

MEMORANDUM

March 2014

Background on the UAAA and Issues to be Considered at the March Drafting Committee Meeting

I. Background

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, 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.
- Defines student-athlete as an individual who "engages in, is eligible to engage in, or may be eligible in the future to engage in, any intercollegiate sport." Under that definition, high school students were clearly student-athletes because the individual may be eligible in the future to engage in intercollegiate athletics.
- Except under limited and temporary circumstances, prohibits an individual 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 his or her training, experience, and education, whether he or she or an associate has been convicted of a felony or crime of moral turpitude, has been administratively or judicially determined to have made false or deceptive representations, has had his or her agent's license denied, suspended, or revoked in any state, or has 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.

II. At the October 2013, meeting, the drafting committee considered the following issues:

DEFINITION OF "ATHLETE AGENT."

The primary common thread in the amendatory legislation of the past three years 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 (i.e., 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.

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.

Notwithstanding how broadly the UAAA definition was cast, some states, most notably Oregon and California, have expanded the definition of student-athlete to specifically include elementary and secondary schools and in the case of Oregon, to also limit the definition to individuals attending an educational institution in the state. For example, in California, a student-athlete is “any individual admitted to or enrolled as a student, in an elementary or secondary school, college, university, or other educational institution if the student participates, or has informed the institution of an intention to participate, as an athlete in a sports program where the sports program is engaged in competition with other educational institutions.” Oregon, on the other hand, amended its athlete agent law to add a definition of educational institution which includes public or private elementary or secondary school, community college, university or other educational institution and revised the definition of student-athlete in 2013 to read as follows: “Student-athlete means an individual attending an educational institution within this state who engages in, is eligible to engage in, or may be eligible in the future to engage in any interscholastic or intercollegiate sport...” Is it necessary to expand the definition to specifically include elementary and secondary schools? Is it good policy to limit the definition to individuals attending schools within the state, since it would preclude a state that hosted a bowl game from prosecuting an individual acting in the state as an athlete agent with respect to an individual who is not enrolled in an educational institution in the state?

Perhaps even more significant, while California has refined the definition of student-athlete as described above, the substantive provisions of the California act appear to apply to all athletes, not just student-athletes. For example, under the California act, an agent contract is between a person and an athlete agent as opposed to being between a student-athlete and an athlete agent. Similarly, both a professional athlete and a student-athlete have a cause of action against an athlete agent, and an athlete agent who violates the act is guilty of a misdemeanor, regardless of whether the violation involved a professional athlete or a student-athlete. However, the disgorgement provision of the California act only applies to violations of the act relating to student-athletes.

The March 2014, draft revises the definition of athlete agent to present two alternative definitions of athlete agent. Alternative A is based on the Alternative B from the October draft which was based on the existing California definition with the addition of the so-called Cam Newton provision where a person who for financial gain secures the enrollment of a student-athlete at a particular institution is an agent. Alternative A specifically **excludes** from the definition of athlete agent individuals providing professional services under a license to provide the professional service, such as doctors, lawyers, accountants, financial planners, stockbrokers, etc., except to the extent the individual provides services that otherwise qualify the individual as

an athlete agent. Thus, an attorney who is consulted by a student-athlete or the family of the student-athlete to render legal advice on the terms of a contract would not be an athlete agent. An individual who recruits or solicits the athlete to enter into an agency contract would be an agent, even if the individual is an attorney. Alternative A has been revised from the October version to limit the regulation of the athlete agent and athletes to student athletes.

Alternative B is based on the Pogge-Agnone memo. It is the same as Alternative A except that rather than excluding licensed professionals acting within the license and not otherwise meeting the definition of athlete agent, it includes anyone, whether licensed or not, who, for compensation, represents a student-athlete for a purpose related the athlete's participation in athletics; advises the athlete on finances, business pursuits or ventures, or career management decisions; manages the business affairs of the athlete, or markets, publicizes; or promotes the student-athlete.

Additional issue: An additional issue has been raised since the last meeting involving the question of whether athlete agents should include entities. As discussed earlier, one of the motivations for amending the act is the number of changes that have been made in various states in the definition of athlete agent to deal with individuals who provide services to student athletes, such as financial planners, business advisers, brand managers, etc, or who operate as extensions of the agent, such as runners, etc.

