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Problems Surrounding the NCAA and Its Lack of Ability to Govern Third-Parties, Namely Recruitment Companies, Alumni, and Boosters

Chris Fontenelli

INTRODUCTION:

When National Collegiate Athletic Association (“NCAA”) president Mark Emmert took over in October of 2010, he knew that the job carried with it the challenging responsibility of “running college sports,” however, he likely did not expect it to be this tough.¹ Since entering the position, Emmert has been met with the challenge of taking on a barrage of university infractions from some of the NCAA’s most recognizable names.² In August of 2011, Yahoo! Sports exposed allegations surrounding the University of Miami athletic program³, placing it amongst schools such as Oregon, Southern California (“USC”), Auburn, Ohio State, Michigan, Connecticut, North Carolina (“UNC”), Louisiana State (“LSU”), Tennessee, Georgia Tech, and others.⁴ A primary issue in these scandals has been the NCAA’s lack of authority to control or discipline third-parties,⁵ namely boosters, 7-on-7 mentors, and “street agents.”⁶ Thus, the NCAA can govern its member institutions, high school associations govern its players and coaches,

¹ Michael Marot, *Tumultuous 1st year has tested NCAA's Emmert*, Associated Press, Oct. 2, 2011, <http://www.chron.com/sports/article/Tumultuous-1st-year-has-tested-NCAA-s-Emmert-2199051.php>.

² *Id.*

³ The allegations involved the relationship between the University of Miami and Nevin Shapiro, a former booster of the university and man convicted of masterminding a separate ponzi scheme. Shapiro alleged that he had provided benefits, including “sex parties, nightclub outings, cars and other gifts,” to former Miami football players and other athletes. Associated Press, *NCAA Investigating Miami Program*, August 17, 2011, http://espn.go.com/college-football/story/_/id/6871050/ncaa-investigating-miami-hurricanes.

⁴ *Id.*; See also Charles Robinson, *Renegade Miami Football Booster Spells Out Benefits to Players*, August 16, 2011.

⁵ A third-party is “any person who maintains (or directs others to maintain) contact with a prospective or enrolled student-athlete, the prospect’s or student-athlete’s relatives or legal guardians, or coaches at any point during the prospect’s or student-athlete’s participation in athletics, and whose contact is directly or indirectly related to the prospect’s or enrolled student-athlete’s athletic skills and abilities (collegiate or future professional); recruitment by, or enrollment in, an NCAA institution; and/or projected professional sports career. For example, third-parties can describe sports agents, street agents, sports marketers, financial advisors, runners, parents/legal guardians, boosters, high-school coaches and AAU/amateur club coaches.” Michael L. Buckner, *HIGH PROFILE ATHLETES & THIRD PARTIES: Practices & Services Suite of Compliance and Investigative Services*, Michael L. Buckner Law Firm, http://www.michaelbucknerlaw.com/services-high_profile_athletes.html.

⁶ Joe Schad, *7-on-7, A touch-and-go situation*, August 5, 2011, <http://sports.espn.go.com/espn/otl/news/story?id=6600377>.

however, no one is governing these third-party “agents” from harming the reputations of the schools and their players.⁷

Although there are no immediate solutions to the NCAA’s lack of ability to police these third-party offenders, it is clear that severe actions must be taken by the NCAA, the states, and federal government before this problem becomes irreparable. Within the upcoming months, the NCAA should propose and adopt new bylaws which conform to the modern day college athletic atmosphere.⁸ However, David Price, former NCAA vice president for enforcement services, has highlighted that although the NCAA has the ability to require certain actors under its jurisdiction to cooperate with an investigation, when it deals with third-parties and former athletes, it is up to those third-parties and former athletes’ choice of whether they want to comply or not.⁹ Ultimately, the NCAA can encourage a school to persuade third-parties and/or former players to cooperate, but in the end, if they refuse to do so, there are no other options the NCAA can take.¹⁰ This comment will largely focus on ungoverned third-parties and the roles that they have played in negatively affecting the college sports world and the possible NCAA, state, and federal solutions to those problems. Part I of the comment will provide a background of the NCAA and each of the various scandals that have been exposed over the past year. The second section of the comment will expose the problem of the relevant third-parties who have included non-school

⁷ Encompassing the severity of the problem, Chris Meritt, Columbus High School football coach has stated: “You’ve got the NCAA that controls their member institutions and coaches. I’ve got the Florida High School Association that manages me, but there is no third-party government. There’s nothing stopping this *street agent* who claims he’s got the ability to send a kid someplace, to ask for money to send the kid there. *There’s no governance.*” (emphasis added).

⁸ Emmert has recently stated that he believes the organization needs to adopt proposals within months that give its investigators more latitude to get information from *third-party* associates. Associated Press, *NCAA prez: Death Penalty an Option*, August 19, 2011, http://espn.go.com/college-football/story/_/id/6877907/ncaa-president-mark-emmert-says-death-penalty-option-punish-rule-breakers.

⁹ “We have the ability to require certain people to talk to us . . . people directly under our jurisdiction . . . but when you go outside that group, we generally are trying to get people to operate in good faith. . . .” Steve Wieberg, *NCAA enforcement power in state of flux*, USA Today, Apr. 23, 2007, http://www.usatoday.com/sports/college/2007-04-22-ncaa-enforcement_N.htm.

¹⁰ *Id.*

affiliated recruiters, boosters, alumni, 7-on-7 mentors, and the so called “street agents.” The third section of the comment will then discuss the current NCAA investigation process and the problems that NCAA investigators are confronted with when a third-party is involved. Lastly, the comment will conclude with the offering of possible solutions to these problems, namely the direction of the state and federal laws.

I. BACKGROUND: HIGHLIGHTING THE PROBLEMS AND EXPOSING THE SCANDALS

A. *Highlighting the Problem*

The current University of Miami scandal, along with several others in recent years, has exposed the need for a “serious and fundamental change” in various aspects of college sports.¹¹ In September of 2011, the NCAAA Division I Recruiting and Athletics Personnel Issues Cabinet held a meeting where the enforcement staff enumerated many of the emerging problems in recruiting trends in collegiate athletics, including:

“(1) involvement of street agents; (2) report of the NCAA Division I Recruiting and involvement of scouting/recruiting services and their relationships with college coaches and agents; (3) employment of individuals associated with prospective student-athletes at institutional camps; (4) marginalization of high school coaches during recruiting process; and (5) intent of nonprofit mentoring programs to insert themselves into the lives of prospective student-athletes and develop relationships with them and their families.”¹²

¹¹ *NCAA Investigating Miami Program*, Aug. 17, 2011, http://espn.go.com/college-football/story/_/id/6871050/ncaa-investigating-miami-hurricanes.

