, 8 VILL. SPORTS & ENT. L.J. 221, 231-32 (2002) (noting that four states were exempted from the enactment of the Sports Protection Act in 1992, including Nevada, Oregon, Delaware, and Montana).

34. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

35. Dennis Dodd, *Legalized Betting Is Coming to College Football, and the SEC Is Bracing for Impact*, CBS SPORTS (May 31, 2018), https://www.cbssports.com/college-football/news/legalized-betting-is-coming-to-college-football-and-the-sec-is-bracing-for-impact/.

36. *See* Amber Jorgensen, *Why Collegiate Athletes Could Have the NCAA, et al. Singing A Different Tune*, 33 CARDOZO ARTS & ENT. L.J. 367, 371 (2015).

37. *See About IMG College Licensing*, IMG C. LICENSING, http://www.imgcollegelicensing.com/About-CLC.aspx (last visited May 9, 2019).

38. Scooby Axson, *NCAA: Organization Posts $1.1 Billion in Revenues*, SPORTS ILLUSTRATED, Mar. 7, 2018, https://www.si.com/college-basketball/2018/03/07/ncaa-1-billion-revenue.

39. *See* David A. Grenardo, *The Continued Exploitation of the College Athlete: Confessions of a Former College Athlete Turned Law Professor*, 95 OR. L. REV. 223, 224, 236 (2016); *see also* Darren Rovell, *NCAA Tops $1 Billion in Revenue for First Time*, ESPN (Mar. 7, 2018), http://www.espn.com/college-sports/story/_/id/22678988/ncaa-tops-1-billion-revenue-first (noting that an audit of the NCAA's 2017 financial statements indicate that it dispersed $560.3 million to its 1,100 member institutions).

airing the March Madness tournament series.[40] Such hefty numbers have prompted questions about the reasonableness of the NCAA's continued status as a tax-exempt organization.[41]

Another growing area of contention among scholars entails the increasingly lucrative coaching salaries now being paid by higher education institutions.[42] The NCAA does not regulate coaching salaries, allowing universities the freedom to pay their athletic coaching staff any salary agreed upon without a cap.[43] Magnified coaching salaries in the collegiate environment serve as one of the top out-of-pocket costs for athletic departments.[44] Although more than ten head college football coaches earn less than half a million dollars a year,[45] leading NCAA-member universities pay serious money for successful coaching staff.[46] In all but a handful of states, college football and men's basketball coaches are now the highest-paid public employees.[47] Sample salaries at the top of the pay scale include Mike Krzyzewski, head men's basketball coach at Duke University, who earns $8,982,325; Nick Saban, head football coach at the University of Alabama, who earns $8,307,000; John Calipari, men's basketball coach at the University of Kentucky, who earns $7,450,000; and Dabo Swinney,

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40. Andrew McCulloch, *Column: Don't Miss the Ball*, MANEATER (Mar. 11, 2015), https://www.themaneater.com/stories/sports/dont-miss-ball. *See* Aaron Mansfield, *Here's How Much Money Americans Will Bet on March Madness This Month*, COMPLEX, Mar. 12, 2018, http://www.complex.com/sports/2018/03/how-much-money-americans-will-bet-march-madness-month.

41. *See infra* text accompanying notes 126-35.

42. *See, e.g.*, William W. Berry III, *Enhancing "Education": Rebalancing the Relationship Between Athletics and the University*, 78 LA. L. REV. 197, 200 (2018) (noting the "wild increase" in coaching salaries at universities); Grenardo, *supra* note 39, at 227 (opining on the inequities of high coaching salaries versus the disallowance of the pay-for-play model in college sports); David A. Grenardo, *The Duke Model: A Performance-Based Solution for Compensating College Athletes*, 83 BROOK. L. REV. 157, 159-162 (2017) (discussing that while college coaches and athletic directors "flourish economically," student-athletes are prohibited from earning income from their sport); M. Mark Heekin & Bruce W. Burton, *Compensation For College Athletes: The Nondestructive Solution*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 364, 373-374 (2015) (noting that universities are willing to increase coaching salaries to promote success in college athletics).

43. Grenardo, *supra* note 39, at 227.

44. Berry III, *supra* note 42 (providing that increasing coaching salaries and expanding athletic facilities serve as the two greatest costs to college athletic programs).

45. United States Department of Labor, *Coaches and Scouts*, BUREAU L. STAT. (Apr. 13, 2018), https://www.bls.gov/ooh/entertainment-and-sports/coaches-and-scouts.htm. *See* Jonah Newman, *Coaches, Not Presidents, Top Public-College Pay List*, CHRON. HIGHER EDUC. (May 16, 2014), https://www.chronicle.com/blogs/data/2014/05/16/coaches-not-presidents-top-public-college-pay-list/.

46. *See* Jimmy Boyd, *List of Top FBS Head Coach Salary for NCAA Football in 2018*, BOYDSBETS, https://www.boydsbets.com/highest-paid-college-football-coaches/ (last visited May 9, 2019).

47. Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee A Coach? (Probably)*, DEADSPIN (May 9, 2013), https://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228.

head football coach at Clemson, who earns $6,205,000.[48] In 2017, twenty college football coaches earned over $4 million in salaries, with at least seventy-five earning at least $1 million.[49] Another fourteen college basketball coaches earn at least $3 million annually.[50]

While college athletics have persistently been driven by unquenchable pressures to win, escalating coaching salaries have prompted questions about the prioritization of sports over academics in higher education.[51] Increasing coaches' earnings have also called into question the continued legitimacy of maintaining the aura of amateurism in college sports, particularly when unpaid student-athletes are the workhorses of successful athletic programs.[52] The development of the so called "arms race" of rising coaching salaries also prompts issues of the commercialization of big time college athletics.[53] Still, universities interpret higher coaching salaries as being an investment in successful athletic programs, resulting in positive effects on the overall quality of student enrollment, faculty, and alumni and booster donations.[54] However, investing exuberant funds into athletic programs is resulting in competitive inequity, allowing financially dominant NCAA Division I teams to continue building and strengthening as compared to less economically prosperous programs.[55]

Academic scholars, in conjunction with the American legal system, have expressed opinions on the growing controversy surrounding the

48. David A. Tomar, *The 25 Highest-Paid College Coaches of 2019*, QUAD, https://thebestschools.org/magazine/highest-paid-college-coaches/ (last visited May 9, 2019).

49. Richard Johnson, *College Football Coach Salaries: A Skyrocketing History, 1869-2018*, SB NATION (Oct. 4, 2018), https://www.sbnation.com/college-football/2018/6/4/17390394/college-football-coach-salary-history-highest.

50. *College Basketball Coaches Who Make More Than $3 Million*, USA TODAY, Feb. 26, 2018, https://www.usatoday.com/picture-gallery/sports/ncaab/2018/02/26/college-basketball-coaches-who-make-more-than-3-million/110866872/.

51. *See* Berry III, *supra* note 42, at 204.

52. *See* Christopher Sweeney, *Judges Are Not 'Super-Referees': Why a Qualified Statutory Exemption to the Sherman Act is Needed to Reform the NCAA and its Exploitive Amateur Model*, 49 J. MARSHALL L. REV. 125, 137-138 (2015) (noting that high coaching and administration salaries are made possible because the workforce (aka student-athletes) are not paid).

53. *See* Heekin & Burton, *supra* note 42, at 372-74 (discussing the arms race of college coaching salaries).

54. *Id.* at 373 (noting the positive effects of higher coaching salaries); *see also* Lora Weurdeman, *Sidelining Big Business in Intercollegiate Athletics: How the NCAA Can De-Escalate the Arms Race by Implementing a Budgetary Allocation for Athletic Departments*, 39 N.C. CENT. L. REV. 85, 89 (2017) (discussing that increases in expenditures of coaching salaries and sports facilities has led to an arms race in intercollegiate sports in order to gain top recruits, coaches, and a "competitive advantage.").

55. Grenardo, *supra* note 39, at 262 (documenting that the arms race has "likely negated" the NCAA's equalizing restraints on the pay-for-play model).

professionalization of college sports.[56] Amateurism, however, continues to be the mainstay amidst the profit-maximizing world that college athletics has evolved into. The "tradition" of non-professionalism on the collegiate playing field has provided shelter to scholarship-recipient student-athletes from being taxed on their grants-in-aid.[57] In addition, the IRS has also only rarely attempted to impose taxes on the college sports industry.[58] As the historically tax-favorable status of college sports has now been challenged following the signing of the TCJA, it is important to understand early efforts to tax intercollegiate athletics.

B. Taxing College Sports – A Historical View

Until the TCJA was signed into law, college sports appreciated relatively amicable federal tax treatment. While critics have called into question the tax-exempt status of the NCAA, its member institutions,[59] and the employment

56. *See, e.g.*, Joseph Davison, *Throwing the Flag on Pay-For-Play: The O'Bannon Ruling and the Future of Paid Student-Athletes*, 11 WASH. J.L., TECH. & ARTS 155 (2015) (analyzing the impact of litigation on amateurism in college sports); Christian Dennie, *He Shoots, He Scores: An Analysis of O'Bannon v. NCAA on Appeal and the Future of Intercollegiate Sports*, 93 N.C.L. REV. 90 (2015) (offering arguments about the future of college athletics after the *O'Bannon* case); Kathryn Kisska-Schulze & Adam Epstein, *Northwestern, O'Bannon, and The Future: Cultivating a New Era for Taxing Qualified Scholarships*, 49 AKRON L. REV. 771 (2016) (analyzing whether student-athletes' qualified scholarships should be taxed); César F. Rosado Marzán & Alex Tillett-Saks, *Work, Study, and Organize!: Why the Northwestern University Football Players are Employees Under the National Labor Relations Act*, 32 HOFSTRA LAB. & EMP. L.J. 301, 303-304 (discussing the commercialization and professionalization of college sports); Josephine R. Potuto et al., *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879 (2014) (analyzing the shift from amateurism to professionalism in college sports); *see also* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015); Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1091 (7th Cir. 1992) (addressing that permitting professional athletes and agents into NCAA sports would destroy amateurism in college sports); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126 (N.D. Cal. 2014); Nw. Univ. & Coll. Athletes Players Ass'n, No. 13-RC-121359, 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014), *rev'd* Nw. Univ. & College Athletes Players Ass'n, 362 N.L.R.B. 167, 2-3, (2015) (No. 13-RC-121359).

