

## Majoring in Infractions: The Evolution of the National Collegiate Athletic Association’s Enforcement Structure

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## INTRODUCTION

In August 2011, Mark Emmert, the president of the National Collegiate Athletics Association (NCAA),<sup>1</sup> convened a retreat of fifty college and university presidents of NCAA Division I member institutions.<sup>2</sup> The ostensible goal of the meeting was to examine what President Emmert characterized as the erosion of the public's trust in intercollegiate athletics.<sup>3</sup> The presidents concluded that a series of issues threatened to undermine the four values on which the collegiate model of intercollegiate athletics is premised: (1) the primacy of student-athletes' academic and athletic success; (2) intercollegiate athletics as a reflection of the values of higher education and the values of shared responsibility and accountability; (3) amateurism as the principle that guides the relationship between student-athletes and their institutions; and (4) intercollegiate competition must be guided by the principle of fair opportunity to compete.<sup>4</sup> The perceived threats to the collegiate vision of intercollegiate athletics include: "[a] risk-reward analysis of the intentional violation of national policy that fails to deter violations and that often is based on financial pressure,"<sup>5</sup> institutions and individuals prioritizing winning over integrity, and public and member institution distrust of both the NCAA's ability to police itself and of the process by which the NCAA investigates and

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<sup>1</sup> A voluntary association, the NCAA is comprised primarily of approximately 1200 private and public colleges and universities. *See* About NCAA Membership, NCAA.ORG, <http://www.ncaa.org/about/who-we-are/membership> (last visited Mar. 4, 2014). The colleges and universities are organized in three membership classifications, Divisions I, II, and III. This Article focuses on the Division I enforcement process.

<sup>2</sup> NCAA WORKING GROUP ON COLLEGIATE MODEL—ENFORCEMENT, FINAL REPORT 2 (2012) [hereinafter ENFORCEMENT REPORT], *available at* [http://www.nacwaa.org/sites/default/files/images/NCAA%20Final\\_Report\\_Oct%202012.pdf](http://www.nacwaa.org/sites/default/files/images/NCAA%20Final_Report_Oct%202012.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1.

adjudicates rules violations and imposes penalties for such violations.<sup>6</sup>

This Article explores the NCAA enforcement structure, one of five areas of concern that the presidents and chancellors at the retreat believed could, if left unaddressed, significantly denigrate the collegiate model of intercollegiate athletics.<sup>7</sup> In particular, the Article examines recommendations of the Working Group on Collegiate Model—Enforcement (hereinafter the Enforcement Working Group), which led to legislation that substantially revamps the NCAA enforcement structure. The Enforcement Working Group is one of five working groups established by the NCAA Division I Board of Directors<sup>8</sup> following the August 2011 presidential retreat. The working groups were charged with evaluating threats to the collegiate model of intercollegiate athletics<sup>9</sup> and promulgating legislation to address them.<sup>10</sup>

The specific charge of the Enforcement Working Group was to promulgate NCAA legislation intended to (1) develop a multilevel violation structure; (2) expedite the processing of infractions cases; (3) enhance the NCAA's penalty structure for violations of its regulations; and (4) reinforce the sense of shared responsibility for rules compliance among the constituent individuals and entities involved in intercollegiate athletics.<sup>11</sup> The presidents further

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<sup>6</sup> *Id.* at 2; see generally Timothy Davis & Christopher T. Hairston, *NCAA Deregulation and Reform: A Radical Shift of Governance Philosophy?*, 92 OR. L. REV. 77 (2013) (discussing other areas of concerns).

<sup>7</sup> ENFORCEMENT REPORT, *supra* note 2, at 2–3. The four other concerns identified by the presidents are: the standard for measuring student-athlete academic success, “the allocation of financial resources within intercollegiate rules,” student-athletes’ financial well-being, and the process for promulgating NCAA rules and the expectation of shared responsibility for compliance. *Id.* For a detailed discussion of these areas of concern, see generally Davis & Hairston, *supra* note 6.

<sup>8</sup> The NCAA Division I Board is an eighteen-member body comprised of college presidents, athletic conference commissioners, and athletic directors. NCAA, 2013–14 NCAA DIVISION I MANUAL § 4.2.1 (2013) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D114.pdf>. The Board’s responsibilities include establishing and directing general policy, establishing strategic plans and adopting and defeating legislation, and “[r]eview[ing] and approv[ing] policies and procedures governing the enforcement program.” *Id.* § 4.2.2.

<sup>9</sup> See *supra* text accompanying notes 4–6.

<sup>10</sup> Davis & Hairston, *supra* note 6, at 79. The working groups are the: Enforcement Working Group, Rules Working Group, Student-Athlete Well-Being Working Group, Resource Allocation Working Group, and Division I Committee on Academic Performance. *Id.*

<sup>11</sup> ENFORCEMENT REPORT, *supra* note 2, at 4.

instructed the Enforcement Working Group to fulfill its charge while cognizant of the NCAA's four core principles.<sup>12</sup> Working within the framework of these directives, the Enforcement Working Group developed recommendations for a new enforcement structure that seeks to foster the following principles: (1) fairness to all participants involved in the enforcement process, including institutions that comply with NCAA regulations; (2) holding those responsible for rules violations (i.e., institutions, coaches, administrators, and student-athletes) accountable for their conduct at individual and institutional levels; (3) an appreciation for the notion of shared responsibility; and (4) enhancing the effectiveness and efficiency of an infractions process that produces easily comprehensible, legitimate, and transparent results.<sup>13</sup>

It was within the context of the forgoing concerns and guiding principles that the Enforcement Working Group recommended changes to the NCAA's enforcement structure, including the processes by which alleged infractions are evaluated and adjudicated and how penalties for rules infractions are categorized.<sup>14</sup> The Enforcement Working Group's recommendations are reflected in NCAA legislation, approved by the NCAA Board of Directors, effective as of August 1, 2013.<sup>15</sup> The Board's approval of enforcement-related reforms comprise one component of the NCAA's effort to deregulate its bylaws, which began in 2011.<sup>16</sup> NCAA deregulation seeks to simplify NCAA rules and regulations so that they focus on NCAA core principles. Deregulation efforts also aim to establish a governance philosophy that emphasizes fairness of competition rather than competitive equity.<sup>17</sup>

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<sup>12</sup> *Id.* at 3–4 (identifying the core principles).

<sup>13</sup> *Id.* at 4–6.

<sup>14</sup> *Id.* at 4–5.

<sup>15</sup> NCAA MANUAL, *supra* note 8, § 19.01.1; Gary Brown, *Board Adopts Tougher, More Efficient Enforcement Program*, NCAA.ORG (Oct. 30, 2012), <http://www.ncaa.org/about/resources/media-center/news/board-adopts-tougher-more-efficient-enforcement-program>.

<sup>16</sup> Associated Press, *NCAA Approves Tougher Sanctions*, ESPN.COM (Oct. 30, 2012), [http://espn.go.com/college-sports/story/\\_/id/8572310/ncaa-approves-tougher-sanctions-rule-breakers](http://espn.go.com/college-sports/story/_/id/8572310/ncaa-approves-tougher-sanctions-rule-breakers).

<sup>17</sup> Davis & Hairston, *supra* note 6, at 84. A competitive equity model attempts to place all athletic programs on an equal footing. *Id.* A fairness-of-competition model recognizes the diversity of institutions that compete at the Division I level. Under this model, schools will not be penalized for natural or economic advantages, including geographic location and a larger resource base. *Id.* at 86.

Our examination of the new enforcement structure begins with a discussion in Part I of the alleged deficiencies in the pre-August 2013 enforcement structure.<sup>18</sup> Part II(A) discusses the pre-August 2013 enforcement structure and establishes the predicate for examining the new enforcement model.<sup>19</sup> Part II(A) also discusses changes to the composition of the Committee of Infractions and how it will process infractions cases.<sup>20</sup> Part II(B) briefly discusses the changes to the Infractions Appeals Committee, which remains largely unchanged.<sup>21</sup> Part II(C) addresses a key feature of the new structure: the classification of infractions into levels.<sup>22</sup> Important aspects of the new structure, discussed in Part II(D), include: (1) new penalty guidelines;<sup>23</sup> (2) holding head coaches accountable for infractions committed by assistant coaches;<sup>24</sup> and (3) the emphasis on the principle of shared governance of intercollegiate programs.<sup>25</sup> Part II(D) also examines two infractions cases decided under the pre-2013 structure and assesses how the infractions would likely have been categorized and the penalties that would have been imposed if the cases had been adjudicated under the new structure.<sup>26</sup> Part III concludes that the new enforcement structure could effectively address some of the shortcomings of the pre-August 2013 enforcement model.<sup>27</sup>

## I

### DEFICIENCIES IN THE PRE-AUGUST 2013 ENFORCEMENT STRUCTURE

The new Division I enforcement structure was promulgated against a backdrop of harsh criticism of the pre-August 2013 structure.<sup>28</sup> Critics pointed to an infractions case involving the University of Miami's intercollegiate athletics program as emblematic of the

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<sup>18</sup> See *infra* text accompanying notes 29–49.

<sup>19</sup> See *infra* text accompanying notes 50–74.

<sup>20</sup> See *infra* text accompanying notes 79–86.

<sup>21</sup> See *infra* text accompanying notes 113–25.

<sup>22</sup> See *infra* text accompanying notes 169–98.

<sup>23</sup> See *infra* text accompanying notes 225–74.

<sup>24</sup> See *infra* text accompanying notes 275–83.

<sup>25</sup> See *infra* text accompanying notes 285–96.

<sup>26</sup> See *infra* text accompanying notes 297–308.

<sup>27</sup> See *infra* text accompanying notes 309–10.

<sup>28</sup> Gary Brown, *DI Board of Directors Approves Overhauled Enforcement Structure*, NCAA.COM (Oct. 30, 2012, 16:41 EDT), <http://www.ncaa.com/news/ncaa/article/2012-10-30/di-board-directors-approves-overhauled-enforcement-structure>.

problems that undermined the credibility and threatened the legitimacy of the NCAA's enforcement mechanism. In the Miami case, the NCAA employed improper tactics while investigating allegations that Nevin Shapiro, a University of Miami booster<sup>29</sup> and convicted felon, provided thousands of dollars in impermissible benefits to Miami athletes between 2002 and 2010.<sup>30</sup> The organization also failed to adhere to its investigative practices by, among other things, hiring one of Shapiro's attorneys, who used her subpoena power in Shapiro's unrelated bankruptcy proceeding to obtain information that the NCAA could not access.<sup>31</sup>

Although less dramatic than the events that transpired in the Miami case, other infractions decisions revealed structural deficiencies in the NCAA enforcement process.<sup>32</sup> These deficiencies threatened the NCAA's legitimacy and weakened member institutions' and the public's trust in its ability to effectively handle rules violations. The call for a new enforcement structure, particularly as it relates to penalties imposed for rules violations, arose from the ground up as a survey of the NCAA membership revealed a desire that the

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<sup>29</sup> Booster is the term commonly used to refer to a representative of the institution's athletic interest. Booster status is acquired by virtue of a person promoting, or being a part of an entity that promotes, an institution's athletics program; making financial contributions to an athletic department or booster organization; either assisting, or being requested to assist, the athletics department in recruiting prospective student-athletes; and providing benefits to enrolled student-athletes or their parents. NCAA MANUAL, *supra* note 8, § 13.02.14(a)–(e). Once acquired, booster status cannot be disavowed and continues indefinitely. *Id.* § 13.02.14.1.

<sup>30</sup> Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011, 5:37 PM), [http://sports.yahoo.com/investigations/news?slug=cr-renegade\\_miami\\_booster\\_details\\_illicit\\_benefits\\_081611](http://sports.yahoo.com/investigations/news?slug=cr-renegade_miami_booster_details_illicit_benefits_081611) (detailing Shapiro's alleged provisions of cash, jewelry, paid trips and other benefits to athletes); NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF MIAMI PUBLIC INFRACTIONS REPORT (2013), *available at* <http://www.scribd.com/doc/178100879/NCAA-University-of-Miami-Public-Infractions-Report> (providing a detailed discussion of the infractions committed by the University of Miami and Shapiro).