¹² The enforcement staff noted that currently, “some football programs’ sue of scouting/recruiting services appears to be contrary to NCAA Bylaw 13.14.3 in that the scouting/recruiting services provide oral reports (in addition to

The cabinet agreed to continue to monitor these trends, namely the involvement of boosters.¹³ Subsequently, Emmert called together more than fifty presidents and chancellors of various schools to promote substantive changes to Division I intercollegiate athletics.¹⁴ As a result, Emmert released a statement that highlighted many of the suggested changes that were covered in the meeting.¹⁵ He addressed his utmost commitment to the aim of simplifying the NCAA's rules, making clear the consequences, and promoting the responsibility "among presidents, athletes, administrators, coaches, conferences, agents, and boosters alike."¹⁶ Emmert's main concern, that the severity of the violations will reach uncontrollable levels, will be prevalent in the various third-party scandals

B. Introduction to the University of Miami Investigation

In August of 2011, Yahoo! Sports conducted an eleven-month investigation into the University of Miami football program, alleging that a former Miami booster, Nevin Shapiro, distributed thousands of violative benefits to over seventy athlete—past and present Miami players now playing elsewhere—from the years of 2002 to 2010.¹⁷ During the investigation, Yahoo! Sports performed over 100 hours of jailhouse interviews with Shapiro, where he alleged

published reports or video) to college coaches. Bylaw 13.14.3 currently requires that the service be made available to any institution desiring to subscribe and at the same fee rate for all subscribers. Oral communication/reports from scouting/recruiting services in information that is not standardized or available to all other subscribers. The cabinet noted the ongoing concerns regarding the involvement of third parties in the recruiting process in basketball and the seemingly similar situations in football. The cabinet agreed to continue to monitor these trends and to discuss ways to specifically address them." *NCAA Division I Recruiting and Athletics Personnel Issue Cabinet*, September 13-14, 2011, <http://fs.ncaa.org/Docs/AMA/RAPIC/June%2011/JuneFinalReport.pdf>

¹³ NCAA.org, *NCAA President Responds to Miami Allegations*, Aug. 17, 2011, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/NCAA+President+Mark+Emmert+responds+to+Miami+allegations>.

¹⁴ *Id.*

¹⁵ Mark Emmert, National Collegiate Athletic Association, Sep. 1, 2011, '*Cheating Will Not be Tolerated*,' <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2011/August/Emmert+Cheating+will+not+be+tolerated>.

¹⁶ *Id.*

¹⁷ Matt Hayes, *What the alleged Miami scandal means for current players and coaches*, AOL SPORTING NEWS, <http://aol.sportingnews.com/ncaa-football/feed/2011-08/um-violations/story/what-the-alleged-miami-scandal-means-for-2011-al-golden-players>.

an “eight-year run of rampant NCAA rule-breaking,” all of which to some extent coaches from the basketball and football teams had either participated or had direct knowledge.¹⁸ In addition, he alleged that the rule breaking violations included cash payoffs, third-party funded trips, jewelry handouts, entertainment in his multimillion-dollar homes and yacht, and prostitutes.¹⁹ In order to validate Shapiro’s claims Yahoo! Sports audited roughly 20,000 pages of business and financial records from his personal bankruptcy case, including cell phone records, interviews tied to a Ponzi case, and more than one thousand photographs.²⁰

In essence, the Miami investigation is a story about a third-party booster who was able to run wild, knowingly help student athletes to break NCAA rules, affecting the lives of hundreds of athletes, families, schools, and administration.²¹ When Yahoo! Sports asked for Shapiro’s justification for his actions, he responded that he “did it because he could . . . [a]nd because nobody stepped in” to stop him.²² However, the NCAA must now conduct a thorough investigation that could take years to determine the severity of punishment to inflict upon the university.²³ The essential obstacle that it faces is the NCAA investigation’s inability to compel former players and third-parties to talk.²⁴ Unfortunately, several of the former Miami student athletes who Shapiro allegedly supplied with improper benefits have refused to cooperate with

¹⁸ Charles Robinson, *Renegade Miami football booster spells out illicit benefits to players*, Yahoo! Sports, Aug. 16, 2011, http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Andy Katz, *Ex-Miami coaches in limbo at new schools*, ESPN.com, Aug. 23, 2011, http://espn.go.com/mens-college-basketball/blog/_/name/katz_andy/id/6888175.

²⁴ Steve Wieberg, *NCAA enforcement power in state of flux*, USA TODAY, Apr. 23, 2007, http://www.usatoday.com/sports/college/2007-04-22-ncaa-enforcement_N.htm.

the NCAA investigators,²⁵ thus the investigators will not be able to corroborate the majority of Shapiro's allegations.²⁶

C. *Introduction to the University of Oregon Investigation*

On Saturday, September 17, 2011, the University of Oregon announced that it had received an official notice of inquiry from NCAA officials.²⁷ The notification was sent because of possible violations with regard to a third-party freelance talent scout that it hired.²⁸ This incident falls squarely in line with the recent problems with player and university affiliations with 7-on-7 camps and the involvement of individuals who work for recruiting services that charge those universities for the recruiting services.²⁹ Oregon athletic director Rob Mullens commented on the notice, stating that it was a step that typically occurs late in the investigation stage and signals that the NCAA will soon inform the school of the allegations.³⁰

As for the investigation itself, in March of 2011, ESPN.com reported that the NCAA had been "exploring the involvement of third-parties" in the recruitment process of football at the collegiate level.³¹ It claimed that NCAA officials were taking a close look into Oregon's usage of third party recruiters in the recruitment of high school student athletes, namely high school

²⁵ Paragon SC, *Will Miami escape heavy NCAA sanctions?*, Conquest Chronicles, Oct. 16, 2011, <http://www.conquestchronicles.com/2011/10/16/2493272/will-miami-escape-heavy-ncaa-sanctions>.

²⁶ Already, the NCAA has faced a circumstance similar to that of Maurice Clarett's, a former standout at Ohio State whom disclosed information about allegations that took place during his tenure, yet once an alumni and in essence a third-party, refused to speak to NCAA investigators. Wieberg, *supra* note 20.

²⁷ John Canzano, *NCAA investigation is official, and it's time for Oregon to show it has changed*, THE OREGONIAN, Sept. 17, 2011, http://www.oregonlive.com/sports/oregonian/john_canzano/index.ssf/2011/09/canzano_ncaa_investigation_is.html.

²⁸ Rachel Bachman, *NCAA sends Oregon Ducks notice of inquiry in Willie Lyles case*, The Oregonian, Sept. 17, 2011, http://www.oregonlive.com/ducks/index.ssf/2011/09/ncaa_sends_oregon_ducks_notice.html.

²⁹ 7-on-7 football teams and showcase camps were created for high profile high school football players to better develop their skills and improve their quality of play. Participation in a 7-on-7 football camp is highly competitive, as high school players are afforded the opportunity to showcase their talents in front of third-party recruiting companies. Those third-party recruiters then sell their collected data to the individual universities for sometimes up to tens of thousands of dollars. Joe Schad, *7-on-7: A touch-and-go situation*, ESPN.COM, Aug. 5, 2011, <http://sports.espn.go.com/espn/otl/news/story?id=6600377>.

³⁰ Rachel Bachman, *NCAA sends Oregon Ducks notice of inquiry in Willie Lyles case*, THE OREGONIAN, Sept. 17, 2011, http://www.oregonlive.com/ducks/index.ssf/2011/09/ncaa_sends_oregon_ducks_notice.html.

