

ENOUGH IS ENOUGH:  
THE CASE FOR FEDERAL REGULATION  
OF SPORT AGENTS

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I. INTRODUCTION

Professional athletes rely on sports agents to represent them in the business aspects of their profession. Agents play a critical role in the athletes' lives by managing business affairs off the field, so that the athletes can focus on their performance on the field.<sup>4</sup> Most professional athletes rely on agents as trusted advisors for many off-the-field aspects of their careers: to negotiate contracts, engage in marketing activities, develop athletes' brands, secure their financial futures, and prepare them for life after their playing careers. In playing such a key role in the athlete's life, great trust is put in the agent. Violation of that trust by the agent, which results in eliminating an athlete's athletic eligibility, ruining an athlete's financial future, harming a collegiate athletic program, and interfering with professional contracts should be addressed by Congress.

Among the first sports agents were theater promoter C.C. ("Cash and Carry") Pyle, who in 1925 negotiated a deal with the Chicago Bears for Red Grange to earn \$3,000 per game and an additional \$300,000 in movie rights, and sports cartoonist Christy Walsh, who provided Babe Ruth with financial advice during the Great Depression.<sup>5</sup> In 1960, Mark H. McCormack's historic hand-

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4. See Diane Brady, *Online Extra: Arnold Palmer: With IMG From the Start*, BLOOMBERG BUS. WEEK MAGAZINE (July 11, 2004), [http://www.businessweek.com/magazine/content/04\\_28/b3891131.htm](http://www.businessweek.com/magazine/content/04_28/b3891131.htm) (detailing Palmer's relationship with his agent). The article further looks at the development of the creation of the sports agent world, from Arnold Palmer's perspective. See *id.* (providing how Palmer's agent changed his perspective on sports marketing).

5. See R.C. BERRY, W.B. GOULD, & P.D. STAUDOHR, *LABOR RELATIONS IN PROFESSIONAL SPORTS*, 10 (1986) (recounting history of early sports agents such as C.C.

shake deal with Arnold Palmer launched the full service sports agency business.<sup>6</sup> Athletes increasingly relied on sports agents in the late 1960s and the 1970s as professional sports grew exponentially.<sup>7</sup> The emergence of new leagues competing for talent with the NFL, the NBA, and the NHL, the development of a free agent market in baseball as a result of the Messersmith-McNally arbitration decision, increased media revenues in professional sports, and growth in endorsement opportunities all created a need for athletes to be represented by agents in contract negotiations.<sup>8</sup>

The growth, however, produced an oversupply of agents for a finite number of clients. Currently, there are 4,300 professional athletes in the four major leagues in United States and between 1,600 and 1,800 agents certified by their respective players associations.<sup>9</sup> While the field can provide high reward and stature, it is also full of risk, creating an environment fraught with ethical challenges. Due to the heavy competition for clients, agents often act in an overly aggressive manner when recruiting and retaining clients. In fact, it appears that offering inducements to athletes in an effort to sign them to representation agreements is routine in the business.<sup>10</sup> Despite a maze of regulations and laws promulgated over

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Pyle, who helped jumpstart sports agency and marketing); *see also* Craig Neff, *Den of Vipers, A Sports Scourge: Bad Agents*, SPORTS ILLUSTRATED (Oct. 19, 1987), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1066585/index.htm> (explaining Ruth's benefit from Walsh's assistance).

6. *See* Brady, *supra* note 4 ("Palmer attributes much of his financial success to his long relationship with IMG founder Mark McCormack, who launched the sports-management company to service the young golf star back in 1960.").

7. *See* KENNETH SHROPSHIRE & TIMOTHY DAVIS, *THE BUSINESS OF SPORTS AGENTS*, 9-14 (2003) (providing how, as professional sports leagues began to grow in popularity, athletes in these leagues began to rely more and more on agents).

8. *See* Nat'l & Am. League Prof'l Baseball Clubs v. Major League Baseball Players Ass'n, 66 Lab. Arb. Rep. (BNA) 101 (1976); *see also* Kan. City Royals v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 261 (W.D. Mo. 1976), *aff'd*, 532 F.2d 615 (8th Cir. 1976) (holding "the provisions of Major League Rules 4—A(a) and 3(g) do not inhibit, prohibit or prevent such clubs from negotiating or dealing with respect to employment with the grievants [in this case]"; also, that "Messersmith shall have been removed from the reserve list of the Los Angeles Club and after grievant McNally shall have been removed from the reserve or disqualified lists of the Montreal Club . . ."). *See* LISA P. MASTERALEXIS, CAROL A. BARR & MARY HUMS, *PRINCIPLES AND PRACTICE OF SPORTS MANAGEMENT* (4th ed. 2012) [hereinafter *PRINCIPLES*] (providing that with growth of professional sporting leagues and increased media deals and endorsement opportunities that came along with it, athletes began to turn more to agents).

9. *See* *PRINCIPLES*, *supra* note 8, at 252 (listing four major leagues in United States: Major League Baseball (MLB), National Football League (NFL), National Hockey League (NHL), and National Basketball Association (NBA)).

10. *See* Phillip J. Closius, *Hell Hath No Fury Like a Fan Scorned: State Regulation of Sports Agents*, 30 U. TOL. L. REV. 511, 512 (1999) (looking at "uncontrolled" activity of agents and reality of payments to collegiate athletes).

the past thirty years, improper behavior by agents persists. Recent examples of this improper behavior include:

- Cecil Newton, father of Carolina Panther quarterback Cam Newton who played college football at Auburn, allegedly tried to sell his son's college playing services to Mississippi State for \$180,000 while Cam was being recruited out of ju- The National Collegiate Athletic Association ("NCAA") suspended fourteen football players for part of a season, and eight for the entire season, from the University of North Carolina's team for receiving improper benefits from an agent and academic misconduct.<sup>11</sup>

- Marcell Dareus, a defensive tackle on the University of Alabama's football team, was suspended for two games by the NCAA for "accepting nearly \$2,000 in improper benefits from an agent."<sup>12</sup>

- The NCAA suspended A.J. Green, a University of Georgia receiver, for four games for selling a football jersey for \$1,000 to an agent.<sup>13</sup>

nior college. The NCAA ruled that Cecil Newton did attempt to sell his son's services but that Cam did not know about the scheme and, thus, there were no suspensions.<sup>14</sup>

- On June 7, 2011, the University of Southern California ("USC") was stripped of its 2004 National Football Championship by the Bowl Championship Series ("BCS") because the NCAA had previously determined that former USC star Reggie Bush had received extra benefits from a would-be sports marketer in violation of NCAA rules. The NCAA also penalized USC by imposing a two-year ban from postseason play and the loss of 30 scholarships.<sup>15</sup> Bush's Heisman win was vacated and both Bush and USC were forced to return their copies of the trophies.

- Nevin Shapiro, former booster and co-owner of a sports agency firm, who is incarcerated for his involvement in a

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11. See *A Look at Recent College Football Scandals*, ASSOCIATED PRESS, May 31, 2011, available at [http://www.usatoday.com/sports/college/football/2011-05-31-4176652001\\_x.htm](http://www.usatoday.com/sports/college/football/2011-05-31-4176652001_x.htm) (listing most recent scandals plaguing college football).

12. See *id.* (stating example of college athlete and agent impropriety).

13. See *id.* (stating example of college athlete and agent impropriety).

14. See *id.* (stating example of college athlete and agent impropriety).

15. See Ted Miller, *USC Stripped of '04 Championship*, ESPN (June 7, 2011, 10:35 AM), <http://sports.espn.go.com/los-angeles/ncf/news/story?id=6632190> ("One of the best ways of ensuring that [BCS games] remain [showcase events] is for us to foster full compliance with NCAA rules. Accordingly, in keeping with the NCAA's recent action, USC's appearances are being vacated.").

\$930 million Ponzi scheme, claims to have given University of Miami athletes hundreds of thousands of dollars in cash, prostitutes, and entertainment at his homes and yachts. The allegations are currently under investigation by the NCAA.<sup>16</sup>

- In 2010 amid allegations that the Toronto Blue Jays were negotiating with the agent of James Paxton, a University of Kentucky junior and MLB first round draft pick, the University declared Paxton ineligible for his senior season. That led to Paxton suing the school, "charging that athletic officials threatened to bar him from playing if he did not agree to meet with NCAA investigators, even though he was not told what rules he was accused of violating."<sup>17</sup> A Kentucky judge ruled in the University's favor.<sup>18</sup>

The conduct of some sports agents has the potential to shake the confidence that the American people have in collegiate athletics at major universities. The illegal and unethical actions of agents may cause private and public universities to lose the services of their teams, athletes, and coaches due to improper behavior that draws suspensions from the NCAA. The effect of the improper agent activity extends beyond those declared ineligible by the NCAA to teammates, coaches, administrators, the campus at large, alumni, and fans who are also victims of the penalties. Large public universities often invest significant public funds into athletic programs

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16. See Charles Robinson, *Renegade Miami Football Booster Spells Out Illicit Benefits to Players*, YAHOO! SPORTS (Aug. 16, 2011), [http://sports.yahoo.com/investigations/news?slug=CR-renegade\\_miami\\_booster\\_details\\_illicit\\_benefits\\_081611](http://sports.yahoo.com/investigations/news?slug=CR-renegade_miami_booster_details_illicit_benefits_081611) (revealing Shapiro ran eight years of NCAA rule-breaking, totaling millions of dollars, sometimes with the knowledge of at least seven football and basketball coaches); see also Pete Thamel, *Hurricane Players and Recruits Accused of NCAA Violations*, N.Y. TIMES, Aug. 16, 2011, at B14, available at <http://www.nytimes.com/2011/08/17/sports/ncaafotball/miami-hurricanes-accused-of-ncaa-violations.html> (reporting allegations involving at least seventy-two current and past players).