<sup>31</sup> Jonathan Mahler, *Could the Miami Scandal Bring Down the NCAA?*, BLOOMBERGVIEW (Feb. 27, 2013, 6:30 PM ET), <http://www.bloomberg.com/news/2013-02-27/could-the-miami-scandal-bring-down-the-ncaa-.html>. The NCAA retained a law firm to conduct an investigation of the improprieties in its investigation of the Miami case. That report can be found at: CADWALADER, WICKERSHAM & TAFT LLP, REPORT ON THE NCAA'S ENGAGEMENT OF A SOURCE'S COUNSEL AND USE OF THE BANKRUPTCY PROCESS IN ITS UNIVERSITY OF MIAMI INVESTIGATION (2013), [http://i.turner.ncaa.com/dr/ncaa/ncaa/release/sites/default/files/files/NCAAMiamiEnforcement\(1\).pdf](http://i.turner.ncaa.com/dr/ncaa/ncaa/release/sites/default/files/files/NCAAMiamiEnforcement(1).pdf).

<sup>32</sup> Greg Bishop, *In N.C.A.A. v. Oregon, Justice Waits Again*, NCAA.COM (Apr. 16, 2013), [http://www.nytimes.com/2013/04/17/sports/ncaafotball/ncaas-case-against-oregon-moves-slowly.html?\\_r=0](http://www.nytimes.com/2013/04/17/sports/ncaafotball/ncaas-case-against-oregon-moves-slowly.html?_r=0).

organization impose more stringent penalties on violators.<sup>33</sup> Indeed, a major impetus for reform was the inability of the pre-August 2013 enforcement structure to sufficiently deter potential rules violators.<sup>34</sup>

The old enforcement regulatory structure failed to incentivize institutions and institutional personnel, particularly coaches, to comply with or encourage compliance with regulations that implicated NCAA core values. Critics of the structure argued that the NCAA's reluctance to impose sanctions (e.g., television and post-season competition bans) that impacted institutional financial interests prompted individuals and institutions to engage in a risk-reward analysis.<sup>35</sup> Involved parties often concluded, pursuant to the risk-reward analysis, that the benefits derived from violating NCAA regulations outweighed the potential penalties that the NCAA would likely impose.<sup>36</sup> In engaging in a risk-reward analysis, those considering violating NCAA rules examined previous cases in which athletic programs rebounded quickly notwithstanding the imposition of penalties.<sup>37</sup> Detractors of the NCAA's enforcement process also argued that inconsistency in results from one infractions case to another reduced the deterrent effect of penalties and the entire enforcement process.<sup>38</sup> Moreover, those critics also claimed that inconsistency not only eroded the "moral authority of the NCAA, but . . . sap[ped] the rulings of their full deterrent effect because they

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<sup>33</sup> Gary Brown, *Violator Beware: Penalties in New Enforcement Structure Pack a Punch*, NCAA.ORG (Jan. 9, 2013), <http://www.ncaa.org/about/resources/media-center/news/violator-beware-penalties-new-enforcement-structure-pack-punch>.

<sup>34</sup> ENFORCEMENT REPORT, *supra* note 2, at 5.

<sup>35</sup> *Id.*

<sup>36</sup> Brad Wolverton, *Do NCAA Rules Work?*, CHRON. HIGHER EDUC. (Apr. 19, 2012), <http://chronicle.com/blogs/players/do-ncaa-rules-work/30019>; Brown, *supra* note 33; see also Eric Prisbell, *NCAA to Widen Powers*, USA TODAY, Aug. 3, 2012, at 6C; Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement, and Infractions Processes: The Laws That Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 311–12 (2010) (arguing for imposing penalties of major violations that impact those aspects of running an intercollegiate athletics program that matter most to coaches).

<sup>37</sup> Brown, *supra* note 33; Steve Megargee, *Sanctions Aren't Deterring Recruits from Scandal-Ridden Programs*, SL.COM (Mar. 22, 2012, 8:17 AM), <http://sportsillustrated.cnn.com/2012/football/ncaa/03/21/ncaa.sanctions.recruiting/> (providing examples where the imposition of sanctions failed to adversely impact an institution's recruitment of high-caliber athletes).

<sup>38</sup> Stephen A. Miller, *The NCAA Needs to Let Someone Else Enforce Its Rules*, ATLANTIC (Oct. 23, 2012, 4:16 PM ET), <http://www.theatlantic.com/entertainment/archive/2012/10/the-ncaa-needs-to-let-someone-else-enforce-its-rules/264012>.

seem untethered to any defined principle.”<sup>39</sup> For example, critics argued that “a comparison of recent challenges to the amateur status of several high-profile college basketball players yields few discernible rules capable of application in future cases.”<sup>40</sup> Concerns relating to the lack of effective deterrents and inconsistency of infraction decision outcomes hastened the call by some that the NCAA delegates its enforcement responsibilities to an external organization as a means of enhancing the credibility of the NCAA’s enforcement process.<sup>41</sup>

The penalties imposed on coaches were perceived to have failed to deter violations of core NCAA regulations and to hold coaches accountable for violations within their programs. In the past, coaches who violated rules escaped the consequences of their infractions by retiring or moving to more lucrative programs or professional sports organizations.<sup>42</sup> The same has been true for student-athletes who violate rules but leave their institutions to play professional sports or because they exhaust their athletic eligibility.<sup>43</sup>

These aspects of the pre-August 2013 enforcement structure created another major source of consternation. Critics argued that not only did the enforcement structure fail to adequately deter and penalize individuals responsible for committing violations, it also substantially harmed the innocent, particularly student-athletes.<sup>44</sup> According to these critics, imposing penalties on innocent parties is inconsistent with the NCAA’s reason for imposing sanctions—to deter violations of its regulations.<sup>45</sup>

Other concerns that prompted a call for a new enforcement structure include: (1) the lengthy period between the initiation of an investigation and the Committee on Infractions’ determination as to whether infractions were committed and if so, the penalties to be

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B.C. L. REV. 551, 568–70 (2011) (providing examples of coaches who accepted more lucrative employment after leaving athletic programs, of which they were in charge, prior to or after the institution had been sanctioned by the NCAA).

<sup>43</sup> *Id.* at 571–72.

<sup>44</sup> *Id.* at 574–75 (articulating the criticism, but recognizing that this might be unavoidable given the limited regulatory reach of the NCAA to police the behavior of individuals no longer associated with NCAA member institutions).

<sup>45</sup> Mary Elizabeth Kane, *When the NCAA Strikes, Who is Called Out?*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 119, 141 (2011).

imposed;<sup>46</sup> (2) the enforcement of rules relating to inconsequential matters,<sup>47</sup> which strained the NCAA's limited enforcement resources and reduced the organization's ability to focus on significant infractions;<sup>48</sup> (3) the two-tiered structure that categorized violations as either major or secondary and created arbitrariness in the penalties imposed,<sup>49</sup> which often failed to reflect the magnitude of the infraction committed;<sup>50</sup> and (4) a failure of the structure to provide institutions and personnel with sufficient guidance as to which types of conduct would result in particular types of punishment.<sup>51</sup>

## II

### THE PRE- AND POST-AUGUST 2013 ENFORCEMENT STRUCTURE

#### *A. NCAA Enforcement Staff and the Committee on Infractions*

##### *1. Pre-August 2013 Enforcement Structure*<sup>52</sup>

The NCAA enforcement structure is initiated when the organization receives information of a possible violation of its regulations.<sup>53</sup> Apart from institutions, which possess an affirmative obligation for assuring that their athletics programs comply with NCAA bylaws,<sup>54</sup> the enforcement structure consists of three principal players—the NCAA enforcement staff,<sup>55</sup> the Committee on

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<sup>46</sup> See ENFORCEMENT REPORT, *supra* note 2, at 4–5 (noting that a goal of the Enforcement Working Group was to expedite the handling of cases).

<sup>47</sup> See Eamonn Brennan, *New NCAA Rules: Fast, Harsh and Nuanced*, ESPN.COM (Oct. 30, 2012, 11:35 AM ET), [http://espn.go.com/blog/collegebasketballnation/post/\\_/id/66180/new-ncaa-rules-fast-harsh-and-nuanced?src=mobile](http://espn.go.com/blog/collegebasketballnation/post/_/id/66180/new-ncaa-rules-fast-harsh-and-nuanced?src=mobile).

<sup>48</sup> Miller, *supra* note 38.

<sup>49</sup> Brad Wolverton, *NCAA Board to Weigh Stiffer Penalties for Programs That Break Rules*, CHRON. HIGHER EDUC. (July 30, 2012), <http://chronicle.com/article/NCAA-Board-to-Weigh-Stiffer/133261/>.

<sup>50</sup> Miller, *supra* note 38 (arguing the NCAA's conflict of interest discouraged it from imposing penalties—such as television bans that would negatively impact the organization's brand and its financial interests—and that penalties for seemingly similar violations were disparate).

<sup>51</sup> Brennan, *supra* note 47.

<sup>52</sup> Note that where the 2013-14 NCAA Division I Manual made no appreciable changes to the pre-2013 enforcement structure, references to bylaws will be to the 2013-14 NCAA MANUAL.

<sup>53</sup> See generally NCAA MANUAL, *supra* note 8, § 19.5.1.

<sup>54</sup> *Id.* § 19.2.1; see also *infra* text accompanying notes 247–52 (discussing institutions' compliance responsibilities).

<sup>55</sup> NCAA MANUAL, *supra* note 8, § 19.5.

Infractions (“COI”)<sup>56</sup> and the Infractions Appeals Committee (“IAC”).<sup>57</sup>

The NCAA enforcement staff is the body that represents the interests of the NCAA. In so doing, it acts as a prosecutor.<sup>58</sup> The enforcement staff presents information to support allegations of rules infractions to the COI and argues for findings of fact and conclusions of law that infractions occurred and the penalties that should be imposed.<sup>59</sup> Upon receiving reasonably reliable information of a potential major infraction, the NCAA enforcement staff, acting on behalf of the NCAA’s entire membership, conducts an investigation to determine whether to proceed by sending a notice of inquiry to the alleged offending institution.<sup>60</sup> If the enforcement staff finds evidence to support a conclusion that a major violation has been committed, it will issue a notice of allegations.<sup>61</sup>

The COI, which acts independently of the NCAA enforcement staff, conducts hearings, makes factual findings relating to alleged violations, and prescribes disciplinary and corrective action.<sup>62</sup> Prior to the 2013 restructuring, the COI consisted of ten members, eight of whom heard and decided cases, and two of whom coordinated appeals to the Infractions Appeals Committee.<sup>63</sup>

As it relates to the enforcement process, the NCAA enforcement staff, as noted above, presents information to the COI alleging that a violation has been committed. The institution and/or individuals, including coaches and student-athletes, will present information attempting to rebut the alleged rules violations.<sup>64</sup> The COI determines whether violations have been committed and imposes penalties.<sup>65</sup> Note that the COI can only take direct action against an institution because it possesses neither police authority nor a direct contractual relationship with coaches, student-athletes, representatives of an

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<sup>56</sup> *Id.* § 19.3.

<sup>57</sup> *Id.* § 19.4.

<sup>58</sup> Potuto, *supra* note 36, at 289.

<sup>59</sup> NCAA MANUAL, *supra* note 8, §§ 19.7.1, 19.7.7.4; *see* Potuto, *supra* note 36, at 289.

<sup>60</sup> NCAA MANUAL, *supra* note 8, § 19.5.1; *see* Potuto, *supra* note 36, at 288–89.

<sup>61</sup> NCAA MANUAL, *supra* note 8, §§ 19.5.3, 19.7.1; *see* Potuto, *supra* note 36, at 288–90 (providing a detailed discussion of the responsibilities of the NCAA enforcement staff and the activities in which it will engage before issuing a Notice of Allegations).

<sup>62</sup> NCAA MANUAL, *supra* note 8, § 19.3.6.

<sup>63</sup> Potuto, *supra* note 36, at 311–13 (providing a detailed discussion of the scope of responsibility and composition of the COI).

<sup>64</sup> *See* NCAA MANUAL, *supra* note 8, § 19.7.2.