³¹ Joe Schad and Mark Schlabach, *Sources: Man who helps Ducks probed*, ESPN.COM, March 4, 2011, <http://sports.espn.go.com/ncf/news/story?id=6179423>.

standout Lache Seastrunk (“Seastrunk”).³² Specifically, the NCAA’s focus was on the role of Willie Lyles, a third-party Texas-based trainer, who played a major part in Seastrunk’s decision to attend Oregon.³³ Questions were raised when Oregon’s payment to Lyles was made shortly after Seastrunk signed his national letter of intent in February 2010 to play football for Oregon.³⁴ Like most programs, Oregon paid Lyles for his recruiting services.³⁵ However, eyebrows were raised after Oregon drastically increased its payments after the signing of Seastrunk.³⁶ Under Oregon open records law, Dave Williford, Oregon athletics department spokesman, supplied the information to ESPN.com.³⁷ The information revealed that a payment of \$25,000 that Lyles received exceeded the \$16,500 Oregon had paid Lyles during the previous two years.³⁸ Moreover, as reported, “The payment raised eyebrows because of Lyles’ role as a mentor to Seastrunk and because the fee, ostensibly for scouting reports of players in 22 states, exceeded the going rate for such reports.”³⁹ The NCAA is also investigating Lyles’ relationship with Oregon’s star tailback LaMichael James (“James”).⁴⁰ During the 2010-11 season, James led Oregon to a 12-1 record and the BCS National Championship Game.⁴¹ In December 2011, Lyles was James’ guest at the ESPNU Home Depot College Football Awards Show, where Lyles

³² Seastrunk was one of the highest rated recruited prospects in 2010 coming out of high school. *Id.*

³³ *Id.*

³⁴ Rachel Bachman, *NCAA sends Oregon Ducks notice of inquiry in Willie Lyles case*, THE OREGONIAN, Sept. 17, 2011, http://www.oregonlive.com/ducks/index.ssf/2011/09/ncaa_sends_oregon_ducks_notice.html.

³⁵ Most high profile NCAA football programs purchase recruiting services. *Id.*

³⁶ Joe Schad and Mark Schlabach, *Sources: Man who helps Ducks probed*, ESPN.COM, March 4, 2011, <http://sports.espn.go.com/ncf/news/story?id=6179423>.

³⁷ Or. Rev. Stat. Ann. § 192.420; *See also Id.* (ESPN requested for the information pursuant to Oregon’s open records law).

³⁸ *Id.*

³⁹ Lyles has also mentored high school players from Texas who had signed with Oregon other than Seastrunk, including standout LaMichael James. In addition, Lyles has mentored several star players who have signed with other major schools. Rachel Bachman, *NCAA sends Oregon Ducks notice of inquiry in Willie Lyles case*, The Oregonian, Sept. 17, 2011, http://www.oregonlive.com/ducks/index.ssf/2011/09/ncaa_sends_oregon_ducks_notice.html.

⁴⁰ Joe Schad and Mark Schlabach, *Sources: Man who helps Ducks probed*, ESPN.COM, March 4, 2011, <http://sports.espn.go.com/ncf/news/story?id=6179423>.

⁴¹ *Id.*

described himself as “James’ trainer and advisor.”⁴² Since then, James has declared for the NFL draft, and therefore will soon become a former player “third party.”⁴³ Thus, he is no longer within the purview of the NCAA’s governing power and the investigators will have to depend solely on his cooperation.

The most troubling problem with this entire situation is that third-party Willie Lyles likely cannot be held accountable by the NCAA for any wrongdoing. Moreover, the NCAA revised its bylaws in 2010 “to make monitoring of recruiting and scouting services more stringent.”⁴⁴ It enacted bylaw 13.3.3.1, which states in pertinent part, “a student-athlete may allow a scouting service or agent to distribute personal information to a school—provided a fee is not based on placing the player at a school.”⁴⁵ The NCAA is concerned with exactly the type of services schools such as Oregon have been receiving from third party recruiters like Lyles,⁴⁶ and if the sudden increase in compensation was for his production of five-star recruits delivered directly to Oregon.⁴⁷

D. Introduction to the University of Central Florida Allegations

In August of 2011, the University of Central Florida (“UCF”) received an official notice of inquiry from the NCAA with regards to potential recruiting violations.⁴⁸ Both the UCF’s men’s basketball and football programs are the focal point of the investigation.⁴⁹ The allegations

⁴² *Id.*

⁴³ Russ Lande, *NFL Draft: LaMichael James turns in strong workout at Oregon’s Pro Day*, March 15, 2012, <http://aol.sportingnews.com/nfl/story/2012-03-15/nfl-draft-lamichael-james-oregon-pro-day-turns-in-strong-workout>.

⁴⁴ Joe Schad and Mark Schlabach, *Sources: Man who helps Ducks probed*, ESPN.COM, March 4, 2011, <http://sports.espn.go.com/ncf/news/story?id=6179423>.

⁴⁵ NCAA BYLAWS arts. 12.3.3.1.

⁴⁶ Joe Schad and Mark Schlabach, *Sources: Man who helps Ducks probed*, ESPN.COM, March 4, 2011, <http://sports.espn.go.com/ncf/news/story?id=6179423>.

⁴⁷ Nick Talbot, *NCAA right to look into recruiting ‘facilitators,’* KILLEEN DAILY HERALD, Mar. 5, 2011, <http://www.kdhnews.com/news/story.aspx?s=52035>.

⁴⁸ Mike Fish, *UCF receives NCAA inquiry letter*, ESPN.COM, Aug. 18, 2011, http://espn.go.com/college-sports/story/_/id/6870978/university-central-florida-receives-ncaa-inquiry-letter.

⁴⁹ *Id.*

are believed to involve Ken Caldwell, former AAU basketball coach who helped Central Florida recruit several basketball and football players.”⁵⁰ From a third-party standpoint, if the UCF coaches knew that Caldwell or Brandon Bender, who is reported to have assisted Caldwell recruiting players to UCF, were promoting the athletic program, then the NCAA could find them to be considered “representatives of the school,” thereby subjecting the school to NCAA violations.⁵¹

Since the beginning of the investigation, UCF’s athletic director, Keith Tribble, has resigned and the men’s basketball coach, Donnie Jones, has received a three game suspension.⁵² Unfortunately, this is just the beginning of a long drawn out NCAA investigation process, that will likely end because of noncooperation. Falling in line with the previously mentioned Miami and Oregon investigations, the school, current players, and fans will be most affected when the NCAA lays down its sanctions, as the third-parties will go unscathed.

E. The Cam Newton Recruitment Investigation

Although on October 12, 2011, the NCAA notified Auburn athletic director Jay Jacobs that it found no major violations against the school,⁵³ the investigation in and of itself is important to this comment.⁵⁴ In 2010, the NCAA began an inquiry into the recruitment of Cam

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Jeff Goodman, *Central Florida AD out, Jones suspended 3 games*, November 9, 2011, <http://eye-on-college-basketball.blogs.cbssports.com/mcc/blogs/entry/26283066/33205519>.

