

MEMORANDUM

TO: Committee on Scope & Program
John A. Sebert, ULC Executive Director

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RE: Proposed Study Committee on Revisions to the Uniform Athlete Agents Act

I. Background and Potential Proposal for a Study Committee

The Uniform Athlete Agents Act (UAAA) was promulgated by the Uniform Law Commission (ULC) in 2000, and drafted in response to the urging of the National Collegiate Athletic Association (NCAA). With the immense amount of money at stake for a wide variety of professional athletes and those that represent them, the commercial marketplace in which athlete agents operate is extremely competitive. While seeking to best position one's clients and to maximize their potential income is both legal and good business practice, the recruitment of a student-athlete while he or she is still enrolled in an educational institution can and will cause substantial eligibility problems for both the student and the school, which can in turn lead to severe economic sanctions and loss of scholarships for the institution. The problem becomes even more acute where an unscrupulous agent misleads a student, and especially where the athlete is not aware of the implications of signing the agency agreement or where agency is established without notice to the athletic director of the school.

In general, the UAAA does the following:

- Defines "athlete agent" and sets the scope of the act to apply narrowly to the conduct of directly or indirectly inducing or attempting to induce a student-athlete into an agency contract. However, the act applies broadly to any type of individual that engages in such conduct.
- Except under limited and temporary circumstances, prohibits a person from acting as an athlete agent without registering in the state. The act provides for a uniform registration system and criminal history disclosures, including required disclosure of their training, experience, and education, whether they or an associate have been convicted of a felony or crime of moral turpitude, have been administratively or judicially determined to have made false or deceptive representations, have had their agent's license denied, suspended, or revoked in any state, or have been the subject or cause of any sanction, suspension, or declaration of ineligibility.
- Requires agents to maintain executed contracts and other specified records for a period of five years, including information about represented individuals and recruitment expenditures, which are open to inspection by the state.

- Allows agents who are issued a valid certificate of registration or licensure in one state to cross-file that application (or a renewal thereof) in all other states that have adopted the act.
- Provides student-athletes with a statutory right to cancel an agency contract within 14 days after the contract is signed without penalty.
- Requires athlete-agent contracts subject to the act to disclose the amount and method of calculating the agent's compensation, the name of any unregistered person receiving compensation because the athlete signed the agreement, a description of reimbursable expenses and services to be provided, as well as warnings disclosing the cancellation and notice requirements imposed under the act.
- Requires both the agent and the student-athlete to give notice of the contract to the athletic director of the affected educational institution within 72 hours of signing the agreement, or before the athlete's next scheduled athletic event, whichever occurs first. Where applicable, the agent must provide this notice to a school where he or she has reasonable grounds to believe the athlete intends to enroll.
- Provides educational institutions with a statutory right of action against an athlete agent or former student athlete (several, but not joint, liability) for damages, including losses and expenses incurred as a result of the educational institution being penalized, disqualified, or suspended from participation by an athletics association or conference, or as a result of reasonable self-imposed disciplinary actions taken to mitigate sanctions, as well as costs and reasonable attorney's fees. The act also preserves any remedy the student-athlete may have against the agent for loss of eligibility, etc.
- Prohibits agents from providing materially false or misleading information, promises or representations, with the intent of inducing a student athlete to enter into an agency contract. The act also prohibits furnishing anything of value to a student athlete or another person before that athlete enters into an agency contract. The act provides that an athlete agent may not intentionally initiate contact with a student athlete unless registered under this act, and may not refuse or willfully fail to retain or permit inspection of required records, fail to register where required, provide materially false or misleading information in an application for registration or renewal thereof, predate or postdate an agency contract, or fail to notify a student athlete (prior to signing) that signing an agency contract may make the student athlete ineligible to participate as a student athlete in that sport. The act imposes criminal penalties for violations of these prohibitions.