<sup>65</sup> *Id.* § 19.3.6.

institution's athletics interests, administrators, or other involved individuals.<sup>66</sup> The COI, and thus the NCAA, can take indirect action against a coach or institutional staff member by issuing a show-cause order.<sup>67</sup>

In a show-cause order, the COI directs a member institution to take disciplinary or corrective action against an institutional staff member, such as a coach, or a representative of the institution's athletics interests.<sup>68</sup> For example, a show-cause order may require an institution to relieve a coach, who has violated NCAA rules, of his or her coaching duties.<sup>69</sup> In the event that an institution refuses to impose the COI's mandated discipline or offer a satisfactory explanation for refusing to do so, the COI will likely sanction the institution.<sup>70</sup> An institution that is considering hiring an individual, sanctioned by the COI for having committed a rules violation at another institution, is likely to receive a show-cause order from the COI.<sup>71</sup> The threat of receiving such an order deters institutions from hiring such individuals.<sup>72</sup> It is unlikely that an institution would subject itself to the possibility of having the COI impose penalties against it for violations an individual committed at another institution.<sup>73</sup> Recent illustrations of notable college coaches receiving show-cause orders include former Ohio State University head football coach Jim Tressel,<sup>74</sup> former University of Oregon head football coach

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<sup>66</sup> Potuto, *supra* note 36, at 298–99.

<sup>67</sup> NCAA MANUAL, *supra* note 8, § 19.02.3.

<sup>68</sup> Potuto, *supra* note 36, at 299–300.

<sup>69</sup> One of the more significant sports law cases, *NCAA v. Tarkanian*, 488 U.S. 179 (1988), demonstrates the consequences of an institution's failure to take corrective action against a coach as directed by the NCAA.

<sup>70</sup> NCAA MANUAL, *supra* note 8, § 19.02.3.

<sup>71</sup> Potuto, *supra* note 36, at 298.

<sup>72</sup> Zach Osterman, *Former Indiana Coach Kelvin Sampson's NCAA Penalty Ends*, USA TODAY (Nov. 26, 2013, 8:16 AM EST), <http://www.usatoday.com/story/sports/ncaab/2013/11/26/kelvin-sampson-former-indiana-hoosiers-coach-ncaa-penalty-ends/3745133/> (stating that institutions are reluctant to hire individuals subject to show-cause orders).

<sup>73</sup> *See id.*

<sup>74</sup> *See* NCAA DIV. I COMM. ON INFRACTIONS, THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT (2011) [hereinafter THE OHIO STATE UNIVERSITY PUBLIC REPORT], available at <http://www.dispatch.com/content/downloads/2011/12/NCAAreport.pdf>.

Chip Kelly,<sup>75</sup> and former University of Tennessee head men's basketball coach Bruce Pearl.<sup>76</sup>

## 2. *Post-August 2013 Enforcement Structure*

In recommending changes to the process by which alleged infractions will be processed, the Enforcement Working Group acknowledged and attempted to address criticism that the pre-August 2013 process was inefficient, lacked transparency, and was too protracted.<sup>77</sup> The recently adjudicated Miami infractions case highlighted these inefficiencies, as the NCAA's investigation dragged on for more than two years.<sup>78</sup> Britton Banowsky, COI chairman and commissioner of Conference USA, indicated that the complexities associated with the Miami case were unique and that under the pre-August 2013 enforcement structure investigations could typically be concluded within six to eight weeks.<sup>79</sup> Nevertheless, the NCAA acknowledged that process-related shortcomings threatened to undermine the integrity and fairness of the infraction process.<sup>80</sup> Accordingly, the Enforcement Working Group proposed changes seeking to enhance the perceived fairness and transparency of the process, create a more efficient processing of violations, and allow institutions and individuals more input and control in the way in which violations are heard.<sup>81</sup>

Under the new enforcement structure, legislation that increases the size of the pool of individuals from which COI panels can be drawn was adopted to address the forgoing concerns. Increasing the size of the pool from ten to twenty-four individuals should allow the chair of the COI to empanel more panels capable of processing more

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<sup>75</sup> See NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF OREGON PUBLIC INFRACTIONS REPORT (2013), available at <http://www.goducks.com/pdf9/2348690.pdf>.

<sup>76</sup> See NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF TENNESSEE, KNOXVILLE PUBLIC INFRACTIONS REPORT (2011), available at [http://grfx.cstv.com/photos/schools/tenn/genrel/auto\\_pdf/2011-12/misc\\_non\\_event/TennesseePublicInfoReport.pdf](http://grfx.cstv.com/photos/schools/tenn/genrel/auto_pdf/2011-12/misc_non_event/TennesseePublicInfoReport.pdf).

<sup>77</sup> ENFORCEMENT REPORT, *supra* note 2, at 4–5.

<sup>78</sup> Michael Casagrande, *University Of Miami Starts NCAA Hearings as Nevin Shapiro Makes New Allegations*, HUFFINGTON POST (June 13, 2013, 2:55 AM EDT), [http://www.huffingtonpost.com/2013/06/13/miami-ncaa-hearings-nevin-shapiro-new-allegations\\_n\\_3432143.html](http://www.huffingtonpost.com/2013/06/13/miami-ncaa-hearings-nevin-shapiro-new-allegations_n_3432143.html).

<sup>79</sup> Mason Levinson, *Miami Is Spared Bowl Ban by NCAA After Booster Investigation*, BLOOMBERG (Oct. 22, 2013, 9:25 AM PT), <http://www.bloomberg.com/news/2013-10-22/miami-is-spared-bowl-ban-by-ncaa-after-booster-investigation.html>.

<sup>80</sup> ENFORCEMENT REPORT, *supra* note 2, at 4–5.

<sup>81</sup> *Id.* at 5.

infractions cases than under the old structure, and thereby expedite the processing of alleged infractions.<sup>82</sup> Under the new structure, five-to-seven-member COI panels will hear cases involving Level I and Level II violations.<sup>83</sup> This should also enhance expediency. Increasing the size of the pool will also decrease the individual workloads of members serving on COI panels.<sup>84</sup>

The new structure directs the NCAA Board of Directors to appoint, to the COI pool, individuals who will lend diverse perspectives in assessing alleged violations.<sup>85</sup> A new emphasis has been placed on including within the pool persons with more intimate knowledge of the day-to-day operation of college sports, including former coaches and presidents who were categorically prohibited from serving on a COI panel under the pre-August 2013 structure.<sup>86</sup> In addition, the pool will consist of university faculty, current athletic directors, and athletic administrators with compliance experience and those who may possess more of an academic focus.<sup>87</sup> These changes are consistent with concerns that the COI membership failed to consist of those who appreciate the pertinent rules and regulations as well as the complexities of intercollegiate sports on college campuses.<sup>88</sup> As was true of the old structure, the revised enforcement structure continues to emphasize creating a pool of COI members who reflect gender and ethnic diversity.<sup>89</sup>

As it relates to process, the new structure incorporates changes intended to increase efficiency. These include: (1) permitting institutions or involved individuals to petition for an accelerated hearing of a case involving Level II violations<sup>90</sup> and granting the COI panel the authority to consider such requests;<sup>91</sup> (2) increasing the

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<sup>82</sup> Michael Marot, *New Enforcement Policies Take Effect at NCAA*, YAHOO! SPORTS (Aug. 1, 2013, 12:14 PM), <http://sports.yahoo.com/news/enforcement-policies-effect-ncaa-154351946-spt.html>.

<sup>83</sup> NCAA MANUAL, *supra* note 8, § 19.3.3.

<sup>84</sup> ENFORCEMENT REPORT, *supra* note 2, at 10–11.

<sup>85</sup> *Id.* at 10–11; NCAA MANUAL, *supra* note 8, § 19.3.1.

<sup>86</sup> ENFORCEMENT REPORT, *supra* note 2, at 10–11; NCAA MANUAL, *supra* note 8, § 19.3.1.

<sup>87</sup> NCAA MANUAL, *supra* note 8, § 19.5.1.

<sup>88</sup> Josephine R. Potuto & Jerry R. Parkinson, *If it Ain't Broke Don't Fix It: An Examination of the NCAA Division I Infractions Committee's Composition and Decision-Making Process*, 89 NEB. L. REV. 437, 453–54 (2011).

<sup>89</sup> NCAA MANUAL, *supra* note 8, § 19.3.1.

<sup>90</sup> *Id.* § 19.7.7.2.

<sup>91</sup> *Id.* § 19.3.7(e).

availability of resolution of Level II violations by written submissions;<sup>92</sup> (3) expanding the summary disposition process for Level I and II violations<sup>93</sup> so as to allow for the increased resolution of disputes by written submissions, appearance by videoconference, and other forms of distance communication by institutions and involved individuals;<sup>94</sup> and (4) under the summary disposition process, allowing for the possibility of expedited hearings when there is agreement on the facts but disagreement as to the proposed penalties.<sup>95</sup>

As noted above, the summary disposition process is intended to provide an expedited resolution of cases in which there is substantial agreement regarding the facts among the involved parties. One limitation may, however, curb use of this procedure. Under NCAA Bylaw 19.6.1 the enforcement staff, involved individuals, and the institution must be in agreement as to all of the factual aspects of the case in order to invoke the summary disposition procedures. Even where the enforcement staff and the institution are largely in agreement as to the facts, disagreement from any individual staff member involved could prevent an infractions case from being determined under the summary disposition process.<sup>96</sup> The obvious problem associated with such a standard becomes apparent in cases that involve numerous individuals. Therefore, finding unanimity across all facts in a particular case, involving numerous individuals, could prove difficult. Notwithstanding changes intended to ameliorate concerns related to the enforcement process, additional concerns will need to be addressed.

A pre-revision concern of institutions appearing before the COI was the COI's neutrality. Although ostensibly the COI operates as an entity separate from and independent of the NCAA's enforcement staff, critics asserted that, in actual practice, the COI functions as an arm of NCAA enforcement.<sup>97</sup> This concern was allegedly demonstrated by the COI's reluctance to deviate from enforcement

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<sup>92</sup> *Id.* § 19.7.7.2.

<sup>93</sup> *Id.* § 19.6.

<sup>94</sup> *Id.* § 19.6.4.5.

<sup>95</sup> *Id.*

<sup>96</sup> *See id.* § 19.6.1.

<sup>97</sup> *See* Potuto & Parkinson, *supra* note 88, at 453 (noting concerns relating to neutrality and independence that caused some to call for a reconfiguration of the COI).

staff recommendations.<sup>98</sup> While such accusations are difficult to substantiate, reform efforts, such as those that now allow campus personnel and practitioners to serve as COI panelists, may assuage these suspicions.

Although the new enforcement structure adopts a more inclusive approach to the COI's composition, which holds the potential to effectively address some concerns, it may also spawn new issues. Under the new structure, current and former athletic administrators and coaches have the ability to pass judgment on their peers.<sup>99</sup> This has given rise to worries regarding the inherent biases that some COI panelists could possess as a result of institutional or conference allegiances. Ideally, the hope is that any COI panel member charged with such great responsibility would be above reproach and able to maintain his or her objectivity.<sup>100</sup> The highly charged and competitive landscape of college athletics, however, produces skepticism. This skepticism has, in turn, led to a suggestion that in the interest of fairness and neutrality, no COI panel member should have an active affiliation with a member institution, either as a staff member or a representative of its athletics interests.<sup>101</sup> A related suggestion is that, in lieu of institutional personnel, impartial arbiters (e.g., retired judges) should exclusively serve as COI panelists.

In addition to concerns over the composition of the committee, institutions, in the past, took issue with the confrontational manner in which infractions hearings were conducted.<sup>102</sup> Rather than an amicable fact-finding endeavor, COI hearings were adversarial.<sup>103</sup> It is unclear whether the changes to the processing of cases will help to alleviate the adversarial nature of the enforcement process.

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<sup>98</sup> See *id.* at 453; Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 517 (1995) (asserting the COI is not sufficiently independent of the NCAA's enforcement staff).

<sup>99</sup> See NCAA MANUAL, *supra* note 8, § 19.3.1.

<sup>100</sup> See Potuto & Parkinson, *supra* note 88, at 458–59 (adopting the position that the COI tends to live up to the ideal of neutrality and independence, in part because the NCAA enforcement structure facilitates achieving this ideal).