⁵³ The NCAA released a statement: “After conducting more than 80 interviews, the NCAA has concluded its investigation into Auburn University,” the NCAA said in a statement. “The NCAA enforcement staff is committed to a fair and thorough investigative process. As such, any allegations of major rules violations must meet a burden of proof, which is a higher standard than rampant public speculation online and in the media. . . .” In addition, it stated that “[t]he allegations must be based on credible and persuasive information and includes a good-faith belief that the Committee on Infractions could make a finding. As with any case, should the enforcement staff become aware of additional credible information, it will review the information to determine whether further investigation is warranted.” *Remove the Asterisk; NCAA Stops Investigation Of Auburn & Cam Newton*, Oct. 13, 2011, <http://www.saturdaydownsouth.com/2011/ncaa-stops-investigation-cam-newton-auburn/>.

⁵⁴ Eddie Maisonet, *Cam Newton Investigation: NCAA Finds No Major Violations Against Former Auburn QB*, Oct. 12, 2011, <http://atlanta.sbnation.com/georgia-bulldogs/2011/10/12/2486457/cam-newton-investigation-auburn-football-ncaa>.

Newton (“Newton”) for possible violations.⁵⁵ The investigation was centered on the possibility of Newton being “shopped” to Mississippi State after he had already signed with Auburn.⁵⁶ The allegations are not necessarily against Newton himself, but rather against Newton’s father and former Mississippi State (“MSU”) player Kenny Rogers, for collaborating on a pay-for-play scenario to get Newton to attend MSU.⁵⁷ Allegedly, Newton’s father offered his son’s services to play for Mississippi State for \$180,000.⁵⁸ However, Newton told the NCAA that he had no knowledge of anything that had occurred.⁵⁹ As a result, the NCAA made a subsequent decision to declare Newton eligible to play the rest of the 2010-2011 while the investigation was ongoing.⁶⁰ He then went on to lead Auburn to a national title, drafted into the NFL, and thus become a former student-athlete of the school.⁶¹ Now, quarterback for the Carolina Panthers,⁶² he has not had to worry about any repercussions other than negative press from the media.⁶³

More importantly, Newton’s recruitment has caused the NCAA to examine “how to close the so-called loophole of third-party, pay-for-play schemes” and what regulations can be established to deter third-party violations.⁶⁴ During the investigation process, many questions arose as to why Cam Newton chose Auburn over Mississippi State; the thought was that Auburn

⁵⁵ Pete Thamel, *N.C.A.A. Inquiry of Auburn Isn’t Over, Exchange Reveals*, NEW YORK TIMES, Jul. 13, 2011, <http://www.nytimes.com/2011/07/14/sports/ncaafootball/ncaas-investigation-of-auburn-isnt-over-yet.html>.

⁵⁶ Jon Solomon, *The Cam rules: Revised SEC bylaws reflect Newton case and how accusations get reported*, THE BIRMINGHAM NEWS, Sept. 10, 2011, http://www.al.com/sports/index.ssf/2011/09/the_cam_rules_revised_sec_byla.html.

⁵⁷ *Id.*

⁵⁸ Pete Thamel, *N.C.A.A. Inquiry of Auburn Isn’t Over, Exchange Reveals*, NEW YORK TIMES, Jul. 13, 2011, <http://www.nytimes.com/2011/07/14/sports/ncaafootball/ncaas-investigation-of-auburn-isnt-over-yet.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Jon Solomon, *The Cam rules: Revised SEC bylaws reflect Newton case and how accusations get reported*, The Birmingham News, Sept. 10, 2011, http://www.al.com/sports/index.ssf/2011/09/the_cam_rules_revised_sec_byla.html.

must have paid his father at least \$180,000 for his playing services.⁶⁵ The investigation looked into the possible violation of NCAA Bylaw 12.3.3 that states in pertinent part:

“Any individual, agency or organization that represents a prospective student-athlete for compensation in placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid shall be considered an agent or organization marketing the individual’s athletics ability or reputation.”

The problem with determining whether a bylaw has been violated, is that the investigators cannot compel the third-parties involved to cooperate, thus leaving them with little to no knowledge of the actual facts.⁶⁶ As always, the NCAA is eager to seek out violators of its bylaws and bring sanctions upon those who are guilty, yet without any form of subpoena power, the enforcement staff has struggled with the cooperation from claimants.⁶⁷ Without proper bank statements, phone logs, and other pieces of evidence, the NCAA is left in the dark.⁶⁸

To further complicate the third party involvement in the Cam Newton scandal, there have been inconclusive allegations made by four former student-athletes, all who attended Auburn with Newton.⁶⁹ In addition to the NCAA’s investigation, HBO’s Real Sports with Bryant Gumbel (“Gumbel”) attempted to shine light on the allegations by exposing some of the third-

⁶⁵ Matt Brooks, Auburn cleared of major NCAA football violations during national championship run, THE WASHINGTON POST, Oct. 13, 2011, http://www.washingtonpost.com/blogs/early-lead/post/auburn-cleared-of-major-ncaa-football-violations-during-national-championship-run/2011/10/13/gIQAVm4lhL_blog.html.

⁶⁶ Teddy Greenstein, CHICAGO TRIBUNE; Chris Dufresne, LOS ANGELES TIMES; Paul Doyle, HARTFORD COURANT, Oct. 13, 2011, http://articles.chicagotribune.com/2011-10-13/sports/chi-todays-question-are-you-satisfied-with-ncaas-decision-on-auburn-20111013_1_cam-newton-auburn-case-subpoena-power.

⁶⁷ Brooks, *supra* note 65.

⁶⁸ *Id.*

⁶⁹ Teddy Greenstein, CHICAGO TRIBUNE; Chris Dufresne, LOS ANGELES TIMES; Paul Doyle, HARTFORD COURANT, Oct. 13, 2011, http://articles.chicagotribune.com/2011-10-13/sports/chi-todays-question-are-you-satisfied-with-ncaas-decision-on-auburn-20111013_1_cam-newton-auburn-case-subpoena-power

parties who may have known about the details.⁷⁰ Unfortunately, Gumble and HBO soon ran into many of the obstacles that the NCAA investigators have faced.⁷¹ Only one of the four former students that made who Gumble interview, Raven Gray, subsequently agreed to be interviewed by the NCAA enforcement staff.⁷² Therefore, it is nearly impossible for the NCAA to substantiate any of the allegations, which highlights its lack of ability to compel third-parties to cooperate and provide information. However, since the other three former student-athletes did not comply with the NCAA enforcement staff's requests, as it is in their rights to do so, "their statements are patent examples of hearsay and were dismissed."⁷³

II. EXPOSING THE PROBLEM

A. *NCAA Must Attempt to Enact "Emergency Legislation" to Address Third-Party Recruitment Within the Collegiate Atmosphere*

In 2011, NCAA president Mark Emmert made a conscious decision to change the ways of which the NCAA attempts to handle third-party recruitment.⁷⁴ In a public statement, he said "We need to make sure our penalty structure and enforcement process imposes a thoughtful level of concern, and that the cost of violating the rules costs more than not violating them."⁷⁵ Specifically, Emmert stated that the enforcement staff will need to better develop an understanding of where these infractions and violations are occurring, such as in the "whole new recruiting world of 7-on-7 football."⁷⁶ In response to a question asked about the "loophole" that allowed Cam Newton's father to shop him around and the complexity of the issues surrounding

⁷⁰ Brooks, *supra* note 65.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Jon Solomon, *NCAA attempts to properly handle third-party recruitment*, THE BIRMINGHAM NEWS, May 11, 2011, http://www.al.com/sports/index.ssf/2011/05/ncaa_attempts_to_properly_hand.html.

