



U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 29, 2010

The Honorable Orrin Hatch
United States Senate
Washington, D.C. 20510

Dear Senator Hatch:

This responds to your letter, dated October 21, 2009, to President Obama expressing your concerns regarding the fairness and legality of the Bowl Championship Series (BCS). The Administration shares your belief that the current lack of a college football national championship playoff with respect to the highest division of college football (currently called the "Football Bowl Subdivision" or "FBS") raises important questions affecting millions of fans, colleges and universities, players and other interested parties.

The Bowl Championship Series (BCS) was formed in 1998 as a contractual joint venture among six FBS (formerly Division I-A) football conferences (ACC, Big East, Big Ten, Big 12, Pac-10 and SEC) plus Notre Dame and the top four college football bowls (the Fiesta, Rose, Sugar and Orange bowls) to create four BCS bowl games, including a national championship game.¹ The BCS was created independent of the NCAA. In 2003, members of the five other FBS conferences (Conference USA, Mountain West, Mid-American, Western Athletic and Sun Belt) were admitted to the BCS. This occurred after those conferences had formed the "Coalition for Athletics Reform" in 2003 and Congress had held hearings on the BCS. A fifth BCS bowl game was added beginning in the 2007 season. Currently the conference champions of the six founding conferences are guaranteed participation in these bowls games regardless of their national standing. That leaves four bowl game slots that are available for all other teams in the FBS. Only one team from outside the six automatic-qualifying conferences (and Notre Dame) can earn an automatic BCS berth in any season based on its BCS rank. The typical result of this selection system has been limited participation by schools outside the six automatic-qualifying conferences, with such teams typically securing at most one slot, although this year, for the first time, two such schools, TCU and Boise State were selected for a BCS bowl game.

In addition to the overall major bowl picture, questions have also been raised about the so-called "BCS National Championship Game." Currently, the FBS is the only college sport organization that does not have a national championship run by the NCAA. The FBS does not have a playoff, instead limiting the availability of playing for its national championship to only

¹ The Bowl Coalition and Bowl Alliance preceded the BCS in the 1990s as contractual joint ventures regarding post-season college football.

two teams, the teams that are ranked, at the regular season's end, as first and second in the nation by a formula which accounts for both poll rankings and computer rankings. No non automatic-qualifying conference school has yet qualified to play in the BCS national championship game, despite some of them (including TCU and Boise State this year, and Utah last year) having undefeated records.

We understand that the "BCS Presidential Oversight Committee" oversees the management of the BCS. The BCS Presidential Oversight Committee consists of university presidents and chancellors. When it was formed in 2003, the group consisted of only eight members, one representing each of the six conferences that created the BCS, one representing Notre Dame and one representing the other five conferences. Only recently, in 2009, has that group been expanded to twelve members so that every conference can have one representative.

College football is financially significant to the colleges and universities involved and a vital part of our nation's sports and entertainment industry. The BCS alone distributes an estimated \$140 million per year to conferences and teams.

Many believe that the BCS is unfair to the conferences and schools that are not part of the automatic-qualifying conferences.² Each of the six automatic-qualifying conferences reportedly receive approximately the entire sum that the five non-automatic-qualifying conferences get combined, if a non-automatic-qualifying team participates in the BCS. If one does not participate, the monetary share is even lower, if two participate the monetary share is higher. In addition to this direct monetary benefit, teams in the automatic-qualifying conferences may have an advantage in attracting top players by being able to guarantee an opportunity to play in a BCS bowl game whenever the team wins a conference championship. By contrast, non-automatic-qualifying conference champions have been denied access to BCS bowl games, even if undefeated and ranked higher than automatic-qualifying conference champions, as was the case with Western Athletic Conference Champion Boise State in 2004 and 2008 seasons.

Further, the BCS system of selecting the top two teams to play for a national championship seemingly afford the non-automatic qualifying conferences little realistic chance to play in a national championship game, unlike the situation in other college sports (and other college football divisions). Indeed, both Utah and Boise State have recently had undefeated seasons, but did not have an opportunity to play for the national championship. This seemingly discriminatory action with regard to revenues and access have raised questions regarding whether the BCS potentially runs afoul of the nation's antitrust laws.