Since the ULC promulgation of the UAAA, 41 states currently operate under the act. It has received widespread support from colleges and universities across the country, as well as the staunch support of the NCAA. In recent years, however, the act has received increasing pushback from state regulators. Montana repealed the act in 2007, due to a perceived lack of agents to register; Colorado repealed the registration function of the act in 2010 (a year after the UAAA's initial adoption) for similar reasons. ULC commissioners and staff have worked with stakeholders and legislatures to prevent repeal of the UAAA in other states, most significantly Florida in 2011, which has a very large agent population. This activity has stemmed in large part from fiscal concerns regarding the cost of implementing and maintaining a registry versus the number of agents who register and the resulting fee revenue, and general burden on

regulatory staff. In California and Virginia, bills to enact the UAAA were vetoed in 2010 and 2011, respectively, over similar concerns. The problem is compounded by a culture of disregard for registration laws among unscrupulous agents, and systematic lack of reporting and enforcement on several levels.

The NCAA has increasingly developed its ability to detect and investigate potential instances of improper activity and benefits between student athletes and agents. As part of this developing and increasingly sophisticated capability, it has become increasingly evident to them that the “agent problem” is evolving. At the end of 2010 and throughout 2011, a series of allegations including improper agent contacts, relationships, and provision of benefits emerged in several states (notably North Carolina, but also in Alabama, Florida, Georgia, and South Carolina). Allegations also surfaced regarding a prominent college football player and a family member allegedly “shopping” his talents to universities in an attempt at significant financial gain; and college football players at a prominent national program trading memorabilia for various benefits. And, although several years old, memories of the widely-publicized sanctions imposed on the University of Southern California because of related improper activity are still fresh.

The number of alleged scandals, all having broken within a short span of time, has had the positive effect of curtailing activity aimed at repealing the UAAA in states. However, in the wake of these incidents, a number of states (Arkansas, Mississippi, North Carolina, Oklahoma, Oregon, and Texas) introduced legislation in 2011 to amend their versions of the UAAA. Many of these bills featured similar themes, notably a recasting of the definition of “athlete agent” to include “runners,” “financial advisors,” and so-called “brand managers” in an attempt to address evolving agent practices. Other changes include additional informational and reporting requirements related to registration; imposition of security bonds on agents; requiring notice to institutions before agents contact student-athletes; heightened enforcement provisions, administrative fines, and criminal penalties; and attempts to broaden the applicability of penalties for providing benefits to student-athletes. Further, at the close of 2011, the NCAA is actively considering internal legislation to amend its definition of “athlete agent” to more closely reflect evolving agent practices, in similar fashion to what has been seen in the state amendatory legislation (see <http://www.ncaa.com/news/ncaa/2011-07-26/cabinet-seeks-better-define-agents>).

The “agent problem” has once again gained prominence in national media and garnered a great deal of attention in state legislatures – particularly those in states whose institutions have been implicated in the recent scandals. It is apparent that legislative interest will remain high in this topic, particularly as NCAA continues to unearth and pursue violations. Further, the UAAA is now 10 years old. Its provisions and its ability to be enforced have been a focus of this increased interest. Based on many discussions with NCAA throughout the year and a recently held UAAA Summit conducted by them with stakeholders, there appears to be a strong sentiment among the stakeholder community that the evolving nature of the agent problem, coupled with a decade of experience with the UAAA and its successes and challenges, merits a formal review of the act’s provisions. Finally, it is also apparent that, absent a formal review by both the ULC and the NCAA, the states would continue to move forward independently on amendatory legislation, with the net effect of disrupting the hard-fought uniformity on this topic in the vast majority of states.