⁷⁵ *Id.*

⁷⁶ *Id.*

third-parties, Emmert stated that “[t]hose who say we’re incapable of moving quickly will be pleasantly surprised in the weeks and coming months.”⁷⁷ In addition, the NCAA Vice President for Enforcement, Julie Roe Lach, has emphasized that the NCAA has to make sure they get third-party recruitment right.⁷⁸ She voiced her concerns in May 2011:

"Who are these individuals? We're trying to get our arms around that . . . [a]nd do we do it through legislation or some other means? I imagine there will be some sort of rule change. But it's not a quick fix. It's going to be a multi-faceted solution."⁷⁹

Other important figures within the collegiate athletic world have also openly voiced their opinions on the troubling matter.⁸⁰ In respect to NCAA football, Grant Teaff, head of the American Football Coaches Association (“AFCA”), has voiced his alarming concerns with regards to third-parties.⁸¹ As a solution, he has stated that it is:

“not as easy as just handing out suspensions and taking money away from universities . . . [i]t goes beyond boosters and now has reached the level that it has with college basketball, where all sorts of third-party people have put their hand into the mix”⁸²

More importantly, he acknowledged that the NCAA has been fighting a losing battle for a while now, as it has been aware of third-party involvement, yet little has been accomplished in

⁷⁷ *Id.*

⁷⁸ Jon Solomon, *NCAA attempts to properly handle third-party recruitment*, THE BIRMINGHAM NEWS, May 11, 2011, http://www.al.com/sports/index.ssf/2011/05/ncaa_attempts_to_properly_hand.html

⁷⁹ *Id.*

⁸⁰ Wes O’Donnell, *SEC Media Days 2011: NCAA Can’t ‘Go on Acting as If It’s Business as Usual’*, BleacherReport.com, Jun. 20, 2011, <http://bleacherreport.com/articles/741592-college-football-2011-recruiting-news-predictions-rankings-and-more/entry/109362-sec-media-days-2011-ncaa-cant-go-on-acting-as-if-its-business-as-usual>

⁸¹ Greg Kozarik, *Can the NCAA fix college football? Part II*, THE EXAMINER, Jul. 14, 2011, <http://www.examiner.com/sports-in-national/can-the-ncaa-fix-college-football-part-ii>.

⁸² *Id.*

detering or stopping the violations.⁸³ In the same article which quoted Teaff, Dave Curtis, a national college football reporter for the Sporting News, voiced his frustration stating:

“[t]here is no solution . . . it is too late and the money is too big and the players and coaches are too entitled.” “The NCAA is just putting their fingers in the holes in the dam but there are too many holes . . . it is not worth saving and it is time to knock it down and rebuild it from scratch.”⁸⁴

Thus, the aforementioned concerns highlight the fact that within recent years, the collegiate sports landscape has become plagued with third-parties, most of who have proceeded to violate NCAA bylaws under the radar.

B. The NCAA Enforcement Staff Lacks Subpoena and Contempt Power With Regards to Third-Parties

As can be recognized throughout the accounts of the NCAA investigations mentioned above, the heart of the problem is the NCAA’s inability to legally force third-parties to cooperate with its investigations.⁸⁵ As opposed to the criminal and civil legal systems, where an alleged third-party can be subjected to a subpoena or can be held in contempt to compel cooperation,⁸⁶ the NCAA enforcement staff lacks subpoena and contempt power.⁸⁷ Even on its website, the NCAA acknowledges that due to its lack of subpoena power, it cannot compel those outside of

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Graham Watson, *Urban Meyer thinks the NCAA should have subpoena power. Can that really work?*, CBS SPORTS, July 20, 2011, http://rivals.yahoo.com/ncaa/football/blog/dr_saturday/post/Urban-Meyer-thinks-the-NCAA-should-have-subpoena?urn=ncaaf-wp3915.

⁸⁶ Josephine R. Potuto, *The NCA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, VANDERBILT J. OF ENT. AND TECH. LAW, 257, 290 (2010) (discussing the difference between the criminal law system and the NCAA’s lack of ability to use subpoena or contempt power, nor access to court-supervised discovery).

⁸⁷ NCAA, *Processing of a typical major infractions case*, NCAA, Oct. 17, 2011, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Investigations>.

its jurisdictional reach to cooperate with the investigation process.⁸⁸ In recent years there has been a conscious move by many to highlight the severity of the NCAA's lack of authority. In July of 2011, CBS Sports conducted an interview with former University of Florida and current Ohio State football coach Urban Meyer.⁸⁹ When asked about what subpoena power could do for the NCAA investigators, Meyer answered that it could impose what he believed to be the two most important missing pieces: fear in the minds of coaches, players, and universities alike and knowledge on the side of the NCAA.⁹⁰ As of now, the NCAA lacks the ability to reach out to third-parties, such as recruiting services, boosters, alumni, former players, and others, thus there is no fear of punishment, leaving the NCAA lacking critical information in almost all cases with regards to third-parties.⁹¹

In the case of Cam Newton and the NCAA's investigation into Auburn, athletic director Jay Jacobs discussed dealing with third-parties and the NCAA's lack of some form of subpoena power.⁹² He acknowledged that due to the lack of a lengthy investigation, which accounts for the NCAA's inability to force third-parties to speak, Auburn's image becomes tarnished because of the allegations in and of itself.⁹³ Although he stated that the lack of subpoena power has not slowed down the investigation with the University,⁹⁴ he did cite the frustration that others have had, namely the lack of third-party cooperation.⁹⁵ Further, various credible collegiate sports

⁸⁸ When listing actors outside of its jurisdiction, the NCAA used examples such as parents of student athletes or prospects, agents, and high school personnel. *Id.*

⁸⁹ Graham Watson, *Urban Meyer thinks the NCAA should have subpoena power. Can that really work?*, CBS SPORTS, July 20, 2011, http://rivals.yahoo.com/ncaa/football/blog/dr_saturday/post/Urban-Meyer-thinks-the-NCAA-should-have-subpoena?urn=ncaaf-wp3915.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Jon Solomon, *Jay Jacobs: NCAA investigation is reviewing Auburn's institutional control as normal procedure*, THE BIRMINGHAM NEWS, Sept. 16, 2011, http://www.al.com/sports/index.ssf/2011/09/jay_jacobs_ncaa_investigation.html.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

writers have discussed their lack of satisfaction with the NCAA's decision regarding Auburn.⁹⁶ One voiced that it was a win for Auburn's lawyers⁹⁷ and their ability to keep the mouths of third-parties shut. Another highlighted the fact that the NCAA has trouble reaching its burden of proof because it does not have subpoena power and is not the FBI,⁹⁸ thus, many of its investigations are inconclusive. In essence, the writers all exposed the NCAA investigators' lack of ability to force former Auburn players and any other third-parties from talking about alleged bylaw violations.⁹⁹

III. A SPECIFIC EXAMPLE OF THE PROBLEM: SEVEN-ON-SEVEN FOOTBALL TEAMS AND CAMPS

A. *What Are They?*

7-on-7 football teams contain the best players from all over the country in an attempt to bring them together on one field, showcasing their talents, with the intent of helping them eventually sign with a high profile university or college.¹⁰⁰ Although participating in a 7-on-7 event is not a violation of NCAA regulations, college coaches are not permitted to attend the events.¹⁰¹ For the purposes of this note, the focus will be on the growing concern that the NCAA has with regards to 7-on-7 events, third-party involvement, and their player relationships.