17. See Devon Teeple, *James Paxton: After a Controversial Career at UK, Paxton Back on Baseball Grid*, BLEACHER REPORT (May 9, 2011), <http://bleacherreport.com/articles/694732-after-a-controversial-career-at-uk-james-paxton-is-back-on-the-baseball-grid> (explaining that according to NCAA, Paxton violated NCAA rules by having agent Scott Boras act on his behalf). It has not been reported whether Boras had a contract with Paxton in compliance with UAAA and SPARTA regulations. See *id.*

18. See *Judge: Kentucky Can Keep Paxton Out of Games*, USA TODAY (Jan. 16, 2010, 12:18 PM), [http://www.usatoday.com/sports/college/baseball/2010-01-16-kentucky-paxton\\_N.htm](http://www.usatoday.com/sports/college/baseball/2010-01-16-kentucky-paxton_N.htm) (ruling Kentucky could bench Paxton for refusing to answer NCAA questions about possible illegal actions threatening his amateur status).

and stadia.<sup>19</sup> Coaches at these universities are often the highest paid state employees.<sup>20</sup>

Congress should re-examine the involvement of agents with student-athletes, as it appears that legislation to date has been ineffective. A recent study by the United States Anti-Doping Agency found that “[n]early 90% of U.S. adults agree that well-known athletes have a responsibility to be positive role models . . . .”<sup>21</sup> Further, the same study found that forty-one percent of children in the general population who play sports and twenty-nine percent of children involved in organized sports through a national governing body agree that if a well-known athlete breaks the rules, it makes children think it is acceptable to break the rules in order to win.<sup>22</sup> Thus, it is important to ensure that the actions of agents potentially inducing amateur athletes to violate NCAA rules do not have an adverse effect on professional and college sports, which in turn erodes the confidence that young athletes have in their role models.<sup>23</sup> These are the problems that the Sports Agent Responsibility and

19. See Kelly Lyell, *Stadium Hopes: The University of Minnesota's Story and How Three Others Are Going About It*, FORT COLLINS COLORADOAN (Feb. 21, 2012, 12:35 AM), [http://www.coloradoan.com/article/20120221/NEWS01/120221003/Stadium-hopes-University-Minnesota-s-story-how-three-others-going-about-it?nclick\\_check=1](http://www.coloradoan.com/article/20120221/NEWS01/120221003/Stadium-hopes-University-Minnesota-s-story-how-three-others-going-about-it?nclick_check=1) (explaining that University of Minnesota recently moved into TCF Bank Stadium, which cost \$288 million to construct). Minnesota's state legislature approved public financing to fund about half of the \$288 million construction cost, with the rest coming from TCF Bank's \$35 million naming rights, a student fee of \$25 a year and increased parking revenue from campus lots on game days. See *id.*

20. See Jeff Smith, *Jim Calhoun Highest Paid State Employee In 2009, Followed By Geno Auriemma, Randy Edsall*, HARTFORD COURANT (Conn.) (May 25, 2010, 12:56 PM), [http://blogs.courant.com/uconn\\_mens\\_basketball/2010/05/calhoun-highest-paid-state-emp.html](http://blogs.courant.com/uconn_mens_basketball/2010/05/calhoun-highest-paid-state-emp.html) (identifying three highest paid state employees in Connecticut: Jim Calhoun, University of Connecticut's Basketball Coach (2008 salary \$1,618,655.44), Randy Edsall, former University of Connecticut football coach (2008 salary \$1,380,569.00) and Geno Auriemma, University of Connecticut woman's basketball coach (2008 salary \$1,309,426.44)).

21. See *What Sport Means in America: A Survey of Sport's Role in Society*, 7 U.S. ANTI-DOPING AGENCY 1010, July 7, 2012, <http://www.usantidoping.org/uploads/usadaresearchreport.pdf> (reporting results from study “of nearly 9,000 Americans, representing the general population, coaches, athletes, and parents of athletes involved in Olympic-path sports and non-Olympic level sports (e.g. community-based, school-based, informal).”).

22. See *id.* at 9 (“As children move into the teen years, their rankings of positive influencers shift away from direct influencers such as coaches, parents, and teachers, toward indirect influencers such as Olympic and college athletes, demonstrating a swing in focus to external public personalities as role models.”).

23. See Tracy L. Ziemer, *Study Says Kids Emulate Athletes*, ABC NEWS (Oct. 13, 2000), <http://abcnews.go.com/Sports/story?id=100296#TxCXxaUeMwE> (reporting study by Kaiser Family Foundation children learn lessons about sports and life from watching famous athletes). The study found that “[t]hree-fourths of the 1,500 10- to 17-year-olds and 1,950 parents surveyed said athletes teach children that being a good sport and playing fair are as important as winning.” *Id.*

Trust Act (SPARTA) and the Uniform Athlete Agent Act (UAAA) were enacted to address.<sup>24</sup> It is clear that neither statute has effectively rid athletics of these problems because they are rarely enforced.<sup>25</sup>

There have been many groups engaged in attempting to regulate agents. Among them are players associations, universities, athletic conferences, national governing bodies, the NCAA, state and federal governments, a now-defunct professional association called the Association of Representatives of Professional Athletes (ARPA), and a new association, the National Association of Sports Agents & Athlete Representatives (NASAAR).<sup>26</sup> Despite the introduction of regulations by all of these groups, none have been truly effective at addressing the full range of problems that have occurred since the late 1970s when former sportswriter Richard Sorkin, agent to dozens of NHL and NBA players, squandered an estimated \$1.2 million of his clients' money, much of it on his own gambling and poor investments.<sup>27</sup> Beyond unscrupulous agents' improper conduct in collegiate sports, reports of unethical behavior in the field of sports agency are widespread. The intended beneficiaries of the sports agency business, professional athletes, are often victims of their

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24. See 15 U.S.C. §§ 7801-7807 (2006) (regulating contact between student athletes and athlete agents). See generally *FAQ on Uniform Athlete Agent Act*, NCAA (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act> (enacted to regulate athlete agents' behavior). "[T]he UAAA, as enacted, requires an athlete agent to register with a state authority, typically the Secretary of State, in order to act as an athlete agent in that state. During the registration process, an athlete agent must provide important background information, both professional and criminal in nature. As of July 2010, the UAAA has been passed in 40 states, the District of Columbia and the U.S. Virgin Islands. This includes Illinois, which will take effect Jan. 1, 2011. Three more states have non-UAAA laws in place designed to regulate agents." *Id.*

25. See Alan Scher Zagier, *Laws on Sports Agents Rarely Enforced*, HUFFINGTON POST (Aug. 17, 2010, 4:15 PM), [http://www.huffingtonpost.com/2010/08/17/laws-on-sports-agents-rar\\_n\\_685000.html](http://www.huffingtonpost.com/2010/08/17/laws-on-sports-agents-rar_n_685000.html) ("[A]n Associated Press review has found that more than half of the 42 states with sports agent laws [e.g. the UAAA] have yet to revoke or suspend a single license, or invoke penalties of any sort.").

26. See Darren Heitner, *National Association of Sports Agents & Athlete Representatives*, SPORTS AGENT BLOG (May 7, 2012), <http://www.sportsagentblog.com/2012/05/07/national-association-of-sports-agents-athlete-representatives/> (creating program geared towards representing interests of sports agents and others representing athletes). "The hope is that NASAAR will at least, in part, help remove the oft unjustified target on sports agents." *Id.*

27. See Neff, *supra* note 5, at 2 (providing story of financial "skulduggery" of agents). "But as court suits pitting athletes against agents proliferate, the Sorkin scandal no longer seems so shocking." *Id.*

trusted advisors.<sup>28</sup> Problems that occur with some frequency include incompetent representation, improper financial advising, fraud, larceny, conflicts of interest, charging excessive fees, and raiding clients.<sup>29</sup>

In one of the most infamous cases, former agent, Tank Black, violated his fiduciary responsibility to his players, pled guilty to money laundering and obstruction of justice charges, and lost a criminal trial on charges of stock fraud. He served a seven year prison sentence.<sup>30</sup> Between 1999 and 2002, according to the National Football League Players Association (NFLPA) estimates, seventy-eight players lost a total of forty-two million dollars from fraudulent financial advisors, some of whom were also their agents.<sup>31</sup> In response, in 2002 the NFLPA commenced its Financial Advisors Program, but critics say “the union’s vetting process for the more than 400 approved money managers isn’t strenuous enough.”<sup>32</sup> In all fairness, the NFLPA’s mission is to be the exclusive bargaining agent for the players, not a regulator of financial advisors. Additionally, if the NFLPA were to have a more strenuous vetting process, it could lead to an antitrust action against the NFLPA since regulating financial advising lies outside of the union’s labor exemption to such lawsuits.<sup>33</sup>

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28. *See id.* (“At the root of many athletes’ financial woes is the fact that agents are subject to few educational or professional requirements, only the vaguest ethical standards and a bare minimum of regulation.”).