It has been suggested that one solution to the problem may be to require registration of a business entity that employs individuals who provide services to student athletes and require the entity to identify the employees of the entity who provide the services, much as is done in the new form contained in Section 5(a), discussed later. It is not clear whether licensing the entity would be in addition to or in lieu of licensing the individuals or how it would be done if the employer was a sole proprietor with employees.

REGISTRATION SYSTEM DESIGN.

In 2010, Colorado repealed the registration portion of its UAAA statute due to a perceived lack of activity. 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. Is there a way to revise the reciprocity provisions to make it easier to register in second and subsequent states? Alternatively, is there a way to create some centralized registry such as is done for the securities industry under FINRA or is there some way to delegate the registration function to stakeholders such as the unions or players associations for the respective professional sport?

The March draft replaces existing Section 5 (a), which contains the information required to register in general terms, with the detailed form developed by the Pogge subcommittee.

The remainder of Section 5 of the March draft deals with three alternatives for the concept of reciprocal licensing in subsection (b) of Section 5.

Alternative A is the existing UAAA provision, which allows an agent licensed in one state to submit the application to the second state where the second state would treat it as an original application.

Alternative B is the version from the October meeting draft, which is a true reciprocal licensing provision. If a person licensed in good standing in one state presents the license in a second state, the second state would be required to issue a license unless the license was not in good standing, the licensing requirements of the other state were not as strict as those of the second state, and there is no action pending in any state in which the applicant is licensed as an athlete agent against the agent or the certificate of registration.

Alternative C is essentially the same as Alternative B except that the license would only be a temporary license and the individual could act as an athlete agent under the temporary license for all purposes for a limited term except signing an agency contract.

The March draft also revises Section 6(e), which relates to renewal of licenses based on out of state renewals to provide two alternatives. The alternatives depend upon which version of Section 5 (b) is adopted. If Alternative A for Section 5(b) is adopted, then Alternative A for Section 6(e) would be appropriate. If either Alternative B or C to Section 5 (b) was adopted, then, to provide for reciprocal renewal of registration based on out-of-state renewal, Alternative B or C for Section 6 (e) would be appropriate.

SURETY BOND.

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 amendatory bills of the past three years included a surety bond requirement.

The Committee decided at the October meeting that a surety bond requirement was too expensive and not generally available.

NOTIFICATION OF EDUCATIONAL INSTITUTIONS PRIOR TO CONTACTING A STUDENT-ATHLETE.

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 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.

The March draft revises Section 14 which, in the October draft, required an athlete agent to notify an educational institution at which a student athlete is enrolled before initiating contact with the athlete. The March draft revises the requirement to apply before the agent communicates or attempts to communicate, as defined, with the athlete or another individual to influence a student athlete and provides that if the communication is initiated by the athlete or other person that the agent would be required to notify the institution with 10 days. The March draft also adds a provision requiring an athlete agent with a pre-existing relationship (other than an agency contract) with a student athlete, to notify the institution at which the athlete enrolls within 10 days of enrollment.

The March draft also adds a new subsection (c) to Section 11 to require an athlete agent with a pre-existing agency contract with a student athlete to notify an educational institution at which the athlete enrolls within 72 hours of enrollment.

REPRESENTATION OF 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 a coaching staff in directing students to particular agents and allowing their favored agents access to student-athletes at their programs.

The March draft adds a new definition of recruit or solicit. The original UAAA defined athlete agent to include anyone who, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract, which could include a coach. Recruit or solicit was not defined but, as the comments to the original act made clear, the definition of athlete agent was intended to be very broad and did not necessarily require that compensation be involved. Certain family members were excluded from the definition. The new definition excludes from the definition advice from family members, friends, and coaches that is not given for compensation, or the expectation of compensation from the agent so that advice given in that circumstance would not make the individual an athlete agent.

ENFORCEMENT AUTHORITY.

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 and student-athletes, preserves any cause of action for student-athletes against agents, and provides for administrative fines and criminal penalties (misdemeanor or felony). At least one

state has created a cause of action against an athlete agent for a “league, conference, association, or federation of educational institutions if any member of the league, conference, association, or federation is injured by an act of the agent.” Should civil enforcement under the act be expanded beyond the student-athlete and the educational institution?

The issue was considered extensively at the October meeting but here are no substantive differences on the October and March drafts on the issue.

STUDENT ATHLETE

The March draft adds a definition of educational institution and revises the definition of Student Athlete to extend the definition to specifically include students in elementary and secondary schools, based on the Oregon law.