Therefore, a Study Committee should be formed by the ULC to review and recommend whether revisions to the UAAA should be made on the following issues:

Should the definition of “athlete agent” in the UAAA be expanded, or should the scope of the act be adjusted, to cover evolving, unethical agent practice? The primary common thread in all of the 2011 amendatory legislation has been revision to the definition of “athlete agent” to include “financial advisors,” “runners,” and, to a lesser extent, “brand managers.” There are third parties who are offering services (ie. financial, marketing, etc.) to student-athletes which may jeopardize both the students’ and institutions’ interests and eligibility through impermissible benefits, and these services can also be a steppingstone to agent representation or attempts to funnel the student to a particular agent. A variation of this issue appeared in Mississippi, where amendatory legislation added to the definition of “athlete agent” a person who seeks (for profit) to obtain enrollment for a student-athlete at an institution.

The existing definition broadly applies to any person engaging in conduct covered by the act. However, there is concern that as a criminal statute (in some respects), application of the act may be construed narrowly in the absence of more specific terms, or at the very least, confusion will persist as to the applicability of the act to particular individuals and the ability to enforce it against them.

Does the registration system work, or are there considerations that need to be added? Are there other alternatives to the existing system? In 2010, Colorado repealed the registration portion of their UAAA statute due to a perceived lack of activity (likely false), and the enactment process in several states has been challenged on fiscal grounds related to the implementation of the registration system. Further, even ethical agents object to the prospect of paying fees in multiple, and many, states for the privilege of plying their trade – often, they claim, without any actual benefit or service provided in return. However, the NCAA and the ULC felt very strongly during the original drafting process that registration was an important, core element to the act that provided information about the agent and heightened transparency for student-athletes and institutions. Existing UAAA provisions allowing reciprocity for applications and forms reduce the burden on agents operating in multiple states.

Would moving further, to a fully reciprocal registration and licensing system between the states help? Are there additional informational items or requirements that should be included in the registration? For example, Texas now requires an agent to be certified by a professional association for a particular sport in order to register to represent a player in that sport. Are there other alternatives to registration? Are there elements of the existing registration system that are being adequately addressed by the certification requirements of the player associations? Finally, one aspect of the 2011 amendatory bills in the states may be very desirable: requiring agents to report allegations and violations that happen between initial registration and later renewal, in any state where they are licensed to the regulators in all states where they are licensed, in a timely fashion.

Should the act require agents to procure a surety bond prior to engaging in conduct governed by the act? The original Drafting Committee considered and rejected the idea of requiring a surety bond for agents. At the time, it was thought that surety bonds were not available to insure against the activity covered by the UAAA or against criminal activity in general. Even if available and sufficient to cover administrative or criminal fines, the amount of any bond would likely not be sufficient to cover the actual damages incurred by an institution. Finally, it was felt that surety bonds would only harm scrupulous agents attempting to comply with the act, and may have the undesired effect of discouraging good actors. However, several of the 2011 amendatory bills included surety bond requirements and any new Study or Drafting Committee should at least examine whether circumstances have changed sufficiently to merit their inclusion in the UAAA.

Should agents be required to notify educational institutions prior to contacting a student-athlete that is enrolled? The original Drafting Committee also considered and ultimately rejected this concept, based on the idea that the law should not prevent two consenting adults of legal contracting age from engaging in the contracting process. Further, the Committee felt there were Constitutional concerns with restricting or prohibiting association between the two parties. However, over the past decade, it has become common practice for many universities to require agents to register with them prior to contacting their athletes, and several of the 2011 amendatory bills included provisions requiring notice. Several went further, starting with a requirement for pre-approval, but these bills either died or were amended to the lesser standard of notice. Have there been any changes over the past decade that would warrant reconsideration of this issue?

Should agents be prohibited from representing both student-athletes and coaches from the same institution? In at least one of the recent and prominent national scandals, allegations have included improper conduct by coaching staff in directing students to particular agents and allowing their agents access to student-athletes at their programs. Should this conflict of interest be prohibited?