29. *See id.* (explaining one instance of fraud where football players were taken in by Dallas agent Joe Courge and his devout Christianity). Further examples include: Steve Kemp trade to the Chicago White Sox because the club despised dealing with his agent, players receiving kickbacks to take lower signing bonuses, negotiating short term contract purely for tax reasons instead of athlete ability, conflict of interests between agents running tournaments while representing players in such tournaments. *See id.*

30. *See* L. Jon Wertheim, *Web of Deceit Smooth-Talking Agent Tank Black Allegedly Ensnared Nearly Two Dozen NFL and NBA Players, Including Vince Carter*, SPORTS ILLUSTRATED (May 29, 2000), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1019341/index.htm> (discussing length of Black’s prison sentence); *see also* *Litigation Release No. 16455*, SEC. & EXCH. COMM’N (February 25, 2000), <http://classaction.findlaw.com/cases/securities/sec/sec1/files/2000/1r16455.html> (summarizing asset-freeze obtained by SEC against Black); *see also* *Tank Black Jailed 6+ Years*, CBCSPORTS (June 14, 2001, 8:22 PM), <http://www.cbc.ca/sports/story/2001/06/14/black010614.html> (summarizing sentence imposed on Black for money-laundering).

31. *See* Elena Bergeron, *Zero-Sum Game*, ESPN MAGAZINE (Aug. 25, 2011, 3:53 PM), [http://espn.go.com/nfl/story/\\_/id/6895017/nfl-michael-vick-typifies-how-easily-nfl-players-go-bankrupt-espn-magazine](http://espn.go.com/nfl/story/_/id/6895017/nfl-michael-vick-typifies-how-easily-nfl-players-go-bankrupt-espn-magazine) (illustrating how poor financial management bankrupts professional athletes by example of Michael Vick).

32. *Id.*

33. *See* PRINCIPLES, *supra* note 8, at 101-03. For a further discussion regarding the inability of the NFLPA to regulate financial advisors, *see infra* notes 63 and 64 and accompanying text.

Professional sport unions, major college football and basketball programs, and the NCAA waste valuable time policing agents to prevent scandals and problems associated with the conduct of agents.<sup>34</sup> In addition, conflicts of interest abound, making policing difficult. For instance, the NCAA requires universities to self-monitor. Athletic departments hire compliance officers to inform staff about the rules and to enforce those rules. A compliance officer may hesitate to report a player's contact with an agent when it might trigger NCAA sanctions, or call into question the recruiting practices of a head coach who may be the highest paid employee in the university system.<sup>35</sup> Likewise, players associations might be leery to investigate and discipline their union's most powerful agents due to the agents' relationships with a stable of clients who are also union members.<sup>36</sup>

The manner in which Congress responded to another systemic problem in the accounting profession is instructive to the current situation of unethical sport agents. In 2001, Enron, a Texas-based energy company, filed for bankruptcy. The Enron bankruptcy led to a scandal because it was later revealed that Enron had fraudulently under-reported company debt and pressured its accounting firm, Arthur Andersen, to ignore it. This under-reporting of debt led to an inflated stock price and company valuation. As a result, Arthur Anderson was convicted of criminal obstruction of justice, although the conviction was later overturned by the United States Supreme Court in *Arthur Anderson, LLP v. United States*.<sup>37</sup> Enron's fraud and Arthur Anderson's willingness to ignore its fiduciary responsibility demonstrated problems in the American stock market

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34. See Darren A. Heitner, *In Baseball's Best Interest?: A Discussion of the October 2010 MLBPA Regulations Governing Player Agents*, 10 VA. SPORTS & ENT. L.J. 249 (2011). The Major League Baseball Players Association issued sweeping new agent regulations principally aimed at addressing client stealing by agents. See Mary Pilon, *Scandals Test the NCAA's Top Rules Enforcer*, N.Y. TIMES Dec. 16, 2011, at D1, available at <http://www.nytimes.com/2011/12/17/sports/major-scandals-test-ncaa-enforcement-arm.html> (outlining major college sports scandals of 2011).

35. See generally *New Filing Cites Evidence OSU AD Smith, Pres. Gee and Tressell Concealed Violations from NCAA*, BREW ON SOUTH U'S BLOG (Feb. 28, 2012), <http://brewonsouthu.wordpress.com/2012/02/28/new-filing-cites-evidence-osu-ad-smith-pres-gee-and-tressell-concealed-violations-from-ncaa/> (listing and explaining OSU's violations of NCAA rules). See *supra* note 24 and accompanying text.

36. See Michael S. Schmidt, *Selig Is Said to Be Unsatisfied With Union's Stance on Boras*, N.Y. TIMES, Jan. 4, 2011, at B14, available at <http://www.nytimes.com/2011/01/05/sports/baseball/05boras.html> (investigating MLB agent's cash loan to prospective client and MLB players' union's claim that this did not violate MLB regulations).

37. See *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005) (overturning obstruction of justice conviction).



that were “broad, deep, systemic, and structural.”<sup>38</sup> According to United States Senator Paul Sarbanes, “[a] number of very major, highly-regarded public companies, along with their auditors, were relying upon convoluted and often fraudulent accounting devices to inflate earnings, hide losses, and drive up stock prices.”<sup>39</sup>

Congress responded to the Enron scandal, and other corporate and financial scandals, by enacting the Sarbanes-Oxley Act of 2002, intended to protect publicly traded companies, shareholders, and the general public from accounting errors and fraudulent practices.<sup>40</sup> With the passage of this Act, Senator Sarbanes commented that it “set standards for honest, transparent, and ethical business practices in our great public companies and established the safety mechanisms to keep them in place.”<sup>41</sup>

For the reasons that follow, a Congressional response akin to Sarbanes-Oxley is necessary to restore and preserve the confidence of the American people in professional and major college football and basketball institutions. Specifically, a portion of Sarbanes-Oxley, the Public Company Accounting Oversight Board (PCAOB), should be used as a guide to create a board to regulate the conduct of agents. Congress has the authority to act because the commercial activities of major college sports constitute interstate commerce.<sup>42</sup> Further, spectator sports are significant to American culture and the American economy. The United States government addressed the relationship of sports to American society when it acknowledged on a State Department website: “Sports play an important role in American society. They enjoy tremendous popular-

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38. See Nance Lucas, An Interview with United States Senator Paul S. Sarbanes, *11 J. Leadership & Org. Studies* 3-8 (2004), available at <http://jlo.sagepub.com/content/11/1/3.full.pdf+html> (interviewing Senator Sarbanes about his role as co-author of Sarbanes-Oxley Act).

39. *Id.* at 4 (quoting Senator Sarbanes regarding fraudulent and misleading tactics used by public companies and their auditors to mislead markets).

40. See Sarbanes-Oxley Act of 2002, Pub. L. 107-204, July 30, 2002, available at <http://www.sec.gov/about/laws/soa2002.pdf> (regulating public company boards, management, and accounting firms). See generally John C. Coates IV, *The Goals and Promise of the Sarbanes-Oxley Act*, 21:1 JOURNAL OF ECON. PERSPECTIVES 91-116 (Winter 2007) (discussing Sarbanes-Oxley's effects on American financial services industry).

41. Lucas, *supra* note 38, at 4.

42. See U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States.”). The commercial activities of major college sports have been determined to be interstate commerce and subject to antitrust legislation. See *Law v. NCAA*, 902 F. Supp. 1394 (D. Kan. 1995) (restricting coaches' earnings violated antitrust laws); see also *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1982) (ruling that NCAA limitations on college football television contracts violate antitrust laws).

ity but more important they are vehicles for transmitting such values as justice, fair play, and teamwork. Sports have contributed to racial and social integration and over history have been ‘social glue’ bonding the country together.”<sup>43</sup> Professional sports in the United States accounts for \$32 billion in revenues, with sports spending growing 1.9 times faster than the gross domestic product.<sup>44</sup> Evidence exists that the continuing recovery of the United States economy will continue to have positive effects on professional sports revenues. In fact, during the past five years, personal consumption expenditures on spectator sports grew two percentage points faster than the personal consumption expenditures in the United States economy.<sup>45</sup>

Part II of this article discusses sport agencies as professional service firms.<sup>46</sup> Part III gives background on self-regulation and co-regulation in professional service firms.<sup>47</sup> Part IV discusses prior attempts at regulating of sport agents.<sup>48</sup> Part V describes the proposed Sport Agent Accountability Board (SPAAB), and Part VI concludes with a discussion of the benefits of this new board.<sup>49</sup>

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43. See *Sports in America*, U.S. DIPLOMATIC MISSION TO GERMANY, <http://usa.usembassy.de/sports.htm> (last visited Dec. 1, 2012) (disseminating information on sports in America).

