April 12, 2011

The Honorable Christine Varney
Assistant Attorney General
Department of Justice - Antitrust Division
950 Pennsylvania Avenue, NW, Suite 3109
Washington, DC 20530

Re: Request for Investigation of the Bowl Championship Series

Dear Assistant Attorney General Varney:

We write to respectfully request that the Antitrust Division launch a formal investigation of the Bowl Championship Series ("BCS"), a cartel that controls distribution of competitive opportunities and benefits associated with major college football's post-season. The BCS secures a fixed and dominant portion of market access and revenue for its founding members (schools from six so-called automatic qualifying conferences, or "AQs"),[1] regardless of their performance on the field or in the marketplace. These acts injure schools in major college football's five other conferences ("non-AQs"),[2] and also harm consumers by restraining output, fixing prices, and reducing quality. We believe the case here for government enforcement of the Sherman Antitrust Act is strong and potentially pursuable under multiple legal theories.[3] We offer below a short description of our factual observations to complement legal analyses and comprehensive submissions by other parties.

<u>BCS Market-Access Rules Shield Preferred Schools from Competition</u>

The BCS allocates market access to the "national championship game" and the nation's four premier bowl exhibitions ("BCS Bowls") in a manner divorced from on-field merit and consumer demand.[4]

Non-AQs have been precluded from the "national championship game" market due to the BCS's mathematically dubious rating system, despite the fact that 11 non-AQs have completed undefeated regular seasons during the BCS's tenure.[5] This is a marked change from the pre-BCS era, when non-traditional teams frequently competed for college football's national championship.[6] And AQs, the schools that control the BCS, have buttressed their current "national championship game" monopoly with an airtight barrier to entry: NCAA rules that demand a collective boycott of any school participating in any alternative post-season system.[7]

As for market access to BCS Bowls, the BCS guarantees automatic invitations to all conference champion AQs regardless of their relative competitive strength and quality, while imposing special and comparatively stringent eligibility rules on all non-AQs.[8] These rules bar non-AQs' entry to BCS Bowls with inordinate frequency,[9] even when they significantly outperform BCS-preferred schools under the system's own AQ-biased rating system.[10] These bars to entry have particular force because the BCS effectively cartelized BCS Bowls, which once encouraged and participated in competition for conference and team affiliation. The BCS Bowl cartel also further immunizes the BCS from competition by mandating that key championship contenders not invited to the BCS's "national championship game" must accept BCS Bowl invitations rather than join a rival post-season system. (This cartelization has no pro-competitive justification, as BCS Bowls thrived prior to the collective allocation agreement, rendering it unnecessary.) Market-access rules and conditions for BCS Bowls result in a system that is at odds with consumer preferences, as shown by BCS Bowl selection decisions, television ratings, and attendance figures.[11]

In sum, the BCS shields preferred schools from competition in the "national championship game" and BCS Bowl markets by imposing AQ-biased market-access rules and by cartelizing BCS Bowls, which were previously produced successfully without need for coordination. AQs are thereby assured preferential treatment in perpetuity, even when they fail to match non-AQs' on-the-field achievements and market appeal.

BCS Revenue Rules Provide Preferred Schools with a Fixed Share

The BCS has also erected a market revenue allocation scheme that is anticompetitive. In a typical post-season, the BCS awards AQs—just over one-half of major college football's participating schools—between 86 percent and 91 percent of revenues from the "national championship game" and BCS Bowl markets, while non-AQs receive between 12 and 7 percent.[12] To place those figures in perspective, the NCAA Basketball Tournament, an open and merit-based championship that includes all of the same universities, yields only an average 61-percent share for AQs.[13] The cumulative effect of this revenue split is staggering, adding up to $614 million more for AQs over the past seven seasons.[14]

Of course, uneven revenue distribution is not necessarily anticompetitive. The BCS revenue scheme is objectionable, though, because financial rewards do not correlate with consumer appeal.[15] In three of the past four post-seasons, non-AQs earned either the highest or second-highest game attendance figures of any BCS Bowl.[16] Furthermore, for three years in a row, BCS Bowls featuring non-AQs have garnered significantly better television ratings than contests between only AQs.[17]

On-the-field performance, which drives market preferences, also fails to justify the BCS's disparate revenue allocation. AQs boast only a meager one-win, four-loss record against non-AQs in post-season BCS Bowls.[18] And in 2010, a year recognized as the high-water mark for "outsider" participation, the BCS handed each AQ conference that placed one BCS Bowl team $17.7 million but gave two non-AQ conferences just $9.8 million and $7.8 million, respectively, for accomplishing an identical feat.[19] This performance-payment disconnect favoring AQs is a persistent phenomenon.[20]

The BCS's revenue rules thus grant AQs a dominant and pre-determined share of market proceeds that is fixed within a narrow range. Market preferences, and the competitive achievements that steer those market preferences, are ignored or diluted.[21]

BCS Market-Access and Revenue Rules Injure Non-Preferred Schools and Ultimately Harm Consumers