<sup>101</sup> See Brent Schrottenboer, *Alabama Case Spotlights Emmert, Saban Friendship*, USA TODAY (Oct. 15, 2013, 5:05 PM EDT), <http://www.usatoday.com/story/sports/ncaaf/2013/10/08/alabama-illegal-benefits-case-spotlights-ncaa-mark-emmert-nick-saban-friendship/2948023/> (commenting on how relationships between institutional and NCAA staff raise questions regarding the neutrality of the NCAA's enforcement efforts).

<sup>102</sup> Potuto, *supra* note 36, at 316–17.

<sup>103</sup> See *id.*

## B. Infractions Appeals Committee

### 1. Pre-August 2013 Enforcement Structure<sup>104</sup>

The IAC, which consists of five members, is charged with hearing and acting on appeals of the findings of significant violations by the Committee on Infractions involving member institutions.<sup>105</sup> In the event of an adverse finding, an institution or involved individual (e.g., coach) can appeal an adverse determination and/or the sanctions imposed to the IAC.<sup>106</sup>

Student-athletes who violate NCAA regulations are rendered ineligible for intercollegiate competition.<sup>107</sup> An institution can seek to restore the eligibility of a student-athlete whom the NCAA has determined to be ineligible because of a violation of its regulations.<sup>108</sup> In such cases, an institutional representative, typically a senior compliance administrator, would submit a formal request for reinstatement on the student's behalf to the NCAA's Committee on Student-Athlete Reinstatement.<sup>109</sup> This committee is the entity within the NCAA that determines whether to restore a student-athlete's eligibility.<sup>110</sup> A request for reinstatement would typically include a position statement from the institution, a personal statement from the student-athlete, and documentation of any mitigating circumstances (e.g., medical conditions, personal or family hardships, extenuating circumstances beyond the student-athletes' control).<sup>111</sup> A student-athlete does not have the right to file a petition for reinstatement on

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<sup>104</sup> Note that where the 2013-14 NCAA Division I Manual made no appreciable changes to the pre-2013 enforcement structure, references to bylaws will be to the 2013-14 NCAA Manual rather than to the 2012-13 NCAA Manual.

<sup>105</sup> NCAA MANUAL, *supra* note 8, § 19.4.1.

<sup>106</sup> *Id.* § 19.10.2.

<sup>107</sup> *Id.* § 14.11.1; *see also* McAdoo v. Univ. of N.C. at Chapel Hill, 736 S.E.2d 811, 817-19 (N.C. Ct. App. 2013) (discussing the process pursuant to which an ineligible student-athlete seeks reinstatement).

<sup>108</sup> NCAA MANUAL, *supra* note 8, § 14.11.1.

<sup>109</sup> *Id.* § 14.11.2.

<sup>110</sup> *Id.* § 10.4.

<sup>111</sup> *See* David Pierce, Anastasios Kaburakis & Lawrence Fielding, *Compliance Officers' Guide to Navigating NCAA Student-Athlete Reinstatement Cases Involving Amateurism Violations*, 1 J. ISSUES IN INTERCOLLEGIATE ATHLETICS 87, 93 (2008) (identifying mitigating circumstances); *Student-Athlete Reinstatement Frequently Asked Questions*, NCAA.ORG, <http://www.ncaa.org/compliance/reinstatement/student-athlete-reinstatement-frequently-asked-questions> (last visited Mar. 15, 2014) (stating that 99 percent of the nearly 1900 reinstatement requests submitted by institutions results in the reinstatement of the athlete).

his or her own behalf.<sup>112</sup> That institution must make the appeal.<sup>113</sup> The institution exercises its discretion in determining whether it is prudent to request a waiver of reinstatement.<sup>114</sup> In most instances, an institution will avail itself of this legislated opportunity.<sup>115</sup> However, in one recent highly-publicized case, the University of North Carolina elected not to request reinstatement for basketball student-athlete P.J. Hairston, who had been deemed ineligible as a result of an alleged amateurism violation.<sup>116</sup> This rare, but not unprecedented course of action effectively ended Hairston's collegiate career.

## 2. *Post-August 2013 Enforcement Structure*

The minimal changes that the Enforcement Working Group made to the appellate component of the enforcement structure were intended to improve the efficiency of the IAC's processing of appeals.<sup>117</sup> With respect to Level I and II violations, appeals can be processed via written submission or videoconference in addition to the traditional in-person oral presentations before the IAC.<sup>118</sup> To speed up the processing of appeals, the new enforcement structure establishes time limits. For example, an institution that seeks to appeal a finding of an infraction and/or the penalty imposed, must submit a notice of appeal within fifteen days from when the COI panel released its decision.<sup>119</sup> Within thirty days of the IAC's acknowledgement of receipt of a notice of appeal, the appealing party must submit initial supporting materials to the IAC.<sup>120</sup> As was true of the pre-August 2013 appeals process, an active member of the COI

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<sup>112</sup> See *Student-Athlete Reinstatement Frequently Asked Questions*, *supra* note 111; NCAA, *Preparing a Student-Athlete Reinstatement Request*, NCAA.ORG, <http://www.ncaa.org/compliance/reinstatement/preparing-student-athlete-reinstatement-request> (last visited Mar. 15, 2014).

<sup>113</sup> See *Preparing a Student-Athlete Reinstatement Request*, *supra* note 112; Potuto, *supra* note 36, at 284–85 (discussing the reinstatement process).

<sup>114</sup> NCAA MANUAL, *supra* note 8, § 14.11.1.

<sup>115</sup> See *Student-Athlete Reinstatement Frequently Asked Questions*, *supra* note 111 (stating that approximately ninety-nine percent of the nearly 1900 reinstatement requests submitted annually by institutions result in the reinstatement of the athlete).

<sup>116</sup> Matt Norlander, *P.J. Hairston Will Not Return to North Carolina*, CBSSPORTS.COM (Dec. 20, 2013, 1:05 PM ET), <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/24382047/pj-hairston-will-not-return-to-north-carolina>.

<sup>117</sup> See ENFORCEMENT REPORT, *supra* note 2, at 13.

<sup>118</sup> NCAA MANUAL, *supra* note 8, § 19.10.5.

<sup>119</sup> *Id.* § 19.10.2.

<sup>120</sup> *Id.* § 19.10.3.1.

panel selected to hear a matter will serve as COI's appeals advocate during the appeals process.<sup>121</sup> Time limits are also imposed when the COI advocate can present appellate materials on behalf of the COI to the IAC.<sup>122</sup> As it relates to Level III violations, the IAC will not be involved in processing these violations.<sup>123</sup> Instead, appeals of Level III violations will be submitted to a COI panel.<sup>124</sup> Unless a request is made by the appealing party for an in-person or videoconference hearing, appeals of Level III violations and penalties will be submitted in writing.<sup>125</sup> Appeals of Level IV violations will be processed at the conference level.<sup>126</sup>

Substantively, a COI determination can be set aside only if the appealing party demonstrates that the COI determination constituted an abuse of discretion.<sup>127</sup> Moreover, a COI panel's factual findings and conclusion that violations occurred cannot be set aside unless the appealing party establishes:

- (a) A factual finding is clearly contrary to the evidence presented to the panel;
- (b) The facts found by the panel do not constitute a violation of the NCAA constitution and bylaws; or
- (c) There was a procedural error and but for the error, the panel would not have made the finding or conclusion.<sup>128</sup>

The forgoing standard represents a codification of the standards applied by the IAC in hearing appeals of infractions cases decided under the pre-August 2013 structure.<sup>129</sup>

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<sup>121</sup> *Id.* § 19.10.3.2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* § 19.11.4.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* § 19.12.2. Each member conference is required to establish processes for investigating and resolving rules violations. *Id.* § 19.12.1.

<sup>127</sup> *Id.* § 19.10.1.1.

<sup>128</sup> *Id.* § 19.10.1.2.

<sup>129</sup> *See, e.g.*, NCAA DIV. I INFRACTIONS APPEALS COMM., REPORT NO. 372, UNIVERSITY OF CENTRAL FLORIDA, ORLANDO, FLORIDA (2013) [hereinafter CENTRAL FLORIDA IAC REPORT], available at <http://law.marquette.edu/assets/sports-law/pdf/Central%20Florida.pdf>; NCAA DIV. I INFRACTIONS APPEALS COMM., REPORT NO. 355, BOISE STATE UNIVERSITY, BOISE, IDAHO 21 (2012), available at <http://www.ncaa.org/sites/default/files/Final%2BPublic%2BReport%2BONLY%2B-%2BBoise%2BState.pdf>; NCAA DIV. I INFRACTIONS APPEALS COMM., REPORT NO. 289, ALABAMA STATE UNIVERSITY, MONTGOMERY, ALABAMA 23 (2009), available at <http://law.marquette.edu/assets/sports-law/pdf/Alabama%20State.pdf>.

### C. Classification of Violations

#### 1. Pre-August 2013 Classification

A centerpiece of the pre-August 2013 enforcement mechanism was the classification of violations as major or secondary. The NCAA Manual defined a secondary violation as one that was “isolated or inadvertent in nature, provides or is intended to provide only a minimal recruiting, competitive or other advantage and does not include any significant impermissible benefit (including, but not limited to, an extra benefit, recruiting inducement, preferential treatment or financial aid).”<sup>130</sup>

Under the forgoing definition, a violation was major and not secondary if it could not be characterized as either isolated or inadvertent.<sup>131</sup> Thus, a violation that may have been isolated but not inadvertent constituted a major violation. Similarly, a violation that was deemed inadvertent would nevertheless constitute a major violation if it resulted in a more than minimal recruiting or competitive advantage. In an NCAA infractions case involving Stetson University, and one of the few to discuss the pre-August 2013 classification of violations, the IAC rejected a coach’s argument that a violation was secondary if any one of the elements was present.<sup>132</sup> Rejecting this argument, the IAC stated that the elements should be read as conjunctive rather than disjunctive.<sup>133</sup> According to the IAC, NCAA bylaws required that all three of the elements that define a violation as secondary must be present for a violation to be characterized as secondary and, thus, to avoid it being characterized as a major infraction.<sup>134</sup>

Secondary violations were subdivided into Level I and Level II. Institutions forwarded information regarding Level I secondary infractions to the NCAA enforcement staff for processing.<sup>135</sup>

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<sup>130</sup> NCAA, 2012-13 NCAA DIVISION I MANUAL § 19.02.2.1 [hereinafter 2012-13 NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

<sup>131</sup> *Id.*

<sup>132</sup> NCAA DIV. I INFRACTIONS APPEALS COMM., FORMER STETSON UNIVERSITY HEAD MEN’S BASKETBALL COACH, PUBLIC REPORT 9–10 (Dec. 13, 2002).

<sup>133</sup> *Id.* at 10.

<sup>134</sup> *Id.*

<sup>135</sup> NCAA, SELF-REPORTING SECONDARY VIOLATIONS THROUGH REQUESTS/SELF-REPORTS ON-LINE (RSRO) (2013), available at <http://www.ncaa.org/sites/default/files/RSRO%2BInstructions.pdf>.

Examples of Level I secondary violations included: (1) a student-athlete making impermissible telephone calls using an institutional calling card;<sup>136</sup> (2) impermissible text messaging;<sup>137</sup> (3) impermissible contact with a prospective student-athlete;<sup>138</sup> (4) providing impermissible transportation during a prospective student-athlete's on-campus visit;<sup>139</sup> (5) allowing a student-athlete to travel with his or her team and receive travel-related expenses without the institution having first certified the athlete's amateur status;<sup>140</sup> and (6) not maintaining a squad list for sports teams.<sup>141</sup>

Level II secondary violations were processed by athletic conferences.<sup>142</sup> Examples included: (1) an institution's failure to include a student-athlete on a squad list prior to the athlete competing;<sup>143</sup> (2) an institution's failure to adhere to size restrictions in regard to printed recruiting materials;<sup>144</sup> and (3) an institution sending video material to a prospect.<sup>145</sup>

The pre-August 2013 enforcement structure defined a major violation as consisting of any violation that was not classified as a secondary violation because it was not isolated, not inadvertent, or it resulted in more than a minimal recruiting or competitive advantage.<sup>146</sup> Illustrations are numerous of rules violations that fall outside the parameters of a secondary violation because the infraction

<sup>136</sup> NCAA Div. I COMM. ON INFRACTIONS, NORTHEASTERN UNIVERSITY, 4 (2009) (classifying infraction as a Level 1 secondary violation).