44. See Patrice Zygband & Herve Collignon, *The Sports Market: Major Trends and Challenges in an Industry Full of Passion*, A.T. KEARNEY (May 2011), <http://www.atkearney.com/index.php/Publications/the-sports-market.html> (offering independent analysis of global sports markets and concluding that sports industry’s growth is faster than that of national gross domestic products in many countries).

45. See Catherine Rampell, *Growth Accelerates, But U.S. Has Lots of Ground to Make Up*, N.Y. TIMES, Jan. 27, 2012, at A1, available at <http://www.nytimes.com/2012/01/28/business/economy/us-economy-grows-at-modest-2-8-percent-rate.html> (reporting Commerce Department finding that United States economy “grew at an annualized rate of 2.8 percent in the fourth quarter [of 2011]”). See *The U.S. Professional Sports Market and Franchise Value Report 2011*, WR HAMBRECHT AND Co. SPORTS FIN. GRP. (2011), [http://www.wrhambrecht.com/pdf/2011\\_Sports\\_Market\\_Report\\_UPDATE.pdf](http://www.wrhambrecht.com/pdf/2011_Sports_Market_Report_UPDATE.pdf) (last visited Oct. 13, 2011) (“Personal consumption expenditures [PCE], which represent over two thirds of GDP as a whole, rose in absolute terms over each of the past five years and at a 3.1% CAGR during the period, to \$10.5 trillion in total according to the Bureau of Economic Analysis. Spectator sports’ share of PCE grew even faster, at a 5.1% CAGR to over \$22 billion in total.”).

46. See *infra* notes 50-67 and accompanying text.

47. See *infra* notes 68-86 and accompanying text.

48. See *infra* notes 111-147 and accompanying text.

49. For a discussion of the Sports Agent Accountability Board, see *infra* notes 148-169. For concluding remarks and a discussion of the benefits of this new board, see *infra* notes 170-172.

## II. SPORT AGENCY AS PROFESSIONAL SERVICES FIRMS

Business relationships among sport agents and athletes are founded upon the agency principle of the agent aligning his incentives with the player and using the player's knowledge to help achieve that player's goals.<sup>50</sup> In this manner, the duties and responsibilities of a sport agent are similar to those of other knowledge workers employed by professional service firms. These firms can be defined as organizations with the following characteristics: "knowledge intensity, low capital intensity, and a professionalized work force."<sup>51</sup> Typical examples of organizations and industries that meet this definition include law, accounting, consulting, health-care, and education. Combining these facets yields an organization where workers control the means of production, decisions are made autonomously, resources are distributed heterogeneously amongst competitors, knowledge is portable, output intangible, and information is asymmetric between producers and consumers.<sup>52</sup> Recognizing these features is essential to analyzing the operations of any professional service firm, including sport agencies.

As the sport agency industry has evolved, aspects of professional service firms have become more pronounced as duties have expanded and specialization has increased. From the industry's early days of handshake agreements to the mergers and consolidations frequent amongst today's competitors, the field has come to resemble the business practices and patterns of advertising and consulting firms.<sup>53</sup> Not coincidentally, these types of firms are among those getting into the agent industry. The requirements to be a sports agent simultaneously reflect the nature of professional services firms and the need for added regulation of sport agents. The low capital needs are even more extreme in this industry where the

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50. See William Rothstein, *The Business of Sports Representation: Agent Evolution in the "Industry"*, 9 VA. SPORTS & ENT. L.J. 19, 23-33 (2009) (tracing history of agency principles as applied to athletics).

51. See Andrew von Nordenflycht, *What is a Professional Service Firm? Toward a Theory and Taxonomy of Knowledge Intensive Firms*, 35 ACAD. OF MGMT. REV. 155, 174 (2009) (explaining basic characteristics of professional service firms).

52. See PETER MILLS & KEVIN SNYDER, KNOWLEDGE SERVICES MANAGEMENT: ORGANIZING AROUND INTERNAL MARKETS, 1-22 (2010) (defining knowledge services and tracing its evolution through America's shift from manufacturing to knowledge-based industry).

53. See Brady, *supra* note 4 (discussing Arnold Palmer's famous handshake deal with Mark McCormack); see generally *Legacy Sport Group and the Agency Sports Management Merge to Form the Legacy Agency*, PR NEWSWIRE (Jan. 23, 2012), <http://www.prnewswire.com/news-releases/legacy-sport-group-and-the-agency-sports-management-merge-to-form-the-legacy-agency-137886193.html> (announcing merger of sports representation businesses).

only requirement to be an agent is to have a client. While leagues and players unions may require registration and certification to handle player contracts, negotiating for endorsement deals or providing financial advice does not require such certification and is fairly unregulated, with numerous individuals performing these duties while working within large firms or directly with an athlete.<sup>54</sup> The NFLPA has a voluntary regulations program for financial advisors.<sup>55</sup> The Major League Baseball Players Association (MLBPA) has also started a limited certification for those solely recruiting players for a player agent or those providing client maintenance services to a player.<sup>56</sup>

Similar to other professional service firms, the customer or athlete in this case, lacks expertise in the specific area under advisement and is thus, trusting that the service provider is working toward their best interests. In the sport agent industry, the customer is a young athlete with little experience in the field of negotiation. With this profile, the customers are particularly susceptible to exploitation by unqualified agents who control the process and final outcomes, with minimal input from clients.

Athletes experience tremendous “information asymmetry” when choosing a representative for contract negotiations, financial,

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54. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (1935) [hereinafter NLRA] (granting workers broad rights to unionize). Section 9 allows unions to be the exclusive representatives of employees, in this case professional athletes who are employed by professional teams, and to bargain wages, hours and other conditions of employment. Unions certify and register agents to negotiate such terms consistent with the respective collective bargaining agreements. Endorsement deals and financial advice are not covered by section 9 and unions do not have the authority to certify agents performing these tasks. See *Collins v. NBPA*, 850 F. Supp. 1468, 1475 (D. Colo. 1991) (“Under the NLRA the employer—the NBA member team—may not bargain with any agent other than one designated by the union and must bargain with the agent chosen by the union.”); see also *White v. Nat’l Football League*, 92 F. Supp. 2d 918 (D. Minn. 2002) (“Under federal labor law, the NFLPA has exclusive authority to negotiate with NFL clubs on behalf of NFL players.”).

55. See *NFLPA Financial Advisor Frequently Asked Questions*, NFL PLAYERS ASS’N, <https://www.nflplayers.com/about-us/FAQs/Financial-Advisor-FAQs/> (discussing aspects of Financial Advisor Registration Program). The NFLPA began a voluntary certification program for financial advisors. The program is voluntary because the NLRA does not give unions authority to regulate financial advisors and the NFLPA cannot require financial advisors to be certified by the NFLPA before they represent a player. See *supra* note 54.

56. See *MLBPA Regulations Governing Player Agents*, § 2(C)(2), MAJOR LEAGUE BASEBALL PLAYERS ASS’N (Oct. 1, 2010), available at <http://reg.mlbpaaagent.org/Documents/AgentForms/Agent%20Regulations.pdf> [hereinafter *MLBPA Regs.*] (“An individual granted such a Limited Certification is authorized thereby to engage, on behalf of a Player Agent, in Recruiting or providing Client Maintenance Services.”); see also Heitner, *supra* note 26, at 263-70 (discussing unenforceability of MLBPA Regulations governing player agents).

or legal advice, and in most other services offered by an agent.<sup>57</sup> Further complicating matters is the intangibility of the final output. The quality of the work is difficult to assess, particularly with no ability to know the results of different decisions. Although an athlete may be content with a marketing deal, there is no way to know if a different agent could have produced a more favorable result. With professional services, the customer is unlikely to possess similar expertise or industry knowledge and thus will have difficulty judging the quality of the output.

Information asymmetry is typically overcome through signaling mechanisms such as requiring lawyers to pass the bar exam, accountants to take and pass the Certified Public Accountant (CPA) examination, and doctors to obtain board certification. However, sport agents must signal using other methods. Since no independent body attesting to the quality of their work exists, agents are forced to use their alliances with other players that they represent or their employment within a large marketing or agency firm as a signal of the quality of their work.<sup>58</sup> Recent trends have seen mergers and acquisitions of sport agencies, with moves to consolidate services under one roof.<sup>59</sup> In addition to the economies of scale created by these mergers, agents are able to use the firm's brand as an asset that can help lure athletes into their practice.

As firms acquire talent, they begin to differentiate from competitors in the number of services offered, business partnerships, and expertise. Over time, this polarization distributes resources heterogeneously, thus increasing the difficulty of the athlete's task in comparing potential agents. While firms merge for efficiencies

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57. See Kenneth Lehn Marker, *Information Asymmetries in Baseball's Free Agent Market*, 22 *ECON. INQUIRY* 37 (1984) (summarizing different types of information asymmetry in professional baseball). Information asymmetry is defined as a situation that favors the more knowledgeable party in a transaction. See *Information Asymmetry*, *BUS. DICTIONARY*, <http://www.businessdictionary.com/definition/information-asymmetry.html#ixzz1rY5XAPrQ> (last visited Apr. 9, 2012) (defining "information asymmetry" in part, as a "[s]ituation that favors the more knowledgeable party in a transaction").