BCS market-access rules prevent non-AQs from competing for the institutional benefits that flow from playing opportunities, including stronger alumni networks, increased admission applications, and improved academic rankings.[22] BCS efforts to stifle competition from non-AQs ultimately harm consumers as well. Consumer demand is constricted by BCS output restraints—AQ-enacted NCAA rules that expressly limit the number of post-season games and BCS rules that restrict non-AQs' production. Consumer preferences are disregarded, as the BCS grants favored teams preferential access and remuneration despite market data that challenges this practice. Consumers pay inflated prices because the BCS has eliminated competition between formerly independent bowl games and conferences.[23] And the quality of the product supplied[24] to consumers is inferior because the BCS doles-out market access and revenue based on built-in AQ bias rather than objective criteria.[25]

Conclusion

The BCS shields preferred schools from competition by erecting barriers to competitive post-season entry, provides favored schools with fixed benefits, and harms consumers of post-season college football. Based on these observations, we believe that a formal antitrust investigation of the BCS is warranted. Indeed, this matter is particularly significant in this time of fiscal difficulty because the BCS is the principal impediment to a competitive post-season playoff that would generate much-needed additional revenue for *all* schools.[26] We, the law and economics professors and practitioners listed below, therefore respectfully urge you to launch a formal antitrust investigation of the BCS.

Respectfully submitted,

Roger I. Abrams
Professor
Northeastern Univ.

Robert A. Baade
Professor
Lake Forest College

David J. Berri
Associate Professor
Southern Utah Univ.

Matthew T. Brown
Associate Professor
Univ. of South Carolina

C. Peter Goplerud, III
Dean and Professor
Florida Coastal School of Law

Roger M. Groves
Professor
Florida Coastal School of Law

Ira Horowitz
Emeritus Professor
University of Florida

Brad R. Humphreys
Professor
Univ. of Alberta

Leo H. Kahane
Associate Professor
Providence College

Chad D. McEvoy
Associate Professor
Illinois State Univ.

Mark S. Nagel
Associate Professor
Univ. of South Carolina

Daniel A. Rascher
Professor
Univ. of San Francisco

Jane E. Ruseski
Assistant Professor
Univ. of Alberta

Allen R. Sanderson
Senior Lecturer
Univ. of Chicago

Andrew D. Schwarz
Partner
OSKR

Leonard B. Simon
Adjunct Professor
Univ. of San Diego

Richard M. Southall
Assistant Professor
Univ. of North Carolina, Chapel Hill

Dennis Stewart
Partner
Hullett Harper Stewart, LLP

Richard H. Thaler
Professor
Univ. of Chicago

Raymond L. Yasser
Professor
Univ. of Tulsa

Andrew S. Zimbalist
Professor
Smith College

---

[1] AQ Conferences are the Atlantic Coast, Big East, Big Ten, Big 12, Pac-10, and Southeastern conferences. The University of Notre Dame is included among "AQs."

[2] Non-AQ Conferences are Conference USA, Mid-American Conference, Mountain West Conference, Sun Belt Conference, and Western Athletic Conference.

[3] *See* Andrew Zimbalist, *The BCS, Antitrust and Public Policy,* Antitrust Bulletin 54.4 at 823-855 (2009) (describing antitrust legal theories for potential BCS case).

[4] Post-season championship and exhibitions are considered different markets under federal antitrust law. NCAA v. Board of Regents, 468 U.S. 85, 111 (1984) (*citing* International Boxing Club of New York, Inc. v. U.S., 358 U.S. 242 (1959).

[5] *See, e.g.*, Hal Stern, *In Favor of a Quantitative Boycott of the Bowl Championship Series*, 2 J. of Quant. Analysis in Sports (2006); Rodney Paul et al., *Expectations and Voting in the NCAA Football Polls*, J. of Sports Economics vol. 8 no. 4 (2007). In 2008-2009, for example, the non-AQ Utah Utes were the only undefeated team in major college football but were excluded from national-championship contention in favor of two one-loss AQs.

[6] Prior to the BCS, for instance, the University of Miami's football program competed for and won national titles in the 1980s and 1990s as a non-traditional team independent from the BCS's six controlling conferences. BYU won the national championship in 1984. The BCS assures that Miami's and BYU's modern-day analogues like Boise State Univ. cannot accomplish the same feat.

[7] NCAA Bylaws §§ 17.9.8.2, 18.02.4, 18.7.1(f) (prohibiting NCAA member participation to "[l]icensed postseason bowl games"). *See also* NCAA Bylaws §§ 17.9.4, 18.7.2.3 (limiting NCAA member participation to a single licensed game), NCAA Bylaws § 18.7.2.1 (condition bowl license on hosting two eligible teams), and NCAA Bylaws § 3.2.4.11 (mandating a collective boycott of any school deemed in non-compliance with NCAA Bylaws).

[8] BCS Selection Procedures, http://www.bcsfootball.org/news/story?id=4819597. Please note, only one non-AQ may earn an automatic bid, regardless of performance.

[9] In the past six seasons, the BCS has awarded nearly 89% of BCS Bowl slots to AQs, which make up slightly more than half of college football's teams.