57. *See* Kisska-Schulze & Epstein, *supra* note 11, at 269; *see also* Letter from John A. Koskinen, IRS Commissioner, U.S. Dep't of Treasury, to Richard Burr (R-N.C.), Senator, U.S. Senate (Apr. 9, 2014) (available at https://www.irs.gov/pub/irs-wd/14-0016.pdf [https://perma.cc/35YH-CYSH]). Letter from John A. Koskinen to Senator Richard Burr (R-N.C.) in response to Burr's March 28, 2014, letter to Koskinen, Commissioner of the IRS until November 12, 2017, in which Burr requested confirmation of the federal tax treatment of college athletic scholarships. *Id.* Koskinen responded that "[i]t has long been the position of the Internal Revenue Service that athletic scholarships can qualify for exclusion from income under section 117." *Id.* The letter further states with regard to the 1977 Revenue Ruling 77-263, 1977-2 C.B. 47, that "the athletic scholarship awarded by the university is primarily to aid the recipients in pursuing their studies and, therefore, is excludable under section 117." *Id.*

58. Kisska-Schulze & Epstein, *supra* note 11, at 250.

59. *See, e.g.*, John D. Colombo, *The NCAA, Tax Exemption and College Athletics*, 2010 U. ILL. L. REV. 109, 110 (2010) (noting dissenters of the tax-exempt status of the NCAA, including political representative Bill Thomas (R-CA22) and George Will, Op-Ed Columnist for *The Washington Post*).

status of student-athletes,[60] the federal government has generally provided agreeable tax treatment across the entirety of college sports.[61] However, such favorable treatment has periodically been weighed and measured by the American legal system, academic scholars, the IRS, and Congress.

1. Student-Athletes' Qualified Scholarships

Internal Revenue Code (I.R.C.) Section 61 establishes the edict for taxing gross income, allowing an exclusion under Section 117 for money received in the form of qualified scholarships.[62] Such exclusion is limited to scholarship funds that are not attached to a condition for receipt.[63] The IRS has held the position that there is currently no evidence of *quid pro quo* in college sports, which would require that student-athletes' scholarship funds be taxed.[64] This stance is distinguishable from various findings by both the U.S. Supreme Court and Tax Court that select fellowship and scholarship recipients are in a *quid pro quo* relationship, thus delineating the available exclusion under the Code.[65]

In *Bingler v. Johnson*, for example, the U.S. Supreme Court held that Ph.D. students' work-in-exchange-for-study stipends were taxable.[66] In both *Bonn v. Commissioner of Internal Revenue* and *Proskey v. Commissioner of Internal Revenue*, the U.S. Tax Court held that funds received by research physicians in exchange for hospital services were *quid pro quo* taxable.[67] The Tax Court also identified a *quid pro quo* relationship in *Zolnay v. Commissioner of Internal Revenue* where a research assistant received fellowship funds conducive to a supervisory work position.[68] In circumstances where no *quid pro quo* relationship was found to exist, the Tax Court has held that fellowship funds were excludable from gross income.[69]

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60. *See* Valrie Chambers & Michael E. Bitter, *Potential Tax Implications of NCAA Family Travel Allowances*, 27 J. LEGAL ASPECTS SPORT 187, 190 (2017) (documenting that student-athletes' amateur status, as well as the tax-exempt organizations they are affiliated with, are being vigorously tested).

61. *See* Kisska-Schulze & Epstein, *supra* note 11, at 254.

62. 26 U.S.C. §§ 61, 117 (2019). *See* Kisska-Schulze & Epstein, *supra* note 56, at 774; *see also* 26 U.S.C. § 117(b)(2)(A), (B) (2019).

63. 26 U.S.C. § 117(c). *See* Bingler v. Johnson, 394 U.S. 741 (1969).

64. Kisska-Schulze & Epstein, *supra* note 56, at 774 (citing to Potuto et al., *supra* note 56, at 890 n.40).

65. *See, e.g.*, *Bingler*, 394 U.S. at 758; Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170 (Ind. 1983); Bonn v. Comm'r, 34 T.C. 64 (1960); Proskey v. Comm'r, 51 T.C. 918 (1969); Zolnay v. Comm'r, 49 T.C. 389 (1968).

66. *Bingler*, 394 U.S. at 758.

67. *See Bonn*, 34 T.C. 64; *see also Proskey*, 51 T.C. 918.

68. *See Zolnay*, 49 T.C. 389.

69. *See, e.g.*, Smith v. Comm'r, 51 T.C.M. (CCH) 1348 (1986) (the Court found that the petitioner's receipt of funds as a graduate assistant required no condition(s) as part of the agreement with the university);

While determining the existence of a *quid pro quo* relationship is standard operating procedure by courts when evaluating the taxability of qualified scholarships under I.R.C. Section 117(c), student-athlete scholarship recipients have enjoyed a rather courteous exemption by the IRS from such standard.[70] Revenue Ruling 77-263, drafted in 1977 in response to a request for guidance on whether student-athletes' scholarship awards are taxable, excludes athletic scholarships from the *quid pro quo* standard.[71] In providing this guidance, the ruling specifies that "athletic scholarships are awarded by the university primarily to aid the recipients in pursuing their studies, and therefore, the value of the scholarships is excludable from the recipients' gross income . . . ."[72]

The *quid pro quo* standard was mirrored in the 1983 case *Rensing v. Indiana State University Board of Trustees*.[73] In that case, the Indiana Supreme Court found that Rensing, a football player at Indiana State University, was not found to be "in the service of" the institution for purposes of workers' compensation eligibility.[74] The Court cited to Revenue Ruling 77-263, documenting that "[t]he Internal Revenue Service has ruled that scholarship recipients are not taxed on their scholarship proceeds."[75] In overturning the lower court's decision, the majority agreed with and quoted Judge Young's dissent[76] in the Fourth District Court of Appeals decision:

> Rensing's participation in football may well have benefited the university in a very general way. That does not mean that Rensing was in the service of the Trustees. If a student wins a Rhodes scholarship or if the debate team wins a national award that undoubtedly benefits the school, but does not mean that the student and the team are in the service of the school. Rensing

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Spiegelman v. Comm'r, 102 T.C. 394 (1994) (the Court held that fellowship grant funds awarded to the taxpayer during his doctoral studies were not provided as compensation for services rendered, and thus not subject to self-employment income tax).

70. *See* Kisska-Schulze & Epstein, *supra* note 56, at 782; *see also* Rev. Rul. 77-263, 1977-2 C.B. 47.

71. *See* Rev. Rul. 77-263, 1977-2 C.B. 47.

72. *Id.*

73. *See* Rensing v. Ind. State Univ. Bd. of Trs., 444 N.E.2d 1170 (Ind. 1983) (this case was issued based on a question of whether a scholarship-recipient football player was eligible to receive workers' compensation benefits. Although *Rensing* would not necessarily be relied on in determining whether a student-athletes' scholarship funds are taxable, the case evidences the American legal system's perception of amateurism in college sports); *see also* Kisska-Schulze & Epstein, *supra* note 56, at 801.

74. *Rensing*, 444 N.E. 2d at 1174.

75. *Id.* at 1173.

76. Rensing v. Ind. State Univ. Bd. of Trs., 437 N.E.2d 78 (Ind. Ct. App. 1982) (Young, J., dissenting).

> performed no duties that would place him *in the service of the university*.[77]

The *Rensing* decision has been used as precedent in later cases involving student-athletes. In the Supreme Court of Massachusetts case *Kavanagh v. Trustees of Boston University*, a college basketball player sought vicarious liability from Boston University (BU) after a BU scholarship athlete punched the plaintiff during a game.[78] In its opinion, the majority cited to *Rensing*, noting, "proceeds of athletic scholarships are not taxable as income."[79] In the Texas Court of Appeals case *Waldrep v. Texas Employers Insurance Ass'n*, a college football player sought workers' compensation benefits following an injury during play for Texas Christian University (TCU).[80] The majority decision, documenting that no income taxes had been withheld from Waldrep's grant-in-aid, cited to *Rensing* in making its determination that "Waldrep was not in the service of TCU."[81]

Outside of these cases and Revenue Ruling 77-263, the only outlying precedent to come forward concerning the federal tax treatment of student-athletes' scholarship funds is a letter from IRS Commissioner John A. Koskinen to Senator Richard Burr (R-NC) written in 2014.[82] Commissioner Koskinen's letter, drafted in response to Senator Burr's request for confirmation of the federal tax treatment of student-athletes' athletic scholarship funds following the Chicago district (Region 13) of the National Labor Relations Board's (NLRB) decision to allow Northwestern University football players to unionize and bargain collectively,[83] confirmed the IRS's 1977 position, documenting, "[i]t has long been the position of the Internal Revenue Service that athletic scholarships can qualify for exclusion from income under Section 117."[84]

Although literary scholars have argued that a *quid pro quo* relationship does in fact exist between scholarship-recipient student-athletes and the universities

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77. *Id.* at 90 (emphasis added); *see also Rensing*, 444 N.E.2d at 1174 (emphasis added).