58. For example, a baseball agent who obtains MLBPA certification is allowed to represent players on a team's forty-man roster. The MLBPA specifically states that the certification is not an endorsement by the MLBPA of the quality of work of the agent. The certification simply allows the agent to perform the work. *MLBPA Regs.*, § 4(K), *supra* note 56 ("In addition, the MLBPA's granting of certification as a Player Agent is not intended to be and does not constitute any guarantee, warranty or endorsement by the MLBPA of the quality of any Player Agent's Performance.").

59. See Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 *UCLA ENT. L. REV.* 193 (2004) (discussing consolidation of sports representative agencies).

in information gathering and client services, mergers and large agency practices also suggest a level of competency that a single agent may lack unless they have numerous clients. Even with similar quality of work, the athlete must rely on market signals given the high degree of asymmetric information when selecting or choosing to remain with an agent.

Another byproduct of this evolving structure is the potential for conflicts of interest between the agent, corporate agency, and the athlete.<sup>60</sup> Consolidation within large corporations also increases barriers to entry for new agents. For other professional service workers, such as new accountants, doctors, or lawyers, assimilation within a larger organization is needed to access clients, technology, specialized industry information, and assistance completing the engagement of a new client. However, fledgling sport agents are charged with recruiting all of their own clients and are capable of outsourcing any expertise that they lack.

While there are many similarities in the structural elements of sport agencies and professional services firms, the primary difference lies in the relationship of the firms with players associations. Players associations elect to defer salary negotiations to agents rather than bargain wages as a group. Sports agents are allowed to negotiate player contracts because the players unions have delegated their exclusive representation on that issue to the agents.<sup>61</sup> In order to protect its collectively bargained wages and benefits, players associations regulate agent activity and certification.<sup>62</sup>

Answering to union regulations is unique in that agents play a minimal role in determining certification or other ethical conduct requirements.<sup>63</sup> Additionally, because regulating agents is not its central mission, players unions devote few resources to monitoring agents and historically have taken little interest in enforcing poli-

60. See David Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents," Full-Service Agencies, and the Dream Team Model*, 3 VA. SPORTS & ENT. L.J. 31 (2003) (outlining areas where conflicts of interest may arise).

61. See *2012-2016 Basic Agreement*, Article IV, MAJOR LEAGUE BASEBALL PLAYERS ASS'N (2011), available at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) (explaining guidelines of player negotiation in MLB under MLBPA players' agreement). For a discussion of the NLRA section 9 and exclusive representation, see *supra* note 54 and accompanying text.

62. See *H.A. Artists & Assocs., Inc. v. Actors' Equity Ass'n*, 451 U.S. 704 (1981) (holding theater union protected by statutory labor exemption when regulating agents due to their impact on collectively-bargained wages and benefits).

63. However, agents were consulted in the process of developing MLBPA's 2010 agent regulations. Two authors of this article are both MLBPA certified agents and have personal knowledge that the MLBPA solicited input from all agents prior to issuing the new regulations in October 2010.

cies put into place.<sup>64</sup> A players union's primary role is to represent its members in collective bargaining and labor issues.

Further, there is a perception that powerful agents with many clients may have greater influence on players than the player associations, which may make it more difficult for players associations to police their certified agents. A recent example that creates this perception is the reported pressure to decertify placed on the NBPA in 2011 by NBA players, which was allegedly led by influential NBA agents.<sup>65</sup> The NBA's powerful agents were pushing the NBPA Executive Director to disclaim or decertify the union.<sup>66</sup> Another example is the discontent expressed by Commissioner Selig when the MLBPA did not discipline a prominent agent for allegations that his agency loaned money to a Dominican player supposedly violating the MLBPA's agent regulations.<sup>67</sup> Given these difficulties for unions to regulate agents and their companies, meaningful change, led by Congress, must take place to ensure that agents are appropriately regulated.

### III. BACKGROUND ON SELF-REGULATION AND CO-REGULATION

The nature of the relationship between professional service firms and their clients demands some form of regulation, whether from the industry itself, the government, or a third party. In general, the purpose of the regulation is to ensure fair competition through uniform rules and standards of conduct, while protecting the rights of the industry's stakeholders. Within professional service firms, this has been attempted by numerous models, but almost always involves some sort of self-regulation. Organizations such as the American Medical Association (AMA), the American Bar Asso-

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64. See Alec Powers, *The Need to Regulate Sports Agents*, 4 SETON HALL J. SPORT L. 253, 264-66 (1994) (noting primary mission of players associations is to serve as certified collective-bargaining agents for players).

65. See Sam Amick, *NBA Agents Growing in Favor of Players' Union Decertification*, SPORTS ILLUSTRATED (Sept. 17, 2011, 1:57 AM), [http://sportsillustrated.cnn.com/2011/writers/sam\\_amick/09/17/nba.labor.decertification/index.html](http://sportsillustrated.cnn.com/2011/writers/sam_amick/09/17/nba.labor.decertification/index.html) (discussing decertification situation in 2011); see also Murray Chass, *Pro Basketball: Decertification has Court Date it May Not Use*, N.Y. TIMES, Aug. 5, 1995, at sec. 1 p.27, <http://www.nytimes.com/1995/08/05/sports/pro-basketball-decertification-has-court-date-it-may-not-use.html> (discussing how NBA filed unfair labor practice charges against prominent NBA agents for "defrauding N.B.A. players" into signing decertification forms).

66. See Chass, *supra* note 65 (noting NBA superstars' agents use their status and clientele as leverage in negotiating with NBA).

67. See Schmidt, *supra* note 36 (stating Commissioner Selig and other high ranking MLB officials are discontent with MLBPA for failing to punish unethical conduct by prominent agent).

ciation (ABA), and the American Institute of Certified Public Accountants (AICPA) all serve to certify practitioners, set industry standards, and educate service providers about industry trends. Self-regulation provides indicators of competency and quality for industry professionals and recourse for harmed clients.

Self-regulation has emerged through trade organizations in these industries to create a code of ethics and facilitate discussion on the field's emerging issues.<sup>68</sup> Ensuring compliance with federal and state laws was not an original goal of these organizations, nor is it a driving factor today.<sup>69</sup> The ABA, along with the AICPA and AMA, serves to enhance opportunities for its members and increase the profession's credibility.<sup>70</sup> The goal is that members of these organizations will hold themselves to a standard higher than the legal minimum and stay in line with industry targets.<sup>71</sup> The setting of industry conduct standards requires significant cooperation amongst competitors, as they determine how they will restrain themselves from behaving in unethical or inappropriate ways. In essence, by agreeing to higher standards, the entire industry is signaling values such as trust, honor, and competence. Rather than enforcing laws and policies, the regulatory goal of such organizations is directed towards defining industry norms and values.<sup>72</sup>

Despite the lofty goals, regulatory attempts by these trade organizations are not entirely noble. Often times, these organizations

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68. See Cyril Chantler, *The Purpose and Limits to Professional Self-regulation*, 302:18 J. OF THE AMA 2032-33 (2009) (explaining importance of self-regulation in professional fields that require trust from clients). See *History of the American Bar Association*, AM. BAR ASS'N, [http://www.americanbar.org/utility/about\\_the\\_aba/history.html](http://www.americanbar.org/utility/about_the_aba/history.html) (last visited Dec. 26, 2011) (stating ABA's role in legal profession).

69. See generally *ABA Mission and Goals*, AM. BAR ASS'N [http://www.americanbar.org/utility/about\\_the\\_aba/aba-mission-goals.html](http://www.americanbar.org/utility/about_the_aba/aba-mission-goals.html) (last visited Dec. 1, 2012) (stating goals of ABA including serving members, improving law profession, eliminating bias, and advancing law); see also *AICPA Code of Professional Conduct*, AM. INST. OF CPAs, <http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/default.aspx> (setting forth goals of AICPA, including principles of conduct, integrity and objectivity, responsibilities to clients and colleagues, and standards of accounting); *AMA Healthier Life Steps*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/public-health/promoting-healthy-lifestyles.page> (last visited Dec. 1, 2012) (presenting goals in improving public health through "patient-physician partnership").

70. See *ABA Mission and Goals*, *supra* note 69 (noting that ABA provides benefits, programs, and services to promote its members' quality of life and growth as professionals).

71. See Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19:4 L. & POLICY 363-414 (1997) (explaining what self-regulation is, its strengths and weaknesses, and its applicability to professional life).

72. See *ABA Mission and Goals*, *supra* note 69 (explaining goals and objectives of ABA including improving legal profession by promoting highest quality legal education and promoting competence, ethical conduct, and professionalism).



engage in regulatory policies in an attempt to avoid more direct government regulation.<sup>73</sup> In theory, trade groups and players associations are in a better position to alter an individual's actions due to their expertise within the industry and their ability to pressure their members to fall in line for the benefit of the organization. Ideally, once the policies are set, they would be easier to enforce and could more directly target the problem. However, this rarely happens in practice. Trade organizations have been criticized for looking out for their own interests rather than the public's interest.<sup>74</sup> It is likely this occurs as norms are defined and various parties are forced to compromise on the ideal structure for regulation. The end result is a "watered down" set of standards that gives the appearance of compliance but does little to eradicate the undesirable actions.<sup>75</sup>

In the process of self-regulation, each trade group independently defines social norms for its members. However, social regulation can be ineffective if groups cannot reach a consensus. Self-regulation is challenging for any industry, but conflicting or lax ethical guidelines create confusion, and add to an environment where the best interests of society are secondary to self-interest. For this reason, medicine, law, and accounting delegate additional governmental regulation to public bodies.