<sup>137</sup> NCAA Div. I COMM. ON INFRACTIONS, SOUTHWEST BAPTIST UNIVERSITY PUBLIC INFRACTIONS REPORT 3 (2012) (concluding that a coach sending a single text message to a prospect constituted a secondary violation).

<sup>138</sup> NCAA Div. I COMM. ON INFRACTIONS, UNIVERSITY OF SOUTH CAROLINA, COLUMBIA PUBLIC INFRACTIONS REPORT 8 (2005) (noting that on two occasions, January 2000 and November 2001, a booster—then Governor of South Carolina—had brief contact with prospects during their on-campus visits).

<sup>139</sup> *Id.* at 9.

<sup>140</sup> NCAA DIVISION II COMMITTEE ON INFRACTIONS, LINCOLN UNIVERSITY, PENNSYLVANIA PUBLIC INFRACTIONS REPORT 8 (2010).

<sup>141</sup> NCAA Div. II COMM. ON INFRACTIONS, CALIFORNIA STATE POLYTECHNIC UNIVERSITY, POMONA PUBLIC INFRACTIONS REPORT 12 (2011), available at <http://broncoathletics.com/documents/2011/12/16/CalPolyPomonaInfractionsReport.pdf>.

<sup>142</sup> John Infante, *NCAA's New Enforcement Model A Mix of Old and Older*, ATHNET (Aug. 6, 2012), <http://www.athleticscholarships.net/2012/08/06/ncaas-new-enforcement-model-a-mix-of-old-and-older.htm>.

<sup>143</sup> Mid-Eastern Athletic Conference, *Reporting Secondary Violations Checklist for Institutions*, MEAC, at 41, <http://www.meacsports.com/fls/20800/Compliance/BPractices/SECONDARYVIOLATIONSChecklist.pdf> (last visited Mar. 15, 2014).

<sup>144</sup> *Id.* at 29.

<sup>145</sup> *Id.*

<sup>146</sup> 2012-13 NCAA MANUAL, *supra* note 130, §§ 19.02.2.1, 19.02.2.2.

resulted in a recruiting or other competitive advantage or involved a significant impermissible benefit. In 2011, the COI sanctioned the University of Connecticut for violations that stemmed, in part, from a representative of the institution's athletics interest providing impermissible recruiting inducements to a prospective student-athlete.<sup>147</sup> NCAA Bylaw 13.2.1 prohibits an institutional staff member or booster from giving any financial aid or benefit to a prospective student-athlete or his or her family or friends, except as permitted by NCAA regulations.<sup>148</sup> An alumnus, a representative of Connecticut's athletics interests, provided a highly-regarded and recruited basketball prospect impermissible recruiting inducements, including: payment of the prospect's standard test registration fee, basketball training sessions, and enrollment in a basketball academy.<sup>149</sup>

One of the more celebrated cases of a major infraction relating to impermissible benefits was the case involving Reggie Bush, a star running back on the University of Southern California football team.<sup>150</sup> The COI report stated that sports agents bestowed upon Bush and his family gifts including: (1) airline tickets; (2) limousine services, which were often requested by Bush or his parents; (3) cash that facilitated Bush's purchase of a car; (4) the purchase of a home for use by Bush's parents (with the understanding that Bush's parents would pay the agents only \$1400 of the approximately \$4500 monthly cost); (5) \$10,000 in cash to enable Bush's family to purchase furniture for the house; and (6) substantial cash payments to Bush.<sup>151</sup>

The COI concluded that Reggie Bush had violated NCAA rules prohibiting college athletes, or their friends or relatives, from accepting transportation and other benefits from agents, if the benefits

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<sup>147</sup> NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF CONNECTICUT, PUBLIC INFRACTIONS REPORT 2 (2011) [hereinafter UCONN INFRACTIONS DECISION], available at [http://blogs.rep-am.com/time\\_out/files/2011/02/20110222-UCONN-report.pdf](http://blogs.rep-am.com/time_out/files/2011/02/20110222-UCONN-report.pdf).

<sup>148</sup> NCAA MANUAL, *supra* note 8, § 13.2.1. A benefit is not impermissible if it is generally available to prospective nonathlete students or their parents and friends. *Id.* Financial aid and benefits specifically prohibited include cash and expenses for academic services. *Id.* § 13.2.1.1.

<sup>149</sup> UCONN INFRACTIONS DECISION, *supra* note 147.

<sup>150</sup> NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF SOUTHERN CALIFORNIA, PUBLIC INFRACTIONS REPORT (2010) [hereinafter USC INFRACTIONS DECISION], available at <http://ht.cdn.turner.com/si/images/2010/06/10/USCreport.pdf>.

<sup>151</sup> *See generally id.* During the same time Reggie Bush and the assistant coach committed NCAA rules violations, similar violations were occurring in the men's basketball program relating to star player O.J. Mayo. *Id.* at 38–45.

were not available to the student body in general.<sup>152</sup> Bush also violated an NCAA rule that prohibits student-athletes from entering into representation agreements with agents.<sup>153</sup> By engaging in this conduct, Bush violated NCAA amateurism bylaws, which generally prohibit student-athletes from receiving any level of compensation beyond room, board, tuition and educational expenses designated by those regulations.<sup>154</sup> Bush's loss of amateur status rendered him ineligible to participate in intercollegiate athletics.<sup>155</sup>

With respect to a USC assistant football coach, the COI found that the coach knew of Bush's relationship with the agents and that Bush had violated NCAA rules.<sup>156</sup> Consequently the assistant coach violated NCAA rules by not conveying his knowledge to USC's athletics compliance staff.<sup>157</sup> NCAA rules promote self-reporting at the earliest opportunities.<sup>158</sup> The coach was also found to have engaged in unethical conduct for providing false and misleading information during the NCAA's investigation.<sup>159</sup>

Applying its rule of restitution,<sup>160</sup> the COI vacated all of the USC football team's victories in which Reggie Bush played when he was ineligible for intercollegiate athletic competition.<sup>161</sup> As a result of these infractions, the NCAA vacated the football team's last two victories of the 2004 football season, which included the team's January 2005 Orange Bowl win and all of its wins during the 2005 season.<sup>162</sup> The January 2005 victory was notable because USC was designated as the Bowl Championship Series (BCS) winner.<sup>163</sup> As a

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<sup>152</sup> See generally *id.* at 146.

<sup>153</sup> NCAA MANUAL, *supra* note 8, § 12.1.2(g).

<sup>154</sup> *Id.* §§ 15.01.6, 15.02.4.1, 15.02.5.

<sup>155</sup> NCAA Division I Bylaw § 12.01.1 states: "Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport." NCAA MANUAL, *supra* note 8, § 12.01.1.

<sup>156</sup> USC INFRACTIONS DECISION, *supra* note 150, at 4, 61.

<sup>157</sup> *Id.* at 61.

<sup>158</sup> NCAA MANUAL, *supra* note 8, § 10.1(d).

<sup>159</sup> USC INFRACTIONS DECISION, *supra* note 150, at 4, 61.

<sup>160</sup> *Id.* at 57; see NCAA MANUAL, *supra* note 8, § 19.13.

<sup>161</sup> USC INFRACTIONS DECISION, *supra* note 150, at 57.

<sup>162</sup> *Id.* at 57–58; Lynn Zinser, *U.S.C. Loses Its 2004 B.C.S. National Championship*, N.Y. TIMES (June 6, 2011), [http://www.nytimes.com/2011/06/07/sports/ncaaf-football/usc-stripped-of-2004-bcs-national-championship.html?\\_r=0](http://www.nytimes.com/2011/06/07/sports/ncaaf-football/usc-stripped-of-2004-bcs-national-championship.html?_r=0).

<sup>163</sup> Zinser, *supra* note 162. The BCS was a computer-generated selection of the top ten teams in the NCAA Division I Football Bowl Subdivision. The system created five football bowl match-ups, and culminated in the selection of a national champion. *The BCS Is . . .*, BCSFOOTBALL.ORG (Oct. 1, 2013, 4:22 PM ET), <http://www.bcsfootball.org/news/story?id=4809716>.

result of the NCAA's sanctions, the BCS vacated USC's Orange Bowl win, stripping it of the 2004 BCS national championship.<sup>164</sup>

Under pre-August 2013 NCAA bylaws, a major violation might also have been the product of the cumulative effect of multiple secondary violations.<sup>165</sup> The impact of the cumulative effect of multiple secondary violations is illustrated by the sanctions imposed on Kelvin Sampson, former head basketball coach of the University of Indiana men's basketball team.<sup>166</sup> Sampson was accused of violating NCAA regulations that limit the number of telephone calls coaches and other institutional representatives can make to a prospective student-athlete—who is a high school athlete that an institution is recruiting to play intercollegiate athletics.<sup>167</sup> Although an isolated, unintentional, impermissible telephone call would have been characterized as a secondary violation, the multiple or intentional secondary violations gave rise to a major infraction. The COI found that Sampson “failed to monitor his program and promote an atmosphere of compliance” because Sampson's coaching staff made 577 impermissible telephone calls to seventeen prospective basketball players.<sup>168</sup> Sampson was found to have intentionally made 233 of the impermissible telephone calls.<sup>169</sup>

In the Indiana infractions case, it was both the multiple calls and the intentional nature of the violations that warranted characterizing the infraction as major. The COI noted, “[s]uch violations are more serious than the same violations committed inadvertently or with lack

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<sup>164</sup> USC INFRACTIONS DECISION, *supra* note 150, at 57–58; Zinser, *supra* note 162.

<sup>165</sup> NCAA MANUAL, *supra* note 8, § 19.02.2.1 (“Multiple secondary violations . . . may collectively be considered as a major violation.”). *See, e.g.*, SOUTHWEST BAPTIST UNIVERSITY PUBLIC INFRACTIONS REPORT, *supra* note 137 (deciding that the sending of a single text message was a secondary violation but sending over 400 text messages to prospects was a major violation); NCAA DIV. I COMM. ON INFRACTIONS, MISSISSIPPI STATE UNIVERSITY PUBLIC INFRACTIONS REPORT 28 (2004) (noting that, although improperly reimbursing prospective student-athletes for travel related expense would ordinarily have amounted to a secondary violation, the cumulative effective of a number of these violations gave rise to a major infraction).

<sup>166</sup> Zach Osterman, *Former Indiana Coach Kelvin Sampson's NCAA Penalty Ends*, USA TODAY (Nov. 26, 2013, 8:16 AM EST), <http://www.usatoday.com/story/sports/ncaab/2013/11/26/kelvin-sampson-former-indiana-hoosiers-coach-ncaa-penalty-ends/3745133/>.

<sup>167</sup> NCAA DIV. I COMM. ON INFRACTIONS, INDIANA UNIVERSITY, BLOOMINGTON PUBLIC INFRACTIONS REPORT 2 (2008), *available at* <http://www.annarbor.com/Indiana.pdf>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

of knowledge that they are violations.”<sup>170</sup> Sampson’s conduct relating to the telephone calls was central to the COI’s finding that he had engaged in unethical conduct and the imposition of a five-year show cause order, which effectively prohibited Sampson from college coaching for five years.<sup>171</sup>

## 2. *Post-August 2013 Classification*

The post-August 2013 enforcement structure makes significant changes to the violation component of the NCAA enforcement process. The classification of violations as secondary or minor has been jettisoned in favor of classifications identified by Levels I through IV. In developing the four-level violation structure, the Enforcement Working Group stated:

The working group anticipates that the proposed structure will provide member institutions and involved individuals with better notice of infractions, and the level of seriousness assigned the infractions, for which they will be held accountable if NCAA bylaws are violated. Further, the group anticipates that the proposed structure will better ensure that enforcement efforts are focused on those infractions that clearly violate NCAA enduring values.<sup>172</sup>

The Enforcement Working Group also reasoned that the major and secondary violation structure failed to afford the COI the flexibility and discretion for the “most serious infractions or intentional violations that are currently labeled secondary.”<sup>173</sup> It also concluded that certain violations that would be categorized as major failed to delineate sufficiently between individual and institutional culpability for infractions.<sup>174</sup>

In recommending changes, the Enforcement Working Group determined that the multi-tier infractions structure would lead not only to greater flexibility and more appropriate categorization of violations, but also would result in increased accountability for those who commit the most serious violations.<sup>175</sup> According to the Working Group, “[f]inally, the four-level violation structure allows the enforcement staff to resolve the infractions cases with minimal impact

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<sup>170</sup> *Id.* at 7.