78. Kavanagh v. Trs. of Bos. Univ., 440 Mass. 195 (Mass. 2003).

79. *Id.* at 199 (citing *Rensing*, 444 N.E.2d at 1173).

80. Waldrep v. Texas Emp'rs. Ins. Ass'n, 21 S.W.3d 692 (Tex. App. 2000).

81. *Id.* at 701; *see also* Cont'l Ins. Co. v. Wolford, 526 S.W.2d 539, 540 (Tex. 1975) (documenting that withholding of taxes is *indicia* of employee status).

82. *See* Letter from John A. Koskinen, *supra* note 57.

83. *See* Nw. Univ. & Coll. Athletes Players Ass'n, No. 13-RC-121359, 2014 NLRB LEXIS 221 (N.L.R.B. Mar. 26, 2014). Note, the region 13 decision was later overturned in Nw. Univ. & College Athletes Players Ass'n, 362 N.L.R.B. 167, 2-3, (2015) (No. 13-RC-121359).

84. *See* Letter from John A. Koskinen, *supra* note 57.

they play for, the IRS has never changed its stance.[85] Thus, student-athletes currently remain free from the long arm of federal taxation on funds received from athletic scholarships. However, it is important to consider that while the TCJA does not directly target student-athletes' grants-in-aid as being taxable, the new tax law could have an impact on athletic departments' abilities to fundraise enough contributions to substantiate the current levels of athletic scholarships moving forward.[86]

2. Taxing the Greater College Sports Arena

Similar to student-athletes' grants-in-aid, the IRS has historically granted favorable tax treatment to the greater college sports industry.[87] I.R.C. Section 501(c)(3) provides a tax exemption for charitable organizations, including corporations organized for educational purposes.[88] Private universities meeting the educational requirements of Section 501(c)(3) qualify for federal tax-exemption, with minor exception.[89] In addition, public universities also qualify for charitable exemption, with many eligible for tax exemption due to their being considered an arm of the state in providing essential governmental functions as codified in I.R.C. Section 115.[90]

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85. *See, e.g.*, Davis, *supra* note 23, at 316 (documenting that "a quid pro quo is the essence of the relationship between the athlete and his university"); Kisska-Schulze & Epstein, *supra* note 56, at 789 (noting the *Bingler* application has not been applied to student-athletes); McCormick & McCormick, *supra* note 23, at 115 (stating "[t]he fact that a university can terminate financial aid to a player immediately upon the athlete's refusal to play demonstrates that such aid is compensation and a quid pro quo for athletic services rendered"); Sean Alan Roberts, Comment, *College Athletes, Universities, and Workers' Compensation: Placing the Relationship in the Proper Context by Recognizing Scholarship Athletes as Employees*, 37 S. TEX. L. REV. 1315, 1317-1318 (1996) (stating that "[a] contractual relationship and a 'pay-for-play' arrangement unarguably exists" between student-athletes and their universities).

86. *See* Kyle Rowland, *College Athletic Departments Wrestle With Impact of Tax Bill*, BLADE (Feb. 3, 2018), http://www.toledoblade.com/College/2018/02/02/College-athletic-departments-wrestle-with-impact-of-tax-bill.html (noting the impact of fundraising on college athletic scholarships); Dirk P. Katstra, *New Tax Legislation*, VA ATHLETICS FOUND., http://virginiaathleticsfoundation.com/new-tax-legislation/ (last visited May 9, 2019) (documenting the importance of contributions being made to the Virginia Athletics Foundation for purposes of maintaining college athletics scholarships).

87. *See* Kisska-Schulze & Epstein, *supra* note 11, at 254.

88. 26 U.S.C. § 501(c)(3) (2019).

89. *See Tax Exemption for Universities and Colleges*, ASS'N AM. U. (Mar. 2014), https://www.aau.edu/sites/default/files/AAU%20Files/Key%20Issues/Taxation%20%26%20Finance/Tax-Exempt-Status-of-Universities-FINAL.pdf (last visited May 9, 2019); *see also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (the U.S. Supreme Court upheld an IRS policy denying tax-exempt status to private universities adhering to racially discriminatory admissions procedures).

90. *See* 26 U.S.C. § 115 (2019); *see also Tax Exemption for Universities and Colleges*, *supra* note 89.

i. I.R.C. § 501(c)(3) and College Athletic Programs

Section 501(c)(3) extends a tax exemption to amateur sports organizations fostering "national or international amateur sports competition."[91] Athletic programs can qualify for tax-exempt status if they are affiliated with a tax-exempt educational organization, such as a college or university. In 1967, the IRS issued Revenue Ruling 67-291, providing that university athletic programs are "an integral part" of the educational process and help further "the educational program of the university," thus qualifying for federal tax exemption.[92] In 1980, the agency issued Revenue Rule 80-296, rearticulating that college and university athletic departments are generally considered educational in nature.[93] Case law has subsequently supported this stance.

In *Kondos v. West Virginia Board of Regents*, for example, the U.S. District Court for the Southern District of West Virginia stated, "the carrying on of an athletic program is an important and necessary element in the educational process, especially at institutions of higher learning."[94] The Tenth Circuit later upheld a U.S. Tax Court decision in *Hutchinson Baseball Enterprises, Inc. v. Commissioner of Internal Revenue*, finding that "the furtherance of recreational and amateur sports" continues to be a charitable activity.[95] Soon after, in *Greenhill v. Carpenter*, the Tennessee Court of Appeals noted:

> For well over one hundred years athletic programs have been an integral part of the educational process in colleges and universities throughout this country . . . . The development of a student's physical body, team work, and sportsmanship have all been part of the college and university educational process, notwithstanding the fact that in recent years big-time college athletics have at times taken on a tinge of commercialism.[96]

In the 1993 case *Cohen v. Brown University*, the U.S. Court of Appeals for the First Circuit opined:

> For college students, athletics offers an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence,

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91. 26 U.S.C. § 501(c)(3). Note, however, that this exemption does not apply to amateur sports competition activities that "involve the provision of athletic facilities or equipment." *Id.*

92. Rev. Rul. 67-291, 1967-2 C.B. 184.

93. Rev. Rul. 80-296, 1980-2 C.B. 195.

94. Kondos v. W. Va. Bd. of Regents, 318 F. Supp. 394, 396 (S.D.W. Va. 1970), *aff'd*, 441 F.2d 1172 (4th Cir. 1971).

95. Hutchinson Baseball Enterprises, Inc. v. Comm'r, 696 F.2d 757, 762 (10th Cir. 1982).

96. Greenhill v. Carpenter, 718 S.W.2d 268, 271 (W.D. Tenn. 1986) (affirming the lower court's dismissal of the claim brought by the mother of a student-athlete killed in plane crash; finding sovereign immunity entitlement to the defendants).

> and perfect self-discipline. In addition, for many student-athletes, physical skills are a passport to college admissions and scholarships, allowing them to attend otherwise inaccessible schools. These opportunities, and the lessons learned on the playing fields, are invaluable in attaining career and life successes in and out of professional sports.[97]

Three years later, the Michigan Court of Appeals in *Harris v. University of Michigan Board of Regents* echoed the IRS's stance on college athletics, stating, "Congress apparently considers collegiate athletics sufficiently related to higher education to embrace such activities within the exemption from federal income tax accorded to educational institutions under § 501(c)(3) of the Internal Revenue Code . . . ."[98] Thus, like the universities they are affiliated with, college athletic departments have generally enjoyed tax-favorable status under the umbrella of I.R.C. Section 501(c)(3).[99]

ii. Taxing Unrelated Business Income

While colleges and universities enjoy tax exemption from revenues derived from their charitable purposes, any activities they partake in which results in unrelated business income (UBI) is taxable.[100] UBI is income earned from activities regularly carried on by an organization, but not substantially related to its tax-exempt purpose.[101] The premise behind the UBI rules, codified in I.R.C. Section 512, is to regulate tax-exempt organizations conducting commercial business activities not within the purview of their stated charitable purposes, thus putting non-profit organizations on equal footing with for-profit entities participating in the same type of activity.[102] Examples of collegiate activities that may be subject to UBI tax include: gift and bookstore sales; mailing list rentals or sales; analytical laboratory facility rentals; advertising;

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97. Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) (affirming the lower court's decision to extend a preliminary injunction reinstating select women's athletic programs to varsity status).

98. Harris v. Univ. of Mich. Bd. of Regents, 558 N.W.2d 225, 230 (Mich. Ct. App. 1996) (the court affirmed the grant of summary judgment by the lower court to the board of regents, university president, and athletics director following an injured student-athlete's complaint that athletic department activities were conducted primarily for profit, and thus not sheltered by government immunity).

99. *See* Darren A. Heitner, *Money and Sports: Economic Realities of Being an Athlete*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 161, 168 (2012).

100. 26 U.S.C. § 512 (2019).

101. *Id.* § 512(a)(1); *see also* Kisska-Schulze & Epstein, *supra* note 11, at 254.