Are there elements that could be changed in or added to the act that would clarify enforcement authority, or make the act more likely to be enforced by state regulators? One of the primary concerns about the UAAA from stakeholders is confusion over enforceability. The existing act provides a cause of action for educational institutions against agents, preserves any cause of action for student-athletes against agents, provides for administrative fines, as well as criminal penalties (misdemeanor or felony). However, outside of definitional adjustments, are there modifications that might increase the likelihood of enforcement? Could the NCAA be granted subpoena authority and any additional tools to legally enforce the spirit of the act, such as a civil cause of action for damages? Is there an effective and permissible way to link violation of NCAA or conference rules to liability under the act? Could prohibitions on providing anything of value to student-athletes be broadened, beyond requiring the intent to induce them into a contract, focusing on harm to the institution or the athlete's eligibility?

Commentary by the Attorney General community indicates that not all states' Attorneys General have blanket or implied ability to enforce criminal laws outside of narrowly defined windows – meaning that enforcement may be left to local prosecutors and courts, which may be overburdened to begin with and may be reluctant to challenge or jeopardize the local college in their hometown venue. Could the UAAA be clarified to fill this perceived gap in authority, and provide more flexibility for state enforcement?

Are there additional matters that should be considered in any potential revision to the act? Given the nature of agent issues and the context in which they arise, it is possible that any number of other issues may warrant discussion by any Study or Drafting Committee. If approved, the charge for any such Committee would hopefully reflect the flexibility to explore any other issues with the NCAA and other stakeholders.

II. Criteria for Uniform Acts

The ULC has several basic considerations that are helpful in determining whether a Study or Drafting Committee on a particular topic is appropriate. A Committee to consider possible revisions to the UAAA would meet these criteria, as follows:

Is uniformity of state law for the proposed subject matter desirable and realistic? With 41 enactments of the original, underlying act, the potential for widespread acceptance and uniformity is ultimately very high. Enactment of modernized amendments would continue to reduce or eliminate conflicts between states and meet the emerging and evolving needs of states to regulate evolving agent conduct and the frequently interstate business of agents.

What have the states already done with regard to this subject? As mentioned above, the vast majority of states have enacted the underlying UAAA, but four states have enacted modifications based on perception of the evolving problem. More are likely to follow suit, and a Study or Drafting Committee would enable the ULC and NCAA to address issues and vet them with stakeholders in an appropriate and productive forum.

Does the proposed project require changes in federal laws or regulations? While there is federal law in this area (the Sports Agent Responsibility and Trust Act of 2004, 15 U.S.C. 7801-7807), it is not preemptive and not in conflict with the UAAA. While there is some question as to whether a central or federal registry system may be desirable, federal law did not create such and state law remains the primary vehicle for this function.

What organizations or interest groups are likely to have an interest in the subject matter of the proposed project and are they likely to support or oppose a uniform or model act in this area? As is typical with all uniform acts, the ULC would invite the American Bar Association to appoint an official Advisor. Further, the ULC may wish to consider inviting the ABA Entertainment and Sports Industries Forum, and possibly the Criminal Justice Section, to identify a potential Advisor or Observers. Further consultation with the ULC legislative staff will presumably identify additional persons of interest. At a minimum, potential stakeholders that may wish to participate in the work of a Study Committee and any Drafting Committee, should one ultimately be appointed, would include: the NCAA; the National Association of Secretaries of State (NASS) and its individual members; the National Association of Attorneys General (NAAG) and its individual members; the National Football League (NFL) and NFL Players Association; the National Basketball Association (NBA) and NBA Players Association; the National Hockey League (NHL) and NHL Players Association; Major League Baseball (MLB) and MLB Players Association; Major League Soccer (MLS) and MLS Players Union; national associations for colleges and universities and individual institutions, athletic directors, and coaches; individual athlete agents; and local law enforcement entities.

Are there resources available to support the development of the proposed project? The NCAA provided a primary source of subject matter expertise, along with numerous stakeholders, during the original drafting of the UAAA. The development of any revisions to the act would likely enjoy at least the same level of interaction and participation. The NCAA also provided some financial support for the development of the original UAAA. While there have been no discussions with them or any other groups or institutions, it is possible that there may be neutral parties from which the ULC might request assistance.