<sup>171</sup> *Id.* at 43; Osterman, *supra* note 166.

<sup>172</sup> ENFORCEMENT REPORT, *supra* note 2, at 4.

<sup>173</sup> *Id.* at 7.

<sup>174</sup> *Id.* at 7–8.

<sup>175</sup> *Id.* at 9–10.

to NCAA enduring values more efficiently and focus its primary resources on the most serious infractions cases.”<sup>176</sup>

*a. Level I Violations—Severe Breach of Conduct*

Based on these articulated reasons, the Enforcement Working Group developed a four-level violation structure. Level I, labeled “Severe Breach of Conduct,” is intended to encompass the most severe rules violations for breaches that seriously undermine the integrity of an NCAA enduring value.<sup>177</sup> Examples, as stated in the bylaws, include violations affording a substantial recruiting or competitive advantage or impermissible benefit.<sup>178</sup> Other illustrations of severe breaches that might constitute a Level I violation include: (1) a lack of institutional control; (2) academic fraud; (3) the failure of the institution or an involved person to cooperate with the NCAA in a violation investigation; (4) individual unethical or dishonest conduct; (5) a failure by a head coach to promote compliance in a program and to monitor the activities of assistant coaches that result from a Level I violation; (6) cash inducements to prospective student-athletes; (7) intentional or reckless violations of NCAA rules; and (8) collective violations of Level II and III violations.<sup>179</sup>

*b. Level II Violations—Significant Breach of Conduct*

Level II violations, labeled “Significant Breach of Conduct,” encompass infractions that result in more than a minimal but less than a substantial recruiting, competitive, or other advantage.<sup>180</sup> Conduct that could give rise to a Level II violation include: (1) the provision of impermissible benefits that are less than minimal but more than substantial;<sup>181</sup> (2) violations involving conduct that compromises the integrity of the collegiate model of intercollegiate athletics;<sup>182</sup> (3) an institution’s failure to monitor unless such failure is substantial or egregious;<sup>183</sup> (4) systemic violations that fall short of a lack of

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<sup>176</sup> *Id.* at 10.

<sup>177</sup> NCAA MANUAL, *supra* note 8, § 19.1.1.

<sup>178</sup> *Id.* § 19.1.1.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* § 19.1.2.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* § 19.1.2(b).

institutional control;<sup>184</sup> (5) multiple recruiting, eligibility, or financial aid violations that do not reflect a lack of institutional control;<sup>185</sup> (6) a failure by a head coach to promote compliance in a program and to monitor the activities of assistant coaches that result from a Level II violation;<sup>186</sup> and (7) collective Level III violations.<sup>187</sup>

*c. Level III Violations—Breach of Conduct*

Similar to Level II secondary violations under the pre-August 2013 enforcement structure, Level III infractions involve violations that are isolated or limited and provide only a minimal recruiting, competitive, or other advantage and a minimal impermissible benefit.<sup>188</sup> This has been one of the more controversial areas among the enforcement reforms due to the possibility of head coach suspensions that may now result from the commission of Level III violations. Not only may head coaches be suspended for committing Level III violations,<sup>189</sup> they are also subject to suspensions for Level III violations that are committed by any individual with a direct reporting line to the head coach.<sup>190</sup> It is controversial, though not because the suspension of head coaches is unprecedented. Indeed, the suspension of head coaches in response to violations of NCAA rules is a longstanding practice.<sup>191</sup> However, it is a deviation from past practices for head coaches to be suspended for what equates to a secondary, or minor violation under the previous enforcement model. The intent behind this new approach is to impress upon head coaches the urgency of maintaining control over their respective programs. As is true of Level I and II violations, head coaches will no longer be able to plead ignorance for indiscretions that occur on their watch. There will be a presumption of responsibility whether or not they were aware.

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<sup>184</sup> *Id.* § 19.1.2(c).

<sup>185</sup> *Id.* § 19.1.2(d).

<sup>186</sup> *Id.* § 19.1.2(e).

<sup>187</sup> *Id.* § 19.1.2(f).

<sup>188</sup> *Id.* § 19.1.3.

<sup>189</sup> *Id.* § 19.9.8.

<sup>190</sup> *Id.* § 19.9.8; NCAA, HEAD COACH RESPONSIBILITIES REGARDING COMPLIANCE WITH AND VIOLATIONS OF NCAA RULES 1-3 (2013), [hereinafter HEAD COACH RESPONSIBILITIES], available at <http://www.ncaa.org/sites/default/files/HeadCoachResponsibility.pdf>.

<sup>191</sup> 2012-13 NCAA MANUAL, *supra* note 130, § 19.5.2(c).

Not all Level III violations will result in a head coach's suspension. All infractions will be handled on a case-by-case basis.<sup>192</sup> Examples of specific Level III infractions that may result in the suspension of a head coach, include: (1) the provision of in-person, off-campus contacts during a dead period—particularly during the NLI signing dead period;<sup>193</sup> (2) exceeding the permissible number of contacts with a prospective student-athlete;<sup>194</sup> (3) intentional or significant game-day simulations and/or impermissible recruiting aids;<sup>195</sup> (4) providing team gear or other inducements to prospective student-athletes;<sup>196</sup> (5) violations that occur as a result of engaging non-scholastic third parties in the recruiting process—prescheduled, unofficial visits that are impermissibly funded, etc.;<sup>197</sup> (6) collective recruiting violations and/or other intentional recruiting violations—multiple impermissible early phone calls or other contacts;<sup>198</sup> (7) impermissible benefits to student-athletes by third parties that the coaching staff knows about or is involved with;<sup>199</sup> and (8) providing a written offer of athletically related financial aid to a prospective student-athlete prior to August 1 of the prospect's senior year in high school.<sup>200</sup>

Level IV Violations—incidental infractions—are akin to Level II secondary violations under the pre-August 2013 enforcement structure in that they involve infractions of a technical nature and do not affect a student-athlete's eligibility to participate in intercollegiate athletics.<sup>201</sup> Because Level IV violations are essentially the same as Level II secondary infractions under the pre-August 2013 structure, they will be adjudicated at the conference level.<sup>202</sup> Examples of Level IV violations include: (1) failure to sign squad list; (2) failure to adhere to size restrictions for written materials; (3) sending general correspondence to a PSA via express mail service; and (4) providing

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<sup>192</sup> *Enforcement Process: Penalties*, NCAA.ORG, <http://www.ncaa.org/enforcement/enforcement-process-penalties> (last visited Mar. 15, 2014).

<sup>193</sup> HEAD COACH RESPONSIBILITIES, *supra* note 190, at 3.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> NCAA MANUAL, *supra* note 8, § 19.1.4.

<sup>202</sup> Under the pre-August 2013 structure, the NCAA outsourced Level II secondary violations to the conference offices to avoid the log jam of paperwork at the national office. Under the new structure, Level IV violations will be handled in the same fashion.

official visit prior to placing a prospective student-athlete onto the NCAA Eligibility Center's Institutional Request List (IRL).<sup>203</sup>

#### *D. The Penalty Structure*

##### *1. Pre-August 2013 Penalty Structure*

Under the pre-August 2013 penalty structure, NCAA Bylaw 19.5.2 articulated a range of penalties that could be imposed for an institution's commission of a major violation.<sup>204</sup> Penalties included: (1) a public reprimand and censure;<sup>205</sup> (2) probation for up to five years;<sup>206</sup> (3) suspension of an institutional staff member;<sup>207</sup> (4) reductions in financial aid awards and recruiting visits;<sup>208</sup> (5) prohibitions on recruiting activities by coaches;<sup>209</sup> (6) vacation of team wins and individual records;<sup>210</sup> (7) financial penalties and prohibiting a team's television appearances;<sup>211</sup> and (8) disassociation of relations between the institution and representatives of the institution's athletic interests.<sup>212</sup> One of the most severe potential penalties was prohibiting a team from engaging in competition, particularly post-season play.<sup>213</sup> Such a ban has serious ramifications, including the loss of potential revenue and the opportunity to expose an institution and its athletics program. The pre-August 2013 revisions articulated a list of five aggravating factors that might warrant the imposition of a prohibition on post-season play.<sup>214</sup> These factors included: (1) an individual involved in committing an

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<sup>203</sup> See, e.g., NCAA, LIST OF INCIDENTAL INFRACTIONS (2013), available at [http://www.ncaa.org/sites/default/files/Violation%2BStructure\\_Level%2BIV\\_Conference%2BInfractions.pdf](http://www.ncaa.org/sites/default/files/Violation%2BStructure_Level%2BIV_Conference%2BInfractions.pdf).

<sup>204</sup> 2012-13 NCAA MANUAL, *supra* note 130, § 19.5.2.

<sup>205</sup> *Id.* § 19.5.2(a).

<sup>206</sup> *Id.* § 19.5.2(b).

<sup>207</sup> *Id.* § 19.5.2(c).

<sup>208</sup> *Id.* § 19.5.2(d), (e).

<sup>209</sup> *Id.* § 19.5.2(f).

<sup>210</sup> *Id.* § 19.5.2(h). Under the pre-August 2013 structure, vacation of wins, one of the sanctions imposed under the NCAA's rule of restitution, occurred under the following circumstances: an ineligible student-athlete competed, academic fraud, serious intentional violations, direct involvement of a coach or other high-ranking institutional administrator, a significant number of violations, a lack of institutional control, a failure to monitor, and the institution is a repeat violator. *Id.*

<sup>211</sup> *Id.* § 19.9.7.

<sup>212</sup> *Id.* § 19.5.2.4.

<sup>213</sup> *Id.* § 19.5.2(g).

<sup>214</sup> 2012-13 NCAA MANUAL, *supra* note 130, § 19.5.2(g)(1)–(5).

infraction remained employed at the institution; (2) the rules violations resulted in a significant competitive advantage; (3) the rules violations demonstrated a lack of institutional control, a failure to monitor, or a failure to cooperate; (4) the COI found academic fraud; and (5) the institution was a repeat violator.<sup>215</sup>

It was not necessary that all five factors be present in order for the COI to find aggravating circumstances that warranted a ban on post-season competition.<sup>216</sup> In the 2011 Ohio State University infractions decision, the presence of two aggravating factors—a failure to monitor and repeat violator status—formed the basis for the COI's imposition of a post-season ban on the football team.<sup>217</sup> The case involved: (1) student-athletes exchanging football gear, apparel, and bowl-game rings for cash and tattoos; (2) a coach concealing his knowledge of the athletes' violations from the NCAA and university administrators in order to protect the athletes' athletic eligibility; and (3) a representative of Ohio State's athletics interests, who had gained insider status with the football program, paying student-athletes for work that they did not perform.<sup>218</sup>

An infractions case involving the University of Central Florida ("UCF") illustrates the circumstances identified by the COI as providing a basis for imposing a post-season ban.<sup>219</sup> The COI found violations in the football and men's basketball programs, including: (1) a booster's impermissible recruitment of several football and basketball players under circumstances where institutional staff members were aware of his conduct;<sup>220</sup> (2) the booster providing substantial impermissible benefits to prospective student-athletes;<sup>221</sup> and (3) the athletic director's and booster's attempts to obtain employment for a recruit's mother.<sup>222</sup> Finding that the forgoing conduct amounted to a lack of institutional control and a failure to

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<sup>215</sup> *Id.* § 19.5.2(g)(1)–(5).

<sup>216</sup> *See* THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, *supra* note 74.

<sup>217</sup> *Id.* at 17, 18; *see* MISSISSIPPI STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, *supra* note 165, at 28 (concluding that repeat violator status and improper recruiting activities of a coaching staff seemingly unconcerned with compliance justified imposition of a post-season ban on play by the football team).

<sup>218</sup> THE OHIO STATE UNIVERSITY PUBLIC INFRACTIONS REPORT, *supra* note 74.