102. *See* 26 U.S.C. § 512; *see also* William A. Bailey, *The Taxman on Campus: How Aggressive IRS Initiatives are Increasing Audit and Compliance Risk for Colleges and Universities*, 2012 BYU EDUC. & L.J. 215, 226 (2012).

restaurant and catering income; parking lot services; franchise agreements; and concession stand income.[103]

The IRS's historical emphasis on college athletics being integral to universities' educational (and thus charitable) functions has resulted in a rather unrestrictive application of the UBI rules to the college sports industry.[104] Almost all revenue generated by college athletics, including ticket sales, broadcasting rights, and corporate sponsorships have been found to facilitate the greater educational role of their tax-exempt universities.[105] In Revenue Ruling 80-295, the IRS dictated that the sale of television (TV) and broadcasting rights to an independent producer by a tax-exempt organization serving as a national governing body for amateur athletics is not UBI.[106] Immediately after, the IRS issued Revenue Ruling 80-296 which publicized that income derived from the sale of broadcasting rights to national radio and TV networks by regional college athletic conference organizations is also not considered UBI.[107]

These two rulings arose after the IRS's 1977 highly-debated attempt to impose a UBI tax on radio and broadcasting revenue stemming from college bowl games.[108] The agency changed its unfavorable position just one year later, issuing a Technical Memorandum in 1978 to the Cotton Bowl Athletic Association (CBAA) stating that it would not impose a tax on the income from the sale of broadcast rights during football games, while also highlighting the impact of college sports on education.[109] Over a decade later, in 1991, the IRS again initiated an attempt to impose a UBI tax on a sponsorship payment made by Mobile Oil Corporation (Mobil) to the CBAA in return for naming rights to the bowl game.[110] Immense objections ensued, prompting Congress to step in

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103. Bailey, *supra* note 102, at 227. *See Examples of Possible Unrelated Business Activities*, TEX. A&M U. SYS., https://www.tamus.edu/business/budgets-and-accounting/tax-services/tax-manual/appendix-b/examples-of-possible-unrelated-business-activities/ (last visited May 9, 2019) (listing a volume of potential examples of UBI at the university level).

104. *See* Erin Guruli, *Commerciality of College Sports: Should the IRS Intercept?*, 12 SPORTS L.J. 43, 44 (2005).

105. Alfred Dennis Mathewson, *By Education or Commerce: The Legal Basis for the Federal Regulation of the Economic Structure of Intercollegiate Athletics*, 76 UMKC L. REV. 597, 613 n.114 (2008) (citing to I.R.S. Gen. Couns. Mem. 37618 (July 28, 1978) (documenting that broadcast rights are substantially related to education)).

106. Rev. Rul. 80-295, 1980-2 C.B. 194.

107. Rev. Rul. 80-296, 1980-2 C.B. 195.

108. *See* Kisska-Schulze & Epstein, *supra* note 11, at 255; *see also* Wirtschafter, *supra* note 12, at 1472-73.

109. Wirtschafter, *supra* note 12, at 1473 n.74 (citing to I.R.S. Tech. Adv. Mem. 78-51-004 (Aug. 21, 1978)); *see also* Kisska-Schulze & Epstein, *supra* note 11, at 255.

110. James L. Musselman, *Recent Federal Income Tax Issues Regarding Professional and Amateur Sports*, 13 MARQ. SPORTS L. REV. 195, 208 (2003).

and issue proposed regulations to overturn the IRS's position on the matter.[111] As recently as 1996, the Michigan Court of Appeals articulated the tax protections afforded to college athletics, noting "income generated by . . . college sports teams from admission tickets and broadcasting revenue is not considered 'unrelated business income' subject to tax."[112]

iii. Taxing Charitable Donors

In addition to the historically favorable tax treatment bestowed on universities and their affiliated athletic programs, I.R.C. Section 170 grants individual taxpayers a deduction for contributions made to charitable organizations, including institutes of higher education.[113] In Revenue Ruling 67-246, the IRS articulated that charitable contributions are deductible for Section 170 purposes so long as they are considered a gift.[114] This ruling further expands that gifts constitute a monetary payment or property transfer without unconditional restrictions attached.[115] In the case where a charitable contribution is made in exchange for the purchase of an item, a taxpayer must establish that any contribution exceeding the value of such item is considered a gift in order to benefit from Section 170.[116] Generally, charitable contribution deductions are capped at 50% of a taxpayer's adjusted gross income (AGI).[117]

Through the end of calendar year 2017, Section 170 also provided donors an 80% charitable deduction for contributions made to educational institutions, which included (as a condition of the donation) a right to purchase preferential seating at university athletic events.[118] This benefit was not birthed without

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111. *Id.*; *see also* Prop. Treas. Reg. § 1.513-4(f) (Ex. 4) (1983); 58 Fed. Reg. 5687 (Jan. 22, 1993).

112. Harris v. Univ. of Mich. Bd. of Regents, 558 N.W.2d 225, 230 (Mich. Ct. App. 1996).

113. *See* 26 U.S.C. § 170 (2019).

114. Rev. Rul. 67-246, 1967-2 C.B. 104.

115. *Id.*

116. *Id.*; *see also* I.R.S. Priv. Ltr. Rul. 110217-99 (Mar. 24, 2000).

117. 26 U.S.C. § 170(b).

118. *Id.* § 170(l). Prior to January 1, 2018, I.R.C. Section 170(l) read:

> (1) For purposes of this section, 80 percent of any amount described in paragraph (2) shall be treated as a charitable contribution.
>
> (2) For purposes of paragraph (1), an amount is described in this paragraph if—
>
> > (A) the amount is paid by the taxpayer to or for the benefit of an educational organization—
> >
> > > (i) which is described in subsection (b)(1)(A)(ii), and
> > >
> > > (ii) which is an institution of higher education (as defined in section 3304(f)), and
> >
> > (B) such amount would be allowable as a deduction under this section but for the fact that the taxpayer receives (directly or indirectly) as a result of paying such amount the

initial scrutiny. In 1984 the IRS issued Revenue Ruling 84-132, pronouncing that preferred seating at university sporting events had significant value, thus denying taxpayers the ability to deduct any part of their donation to a university athletic program that accompanied such right unless it was established that part of the contribution exceeded the value of the right to buy tickets.[119] Following immediate backlash, the IRS suspended the Ruling, issuing an Announcement that the agency would hold a public session to discuss the issue.[120] Two years later, the IRS issued Revenue Ruling 86-63, officially superseding Revenue Ruling 84-132, allowing for a deduction equal to the difference between the contribution and the value of the preferred seating.[121] Once again, this ruling was met with criticism.[122] Two years later, Congress enacted the Technical and Miscellaneous Revenue Act of 1988 which stipulated that 80% of amounts contributed to institutions of higher education that included a "right to purchase tickets for seating at an athletic event in an athletic stadium of such institution," would be allowed as a deduction.[123]

Acknowledgement of this new benefit was later prescribed in a 1999 IRS Technical Advice Memorandum following a taxpayer's request for guidance on whether a portion of their payment made to a state university's foundation, which included the right to buy seating in the skybox located in the university athletic stadium, was deductible.[124] The IRS concluded that the portion of payment that included the taxpayer's right to purchase preferred seating constituted a "benefit of the University," thus allowing an 80% deduction of the payment under Section 170.[125]

iv. Tax-Exemption and the NCAA

While the above analysis highlights the historical federal tax benefits afforded to institutions of higher education, their affiliate athletic programs, and

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> > right to purchase tickets for seating at athletic event in an athletic stadium of such institution.
>
> If any portion of a payment is for the purchase of such tickets, such portion and the remaining portion (if any) of such payment shall be treated as separate amounts for purposes of this subsection.

26 U.S.C. § 170(l) (2017).

119. Rev. Rul. 84-132, 1984-2 C.B. 55.

120. *See* Kristin Balding Gutting, *Relighting the Charitable Deduction: A Proposed Public Benefit Exception*, 12 FLA. TAX REV. 453, 485 (2012); *see also* Announcement 84-101, 1984-45 I.R.B. 21.

121. *Gutting*, *supra* note 120; *see also* Rev. Rul. 86-63, 1986-1 C.B. 88.

122. *Gutting*, *supra* note 120, at 485.

123. H.R. 4333, 100th Cong. § 6001(a) (1988).

124. I.R.S. Tech. Adv. Mem. 122293-98 (July 7, 1999).

125. *Id.*

their generous charitable donors, an examination of amateur athletics would not be complete without a brief discussion of the tax treatment of the NCAA. Like most colleges and universities, the NCAA has benefited from significant federal tax protection.[126] As stated earlier, I.R.C. Section 501(c)(3) provides a tax exemption to organizations fostering "national or international amateur sports competition."[127] Since its inception, the NCAA has successfully maintained its tax-exempt status under the parameters of this Code section.[128]

The organization's stated core purpose is to "govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount."[129] So long as the NCAA continues its promotion to operate exclusively for educational purposes, it should continue its tax favorable status; however, that status could be revoked if any of its earnings "inures to the benefit of any private shareholder or individual."[130] Some have questioned whether this is already occurring.

It has been argued that the NCAA and its member institutions engage in activities not generally affiliated with non-profit organizations, including the imposition of politically correct standards of tolerance on member organizations and entering into billion dollar contract agreements.[131] Academic scholars and the American legal system have probed whether the NCAA should instead be recognized as a for-profit business.[132] The U.S. Supreme Court, in *NCAA v.*

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126. *See* Kisska-Schulze & Epstein, *supra* note 11, at 256; *see also* Colombo, *supra* note 59, at 133 (noting that the NCAA benefits from tax-exemption).