⁹⁶ Teddy Greenstein, CHICAGO TRIBUNE; Chris Dufresne, LOS ANGELES TIMES; Paul Doyle, HARTFORD COURANT, Oct. 13, 2011, http://articles.chicagotribune.com/2011-10-13/sports/chi-todays-question-are-you-satisfied-with-ncaas-decision-on-auburn-20111013_1_cam-newton-auburn-case-subpoena-power.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *What is 7-on-7 football?*, FOX SPORTS HOUSTON, July 13, 2011, http://www.foxsportshouston.com/07/13/11/What-is-7-on-7-football/landing_uil.html?blockID=538618.

¹⁰¹ *Id.*

B. *The Biggest Concerns With 7-on-7 Football Teams.*

The controversy involving the elite 7-on-7 football focuses primarily with regards to third-party issues.¹⁰² For many years, recruiting has consisted of high school players, their parents, and the college coaches.¹⁰³ However, more recently, third-party recruiting companies (e.g. 7-on-7 football coaches and companies) have gained power and influence in the recruiting process, as seen from the outbreak of college recruiting scandals over the past couple years.¹⁰⁴ At this summer's annual meeting of the National Federation of State High School Associations ("NFSHSA") in Philadelphia, Pennsylvania, the "hot topic . . . was the explosive growth of 7-on-7 football teams and events, the influence of non-scholastic coaches in these programs, and the possible ramifications on recruiting."¹⁰⁵ Moreover, Rachel Newman Baker, NCAA managing director of enforcement, has recently stated that any player receiving any illicit benefits or preferential treatment from third-parties could jeopardize players' college eligibility.¹⁰⁶ In expressing her concerns, Baker said "A lot of it is about connecting the dots. Who is affiliating with who? Who works with who? What prospects are close to third-parties?"¹⁰⁷ In another article, Baker voiced her fear and concern that

"we give outside third-parties who don't have prospective student-athletes' best interests at heart more room to have those prospects make bad decisions," she said. "You can call yourself a cousin, you can call yourself a mentor, you can call yourself a friend, but it's what are you doing for that student-athlete or that prospective

¹⁰² Andy Staples, *As third parties go, Keyshawn Johnson the ultimate wild card*, SPORTS ILLUSTRATED, Apr. 13, 2011, http://sportsillustrated.cnn.com/2011/writers/andy_staples/04/13/keyshawn-johnson-7-on-7/index.html

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Jack Carey and Jim Halley, *7-on-7 summer high school football events raising concerns*, USA TODAY, Apr. 20, 2011, http://www.usatoday.com/sports/preps/football/2011-07-19-7-on-7-high-school-summer-football_n.htm.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

student-athlete and where does that cross the line and potentially jeopardize that individual's eligibility?"¹⁰⁸

The biggest worry is that the NCAA has struggled to monitor recruiting with regards to AAU basketball in the past, and the worry is that it has become the same for football as well.¹⁰⁹ Deon Bush is one example of a player who has utilized 7-on-7 games, as he is one of the nation's top-rated safeties.¹¹⁰ He was videotaped during a tryout for one of the teams and he said that because of the exposure, within two days of the taping he had five offers.¹¹¹ However, Bush's high school coach has voiced the concern that surrounds the underlying issue of this comment, stating that "I think anybody that runs a 7-on-7 team that tells you they're doing it for the exposure of kids is trying to pull one on you to be honest . . . [t]hey're doing it to make a buck."¹¹² Furthermore he said that:

"[t]he people that are running 7-on-7, you can also call them street agents, let's call it for what it is. The college coaches will be the first to tell you they would love to cut those guys out of the picture. The thing is, they're forced to deal with these guys, because if they don't, their competitor is."¹¹³

Not only have these 7-on-7 teams alarmed hundreds of high school coaches, parents, and NCAA administrators, but prominent college coaches receiving these players have voiced their concerns as well. Maryland coach Randy Edsall has voiced his concern with the 7-on-7 teams

¹⁰⁸ Joe Schad, *7-on-7, A touch-and-go situation*, August 5, 2011, <http://sports.espn.go.com/espn/otl/news/story?id=6600377>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Joe Schad, *7-on-7, A touch-and-go situation*, August 5, 2011, <http://sports.espn.go.com/espn/otl/news/story?id=6600377>.

and games.¹¹⁴ His fear is that high school coaches in all sports are losing control over their players to third-parties, and that the third-party recruiters are becoming more of an importance in the lives of these high school athletes than the coaches who deal with the players on a daily basis.¹¹⁵ In addition, former Penn State head coach Joe Paterno expressed his concerns during the 2011 Big Ten meetings, stating that these third-party recruiters are “literally putting kids up on auction blocks so people can get a look at them. “There are guys who are soliciting kids to go to a camp and getting paid to bring certain kids to camps. You don’t want those people involved in our game.”¹¹⁶

IV. THE NCAA’S CURRENT INVESTIGATION PROCESS

The typical NCAA major infractions case involves a four step process including the: (1) Investigation stage; (2) Charging stage; (3) Hearings stage; and (4) Penalties stage. Although the average enforcement process takes less than a year to complete, the allegations mentioned above have proven to be much more complicated and take exceedingly longer.¹¹⁷ Further, the underlying problem with the overall process that is highlighted in this comment is the fact that the NCAA does not have subpoena power,¹¹⁸ thus lacks the ability the compel those outside of its jurisdiction (third-parties) to cooperated in the process.¹¹⁹

A. *The Investigation Stage.*

At the investigation stage, the NCAA enforcement staff gathers information about alleged violations from various sources, including schools, media reports, confidential and anonymous

¹¹⁴ Jeff Barker, *Rise of 7-on-7 football teamsraises questions*, THE BALTIMORE SUN, July 21, 2011, http://articles.baltimoresun.com/2011-07-21/sports/bs-sp-7-on-7-football-20110721_1_7-on-7-high-school-coaches-maryland-coach-randy-edsall.

¹¹⁵ *Id.*

¹¹⁶ Schad, *supra* note 108.