<sup>219</sup> *See* CENTRAL FLORIDA IAC REPORT, *supra* note 129.

<sup>220</sup> *Id.* at 2–3.

<sup>221</sup> *Id.* at 3–4.

<sup>222</sup> *Id.* at 4–5.

monitor,<sup>223</sup> and taking into account UCF's repeat violator status, the COI imposed significant penalties.<sup>224</sup> These penalties included five years of probation, a one-year prohibition on both the football and men's basketball teams' participation in post-season competition, a reduction in scholarships in those sports, a \$50,000 fine, and a vacation of wins by the men's basketball team.<sup>225</sup>

On appeal, UCF urged the IAC to set aside the prohibition on post-season play by the football team because the penalty was allegedly excessive and an abuse of the COI's discretion.<sup>226</sup> Agreeing with UCF, the IAC concluded that the COI failed to distinguish between the aggravating factors on which the post-season bans were instituted for the football and basketball teams.<sup>227</sup> According to the IAC,

[t]he rationale for the football postseason penalty is so intricately woven with factors only supportive of the basketball postseason penalty (i.e., continued employment; significant competitive advantage) as to make it impossible to determine whether these additional factors formed a significant basis for the Committee on Infractions imposition of the football postseason [ban] . . . .<sup>228</sup>

The IAC further stated that the COI had failed to specifically delineate the basis for finding a lack of institutional control as it related to the football program.<sup>229</sup> Finally, the IAC agreed with the COI's argument that a post-season ban could be premised on a finding of one aggravating factor.<sup>230</sup> Yet, it concluded that the COI must clearly delineate whatever aggravating factor or factors provide a basis for the penalty imposed.<sup>231</sup>

## 2. *Post-August 2013 Penalty Structure*

### *a. Level I & Level II Infractions*

In developing a new penalty structure, the Enforcement Group was guided by several principles. One was the belief that strong penalties should be prescribed for conduct that "clearly violate[s] the NCAA's

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<sup>223</sup> *Id.* at 5.

<sup>224</sup> *Id.* at 7–9.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 12.

<sup>227</sup> *Id.* at 13.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 14.

<sup>231</sup> *Id.*

enduring values.”<sup>232</sup> The Enforcement Group also developed a new penalty structure premised on the belief that the existing structure failed to deter serious violations.<sup>233</sup> In particular, the working group shared the concerns of many external critics of the pre-August 2013 structure, namely that violators engaged in a risk-reward analysis under which individuals and institutions concluded that the anticipated benefits and advantages resulting from rules violations outweighed the negative consequences of NCAA penalties.<sup>234</sup> As stated by Ed Ray, the president of Oregon State University and chair of the Enforcement Working Group:

[I]t was clear we needed to have stiffer and more predictable penalties, so that people who were doing the “risk-reward” calculation would think twice about whether it was in their interests to engage in bad behavior. Having penalty guidelines—and having penalties that are in those guidelines be more severe than what we have now—was a good way of sending clear signals to people.<sup>235</sup>

The Enforcement Working Group also acknowledged the widely-held perception that the pre-August 2013 penalty structure produced inconsistent results.<sup>236</sup> The new penalty structure also reflects the group’s desire to create a structure that recognizes the efforts of those institutions and institutional leaders who operate their programs in ways that attempt to ensure fairness of competition, compliance, and accountability.<sup>237</sup>

The Enforcement Working Group was also cognizant of criticisms that the imposition of penalties with the greatest deterrence value, such as post-season competition bans and scholarship limitations,<sup>238</sup> adversely impact student-athletes who did not commit violations.<sup>239</sup> While sensitive to this concern, the Enforcement Working Group concluded it was outweighed by the interest to protect member

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<sup>232</sup> ENFORCEMENT REPORT, *supra* note 2, at 5.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Brown, *supra* note 28.

<sup>236</sup> ENFORCEMENT REPORT, *supra* note 2, at 15.

<sup>237</sup> *Id.* at 5.

<sup>238</sup> Brown, *supra* note 33.

<sup>239</sup> ENFORCEMENT REPORT, *supra* note 2, at 16. *See* Weston, *supra* note 42 (discussing the adverse consequences of NCAA-imposed penalties on student-athletes not involved in committing violations); Christopher Davis, Jr. & Dylan Oliver Malagrino, *Hold Your Fire: The Injustice of NCAA Sanctions on Innocent Student Athletes*, 11 VA. SPORTS & ENT. L.J. 432 (2012) (discussing the same).

institutions by imposing significant violations on offending institutions.<sup>240</sup>

As a result, postseason bans and scholarship reductions must be used in the enforcement process. People (coaches, administrators, student-athletes) comprise institutions and sports programs, and there is no practical way to impose meaningful penalties on an institution without affecting some individuals who may not have had any involvement in or benefitted from the violations for which the institution is responsible.<sup>241</sup>

Cognizant of this concern and in an effort to minimize the consequences for student-athletes at institutions that are subject to severe sanctions, the NCAA has on occasion waived the transfer residence requirement.<sup>242</sup> A waiver permits student-athletes to compete immediately at another institution.<sup>243</sup>

Finally, the Enforcement Working Group articulated the following goals of its penalty guidelines in cases involving the most significant violations: (1) providing institutions and individuals with notice of the range of potential penalties;<sup>244</sup> (2) enhancing consistency in applying penalties while preserving some discretion of the COI to adjust penalties;<sup>245</sup> (3) increasing expediency of process without sacrificing integrity and fairness of process;<sup>246</sup> (4) imposing penalties that recognize institutional and leadership responsibility for the governance of intercollegiate athletics programs;<sup>247</sup> (5) holding persons in position of authority accountable for their failures to act appropriately;<sup>248</sup> (6) imposing penalties on coaches and other administrators whose conduct is inconsistent with the NCAA's compliance expectations;<sup>249</sup> and (7) imposing penalties that "deter the

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<sup>240</sup> ENFORCEMENT REPORT, *supra* note 2, at 16.

<sup>241</sup> *Id.*

<sup>242</sup> Adam Rittenberg, *NCAA Outlines Policy for PSU Transfers*, ESPN.COM (July 24, 2012, 5:45 PM ET), [http://espn.go.com/blog/bigten/post/\\_id/53892/ncaa-outlines-policy-for-psu-transfers](http://espn.go.com/blog/bigten/post/_id/53892/ncaa-outlines-policy-for-psu-transfers); *U. of Kentucky's LeRon Ellis Will Transfer After Sanctions by NCAA*, L.A. TIMES (May 22, 1989), [http://articles.latimes.com/1989-05-22/sports/sp-576\\_1\\_leron-ellis-kentucky-sophomore-standout](http://articles.latimes.com/1989-05-22/sports/sp-576_1_leron-ellis-kentucky-sophomore-standout).

<sup>243</sup> Rittenberg, *supra* note 242.

<sup>244</sup> ENFORCEMENT REPORT, *supra* note 2, at 15.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

risk-reward analysis . . . and address any unfair advantage from the violation.”<sup>250</sup>

Mindful of these goals, the Enforcement Working Group developed a penalty structure the centerpiece of which is standard penalty guidelines. Pursuant to these guidelines, core penalties are prescribed for the most serious rules violations.<sup>251</sup> In adopting core penalties, the Enforcement Group was guided by penalties identified by the membership as having the greatest deterrent effect and/or having the closest relationship to the gravity of violations involved in an infractions case.<sup>252</sup>

The new penalty structure consists of the following six core penalties: (1) limitations of varying duration, depending on the severity of the infraction, on an institution's ability to participate in post-season competition; (2) financial penalties including revenues that institutions received from participation in events such as tournaments or bowl games or the revenue generated by a particular sport; (3) limitations on the number of athletic scholarships that can be awarded in given sports; (4) limitations on an institution's recruiting activities in a given sport, including prescribing the number of official and unofficial visits by recruits at the institution and limits on the ability of the institution to engage in off-campus recruiting activities; (5) show-cause orders; and (6) placing the institution on probation, which requires the institution to comply with conditions that are imposed, such as periodic compliance reports during the probationary period.<sup>253</sup>

The more stringent nature of the new structure is illustrated by the guidelines and the minimum penalties that will be imposed. The guidelines for Level I breaches would require, absent aggravating or mitigating circumstances, the COI to impose a one-to-two-year post-season ban, scholarship reductions up to twenty-five percent of the total scholarships allocated to a particular sport, and fines of \$5000 and one to three percent of the total budget of the relevant sports program.<sup>254</sup> As discussed above, additional penalties (e.g., show-cause orders and coach suspensions) could also be imposed.<sup>255</sup>

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 5.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 15, 17–18.

<sup>254</sup> NCAA MANUAL, *supra* note 8, at 329 fig.19-1.

<sup>255</sup> See *infra* text accompanying notes 244–45.

One aspect of the new structure is similar to criminal law sentencing guidelines.<sup>256</sup> With the new structure, the COI is only permitted to depart from the prescribed Level I and II core penalties in cases involving extenuating circumstances.<sup>257</sup> In departing from the guidelines, the COI must articulate the basis for its departure from the prescribed penalties.<sup>258</sup>

While prescribing the new penalty structure, the Enforcement Working Group did not seek to strip the COI of its discretion. An element of subjectivity remains in the process since the COI can depart from the prescribed penalties if extraordinary circumstances are present.<sup>259</sup> Another element of subjectivity remains in the penalty part of the process, by granting the COI the discretion to slot cases.<sup>260</sup> The penalty structure includes a framework that allows for the prescribed penalties to be adjusted upward or downward depending on the presence or absence of aggravating or mitigating circumstances.<sup>261</sup>

The new penalty structure subdivides Level I and II violations into standard, aggravating or mitigating.<sup>262</sup> A COI panel determines the sub-categorization of Level I and II violations after considering the presence or absence of aggravating and mitigating factors.<sup>263</sup> Examples of aggravating factors include: (1) multiple Level I violations by a school or individuals committing infractions; (2) a history of Level I and II violations or major violations by the institution; (3) a lack of institutional control; (4) unethical conduct; and (5) multiple Level II violations.<sup>264</sup>

The impact of this subdivision of penalties to be imposed for Level I and II violations is illustrated as follows. If a Level I infractions case is categorized as standard and neither aggravating nor mitigating factors are present, the prescribed post-season ban would be one to

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<sup>256</sup> See Brown, *supra* note 33 (comparing the penalty guidelines to criminal law sentencing guidelines that restrict a judge's discretion to depart from the prescribed penalties absent extraordinary circumstances).

<sup>257</sup> NCAA MANUAL, *supra* note 8, § 19.9.6.

<sup>258</sup> *Id.* § 19.9.6.

<sup>259</sup> Brown, *supra* note 33.

<sup>260</sup> *Id.* "Slotting" cases refers to the COI's ability to apply lesser or more serious penalties based on the circumstances surrounding the violation.

<sup>261</sup> *Id.* at 6.

<sup>262</sup> NCAA MANUAL, *supra* note 8, § 19.9.2.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* § 19.9.3.

two years.<sup>265</sup> An aggravated Level I infractions case would result in an increase in the length of the post-season ban to two to four years.<sup>266</sup>

In contrast, a Level I case involving mitigating circumstances would result in a reduction in the duration of a post-season ban to zero to one year.<sup>267</sup> Mitigating circumstances include an institution's: (1) "prompt self-detection and self-disclosure of the violation(s);"<sup>268</sup> (2) prompt acknowledgement of violation, assumption of responsibility, and undertaking of corrective action;<sup>269</sup> (3) exemplary cooperation (e.g., identifying information and individuals of which and whom the enforcement staff was unaware);<sup>270</sup> and (4) unintentional violation of regulations.<sup>271</sup>

The COI also retains the discretion to supplement core penalties with penalties available under the pre-August 2013 structure that have been incorporated into the new structure.<sup>272</sup> These additional penalties include: (1) vacation of contests;<sup>273</sup> (2) partial or full season prohibitions on a team's ability to engage in intercollegiate competition (commonly known as "the death penalty");<sup>274</sup> (3) prohibiting certain coaches from engaging in coaching activities;<sup>275</sup> disassociation of boosters;<sup>276</sup> and (4) prohibition on television appearances.<sup>277</sup>

#### *b. Level III & Level IV Infractions*

Under the new enforcement structure, penalties for Level III and IV violations largely mirror those imposed for secondary violations under the pre-August 2013 structure. These include terminating the recruitment of a prospective student-athlete;<sup>278</sup> forfeiture of games in

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<sup>265</sup> *Id.* at 329 fig.19-1.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* § 19.9.4(a).