127. 26 U.S.C. § 501(c)(3). Note, however, that this exemption does not apply to amateur sports competition activities that "involve the provision of athletic facilities or equipment." *Id.*

128. *See id.* (noting that the NCAA is a Section 501(c)(3) organization).

129. *NCAA Strategic Plan*, NCAA EXECUTIVE COMMITTEE (Apr. 2004), http://www.ncaapublications.com/productdownloads/SP04.pdf.

130. *See* 26 U.S.C. § 501(c)(3).

131. *See* ADAM EPSTEIN, SPORTS LAW 42-42 (2013) (noting the NCAA's tax-exempt status receives intense public scrutiny over whether its primary purpose is educational when its actions are clearly motivated by raising revenue, and providing that it is treated no differently than Salvation Army, Goodwill, United Way, Red Cross, or the Ronald McDonald House, none of which have billion dollar television contracts).

132. *See, e.g.*, Colombo, *supra* note 59 (analyzing the NCAA as a tax-exempt organization following the 2006 inquiry by the U.S. Congress asking the organization to justify its exemption); Michael A. Corgan, Comment, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 VILL. SPORTS & ENT. L.J. 371, 387-88 (2012) (addressing the tax-exempt status of the NCAA); Richard G. Johnson, *Submarining Due Process: How the NCAA Uses its Restitution Rule to Deprive College Athletes of Their Right of Access to the Courts . . . Until Oliver v. NCAA*, 11 FLA. COASTAL L. REV. 459, 536 (2010) (questioning the reasonableness of the NCAA's tax-exempt status when it spends millions of dollars annually on legal fees in order to fight college athletes); Amy C. McCormick & Robert A. McCormick, *The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism*, 45 SAN DIEGO L. REV. 495, 504 (2008) (stating that the NCAA's status as a tax-exempt organization should be re-examined); Kadence A. Otto & Kristal S.

Board of Regents, acknowledged that the NCAA is organized as a non-profit organization, but added footnote commentary suggesting, "the economic significance of the NCAA's nonprofit character is questionable at best . . . the NCAA and its member institutions are in fact organized to maximize revenue . . . ."[133] Even Congress has required that the NCAA indorse its position as a nonprofit organization.[134] Still, through this varied scrutiny, the NCAA has thus far maintained its tax-exempt status.[135]

The above analyses illustrate a history of the generally amicable federal tax treatment blanketing college athletics. Beginning January 1, 2018, however, certain new federal tax rules prescribed in the TCJA will have a direct or indirect impact on the college sports arena. Section III identifies and addresses the specific TCJA provisions that could influence U.S. college sports in the future.

III. THE IMPACT OF THE TAX CUTS AND JOBS ACT ON COLLEGE SPORTS

During his presidential campaign, one of Donald Trump's promises included his interest in making "big league" changes to the nation's federal tax laws.[136] As "big-league" Division I college sports have steadily transformed amateur athletics into a lucrative commercial industry,[137] President Trump's verbiage may have foreshadowed imminent tax changes coming to the college sports industry. Although the proposed November 2017 Republican-sponsored

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Stippich, *Revisiting Tarkanian: The Entwinement and Interdependence of the NCAA and State Universities and Colleges 20 Years Later*, 18 J. LEGAL ASPECTS SPORT 243, 275-79 (2008) (discussing the complexities surrounding the NCAA's tax-exempt status and noting that not only is the NCAA exempt from federal income taxes, but has been exempt from state taxes as well); Amanda Pintaro, *Is the NCAA Fulfilling its Tax-Exempt Status?*, ILL. BUS. L.J. (2010) (analyzing the tax-exempt status of the NCAA); *see also* Nat'l Collegiate Realty Corp. v. Bd. of Cty. Commr's, 690 P.2d 1366 (Kan. 1984) (reasoning that property used by NCAA for its national headquarters was used exclusively for educational purposes within the meaning of state statute granting an exemption); Nat'l Collegiate Athletic Ass'n v. Kansas Dep't of Revenue, 781 P.2d 726 (Kan. 1989) (reasoning that the NCAA was an *educational institution* within the purview of applicable Kansas statute and therefore exempt from sales taxes in Kansas).

133. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 100 n.22 (1984).

134. Kisska-Schulze & Epstein, *supra* note 11, at 356; *see also* Colombo, *supra* note 59, at 149 (2010).

135. Kisska-Schulze & Epstein, *supra* note 11, at 356. *See* Elia Powers, *The NCAA Responds*, INSIDE HIGHER ED (Nov. 16, 2006), https://www.insidehighered.com/news/2006/11/16/ncaa-responds (referencing the twenty-five-page response drafted by Myles Brand—then President of the NCAA—to Capitol Hill defending the NCAA's status as a tax-exempt organization).

136. Ryan J. Clements, *Trump's "Big-League" Tax Reform: Assessing the Impact of Corporate Tax Changes*, 7 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 2 (2017).

137. *See* Howard LaFranchi, *University Heads Cite Hard Lessons in Handling Sports Scandals. Maryland and Tulane Chiefs Urge Hands-On Leadership and Reforms*, CHRISTIAN SCI. MONITOR (Mar. 25, 1987), https://www.csmonitor.com/1987/0325/acoll.html (referencing a change in "big-league college sports"); *see also* Elisabet Van Nostrand, *Stony Brook Aims for Division I; Seeking 'Big-League' Sports Status*, NEWSDAY (Dec. 5, 1991) (discussing the State University of New York at Stony Brook's efforts to enter the "big-league" of college sports by pushing to enter the NCAA D-1 level).

bill included several sections that could have affected both professional and amateur athletics, only certain of these proposals were embedded in the final legislation.[138] The chart depicted in Subsection (A) identifies pertinent sections of the TCJA and I.R.C. that could have a direct or indirect impact on the U.S. college sports industry moving forward.[139] Subsection (B) provides more detailed consideration of the application of these rules to the overall college sports arena.

A. The Effect of the TCJA on the U.S. College Sports Industry

Applicable TCJA and I.R.C. Sections	**Brief Description**
Increase in Standard Deduction TCJA Section 11021 Rev. Proc. 2018-18 amends I.R.C. Section 63(c)(2)	The TCJA significantly increased the standard deduction amounts available under I.R.C. Section 63. Section 11021 of TCJA provides the following standard deductions beginning tax year 2018: $12,000 for individuals; $18,000 for heads of households; and $24,000 for married couples filing jointly.
Limitation on Deduction by Employers of Expenses for Fringe Benefits TCJA Section 13304 IRC Section 274 Treas. Reg. Section 1.274-2	The TCJA amends I.R.C. Section 274 by removing employers' ability to deduct the cost of tickets to sporting events purchased for the purpose of entertaining business clients and prospects. Prior to this law taking effect, employers could deduct 50% of various business entertainment expenses, including the price of event tickets.
Excise Tax on Excess Tax-Exempt Organization Executive Compensation	The TCJA requires that applicable tax-exempt organizations pay a 21% excise tax on executive compensation deemed excessive.

138. *See* H.R. 1, 115th Cong. (2017-2018) (introduced Nov. 2, 2017, enacted Dec. 22, 2017).

139. Although outside the scope of this article to analyze the impact of the TCJA on professional sports, it should be noted that several sections of the final legislation embedded in the TCJA could have direct and/or indirect impacts on professional athletes and the industry in general.

TCJA Section 13602 I.R.C. Section 4960	Organizations subject to this provision include I.R.C. Section 501(c)(3) nonprofit organizations. The tax applies to the top five highest paid employees whose annual compensation exceeds $1 million.
Excise Tax Based on Investment Income of Private Colleges and Universities TCJA Section 13701 I.R.C. Section 4968	The TCJA amends Chapter 42 of the I.R.C. by adding a new provision, I.R.C. Section 4968, which imposes a 1.4% excise tax on the investment income of qualifying private colleges and universities. This provision applies to eligible private educational institutions that have: (1) at least 500 students during the previous tax year; (2) more than 50% of whom were in the United States; and (3) at least $500,000 in aggregate fair market value of assets per student.
Repeal of Deduction for Amounts Paid in Exchange for College Athletic Event Seating Rights TCJA Section 13704 I.R.C. Section 170(l)	The TCJA amends I.R.C. Section 170(l) by repealing the 80/20 deduction previously allowed for amounts paid in exchange for priority seating rights to college athletic events.

B. Losing Tax Amicability – The TCJA Hits the College Sports Industry

Following the $1.5 trillion dollar reconstruction of the U.S. Tax Code, the final provisions rooted in the TCJA could prove costly for college athletics programs across the nation.[140] Although historically provided amicable tax treatment as discussed above, the college sports industry now faces significant financial implications.[141] Particularly, the final legislation closed several loopholes that will require college athletic departments to mollify financial

140. *See* Chris Smith, *New Tax Law Could Cost Top College Athletic Departments Millions*, FORBES, Dec. 22, 2017, https://www.forbes.com/sites/chrissmith/2017/12/22/gop-tax-law-could-cost-top-college-athletic-departments-millions/#4bcb0740abea; *see also* Rowland, *supra* note 86 (noting the $1.5 trillion dollar cost to overhaul the U.S. tax code).