Government regulation in place of self-regulation also has flaws that result in difficult implementation and less than ideal outcomes. Often times, government involvement as a regulator stems from legal and ethical issues that garner a high degree of public attention. One such example is the increase in government regulation of airport security after the attacks of September 11, 2001.<sup>76</sup> The government had previously outsourced security operations to the airlines, which in turn, hired private contractors. Recognizing that the airlines had financial incentives to minimize security costs,

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73. See Gunningham & Rees, *supra* note 71, at 369-70 (noting organizations give appearance of regulation to ward off government intervention, however, these organizations are actually serving their own interests at expense of public).

74. See *id.* at 370 (stating self-regulation oftentimes serves to keep government oversight away and to deceive public into thinking irresponsible organizations are responsible).

75. See ROSS E. CHEIT, SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS 238 (1990), available at <http://ark.cdlib.org/ark:/13030/ft8f59p27j/> (discussing case study in which one of four private regulation standards were weak and watered down).

76. See Sidney Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 415 (2003) (stating that "there is no better example of the adverse impact of a private actor's opportunistic behavior than the failure of the airlines to provide adequate security for airports prior to September 11 . . .").

the government responded by further regulating security policies and procedures, adding rules to the already complicated landscape.<sup>77</sup> Though sometimes necessary, direct government regulation is inefficient due to the higher transaction cost of accessing industry knowledge and implementing the system.<sup>78</sup> These issues lead to regulations that are more easily circumvented due to the information asymmetry by the regulator and those being regulated. Further, direct government regulation does not include social aspects that encourage members of an industry to develop social norms that guide behaviors.<sup>79</sup>

These aspects make government regulation a possible solution when setting policies on economic matters, but mostly ineffective when dealing with social conduct.<sup>80</sup> In these cases, co-regulation is a potential solution that has been implemented in several professional service industries. Co-regulation can take multiple forms but typically involves industry members defining standards of practice, government ratification of these standards, and enforcement through trade organizations.<sup>81</sup> The creation of the PCAOB illustrates a shift to this paradigm.<sup>82</sup> In response to Enron and other accounting scandals, Congress passed the Sarbanes-Oxley Act of 2002, which implemented a form of co-regulation in place of previous self-regulation in the accounting industry.<sup>83</sup> In effect, this co-regulation serves to obscure the boundaries between roles of regulatory actors, structure, actors within the regulatory regime, and functions of the regulation.<sup>84</sup>

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77. *See id.* (explaining that private actors have profit-seeking motive to act efficiently when complying with regulations).

78. *See id.* at 390 (noting these governmental decisions are “make-or-buy” decisions that must be made based on financial impacts of regulatory action).

79. *See id.* at 423 n.128 (discussing how certain factors may determine whether organizations will voluntarily comply with regulations without acknowledging regulatory penalties).

80. *See* Gunningham & Rees, *supra* note 71, at 365 (drawing distinctions between regulation on economic and social matters).

81. *See id.* at 365 (discussing different types of distinctions made within self-regulation).

82. *See* 15 U.S.C. § 7211 (2006) (establishing Public Company Accounting Oversight Board and its duties). *See About the PCAOB*, PUB. CO. ACCOUNTING OVERSIGHT BD., <http://pcaobus.org/About/Pages/default.aspx> (last visited Dec. 26, 2011) (providing examples of industry enforcing standard of practice through government ratification of PCAOB).

83. *See* Sarbanes-Oxley, *supra* note 40 (providing new and enhanced standards for public companies in United States). *See* Shapiro, *supra* note 76 (describing issues surrounding enforcement of agency regulations).

84. *See* Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591, 592

A decision that must be made when regulating industries is where to regulate. For example, how should individuals and their firms be incentivized and punished if they fail to adhere to the standards? An analysis of the location of regulation in professional service firms finds differences based on the industry's relationship to clients and to the general public. In healthcare, law, and accounting, individuals are licensed and governed by a set of standards, e.g. laws often influenced by trade organizations. Failure to comply with these standards results in loss of license and opportunity to participate in the industry. While this punishment may be enough of a deterrent, discipline can also be given to the employer of an offending employee. For example, CPAs may lose their license if found committing fraud, but their accounting firm will also face penalties including fines, suspensions, and ultimately could lose their entire practice.<sup>85</sup> Holding employers accountable increases the social pressure to adhere to the laws and standards that support the firm and individuals' reputations. In fact, the MLBPA player agent regulations hold certified agents vicariously liable for activities of other partner agents, recruiters or client maintenance providers who fail to provide adequate supervision to ensure compliance and observance of reasonable care.<sup>86</sup>

Accounting firms are held liable for employee behaviors because implicitly, the audits are conducted to provide trust in audited financial statements that are used by the public to guide business decisions. Simple regulation by the government or by self-regulating bodies fails to provide the combination of enforcement and social norms that are needed to curtail undesired behaviors. To provide enforcement of appropriate business standards, co-regulation is needed to direct incentives of individuals and firms.

#### IV. PRIOR ATTEMPTS AT REGULATING SPORT AGENTS

The activities of sport agents are primarily regulated by NCAA regulations, the UAAA which has been adopted by 42 states, the federal government's SPARTA, and the regulations of the profes-

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(2010) (recognizing "blurring of the boundaries" between different layers of regulation theory).

85. See *Arthur Andersen Goes Out of Business*, ABC NEWS (Aug. 31, 2002), <http://abcnews.go.com/Business/Decade/arthur-andersen-business/story?id=9279255> (discussing terminal consequences for Arthur Andersen LLP for shredding documents related to audit of Enron).

86. See *MLBPA Regs.*, § 5(C), *supra* note 56, (explaining, in Vicarious Liability of Player Agents and Applicants section, standard of conduct for all player agents).

sional athletes' players associations.<sup>87</sup> This array of rules and regulations is ineffective and does not serve the needs of the athletes, leagues, universities, professional teams, or fans.

### A. NCAA Regulations

NCAA rules prohibit amateur college athletes from retaining an agent. An athlete will be declared ineligible to play sports if "he or she has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport."<sup>88</sup> An athlete cannot enter into a verbal or written agreement to have an agent represent him or her in future professional sports negotiations that are to take place after his or her eligibility has expired.<sup>89</sup> An athlete can secure "advice from a lawyer concerning a proposed professional sports contract," provided that lawyer will not become the athlete's agent at a later point.<sup>90</sup> However, a lawyer "may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization" on behalf of the athlete.<sup>91</sup>

NCAA by-laws clearly preclude student-athletes from doing anything more than talking with an agent.<sup>92</sup> All potential inducements, from taking an athlete to dinner, to giving an athlete a ride in a car, to providing anything of value to the athlete, violate NCAA by-laws and thereby, can result in the loss of athletic eligibility.<sup>93</sup> There is no recourse against agents, pursuant to NCAA regulations, since they are not members of the NCAA. The NCAA only has authority to penalize its member institutions and student-athletes.

The NCAA Bylaws prohibiting any representation of an athlete by an agent or lawyer ignores the reality that amateur athletes who aspire and have the talent to play professional sports would benefit

87. *See id.*

88. *See* 2011-12 NCAA DIVISION I MANUAL § 12.3.1, NCAA (2011), *available at* <http://www.ncaapublications.com/productdownloads/D112.pdf> (explaining NCAA prohibition on use of agents by its athletes).

89. *See id.* § 12.3.1.1 (extending prohibition on agency agreements to future negotiations).

90. *See id.* § 12.3.2 (allowing athletes provisional consultation with lawyers regarding agency agreements).

91. *See id.* § 12.3.2.1 (prohibiting lawyer participation in athlete discussions with professional organizations).

92. *See* Ted Curtis, *The Regulation of Sports Agents*, in *LAW OF PROFESSIONAL AND AMATEUR SPORTS 1-10* (Gary Überstine ed, 2011).

93. *See* 2011-12 NCAA DIVISION I MANUAL, §12.3.1.2, *supra* note 88 (warning that receipt of certain benefits from perspective agents may result in athlete eligibility).

from representation. Signing a professional contract is a process for an athlete, not simply a negotiation session. An experienced sports agent guides athletes through the pre-draft process that begins when athletes are first scouted. Scouts for professional teams approach players and their families to begin conversations about the amount of compensation it will take to sign them to a contract. An unprepared player or family member unaware of the market value for his talent negatively impacts the drafting or signing process. Scouts also ask many questions about a player's makeup, family, and may ask a player to take psychological tests. An agent can help the player field these questions, prepare the player and family with consistent messaging and guide the player through the process of signing. In MLB or the NHL, this may all transpire while the athlete is in high school. The athlete may not be prepared to negotiate with a professional team employee who has years of negotiating experience. Limiting an athlete's access to a prepared sports agent slants the negotiating table toward the team. There are also rules, such as signing dates and scholarship provisions plus practices, such as the NFL combines, pre-draft camps, and workouts that may be unfamiliar to one who does not work in the sport industry. The NCAA rules are unfair to amateur athletes and leave them with no professional advice when negotiating with professional teams.<sup>94</sup> Simply allowing for legal advice from an individual who is not an agent, thus one who does not understand the intricacies of sport business, harms the athlete. NCAA regulations are also not an effective deterrent to athletes with collegiate eligibility who have decided to become professional athletes, as the athletes are not members of the NCAA.