¹¹⁷ NCAA, *Enforcement: Investigations Process*, Oct. 17, 2011, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Investigations>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

sources, and other individuals that provide information.¹²⁰ The NCAA has developed reliable sources in different areas within the purview of collegiate athletics,¹²¹ and thus begins the investigation by interviewing alleged violators both on and off campus.¹²² However, as mentioned above, the NCAA's ability to interview certain alleged third-parties is extremely limited. Although pursuant to the NCAA's cooperative principle¹²³, investigators have access to supporting documentation, including recruiting logs, phone records, compliance files, academic records, emails, bank statements, and credit card receipts,¹²⁴ they cannot force third-parties into providing that same information. If the investigation lacks sufficient evidence of a major violation, the NCAA will close the case and no further action will be taken,¹²⁵ however, if evidence reflects a major violation, the case moves on to the charging stage.¹²⁶

B. The Charging Stage.

The charging stage begins with the NCAA enforcement staff sending a "notice of allegations" to the institution and any involved individuals.¹²⁷ A notice of allegations typically will provide the outlined rules that the institution and individuals have allegedly violated.¹²⁸ At this point in the investigation, there are two available options of the NCAA investigators, schools, and individuals involved. First, if the institution and individuals agree with the alleged facts from which the investigation has produced, the case may enter a "summary-disposition process." In a summary disposition process, the school, student athletes and NCAA enforcement

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ NCAA, *Enforcement: Investigations Process* (Oct. 17, 2011),

<http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Investigations>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ NCAA, *Enforcement: Charging* (May 10, 2011),

<http://www.ncaa.org/wps/wcm/connect/public/ncaa/enforcement/process/charging>.

¹²⁸ *Id.*

investigators agree that the findings of fact of the investigation are not in dispute. Thus, if the school elects to enter the summary-disposition stage, the school need not appear before a Committee to discuss or refute the infractions. The Committee will then proceed to the deliberation process to determine whether the allegations warrant a punishment, and if so, what the punishment will be. However, if all the parties respond to the allegations set forth by the Committee, and determine that a hearing is necessary, the parties will appear in such a hearing. Unfortunately, this stage of the investigation process is plagued with flaws and unfortunate obstacles, because the parties involved may not always be those that committed the most serious offenses. Whether one looks at the Miami, Oregon, or Cam Newton scandal, the NCAA lacked the authority to bring third-parties into the investigation that were considered outside of their jurisdiction, therefore the hearings usually lack an overabundance of important facts.

B. The Hearing Stage.

Most major collegiate athletic scandals, such as those highlighted in this comment, are deliberated before the NCAA Committee on Infractions, composed primarily of individuals with a legal background.¹²⁹ At these hearings, all parties are usually present, frequently represented by legal counsel.¹³⁰ It is suggested, not required, that all student athletes involved with the allegations also attend.¹³¹ Further, the NCAA Enforcement Staff is also present, represented by the primary investigator of the case, director who oversaw the investigation, and vice president of enforcement.¹³² Analogous to a court proceeding, all parties are allowed to provide opening statements, make presentations on each allegation, ask questions, and address closing

¹²⁹ NCAA, *Enforcement: Hearing Stage* (March 29, 2012), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Enforcement/Process/Hearings>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

statements.¹³³ Once the process is finished, the Committee then deliberates and will reach a decision pursuant to the allegations, evidence, and suggested penalties.¹³⁴ Finally, the Committee will prepare a report, with the assistance of the NCAA staff, and release the holding roughly eight to twelve weeks subsequent to the hearing.

B. The Penalty Stage.

The penalty stage is a unique, case by case process, where the Committee reveals the specific punishments that attach to the university and student athletes. Again, the overarching problem that the NCAA has recognized in recent years—the penalties usually do not do the schools and players justice—because the third-parties who had the most involvement with the violations go unscathed. Although a broad range of penalties can be imposed under the purview of the NCAA Enforcement Committee, the reality is that they ultimately are considered too harsh and unwarranted, because players, fans, schools, and the NCAA all deal with the negative residual effects. Unfortunately, until the states and/or federal government bring teeth to the NCAA’s want of stricter enforcement of third-parties, this investigation process will continue to be a flawed system, by no means fault of the NCAA.

V. POSSIBLE SOLUTIONS

A. The NCAA’s Recent Broadening of the Definition of “Agent.”

In response to the high volume of recent third-party scandals, namely those mentioned within this comment, the NCAA proposed to alter its bylaw and broaden the definition of agent.¹³⁵ It recognized that its bylaws governing agents had to reflect the real life problems that were prevalent within college sports, namely with third-parties such as alumni, boosters, street

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Associated Press, *NCAA Proposes Changes in Agent Rules* (Nov. 22, 2011), http://espn.go.com/college-sports/story/_/id/7269279/ncaa-proposal-broaden-definition-sports-agents.

agents, and parents, who were improperly benefiting from student athletes.¹³⁶ Specifically, the NCAA recognized that these third-parties were exempt from its oversight, while at the same time, federal and state laws that governed registered agents did not cover them either.¹³⁷ Thus, in an attempt to deter these third-parties and possible violators, the NCAA broadened its definition of “agent” to include any person who benefits from a student athlete by enrolling at a particular school.¹³⁸ With a broadened definition of “agent,” the hope is that these other third-party representatives who have been putting these student athletes’ eligibility into jeopardy will either fully register as a recognized agent or will no longer commit violations of NCAA bylaws.¹³⁹ Under this new definition, Cam Newton’s father, Cecil Newton, who wanted money from Mississippi State when Cam was being recruited, would fall within the purview of the definition.¹⁴⁰ However, it is still too early to determine whether the NCAA will be able to regulate these third-parties with the broadened definition. Thus, the states and federal government should bring teeth to the new “agent” definition and broaden their own laws, namely SPARTA and each State’s respective agency law.

B. Providing the NCAA with Subpoena-Like Power.

Unfortunately, the reality of the NCAA being granted a subpoena-like power is unlikely; however, the question has been raised within recent years. The question then becomes how the NCAA could possibly be given an ability to force third-party individuals, once or currently associated with an NCAA institution, into cooperating with an investigation. Josephine R. Potuto, Professor at the University of Nebraska College of Law, has acknowledged that it would

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ NCAA Broadens Definition of Agent, Includes Family, YAHOO SPORTS! (Jan. 11, 2012), <http://rivals.yahoo.com/ncaa/football/news?slug=ap-newtonloophole>.

¹⁴⁰ *Id.*

be in the NCAA's investigation committee's interest to align in some way with the government.¹⁴¹ Possibly through a Congressional statutory provision, the NCAA would be afforded the ability to use its subpoena power in only certain circumstances. Highlighting the problem, Potuto discussed the NCAA's process of sanctioning or punishing an institution for non-cooperation after the investigation has been complete.¹⁴² In contrast to the current system, a subpoena power would allow the NCAA investigation committee a better opportunity to retrieve more information from involved third-parties, thus building a full case.¹⁴³

After exploring whether the NCAA could gain some form of power to force third-parties to cooperate, the extent the usage of such a power would likely raise concerns. Having such ability, it would seem reasonable to include a strict burden of proof prior to being able to force a third-party into cooperating. By doing so, the NCAA would have a limited ability which it would not be able to easily manipulate. It seems very likely that the enforcement staff would not allow its investigators to abuse such ability. Any broader use of this powerful ability would "both appear, and be criticized, as a witch hunt."¹⁴⁴ From a policy standpoint, the more sparingly its apparent usage will be, the more leverage the supporters of a subpoena-like power will have. Ultimately, it comes down to the NCAA being granted a powerful tool, which many would argue it is of desperate need, forcing alleged third-party individuals into cooperating.

¹⁴¹ Josephine R. Potuto, *The NCA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, VANDERBILT J. OF ENT. AND TECH. LAW, 257, 290 (2010) (discussing the difference between the criminal law system and the NCAA's lack of ability to use subpoena or contempt power, nor access to court-supervised discovery).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Potuto, *supra* note 136.