141. *See* Matt Murschel, *New Tax Law Could Prove Costly for College Athletics*, ORLANDO SENTINEL, Feb. 17, 2018, http://www.orlandosentinel.com/sports/college/college-gridiron-365/os-sp-college-athletics-tax-law-changes-0219-story.html.

consequences associated with booster and alumni donations.[142] One early estimate anticipates that the financial impact to the amateur sports industry—due to the signing of the TCJA—could be in the millions of dollars.[143]

A recent study conducted by the American Enterprise Institute (AEI) found that the TCJA will reduce charitable giving in 2018 by 4%, equating to a reduction in overall donations of $16.3 to $17.2 billion dollars.[144] As U.S. colleges raised $1.2 billion in sports donations in 2015 alone, the legislative branch's decision to target college athletics prompted one commentator to publicly inquire, "[W]hether Congress just doesn't like college sports."[145]

The two major components of the TCJA that will impact major college athletic programs across the country moving forward are the excise tax on executive compensation salaries and the loss of charitable deductions available to athletic ticket purchasers. However, there are a number of provisions embedded in the final legislation that could also have an indirect impact on the college sports industry in general. The remainder of this Section provides an analysis of the potential effect of the TCJA on the U.S. college sports arena.

1. Charitable Contributions, Limitation on Deductions & Removal of Priority Seating

Tax year 2018 sets the stage for taxpayers to elect significantly higher standard deduction amounts on their individual income tax returns. The TCJA almost doubled the previous standard deductions available under I.R.C. Section 63.[146] Section 11021 of the TCJA now provides deduction amounts for tax years 2018 through 2025 at $12,000 for individuals, $18,000 for heads of households, and $24,000 for married couples filing jointly.[147] Following the implementation

142. *See* Kisska-Schulze & Epstein, *supra* note 11, at 227; *see also id.* (noting that a major loophole that closed was the elimination of the 80/20 tax deduction for contributions made that included the right to athletic seating).

143. Smith, *supra* note 140.

144. *New Tax Study Anticipates Significant Decrease in Charitable Giving Following Tax Reform*, ASS'N FUNDRAISING PROFS. (Aug. 28, 2018), https://afpglobal.org/news/new-tax-study-anticipates-significant-decrease-charitable-giving-following-tax-reform.

145. *See* Wolverton & Kambhampati, *supra* note 26 (documenting capital campaign donations made to college athletic departments); *see also* Crystal Christenson, *Makes You Wonder Whether Congress Just Doesn't Like College Sports*, WIPFLI, https://www.wipfli.com/insights/articles/tax-makes-you-wonder-whether-congress-just-doesnt-like-college-sports-180416 (last visited May 9, 2019) (inquiring into Congress's decision to tax colleges sports).

146. *See* H.R. 1, 115th Cong. § 11021 (2017-2018); *see also* 26 U.S.C. § 26 (2019).

147. H.R. 1, 115th Cong. § 11021.

of this law, Revenue Procedure 2018-18 officially amended I.R.C. Section 63(c)(2) to reflect this new temporary increase.[148]

For millions of taxpayers, the increased standard deduction will result in a meaningful decrease in the number of taxpayers who are eligible to itemize their deductions.[149] Historically, U.S. tax law has encouraged Americans to engage in charitable giving by providing a federal tax deduction for donations made to programs generally unfunded by the government.[150] As a taxpayer's income increases, the out-of-pocket costs of charitable donations decreases.[151] Taxpayers who elect the standard deduction because they do not meet the required income or itemized deduction threshold receive no financial tax benefit from making charitable contributions.[152]

Congressional motivation to introduce charitable deductions arose in the early part of the twentieth century following an anticipated decrease in donations from prosperous taxpayers during times of war.[153] Officially inducted into the U.S. Tax Code in 1954, I.R.C. Section 170 provides a deduction for charitable contributions, subject to certain restrictions.[154] Some critics suggest that charitable giving is not reliant on tax deductions.[155] However, empirical evidence supports that the charitable giving of low- and middle-class taxpayers is affected by the price of giving, resulting in their being sensitive to tax incentives.[156] It seems plausible that absent an available tax deduction,

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148. *See* I.R.S. Rev. Proc. 2018-18 (2018). Note that the standard deduction increase is scheduled to expire on December 31, 2025. *Id*.

149. *See* Gary Strauss, *Higher Standard Deduction Means Fewer Taxpayers to Itemize*, AARP (Jan. 22, 2018), https://www.aarp.org/money/taxes/info-2018/new-standard-deduction-fd.html.

150. Alyssa A. DiRusso, *Charity at Work: Proposing a Charitable Flexible Spending Account*, 2014 UTAH L. REV. 281 (2014).

151. Alice Gresham Bullock, *Taxes, Social Policy and Philanthropy: The Untapped Potential of Middle- and Low-Income Generosity*, 6 CORNELL J.L. & PUB. POL'Y 325, 330 (1997).

152. DiRusso, *supra* note 150 (documenting a thorough history of I.R.C. Section 170 and U.S. charitable giving deductions).

153. *Id.* at 289-91.

154. *See* 26 U.S.C. § 170 (2019); *see also id.* at 323.

155. *See* DiRusso, *supra* note 150, at 295 (citing to Ray D. Madoff, *What Leona Helmsley Can Teach Us About the Charitable Deduction*, 85 CHI.-KENT L. REV. 957, 964-67 (2010); *see also* Bullock, *supra* note 151, at 339 (noting that critics suggest the charitable giving of low-and middle-class taxpayers is not affected by tax incentives).

156. *See* Bullock, *supra* note 151, at 340 (citing to Michael J. Boskin & Martin Feldstein, *Effects of Charitable Deduction on Contributions by Low Income and Middle Income Households: Evidence From the National Survey of Philanthropy*, 50 REV. ECON. & STAT. 351-54 (1978); Eleanor Brown, *Tax Incentives and Charitable Giving: Evidence from New Survey Data*, 15 PUB. FIN. Q. 386-96 (1987); Jerald Schiff, *Does Government Spending Crowd Out Charitable Contributions?*, 38 NAT'L TAX J. 535-46 (1985); William A. Luksetich & Nasser Daneshvary, *Prices of Giving, Income Sources and Declared Contributions* (paper presented at the annual meeting of the Association for Research on Nonprofit Associations and Voluntary Actions (ARNOVA), San Francisco, 1994)); *see also* DiRusso, *supra* note 150, at 342 (citing to David M.

taxpayers may be less incentivized to give generously under the newly-increased standard deduction amounts.[157]

The standard deduction amounts pronounced in the TCJA serve to promote the philanthropy of wealthy individuals, while disincentivizing middle and lower class donations.[158] The Tax Policy Center estimates that this change will result in itemized deductions for charitable contributions made to non-profit organizations to decrease from $37 million to $16 million in 2018.[159] Although this change may not have directly targeted college sports, it could certainly present an indirect, negative impact. In 2017, charitable donations made to U.S. colleges and universities rose 6%.[160] Institutions of higher education raised $43.6 billion in 2017 alone.[161] This amount served as the highest fundraising total recorded by colleges and universities in the past six years.[162]

While the financial systems of college athletic departments are often separate and distinct from their universities' academic programs, outside donations made to finance ungraded athletic facilities and student-athlete financial aid hit the billion dollar mark in 2015.[163] Although alumni and booster donations account for the greatest portion of athletic budgets, one of the biggest challenges facing athletic program fundraising is increasing donor motivation, which is directly tied to access to priority seating at athletic events.[164] The prevalence of this motivation is driven by the limited number of available tickets to select college sporting events like football and basketball, and the popularity

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Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221 nn.101-02 (2009) (quoting Professor Schizer who finds that charitable deductions are necessary to "persuade donors to be more generous," and that reducing tax benefits could cause donors to refuse "support even from programs they favor," believing that funding will ultimately be borne by others)).

157. Associated Press, *Charitable Giving To Take a Hit From the Tax Law*, CBS NEWS (Dec. 28, 2017), https://www.cbsnews.com/news/charitable-giving-to-take-a-hit-from-the-tax-law/.

158. *Id.*

159. Howard Gleckman, *21 Million Taxpayers Will Stop Taking Charitable Deductions Under the New Tax Law*, FORBES, Jan. 11, 2018, https://www.forbes.com/sites/beltway/2018/01/11/21-million-taxpayers-will-stop-taking-charitable-deductions-under-the-new-tax-law/#b25b2d4238f0.

160. Heather Joslyn, *Donations to Colleges Up 6% in 2017*, CHRON. PHILANTHROPY (Feb. 6, 2018), https://www.philanthropy.com/article/Donations-to-Colleges-Up-6-in/242441.

161. Rick Seltzer, *Giving to Colleges Rises by 6.4%*, INSIDE HIGHER ED (Feb. 6, 2018), https://www.insidehighered.com/news/2018/02/06/personal-giving-pushes-donations-colleges-and-universities-new-level-2017.

162. *Id.*

163. *See* Yong Jae Ko et al., *What Motivates Donors to Athletic Programs: A New Model of Donor Behavior*, 43 NONPROFIT & VOLUNTARY SECTOR Q. 523, 523 (2013); *see also* Wolverton & Kambhampati, *supra* note 26.

164. *See* Ko et al., *supra* note 163 (noting the significance of alumni donations); s*ee also* James M. Gladden et al., *Towards a Better Understanding of College Athletic Donors: What Are the Primary Motives?*, 14 SPORT MARKETING Q. 18, 19 (2005) (documenting the main challenges facing college athletic program fundraising).

of priority points programs at Division I schools.[165] As such, college athletic programs will suffer not only from declining charitable donations due to the increased standard deductions, but also from the TCJA's abolishment of the 80% deduction previously allowed for amounts paid in exchange for college athletic seating rights.