[10] In 2010-2011, for example, non-AQ Boise State was excluded, despite finishing the regular season ranked 10th in BCS Standings. Meanwhile, two AQs, 13th-ranked Virginia Tech (a team Boise State defeated) and unranked UConn, each received automatic invitations to BCS Bowls by virtue of winning their respective conferences.

[11] BCS Bowls select at-large teams in a specified order each year. For the past three post-seasons, the final school picked was an AQ (Cincinnati – 2009 Orange Bowl, Cincinnati – 2010 Sugar Bowl, and UConn – 2011 Fiesta Bowl), rather than a non-AQ. BCS Bowls themselves realize consumers prefer non-AQs to some AQs that receive automatic invitations. BCS intuitions about consumer preferences were borne out each time by TV ratings and attendance figures.

[12] *See, e.g.,* Bowl Championship Series Media Guide at 13 (2009-2010). The remainder goes to Service Academies and to Football Championship Subdivision teams.

[13] U.S. House Cmte. on Energy and Commerce, *The Bowl Championship Series: Money and Other Issues of Fairness for Publicly Financed Universities* (May 1, 2009).

[14] Sally Jenkins, *BCS One Step Ahead of Law--Until Now*, Wash. Post (Dec. 12, 2009); BCS Press Release, Jan. 25, 2010; BCS Press Release, Jan. 25, 2011. The BCS has also disadvantaged non-AQs in the overall post-season bowl market. Richard Evans, *NCAA Bowl Finance: Something Changed in 1995*, Econosseur Blog (2009).

[15] *See generally,* Arent Fox, *Tall Tales of the BCS* (2011).

[16] Bowl Championship Series, *Historical TV Ratings and Attendance Statistics* (2011). In fact, 2010's Boise State-TCU matchup between two non-AQs outdrew previous Fiesta Bowls featuring prominent AQs Texas, Ohio State, West Virginia, and Oklahoma. It was the highest attendance for a Fiesta Bowl since the last time Boise State traveled to Arizona in 2007. Non-AQs successfully attracted high attendance at the Sugar Bowl as well. Previous Sugar Bowls featuring non-AQs Utah and Hawaii significantly outsold 2010's all-AQ Florida-Cincinnati contest.

[17] Bowl Championship Series, *Historical TV Ratings and Attendance Statistics* (2011). In 2011, TCU's game against Wisconsin was the highest-rated BCS Bowl. In 2010, the Boise State-TCU Fiesta Bowl received an 8.23 share compared to the Iowa-Georgia Orange Bowl's 6.80 rating. The 2009 Sugar Bowl between Utah and Alabama received a 7.80 share, compared with a 5.40 rating for the Virginia Tech-Cincinnati Orange Bowl, which received the lowest TV rating ever for a BCS Bowl.

[18] *See* NCAA, Bowl Championship Series Revenue Distribution Statistics.

[19] BCS Press Release, Jan. 25, 2010.

[20] In many specific instances, the BCS revenue distribution scheme produces bizarre results. In 2009, for instance, the *winless* Washington Huskies brought home more BCS dollars than the *undefeated* Utah Utes, a non-AQ. U.S. Senate Judiciary Committee Hearing, *The Bowl Championship Series: Is It Fair and In Compliance with Antitrust Law?* (July 7, 2009). And in 2006, the BCS awarded the one-win AQ Syracuse Orangemen *double* the amount it gave the *entire* WAC, a conference of nine non-AQs. NCAA, Bowl Championship Series Five-Year Summary of Revenue Distribution 2003-2008 (2008).

[21] BCS claims that uneven revenue distribution is a product of non-AQs' preferences are erroneous, as shown by the BCS's own documents. Bowl Championship Series Media Guide at 13 (2009-2010) (revenue is "guaranteed *in aggregate* to Conference USA, the Mid-American, Mountain West, Sun Belt, and Western Athletic Conferences for their participation in the arrangement").

[22] *See, e.g.,* Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity & Quality of Student Applications*, 75 Southern Economic J. 750-80 (2009); C.D. McEvoy, *The Relationship Between Dramatic Changes in Team Performance & Undergraduate Admissions Applications*, The Smart J., 2, 17-24 (2005).

[23] *See* Nathaniel Grow, *Antitrust and the Bowl Championship Series*, 2 Harv. J. of Sports and Entertainment L. 53 (2011).

[24] B.F. Pair, C.S. Moore, & S.W. Dittmore, *Paying for wins: An examination of football non-conference game scheduling by BCS schools, 1994-2009* (2010).

[25] Courts have recognized that in the context of collegiate athletics, consumer welfare is implicated when anticompetitive restraints deprive consumers of the most competitive sporting events possible. *See Metropolitan Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n*, 339 F.Supp.2d 545, 551 (S.D.N.Y. 2004).

[26] Andrew Zimbalist, *Dollar Dilemmas During the Downturn: A Financial Crossroads for College Sports*, J. of Intercollegiate Sport vo. 3, Issue 1 (2010).