In addition, many believe the current BCS is not the best way to serve the interests of college football fans, and that there would be greater fan (consumer) interest in a playoff format that ensures a final championship game that results in an undisputed national champion, as there is in other NCAA competitions both in football (at other division levels) and in virtually all other collegiate sports. College basketball's March Madness tournament is enormously popular with

² See, e.g., Testimony of Barry J. Brett before the Senate Judiciary Committee, July 7, 2009, available at <http://judiciary.scnatc.gov/pdf/09-07-07BrettTestimony.pdf>.

fans and has afforded teams from a variety of conferences, such as Memphis in 2008 and Utah in 1998 an opportunity to earn a chance to play for a national championship, and teams such as the University of Pennsylvania in 1979 and George Mason in 2006 to earn a place in the Final Four. Others have argued that the BCS eliminates competition among certain bowls and conferences for national television contracts and appearances.

Controversy surrounding the BCS and lack of a playoff has generated substantial interest in the exploration of other possible approaches to post-season FBS football. As you noted in your letter, the President has expressed his personal view that college football have an 8-game playoff. Others have suggested a variety of playoff formats, including a so-called "plus one" system in which one additional game would be played by the two top-rated teams at the end of the bowl games, a 4-team playoff (among the top 4 teams before the bowl games) and a 16-game playoff (that might include the 11 conference champions and 5 at-large teams).

While many are critical of the BCS and the lack of playoff, others contend that the BCS was a response to the unique history and characteristics of FBS football (involving bowl games), and benefits fans compared to the college football post-season that previously existed.³ Further, some contend a playoff format would adversely affect the FBS regular season, the bowls, and players.

Those who support the BCS and oppose a playoff contend that college football at the FBS (formerly called Division I-A) level is unique among college sports because of the presence and history of bowl games during the holiday season that create economic benefits for the host communities and reward teams for a successful regular season. The BCS and its predecessor systems incorporate the existing bowl system, and that system reflected historical ties between certain bowls and conferences (e.g., the Rose Bowl pairing the Big Ten and Pac-10 champions). While many supporters of a playoff accept the desirability of retaining the post-season bowls, doing so may complicate implementing such a system.

BCS supporters contend that proper evaluation of the BCS entails a comparison to the college football post-season that existed *before* the BCS (and its 1990s predecessors), and that the BCS has produced important benefits for college football fans. First, the BCS has resulted in a national championship game between the top two teams ranked by predetermined (albeit not universally accepted) criteria. Such match-ups had been previously been rare, and by one count had occurred only nine times between the end of World War II and 1991.⁴ Second, they contend

³ See, e.g. Testimony of William Monts before the Senate Judiciary Committee, July 7, 2009, available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3951&wit_id=8097.

⁴ BCS supporters argue that guaranteeing such a number one versus number two match-up would not be possible without automatic slots for certain conference champions, as those champions would otherwise be committed to play in particular bowl games and would not sacrifice those arrangements absent an automatic BCS slot.

that the BCS and its predecessors have reduced the likelihood of undesirable match-ups in the non-championship games that formerly resulted from bowls and conferences making premature commitments during the football season.

Before the early 1990s, most bowls had at least one open slot that they hoped to fill with highly ranked, attractive teams. This often resulted in bowls inviting teams that were highly ranked while several games remained in the regular season; such teams might falter later in the season, resulting in bowl match-ups that were less desirable than anticipated weeks earlier.

Opponents and proponents of a playoff differ as to the effect a playoff would have on interest in regular season games. To opponents, the current system maximizes such interest -- fans need to follow not only their own team and conference, but others as well, as many games can affect which teams ultimately rank first and second and are thus eligible to play in the BCS championship game. To proponents of a playoff, since more teams would qualify for a playoff, more games would determine who would ultimately qualify for those playoff berths, and there would be greater interest in those games than at present.

The Department of Justice is reviewing your letter as well as other materials to determine whether to open an investigation into the legality of the current system under the antitrust laws. Importantly, and in addition, the Administration also is exploring other options that might be available to address concerns with the college football post-season. These include encouraging the NCAA to take control of the college football post-season at the FBS level (as it does at other football levels and with regard to other sports), asking a governmental or non-governmental entity or a commission to study the benefits, costs and feasibility of a playoff system, asking the Federal Trade Commission to examine the legality of the current system under consumer protection laws, exploring whether other agencies may be able to play a role, and legislative efforts aimed at encouraging adoption of a playoff system. We note in that regard that legislation in the House, H.R. 390, that would ban the promotion of a post-season FBS game as a championship or national championship game unless it results from a playoff, recently passed by voice vote in the House Energy and Commerce Committee's Commerce, Trade and Consumer Protection Subcommittee. Others have suggested that legislation might target universities' tax exempt status if a playoff system is not implemented.

Thank you for bringing your perspective to the Administration's attention. If we can be of further assistance on this issue, please do not hesitate to contact this office.

Sincerely,



Ronald Weich
Assistant Attorney General