The TCJA effectively repealed the 80/20 rule which allowed donors to deduct 80% of their contributions paid in exchange for priority seating rights to college athletic events.[166] As discussed previously, prior to this redaction the IRS allowed taxpayers who made payments to, or for the benefit of, colleges or universities and, as a result, received athletic event tickets in the athletic stadiums to deduct 80% of such payments as charitable contributions.[167] Effective January 1, 2018, taxpayers can no longer take the charitable deduction on 80% of any contribution tied to a right to purchase priority seating tickets at college sporting events.

The loss of the 80/20 tax deduction could result in a decreased demand for college athletic season tickets, which would further result in decreased charitable donations. In addition, the TCJA now bars employers from taking deductions for expenses relating to entertainment activities.[168] Specifically, TCJA Section 13304 amends I.R.C. Section 274 by imposing limitations on deductions available to employers for expenses related to certain fringe benefits.[169] Included in this amended Section is the removal of the allowance by employers to deduct the cost of tickets to sporting events purchased for the purpose of entertaining clients and business prospects.[170] Prior to this law taking effect, employers were permitted to deduct 50% of various business entertainment expenses, including the price of event tickets.[171] As a result, businesses may cease to offer entertainment options to clientele, which have historically included the purchase of seats in stadium suites.[172] Although the Joint Committee on Taxation estimates this change in law will result in an increase of $23.5 billion in tax revenue, colleges and universities that include

165. Gladden et al., *supra* note 164, at 27.

166. 26 U.S.C. § 170(l) (2019).

167. CHARITABLE CONTRIBUTIONS, U.S. DEP'T TREASURY 3 (2017).

168. 26 U.S.C. § 274(a) (2019).

169. *See* H.R. 1, 115th Cong. § 13304 (2017-2018); *see also* 26 U.S.C. § 274.

170. H.R. 1, 115th Cong. § 13304; *see also* Treas. Reg. § 1.274-2(b) (2018).

171. *See* Treas. Reg. § 1.274-2(c) (2017).

172. *See* Y. David Scharf, *New Tax Law Is a Curveball for the Sports Industry*, U.S. NEWS (Feb. 20, 2018), https://www.usnews.com/opinion/economic-intelligence/articles/2018-02-20/new-tax-law-is-a-curve-ball-for-the-sports-industry.

revenue streams from corporate suites as part of their overall budgets may suffer substantial revenue loss.[173]

Moving forward, athletic departments will need to account for the financial impact of these changes in law, and will need to evaluate other motivational giving incentives outside the privilege of priority seating rights.[174] Capitalizing on future efforts to better understand and influence donors' emotional commitment to universities, athletic departments, teams, and select athletes will be an integral component to athletic departments' ability to generate funds otherwise lost due to the enactment of the TCJA. As tax benefits are cited as one of the top motivators influencing charitable gifting, athletic departments will now have to devise ways to expand their efforts to encourage alumni and booster donations absent the attraction of tangible benefits.[175]

2. Excise Taxes on Executive Compensation and Investment Income

Section 13602 of the TCJA adds a new I.R.C. Section 4960 to the Tax Code.[176] This section requires that "applicable tax-exempt organizations" be subject to a 21% excise tax on payments of executive compensation deemed excessive under the new law's provisions.[177] Beginning after tax year 2017, organizations subject to this provision include those exempt from taxation under I.R.C. Section 501(a), including Section 501(c)(3) nonprofit organizations.[178] As noted earlier, tax exempt organizations include colleges, universities, and university athletic programs.[179] The new excise tax, payable by the organization, applies to the top five highest paid employees whose annual compensation exceeds $1 million.[180] The tax also applies to excess parachute payments.[181]

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173. *Id.*

174. *See* Gladden et al., *supra* note 164, at 27 (noting the need to observe ways to motivate charitable donors).

175. Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U.L. REV. 1663, 1701 n.242 (2015) (citing tax incentives as one of the top three motivators for charitable giving).

176. *See* H.R. 1, 115th Cong. § 13602 (2017-2018); *see also* 26 U.S.C. § 4960 (2019).

177. 26 U.S.C. § 4960(a).

178. *Id.*; *see also* 26 U.S.C. § 4960(c)(1).

179. *See* Robert Lattinville & Roger Denny, *How the New Excise Tax Impacts Coach Compensation*, ADU, https://athleticdirectoru.com/articles/how-the-new-excise-tax-impacts-coach-compensation/ (last visited May 9, 2019).

180. 26 U.S.C. § 4960(a)(1).

181. *Id.* §§ 4960(a)(1), (c)(2); *see also* Lattinville & Denny, *supra* note 179 (defining excess parachute payments as "compensation paid upon the termination of the employee's employment if the aggregate present value of such payment equals or exceeds three times the employee's 'base amount.'").

Similar to the repeal of the 80/20 deduction discussed above, the new I.R.C. Section 4960 directly targets college athletic programs. In 2006, forty-two college football coaches earned at least $1 million a year in salaries.[182] Six years later, that same number of coaches earned at least $2 million in salaries.[183] As of 2016, twenty college football coaching salaries topped the $4 million mark,[184] while the twenty-five highest paid college basketball coaches in the U.S. earned between $2 and $6 million per year.[185] Data collected across all fifty states in 2016 found that college football or men's basketball coaches are the highest-paid public employees in thirty-nine states.[186] In all, there are approximately 240 NCAA Division I coaches and athletic directors earning more than $1 million.[187] Implementing a 21% excise tax on top of these salaries will require universities to pay millions of additional dollars in taxes beginning in 2018.

Moving forward, universities with limited resources may have to consider capping coaches' compensation at $1 million.[188] To survive the continued "arms race" of increasing coaching salaries, more lucrative universities may have to simply re-budget for the additional taxes, or instead devise creative pay schemes to offset the impact of the tax. One possibility is to allow coaching staff to enter into direct sponsorship agreements with outside vendors to enhance lower salaries paid by universities.[189] Another option includes supplementing a portion of coaches' salaries with more impressive employee compensation and benefits packages that may include more significant life insurance options, retirement plan contributions, and deferred compensation.[190]

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182. Erik Brady et al., *NCAA Football Coaches' Average Salary at 1.64 Million*, USA TODAY, Nov. 20, 2012, https://www.usatoday.com/story/sports/ncaaf/2012/11/19/college-football-coaches-contracts-analysis-pay-increase/1715435/.

183. *Id.*

184. *See College Football Coaches Who Make More Than $4 Million*, USA TODAY, Oct. 26, 2016, https://www.usatoday.com/picture-gallery/sports/ncaaf/2016/10/26/college-football-coaches-who-make-more-than-4-million/92508490/.

185. *Id.*; see *also* Laura McKenna, *Why College Basketball Coaches Make Such High Salaries*, ATLANTIC, Mar. 24, 2016, https://www.theatlantic.com/education/archive/2016/03/the-madness-of-college-basketball-coaches-salaries/475146/.

186. Evan Comen et al., *The Highest Paid Public Employee in Every State*, 24/7 WALL ST. (Sept. 20, 2016), https://247wallst.com/special-report/2016/09/20/the-highest-paid-public-employee-in-every-state/.

187. Lattinville & Denny, *supra* note 179.

188. *Id.*

189. *See id.*

190. *See id.*

Initial estimates speculate that the new excise tax on coaching salaries will increase government revenue by $1.7 billion.[191] However, the financial impact that universities will ultimately suffer due to this new Code section will require a reevaluation by universities of their college athletic programs' budgets, particularly in conjunction with the anticipated loss in revenue from charitable donations. The House Ways and Means Committee projects that the removal of the 80/20 deduction will net an additional $200 million to the government annually.[192] While it may prove lucrative to the federal government, the combination of I.R.C. Sections 4960 and 170(l) pose direct threats to college athletic programs' bottom lines.

In addition, the TCJA introduced a new 1.4% excise tax on the investment income of qualifying private colleges and universities beginning after December 31, 2017.[193] This provision applies to eligible private educational institutions that enrolled at least 500 students during the previous tax year, more than 50% of whom were in the U.S., and at least $500,000 in aggregate fair market value of assets per student.[194] Dubbed the "Harvard tax," state colleges and universities are unaffected by this new tax.[195]

While the Harvard tax does not have a direct impact on college sports, it could result in at least twenty seven private colleges and universities, including Harvard, Princeton, and Yale, having millions of dollars less in funds to spend on students and student-athletes.[196] The Ivy League in NCAA Division I sports boasts more than 8,000 student-athletes competing each year.[197] In recent years, the Ivy League has increased commercialized branding and high-income

191. David Cloninger & Grace Raynor, *Tax Reform Law Has College Administrators, South Carolina and Clemson Fans Wondering What's Next*, POST & COURIER, Jan. 14, 2018, https://www.postandcourier.com/sports/tax-reform-law-has-college-administrators-south-carolina-and-clemson/article_9b344f5a-f6f1-11e7-83e7-3fb6abc825cb.html.

192. Smith, *supra* note 140.

193. *See* H.R. 1, 115th Cong. § 13704(b) (2017-2018); *see also* 26 U.S.C. § 4968 (2019).

194. 26 U.S.C. § 4968(b)(1).

195. *See New Excise Tax on College and University Net Investment Income – What Your Institution Needs to Know*, PRICEWATERHOUSECOOPERS (Jan. 10, 2018), https://www.pwc.com/us/en/tax-services/publications/insights/assets/pwc-new-excise-tax-on-college-and-university-net-investment-income.pdf (noting that public institutions are not impacted by this tax); *see also* J. Calvin Marks, *Excise Tax on University Endowments*, JOHNSON LAMBERT LLP (Mar. 2018), https://www.johnsonlambert.com/post/excise-tax-on-university-endowments/ (referencing this new tax as being the "Harvard tax").