The NCAA regulations also carry little weight with agents since they are not NCAA members and the NCAA cannot enforce the rules against them.<sup>95</sup> The penalties for violating NCAA Bylaws on agents are levied against athletes and universities and not agents.<sup>96</sup> The number of scandals associated with agents and NCAA college athletes demonstrates that the NCAA rules have not, in and of

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94. See *id.* § 12.3 (explaining NCAA prohibition on use of agents by its athletes).

95. See PRINCIPLES, *supra* note 8, at 280 (explaining that NCAA cannot penalize sports agents for violating its regulations).

96. See Closius, *supra* note 10, at 512 (describing examples of punishments imposed on institutions for violating NCAA bylaws).

themselves, been a deterrent to athletes having contact with agents.<sup>97</sup>

### B. The Uniform Athlete Agent Act (UAAA)

The National Conference of Commissioners on Uniform State Laws wrote the UAAA in 2000 because at that time 28 states had differing laws to regulate agent conduct.<sup>98</sup> The UAAA's chief goals are to uniformly regulate the conduct of agents and to protect the athletes and universities.<sup>99</sup> It has now been adopted in forty-two states.<sup>100</sup>

The UAAA requires an agent to register, usually with the Secretary of State, to represent an athlete in that state.<sup>101</sup> The UAAA prohibits an agent from giving false or misleading information or promises with the intent to induce a student-athlete into signing an agency contract and from furnishing anything of value to a student-athlete before signing a contract.<sup>102</sup> The UAAA requires written notification to institutions when a college athlete signs an agency contract before their eligibility expires.<sup>103</sup> In addition, the UAAA requires an agency contract to contain a notice warning the college athlete that if they sign a contract with an agent it may cause them to become permanently ineligible for intercollegiate competition.<sup>104</sup>

Violations of the UAAA can be punished with criminal, civil, and administrative penalties and fines of up to \$25,000, and gives the college or university a private right of action against the agent for any damages.<sup>105</sup> There are few cases of prosecution of agents under the UAAA, but the state of Oklahoma recently created a special sports agent prosecution team to investigate issues of agent mis-

97. See *A Look at Recent College Football Scandals*, *supra* note 11 (discussing recent cases of misconduct in college football involving athlete interaction with agents).

98. See UNIFORM ATHLETES AGENTS ACT 1, UNIF. LAW COMM'N (2000), available at [http://www.uniformlaws.org/shared/docs/athlete\\_agents/uaaa\\_finalact\\_2000.pdf](http://www.uniformlaws.org/shared/docs/athlete_agents/uaaa_finalact_2000.pdf) (explaining lack of uniformity among state laws regulating agent conduct).

99. See *Uniform Athlete Agents Act, What is the UAAA?*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Uniform+Athlete+Agents+Act+Homepage> (last visited Aug. 17, 2012) (summarizing function of UAAA).

100. See *id.* (mapping states that have adopted UAAA).

101. See UNIFORM ATHLETES AGENTS ACT, § 5, *supra* note 98 (discussing registration procedures for athlete agents).

102. See *id.* at § 14 (identifying prohibited conduct for athlete agents).

103. See *id.* at § 11 (explaining notification requirements for athlete agents).

104. See *id.* at § 10 (requiring agency contract to include warning of possible ineligibility for intercollegiate competition).

105. See *id.* at §§ 15-17 (outlining criminal, civil, and administrative penalties for noncompliance with UAAA).

conduct.<sup>106</sup> Three states, California, Michigan, and Ohio, have their own unique laws that regulate agent conduct.<sup>107</sup> The Attorney General of Ohio has also indicated that sports agents would suffer consequences for any malfeasance.<sup>108</sup>

### C. The Sports Agent Responsibility and Trust Act (SPARTA)

In September 2004, President Bush signed SPARTA into law.<sup>109</sup> At that time only twenty-one states had passed the UAAA, and SPARTA was an effort by the federal government to create a comprehensive nationwide system of licensing for sport agents.<sup>110</sup> SPARTA protects student athletes by prohibiting sports agents from inducing them to sign representation contracts by providing false or misleading information, giving gifts, providing anything of value, and failing to disclose to the athlete that they may lose their NCAA eligibility.<sup>111</sup> Athletes and agents must also inform universities of the representation contract.<sup>112</sup> Violations of SPARTA are deemed to be “unfair or deceptive acts or practices” and are enforced by the Federal Trade Commission (hereinafter “FTC”).<sup>113</sup> Additionally, the attorney general of any state may enforce SPARTA to enjo

106. See Darren Heitner, *Oklahoma Creates Special Sports Agent Prosecution Team*, SPORTS AGENT BLOG (Sept. 12, 2011), <http://www.sportsagentblog.com/2011/09/12/oklahoma-creates-special-sports-agent-prosecution-team/> (reporting on Oklahoma’s recent prosecutorial initiative against sports agents).

107. See *FAQ on Uniform Athlete Agent Act*, NCAA (July 29, 2010), <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/July+latest+news/FAQ+on+Uniform+Athlete+Agents+Act> (explaining that California, Michigan, and Ohio have adopted their own laws to regulate athlete agents).

108. See Joel Hammond, *Ohio AG Warns Sports Agents About Improper Conduct*, CRAIN’S CLEVELAND BUS. (Oct. 5, 2010, 1:33 PM), <http://www.crainscleveland.com/apps/pbcs.dll/article?AID=/20101005/FREE/101009942/0/SEARCH#> (reporting that Ohio’s Attorney General intends to crack down on inappropriate interactions between sports agents and student athletes).

109. See Sports Agent Responsibility and Trust Act, 15 U.S.C. §§ 7801-7807 (2006) (standardizing regulation of sports agent conduct).

110. See *Sports Agent Responsibility and Trust Act: Hearing on H.R. 361 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 108th Cong. 18-22 (2003) (statement of Rep. Bart Gordon), available at [http://commdocs.house.gov/committees/judiciary/hju87094.000/hju87094\\_of.htm](http://commdocs.house.gov/committees/judiciary/hju87094.000/hju87094_of.htm) (emphasizing lack of uniformity among state laws regulating sports agent conduct and asserting that SPARTA would help correct this lack of uniformity).

111. See § 7802 (forbidding agents from conveying misrepresentations or gifts to athletes and requiring that agents make certain disclosures to athletes).

112. See § 7805 (requiring notice be given to athletic directors when athletes and agents negotiate agency agreements).

113. See § 7803 (“A violation of this chapter shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).”).

unfair or deceptive practice, enforce compliance, and obtain restitution and damages for the residents of the state.<sup>114</sup> Damages for violations of SPARTA include actual losses and expenses incurred by the educational institution, and costs such as attorney's fees.<sup>115</sup>

Congress expressed a clear desire to have SPARTA and the UAAA work in concert:

It is the sense of Congress that States should enact the Uniform Athlete Agents Act of 2000 drafted by the National Conference of Commissioners on Uniform State Laws, to protect student athletes and the integrity of amateur sports from unscrupulous sports agents. In particular, it is the sense of Congress that States should enact the provisions relating to the registration of sports agents, the required form of contract, the right of the student athlete to cancel an agency contract, the disclosure requirements relating to record maintenance, reporting, renewal, notice, warning, and security, and the provisions for reciprocity among the States.<sup>116</sup>

Commentators have suggested that the law is "one-sided" and that only the agents are regulated and the athletes are perceived as playing no role in the practice of inducements by "selling" their services to universities, for example the alleged actions of Cam Newton's father.<sup>117</sup> In other words, the agent, the student and perhaps the university in the recruiting process may commit unfair and deceptive practices, yet only the agent is penalized for unfair and deceptive practices.<sup>118</sup> An additional criticism of SPARTA is that it is rarely enforced. According to an FTC spokesman, the agency has had "very, very few" complaints and taken no enforcement actions.<sup>119</sup>

114. See § 7804 (identifying civil actions to enforce SPARTA).

115. See § 7805 (listing civil remedies available for violation of SPARTA).

116. § 7807.

117. For a discussion of college football scandals, including the one involving Cam Newton's father, see *A Look at Recent College Football Scandals*, *supra* note 11 (discussing attempt by Cam Newton's father to auction off his son's football skills to Mississippi State for \$180,000).

118. See generally *Ohio State's Urban Meyer Defends Recruiting Practices to Fellow Big Ten Coaches*, ASSOCIATED PRESS, Feb. 3, 2012, available at [http://blog.pennlive.com/patriotnewssports/2012/02/ohio\\_states\\_urban\\_meyer\\_defend.html](http://blog.pennlive.com/patriotnewssports/2012/02/ohio_states_urban_meyer_defend.html) (describing deceptive practices and corresponding punitive measures towards agents).