<sup>269</sup> *Id.* § 19.9.4(b).

<sup>270</sup> *Id.* § 19.9.4(f).

<sup>271</sup> *Id.* § 19.9.4(g).

<sup>272</sup> Brown, *supra* note 33.

<sup>273</sup> NCAA MANUAL, *supra* note 8, § 19.9.7(g).

<sup>274</sup> *Id.* § 19.9.7(a).

<sup>275</sup> *Id.* § 19.9.7(k).

<sup>276</sup> *Id.* § 19.9.7(i).

<sup>277</sup> *Id.* § 19.9.7(h).

<sup>278</sup> *Id.* § 19.9.8(a).

which an ineligible student-athlete participated;<sup>279</sup> public reprimand;<sup>280</sup> and reduction in scholarships.<sup>281</sup>

*c. Coach & Administrator Accountability*

The new enforcement structure will result in increased scrutiny of coaches.<sup>282</sup> Based on the Enforcement Working Group's belief that "head coaches are in the best position to create a culture of integrity and accountability,"<sup>283</sup> Enforcement Working Group members recommended legislation that would hold head coaches responsible, through show-cause orders, for the violations committed by the coach's staff.<sup>284</sup> A newly enacted provision emphasizes the responsibility of the head coach by creating a presumption that the head coach is "responsible for the actions of all assistant coaches and administrators who report, directly or indirectly, to the head coach."<sup>285</sup> The presumption will make it more difficult for a coach to escape accountability for the conduct of his or her subordinates by claiming that he or she was unaware of their rules violations.

A head coach can rebut the presumption of responsibility by "demonstrably showing what he/she did to both promote an atmosphere of compliance and monitor his/her staff . . . ."<sup>286</sup> The presumption impliedly adopts the notion that the coach will have in place processes to monitor the activities of assistant coaches and other athletics personnel who report to the coach.<sup>287</sup> One example of head coaches' efforts to comply with this new requirement is to invite a member of the institution's compliance staff to all staff recruiting meetings.<sup>288</sup> Such actions are an affirmative step by which a head coach can demonstrate a commitment to compliance.

A failure by the head coach to adequately fulfill his or her compliance responsibilities and the failure of the institution to take appropriate action thereafter will subject the head coach to suspension

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<sup>279</sup> *Id.* § 19.9.8(b).

<sup>280</sup> *Id.* § 19.9.8(h).

<sup>281</sup> *Id.* § 19.9.8(e).

<sup>282</sup> Marot, *supra* note 82.

<sup>283</sup> ENFORCEMENT REPORT, *supra* note 2, at 22.

<sup>284</sup> *Id.* at 6.

<sup>285</sup> NCAA MANUAL, *supra* note 8, § 11.1.1.1.

<sup>286</sup> ENFORCEMENT REPORT, *supra* note 2, at 23.

<sup>287</sup> *Q&A with Oregon State President Ed Ray*, NCAA.ORG (Oct. 30, 2012), <http://www.ncaa.org/about/resources/media-center/news/qa-oregon-state-president-ed-ray> [hereinafter *Ray Q&A*].

<sup>288</sup> HEAD COACH RESPONSIBILITIES, *supra* note 190.

from coaching activities through a show-cause order.<sup>289</sup> A head coach's violation of his or her responsibility will be a Level I or Level II violation depending on whether the underlying violation by an individual, who reports to the head coach, is a Level I or Level II violation.<sup>290</sup>

Similarly, the Enforcement Working Group was clear in its directives that the responsibility does not end with head coaches. Members felt strongly that athletic directors and presidents alike must be held accountable for breaches of NCAA regulations that occur on their campuses, particularly in cases involving Level I and II infractions. This was articulated in the Enforcement Working Group's recommendation that resulted in legislation that gives the COI the latitude to identify an institution's president or chancellor and athletic director in the public infractions decision in cases where there was a finding of a lack of institutional control.<sup>291</sup> This legislation also authorizes the COI to identify an athletic director in a case where there is a finding of a failure to monitor.<sup>292</sup> This action is the most significant to date in attempting to hold high-ranking administrators accountable for actions in which they were not directly involved, but occurred under their watch.

#### *d. Shared Responsibility*

The new enforcement structure also emphasizes the shared responsibility of all representatives of NCAA member institutions for upholding the values of the NCAA.<sup>293</sup> Each NCAA member institution is charged with the responsibility to conduct its intercollegiate athletics program in compliance with NCAA's rules and regulations.<sup>294</sup> Institutional responsibility subsumes the actions of staff members and other individuals and entities conducting activities that promote an institution's intercollegiate athletic interests.<sup>295</sup> Therefore, student-athletes, coaches, other institutional staff, and boosters must comply with NCAA rules and regulations.<sup>296</sup>

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<sup>289</sup> NCAA MANUAL, *supra* note 8, § 19.9.5.5.

<sup>290</sup> *Id.* §§ 19.1.1(e), 19.1.2(e).

<sup>291</sup> *Id.* § 19.8.1.2.

<sup>292</sup> *Id.*; ENFORCEMENT REPORT, *supra* note 2, at 25–26.

<sup>293</sup> Brown, *supra* note 28.

<sup>294</sup> NCAA MANUAL, *supra* note 8, § 2.1.1.

<sup>295</sup> *Id.* § 2.1.2.

<sup>296</sup> *Id.* § 2.8.1.

Moreover, institutions must undertake actions necessary to appropriately monitor the conduct of these individuals and entities in an effort to ensure compliance.<sup>297</sup> Institutions are also charged with taking corrective action and informing the NCAA when compliance has not been achieved.<sup>298</sup> Based on these underlying principles, the new enforcement structure imposes an affirmative obligation on such representatives to assume responsibility for compliance and to cooperate and assist the NCAA enforcement staff, the COI, and IAC in “further[ing] the objectives of the Association and its enforcement program.”<sup>299</sup>

As noted above, institutions have always possessed a duty to monitor their programs, educate their constituencies, and cooperate with the NCAA.<sup>300</sup> Therefore, the new enforcement structure has not imposed any additional responsibility on institutions. The bar has been raised, however, in terms of the extent to which an institution must now engage in these efforts in order to meet and properly fulfill its compliance responsibilities. For example, an institution’s compliance office providing rules education at a weekly coaches’ meeting is a necessary compliance activity that likely occurred on most campuses prior to August 2013.<sup>301</sup> The new enforcement structure’s reference to an “affirmative obligation”<sup>302</sup> suggests that mere rules education will not suffice. Continued educational efforts that are supported by systematic, vigilant monitoring efforts are now expected.

This new standard for monitoring and educating staff raises an issue that may have been lost in the discussion of increased accountability for coaches. These efforts place great responsibilities on compliance personnel, who are primarily responsible for implementing and enforcing these new accountability standards. This can place great strains on compliance departments that are not adequately staffed to meet these demands.

Below are two examples of how the new enforcement model would impact recent violations that occurred under the pre-August 2013

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<sup>297</sup> *Id.*

<sup>298</sup> *Id.* § 19.2.3.

<sup>299</sup> *Id.* §§ 19.2.1, 19.2.3.

<sup>300</sup> *Id.* § 6.01.1.

<sup>301</sup> *See, e.g.*, BINGHAMTON UNIV., HEAD COACH RESPONSIBILITIES REGARDING COMPLIANCE WITH AND VIOLATIONS OF NCAA RULES (2012), available at <http://www.bubearcats.com/compliance/compliance-corner-november-2012.pdf>.

<sup>302</sup> NCAA MANUAL, *supra* note 8, § 19.2.1.

enforcement structure. In 2011, a head coach at a Division I institution sent a written offer of financial aid to a prospect prior to August 1 of the prospect's senior year in high school.<sup>303</sup> The head coach thought it was permissible to send the written offer because the PSA had listed his high school graduation date as 2010 and his age as 17.<sup>304</sup> This was clearly an inadvertent occurrence that resulted in no further action being taken by the NCAA.<sup>305</sup> Under the new model, this conduct could result in the suspension of the head coach.<sup>306</sup>

The University of North Carolina infractions case is another example of what would likely have been a drastically different outcome under the new enforcement model.<sup>307</sup> This case featured major infractions including academic fraud, impermissible benefits, unethical conduct, a failure to monitor, and numerous agent/amateurism violations.<sup>308</sup> The COI imposed three years of probation,<sup>309</sup> vacation of the football team's wins in which ineligible student-athletes participated,<sup>310</sup> a reduction of fifteen football scholarships over a three-year period,<sup>311</sup> a one-year post-season ban,<sup>312</sup> and a three-year show-cause penalty against the former assistant coach.<sup>313</sup> Although these were significant penalties, under the new structure, instead of a three-year show-cause order, the range would have been between five to ten years,<sup>314</sup> the head coach (who was terminated) would have been subject to a suspension of anywhere from fifty to one hundred percent of the ensuing season,<sup>315</sup> and instead of a three-year probationary period, the institution would have incurred a six-to-ten-year probationary period.<sup>316</sup> In addition,

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<sup>303</sup> Note that information regarding this violation is archived in the NCAA Infractions Database, which is not publicly available (information on file with authors).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> NCAA DIV. I COMM. ON INFRACTIONS, UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL PUBLIC INFRACTIONS REPORT (2012), *available at* <http://chronicle.com/blogs/ticker/files/2012/03/UNC.pdf>.

<sup>308</sup> *See generally id.*

<sup>309</sup> *Id.* at 22.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 23.

<sup>312</sup> *Id.* at 23–24.

<sup>313</sup> *Id.* at 24.

<sup>314</sup> NCAA MANUAL, *supra* note 8, at 330 fig.19-1.

<sup>315</sup> *Id.* at 329 fig.19-1.

<sup>316</sup> *Id.*

scholarship limits of twenty-five to fifty percent and a post-season ban of two to four years could have been imposed had the same violations been adjudicated under the new model.<sup>317</sup> These examples support the notion that the new enforcement structure may provide stronger incentives to comply, which was one of the Enforcement Working Group's principal goals.<sup>318</sup>

### CONCLUSION

The NCAA's enactment of a new enforcement structure represents another effort by the organization to respond to the concerns of member institutions and to adopt rules that restore trust in the organization's ability to fairly and efficiently govern Division I intercollegiate athletics. The new enforcement structure also embodies bylaws that promote the three primary goals set by the Enforcement Working Group when recommending an enforcement structure legislative overhaul: (1) imposing stricter and more predictable penalties; (2) having a more transparent and expedited infractions process; and (3) enhancing the ideal of shared responsibility in promoting the NCAA's core values.<sup>319</sup> Whether the new structure will succeed in accomplishing these ambitious goals will be determined as the COI begins to process infractions cases under the new regulations and precedent develops. It is also likely that the new structure will not quiet the NCAA's most severe critics.<sup>320</sup> Indeed, the new structure, while resolving past issues, is likely to spawn new concerns. The effectiveness of the new structure will also turn on the manner in which the COI exercises its judgment in classifying violations and adhering to the prescribed penalty framework.<sup>321</sup> Nevertheless, the new structure represents a laudable effort, through the adoption of penalty guideless, to impose more severe penalties on violators. The imposition of such penalties may deter rules violations and stymie the risk-reward analysis previously engaged in by those who violate NCAA regulations.

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<sup>317</sup> *Id.*

<sup>318</sup> In order to provide guidance to institutions, the NCAA created a database of twenty-five hypothetical cases which illustrate how certain violations would be classified and the penalties that would be assessed. ENFORCEMENT NCAA, CASE ANALYSIS LIBRARY, (2013), available at [http://www.ncaa.org/sites/default/files/CaseAnalysisLibrary\\_080513.pdf](http://www.ncaa.org/sites/default/files/CaseAnalysisLibrary_080513.pdf).

<sup>319</sup> *Ray Q&A*, *supra* note 287.

<sup>320</sup> Brennan, *supra* note 47.

<sup>321</sup> Infante, *supra* note 142.