196. *See* Matthew Sussis, *Hit to Leading Universities From New Tax May Be In Tens of Millions of Dollars*, MARKET WATCH (Jan. 16, 2018), https://www.marketwatch.com/story/hit-to-leading-universities-from-new-tax-may-be-in-tens-of-millions-of-dollars-2018-01-16.

197. *About the Ivy League*, IVY LEAGUE, http://ivyleague.com/sports/2017/8/13/HISTORY_0813173057.aspx (last visited May 9, 2019).

revenue streams to help fund athletic programs.[198] Currently, Harvard ranks first in Division I sports for hosting the greatest number of athletic programs in the country, while providing more financial aid to students than any other institution in the U.S.[199] In 2014, Yale spent almost $38 million on athletics, representing the second highest figure in the Ivy League athletic spending that year.[200] Certainly, the new excise tax could have an indirect impact on the internal finances available to the Ivy League athletic programs.

The imposition of I.R.C. Section 4986 was met with immediate and heavy criticism. Cornell University President Martha Pollak claimed the estimated tax cost to the University will be $10.5 million annually, noting that the tax will require "less money to spend on institutional aid, research, new libraries and other campus buildings and facilities."[201] Harvard President Drew Faust declared "the new endowment tax represents an unprecedented attack on the tax-exempt status of nonprofits and charities because it taxes, for the first time, income from such an institution's core mission – in this case, education."[202] Vanderbilt University Chancellor Nicholas Zeppos, along with forty eight colleagues, has directly requested that Congress modify or eliminate the tax, noting "this legislation . . . needlessly undercuts the resources universities need to operate . . . ."[203]

Although the newly-imposed 21% excise tax on coaching salaries may not affect the Ivy League, as compared to other NCAA Division I leagues, the 1.4% excise tax on private colleges and universities could have a significant impact on the financial capabilities of the Ivy League athletic programs moving

198. Henry Zhu, *A New Commercial Age in the Ivy League*, HARV. CRIMSON (Apr. 4, 2018), https://www.thecrimson.com/column/kazhu-kid/article/2018/4/4/column-april3-hz-ivyleague/.

199. *Harvard Football at a Glance*, HARV., https://www.gocrimson.com/sports/fball/Program_Information/Harvard_Football_at_a_Glance (last visited May 9, 2019).

200. Greg Cameron, *Breaking Down Yale Athletics' Budget*, YALE NEWS (Feb. 4, 2015), https://yaledailynews.com/blog/2015/02/04/breaking-down-yale-athletics-budget/ (the highest expenses paid that year came from the University of Pennsylvania, which reportedly spent $28,627,930 in 2014).

201. Anne Delwiche & Alisha Gupta, *Pollak Slams GOP Tax Plan, Says It Would Cost Cornell Millions*, CORNELL DAILY SUN, Nov. 9, 2017, http://cornellsun.com/2017/11/09/pollack-slams-gop-tax-plan-says-it-would-cost-cornell-millions/.

202. Alvin Powell, *Harvard President Voices Concern After Endowment Tax Passes*, HARV. GAZETTE (Dec. 21, 2017), https://news.harvard.edu/gazette/story/2017/12/harvard-president-voices-concern-after-endowment-tax-passes/.

203. *Chancellor Zeppos Weighs In on the Tax Cut and Jobs Act*, VAND. NEWS (Mar. 7, 2018), https://news.vanderbilt.edu/2017/11/09/statement-by-vanderbilt-university-chancellor-on-the-tax-cut-and-jobs-act/. The Treasury subsequently issued Notice 2018-55, stating a plan to issue proposed regulations limiting the impact of the new tax on private college and university endowments. *See Guidance on the Calculation of Net Investment Income for Purposes of the Section 4968 Excise Tax Applicable to Certain Private Colleges and Universities*, I.R.S., https://www.irs.gov/pub/irs-drop/n-18-55.pdf (last visited May 9, 2019) (Notice 2018-55).

forward.[204] Under this new law, alumni donations may decrease due to concerns that their charitable giving would go into the hands of the federal government rather than the institutions they support.[205] With less money available for scholarships to students and funding of facilities, Ivy League athletic departments may be at a financial risk in the future, requiring that programs look to further their commercialized opportunities with third party vendors in order to help fund their sports programs.

IV. CONCLUSION

Although many of the key elements of the TCJA's overall tax overhaul did not address college athletics, at the onset of 2018 U.S. institutions of higher education are finding themselves examining the financial impact that the law will have on their bottom lines, to include continued funding of their sports programs. Embedded within the core of the TCJA, collegiate amateur athletics—both directly and indirectly—were targeted by Congress for the first time in recent history for tax purposes.

Prior to January 1, 2018, the college athletics industry enjoyed favorable federal tax treatment, with Congress declaring the fostering of amateur athletics as being a charitable purpose.[206] Similarly, the IRS has thus far been disinterested in taxing student-athletes on their athletic scholarships.[207] However, the new tax provisions entrenched in the TCJA now require that both public and private colleges and universities, along with their affiliated athletic departments, prepare for the imminent financial impact.

Thus far, little guidance from the Treasury has been issued with respect to the application of the TCJA.[208] Requests for guidance from trade groups across the U.S. industry have already begun.[209] Because the Treasury has now issued

204. *See* Leonard Dozier, *Salary of An Ivy League Basketball Coach*, CAREER TREND (Jan. 7, 2019), https://careertrend.com/salary-of-an-ivy-league-basketball-coach-12598435.html (noting that the average salary of Ivy League head basketball coaches is $81,788); *see also* Ashley McDonnell & Jake Comer, *Brown Head Coaches Paid 22 Percent Less Than League Average*, BROWN DAILY HERALD, Apr. 12, 2011, http://www.browndailyherald.com/2011/04/12/brown-head-coaches-paid-22-percent-less-than-league-average/ (documenting that Cornell University's head football coach is the highest paid in the Ivy League at $91,368).

205. *See* Delwiche & Gupta, *supra* note 201.

206. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1313(a), 90 Stat. 1520, 1730 (1976) (codified as amended at I.R.C. § 501(c)(3) (2017)).

207. *See* Randall, *supra* note 11, at 299; *see also* Kisska-Schulze & Epstein, *supra* note 11, at 250.

208. *See* Robert Sledz, *U.S. Treasury Official Provides Update on TCJA Guidance at 2018 OECD Conference*, THOMSON REUTERS (June 20, 2018), https://tax.thomsonreuters.com/blog/u-s-treasury-official-provides-update-on-tcja-guidance-at-2018-oecd-conference/.

209. *See, e.g.*, *Request for Immediate Guidance Regarding IRC Section 199A – Deduction for Qualified Business Income of Pass-Through Entities (Pub. L. No. 115-97, Sec. 11011)*, *supra* note 4; Thomas P. Nickels,

Notice 2018-43, which invites public recommendations for consideration in the 2018-19 Priority Guidance Plan, it is important that institutions of higher education and their athletic programs boisterously participate in this discussion.[210] History shows that the immediate backlash by colleges and universities following the IRS's issuance of Revenue Ruling 84-132, which denied taxpayers the right to deduct any part of their donations to university athletic programs which also included a right to purchase priority seating, ultimately prompted Congress to pass the Technical and Miscellaneous Revenue Act of 1988, which allowed for the 80/20 charitable tax deduction.[211] Less than a decade letter, immense objections by university systems to the IRS's imposition of a UBI tax on corporate sponsorship payments in exchange for naming rights to bowl games compelled Congress to issue proposed regulations overturning the IRS's position.[212] As Lindsey Graham, Senator of South Carolina and home of the 2017 and 2019 National Championship Clemson football team, noted in his early efforts to thwart the repeal of the 80/20 deduction as implemented into the TCJA, "You mess with college football, you're going to get creamed."[213] It is imperative that colleges and universities begin to proactively engage with Congress to discuss the elimination or modification of the applicable sections of the TCJA in order to reduce the negative financial impact that this law will have on college sports moving forward.

In the interim, university athletic departments must aggressively begin accounting for the financial effects that the TCJA will have on their programs; capitalize on new and continued efforts to influence alumni and booster commitments to their universities, athletic departments, college teams, and student-athletes; expand efforts to encourage future donations without the attraction of tangible benefits like rights to priority seating and corporate suites; and consider entertaining additional third-party commercialized opportunities in order to fund their sports programs. In conjunction, some universities may need to re-evaluate their salary negotiations with college coaches and investigate innovative options for supplementing escalating salaries. The TCJA

Request for Guidance on Questions Raised by New Tax Law, AM. HOSP. ASS'N (May 1, 2018), https://www.aha.org/system/files/2018-05/180501-cl-aha-office-tax-policy.pdf; *U.S. Chamber of Comments Regarding Regulatory Guidance Under Public Law No. 115-97*, *supra* note 4.

210. *Public Comment Invited on Recommendations for 2018-2019 Priority Guidance Plan*, *supra* note 5.

211. H.R. 433, 100th Cong. § 6001(a) (1988).

212. Musselman, *supra* note 110, at 208.

213. *See* Brian Murphy, *College Football: Lindsey Graham Seeks to Save Tax Deduction*, NEWS & OBSERVER, Nov. 30. 2017, https://www.newsobserver.com/news/politics-government/politics-columns-blogs/under-the-dome/article187347008.html.

is here to stay—at least for now— and colleges and universities need to prepare for the immediate and long-term effects.