C. *States Have Already Begun “Bringing Teeth” to the NCAA’s New Definition of “Agent,” and Other States Should Follow in Line.*

Within recent years, states such as Tennessee and Arkansas have strengthened their state laws with regards to their current governance of athlete agents pursuant to the guidance by the Uniform Athlete Agents Act. In 2011, Arkansas expanded on its laws governing athlete agents, implementing stricter punishments for third-parties, including an athlete’s relatives and unregistered agents who negotiate benefits in exchange for an athlete’s attendance at a school.¹⁴⁵ In addition, Tennessee also broadened its own state laws governing athlete agents to extend to the same third-party problems that Arkansas addressed.¹⁴⁶ The new state laws will hopefully pioneer the movement to bring teeth to the NCAA’s current definition of “athlete agent,” thereby creating a deterrent effect for any future NCAA violations.

i. *Tennessee’s Athlete Agent Reform Act of 2011.*

In response to the recent problems that third-parties have been generating and the effect that they are having on student athletes and schools alike, Tennessee recently amended its sports agent law, effectively closing many of the loopholes highlighted throughout this comment.¹⁴⁷ Essentially, the Athlete Agent Reform Act of 2011 (“AARA”), which took effect on July 1, 2010,¹⁴⁸ strengthens the State’s supervision of informal or unregistered agents, or as the NCAA would call them, third-party recruiters, parents, boosters, runners, alumni, and others alike.¹⁴⁹ This enactment will certainly help support the NCAA’s trend to keep student athletes from

¹⁴⁵ Ark. Code Ann. § 17-16-102.

¹⁴⁶ Tenn. Code Ann. § 49-7-2123.

¹⁴⁷ Tenn. Code Ann. § 49-7-2141.

¹⁴⁸ Tenn. Code Ann. § 49-7-2122.

¹⁴⁹ *Id.*

receiving benefits and compensation from third-parties, and keep them from illegally benefiting from the student athletes for attending a specific college.¹⁵⁰

First, it solves the “Cam Newton Loophole” by incorporating a provision that expanded the previous definition of “athlete agent” to include parents and legal guardians who accept any form of financial benefit or gift on behalf of the student athlete attending a specific university.¹⁵¹ However, the law also seems to solve third-party problems with regards to the “Oregon Recruiting Scandal,” as it would govern previously mentioned third-party recruiters such as Willie Lyles.¹⁵² It conditions that if a third-party, like Lyles, knowingly influences or attempts to influence a student-athlete to accept an athletic scholarship from which the third party receives any compensation or anything of value in return, the relationship between Lyles and the student athlete *must* be disclosed.¹⁵³ (emphasis added). Further, the third-party agent must also provide a written notice of disclosure of the relationship to the student athlete’s parent(s), secretary of state, athletic director, president, and general counsel of the college within 48 hours of disclosing it to the student athlete.¹⁵⁴ Failure to comply with the statute can result in a fine up to \$25,000 or the possibility of confinement of a minimum of one year and a maximum of six.¹⁵⁵ Thus, with

¹⁵⁰ Associated Press, *Tennessee Tightens Agent Laws*, NY TIMES (June 18, 2011), <http://www.nytimes.com/2011/06/19/sports/tennessee-tightens-agent-laws.html>.

¹⁵¹ Tenn. Code Ann. § 49-7-2122.

¹⁵² Tenn. Code Ann. § 49-7-2122 reads, in pertinent part: “[a]ny person who, in this state, knowingly influences, or attempts to influence, any student athlete to accept an athletic scholarship that is offered by a higher education institution from which such person receives any compensation or any other thing of value shall provide a written disclosure of such person's relationship with the higher education institution to the student athlete concurrently with initially making such influence or attempt to influence. Any person who is required to disclose a relationship with a higher education institution to a student athlete pursuant to this subsection (a) shall also provide, within forty-eight (48) hours of providing the written disclosure to the student athlete, a written disclosure of such relationship to the student athlete's parent or legal guardian, the secretary of state, and to the athletic director, president and the general counsel of the higher education institution from which such person has influenced or attempted to influence the student athlete to accept an athletic scholarship.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (“ . . . (c) Failure to provide a written disclosure as required by subsection (a) is a Class E felony punishable by a fine of no more than twenty-five thousand dollars (\$25,000) or confinement for no less than one (1) year nor more than six (6) years, or both.”).

regards to the University of Oregon Scandal, Willie Lyles would have to disclose his relationship with amateur athletes he was “assisting” in finding a school to attend, or would have be in direct violation of the Tennessee Statute § 49-7-2122.

Although statute does not solve all of the problems that have been highlighted by the NCAA within recent years, it should sufficiently serve the goal of deterrence, bringing third-party agent problems to the spotlight, furthering the move towards a uniform state and federal governance of “athlete agents.”

ii. *Arkansas’s Athlete Agent Reform Act of 2011.*

Similar in structure to Tennessee’s Athlete Agent Reform Act of 2011, the Arkansas Athlete Agent Reform Act of 2011 has broadened the definition of “athlete agent” within Arkansas. Many, along with Arkansas’s chief deputy attorney general, Brad Phelps, have recognized Arkansas’s previous athlete agent law as an insufficient deterrent for third parties.¹⁵⁶ The previous statute only imposed misdemeanor charges and a maximum penalty of \$5,000 as a penalty.¹⁵⁷ However, violation of the 2011 Act can subject a person to felony charges and up to \$250,000 in fines per violation.¹⁵⁸ More importantly, the Act now governs any family members of a student athlete who offer or solicit on behalf of themselves or a student athlete, any type of financial benefit or gift prohibited by the NCAA.¹⁵⁹ Fully endorsed by the NCAA, the new Arkansas law has completely changed the landscape of governing third-party runners, recruiters, boosters, and agents within Arkansas, to the same effect as in Tennessee.¹⁶⁰ Thus, if other states

¹⁵⁶ Libby Sander, *Could Arkansas’s New Law on Sports Agents Be a Model for Other States?* (November 16, 2011), <http://chronicle.com/blogs/players/could-arkansass-new-law-on-sports-agents-be-a-model-for-other-states/29247>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; See also Ark. Code Ann. § 17-16-115.

¹⁵⁹ Libby Sander, *Could Arkansas’s New Law on Sports Agents Be a Model for Other States?* (November 16, 2011), <http://chronicle.com/blogs/players/could-arkansass-new-law-on-sports-agents-be-a-model-for-other-states/29247>; See also Ark. Code Ann. § 17-16-115.

¹⁶⁰ *Id.*

create stronger state agency laws and follow in line with Arkansas and Tennessee, the NCAA's current definition of "agent" will likely carry strong weight.

VI. CONCLUSION

Although stronger state agency laws seem to be the current solution to the third-party problems mentioned throughout this comment, the lack of a federal national agency law that governs those third-parties raises concerns. However, the NCAA can only hope that more states continue to follow the trend and strengthen their previous athlete agent laws. If enough states choose to reform their laws to close the loopholes recognized by the NCAA, Congress may have enough reason to create a federal law that addressed the aforementioned third-party problems.