119. See Zagier, *supra* note 25 (explaining that regulations lack enforcement).



In fact, several high-profile cases involving agent malfeasance have occurred since these laws have been passed.<sup>120</sup> These situations have had a detrimental impact on the industry and have increased the need for oversight. Federal and state regulations have failed, due in part to their inability to address the social norms of the profession or create momentum for change within the industry. As scandals occur, several states have tried to increase scrutiny of agents and to toughen punishments for offenders. For example, Texas has assessed fines of \$17,000 and amended its regulations to make violations by agents or runners a felony, punishable with up to ten years in prison.<sup>121</sup> Given the lack of enforcement of the laws already on the books, this additional legislation is unlikely to have the desired impact. Further, the laws only target agents and athletes at the collegiate level and do not address unethical behaviors committed toward professional athletes by agents.

#### D. Player's Association Regulations

Pursuant to the NLRA, players associations are the exclusive bargaining agents of their respective players and have the authority to certify agents to negotiate individual salary and additional benefits for the players over and above the minimum requirements of the respective collective bargaining agreements ("CBA").<sup>122</sup> All of the players associations, with the exception of the MLSPU, have regulations that determine the requirements for agent certification and to regulate agents.<sup>123</sup> The MLSPU has not yet created a certification program and utilizes FIFA Agent regulations in place of creating their own.<sup>124</sup>

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120. See J.P. Giglio, *Associate UNC Coach Said to be Part of Probe*, CHARLOTTE OBSERVER (N.C.) (Aug. 10, 2010), <http://www.charlotteobserver.com/2010/08/09/1612668/associate-coach-said-to-be-part.html> (noting examples of scandals).

121. See *Texas Cracks Down on Unethical Agents*, ASSOCIATED PRESS, May 18, 2011, available at <http://sports.espn.go.com/ncaa/news/story?id=6564280> (detailing reasons for ineffectiveness of regulations).

122. See NLRA, §§151-169, *supra* note 54 (highlighting section 9 of NLRA). The players associations that are discussed in this article are the MLBPA, NFLPA, National Hockey League Players Association (hereinafter "NHLPA"), National Basketball Players Association (hereinafter "NBPA"), and the Major League Soccer Players Union (hereinafter "MLSPU") (describing reasons for scandals particularly relating to MLSPU).

123. See *Becoming an Agent*, MLSPU HOME, [http://www.mlspu.org/become\\_agent.html](http://www.mlspu.org/become_agent.html) (last visited Oct. 9 12, 2012) (stating "Currently, we do not have agent regulations. Thus, there is no certification process and/or exam to become an agent.").

124. See PRINCIPLES, *supra* note 8, at 281; see also *Collective Bargaining Agreement between Major League Soccer and Major League Soccer Players Union* § 18.3, U.S. SOCCER (Dec. 1, 2004), available at <http://www.ussoccer.com/About/Federation-Services/>

Commentators have noted that players unions have largely failed to curb the conduct of unethical agents.<sup>125</sup> A review of the regulations for the MLBPA, NFLPA, NHLPA, and NBPA agent regulations shows that they are primarily concerned with ensuring agents are qualified, by education and experience, to represent players.<sup>126</sup> NFLPA agents and MLBPA agents must also attend annual meetings with players associations to keep abreast with developments in the industry.<sup>127</sup> Typically, among other things, agent regulations prohibit the agent from providing monetary inducements to a player or his family to induce a player to utilize his services or providing materially false or misleading information to a player.<sup>128</sup> The MLBPA and the NFLPA have updated their agent regulations most recently, in 2010 and 2007, respectively, and have been the most proactive in attempting to address agent conduct.

The MLBPA Regulations Governing Player Agents were first promulgated in 1988 by the MLBPA's Executive Board, which is comprised of Major Leaguers. The new MLBPA regulations are an ambitious attempt at curtailing client stealing and questionable agent conduct that had the effect of distracting players from performing their job on the field and had a negative impact on player salary negotiations.<sup>129</sup>

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Player-Agents.aspx (stating MLSPU agrees to create certification program). It has not yet been developed as of August, 2012. *See id.* U.S. Soccer, the governing body of all soccer in the United States, requires agents to follow FIFA regulations. *See FIFA Regulations Players' Agents*, FIFA (July 4, 2012), available at [http://www.fifa.com/mm/document/affederation/administration/51/55/18/players\\_agents\\_regulations\\_2008.pdf](http://www.fifa.com/mm/document/affederation/administration/51/55/18/players_agents_regulations_2008.pdf).

125. *See* Richard T. Karcher, *Solving Problems in the Player Representation Business: Unions Should Be the Exclusive Representatives of the Players*, 42 WILLIAMETTE L. REV. 737, 760-62 (2006) (explaining inability of unions to curb agent malfeasance).

126. *See, e.g., NFLPA Regulations Governing Contract Advisors*, § 2, NFL PLAYERS ASS'N (Mar. 2007), available at [http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA\\_Regulations\\_Contract\\_Advisors.pdf](http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf) [hereinafter *NFLPA Regs.*] (requiring Contract Advisors to have undergraduate degree from accredited four-year college/university but granting exceptions if applicant has significant negotiating experience.)

127. *See id.* § 3A (detailing further requirements); *see also MLBPA Regs.*, § 5(A)(5), *supra* note 56 (providing stricter guidelines for agents).

128. *See MLBPA Regs.*, § 5(B)(5), *supra* note 56 (explaining that monetary inducement is prohibited); *see also NFLPA Regs.*, § 3(B)(4), *supra* note 126 (prohibiting agents' communication of false information).

129. *See MLBPA Regs.*, § 1(A), *supra* note 56 (stating that primary objectives of the new MLPBPA regulations include: "[t]o establish and enforce minimum requirements for eligibility to become a Player Agent and uniform standards of conduct and fiduciary responsibility for all Player Agents . . . [t]o afford each Player the opportunity to select a certified Player Agent who has agreed to abide by these Regulations and to advise Players honestly, competently, loyally, and zealously as a fiduciary . . . [t]o afford each Player the opportunity to make better-informed deci-

The MLBPA required previously certified agents to reapply for certification upon passage of the new regulations in October 2010.<sup>130</sup> The 2010 regulations required individuals who recruit clients for an agent and those who provide “client maintenance services” to apply for a lesser certification.<sup>131</sup> Agents must inform the Players Association if they speak to a player they do not represent, or intend to do so, or travel to meet a player they do not represent.<sup>132</sup> Often agents attempt to recruit players away from their current agents as they are eligible for free agency or salary arbitration since that is when a player will receive a significant increase in compensation and thus, the agent will receive a fee increase. The new regulations prevent a player in this stage in his career from changing agents “unless they first consult with the MLBPA.”<sup>133</sup> This consultation requirement is an attempt by the MLBPA to monitor the recruitment of their members and an attempt to limit overly aggressive recruitment by agents seeking clients. If a dispute arises between a player and an agent it must be resolved by mandatory arbitration.<sup>134</sup> The new regulations state that no agent may provide or promise anything of value to a player he does not already represent.<sup>135</sup> However, an agent may supply free baseball equipment to existing clients up to \$1,500 per year. Providing more would be considered an improper inducement.<sup>136</sup> The new regulations also call for a five-to-seven member Player Agent Advisory Committee appointed by the MLBPA’s Executive Director for the purpose of

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sions about his choice of certified Player Agent . . . and by regulating the conduct of those persons . . . engaged . . . in Recruiting and providing Client Maintenance Services for players; To ensure uniformity and consistency in the rules and standards applicable to Player Agents . . . notwithstanding the different, and sometimes inconsistent, laws, rules and regulations of the many national, state, and local jurisdictions that might otherwise govern those activities; To provide both Players and Player Agents with fair, cost-effective and expeditious procedures for privately resolving any disputes.”).

130. *See id.* § 4(E) (requiring more strict certification guidelines).

131. *See id.* § 4(D) (requiring lesser certification for agents).

132. *See id.* § 5(A)(11) (prohibiting travel to meet players who are not their clients).

133. *See id.* § 6(L) (requiring consultation before switching agents)

134. *See id.* §§ 6(J), 7. For a full discussion of the new MLBPA regulations, see Gregg Clifton & Jeffrey Toppel, *MLBPA Issues New Sweeping Regulations Governing Agents*, SPORTS LITIG. REP. (Sept. 24, 2010), available at <http://www.hackneypublications.com/sla/archive/001133.php>; *see also* Darren A. Heitner, *supra* note 34.

135. *See MLBPA Regs.*, § 5(B)(5), *supra* note 56. Previous MLBPA regulations also prohibited agents from giving athletes money or other things of value to a player as an inducement for the player to hire or remain with that agent. *See id.*

136. *See id.* § 5(B)(5)(d) (detailing gift amounts that are allowed and prohibited).

reviewing the implementation, interpretation, and enforcement of the regulations.<sup>137</sup>

In March 2007 the NFLPA amended their regulations for Contract Advisors or agents.<sup>138</sup> The NFLPA agent regulations are substantial and detailed in an effort to protect their player-members and to guard against agent misconduct. Among the more prominent regulations, the NFLPA requires agents to “comply with state and federal laws,” “act at all times as a fiduciary for NFL players,” and “comply with the stated policies of the NFLPA.”<sup>139</sup> The NFLPA regulations prohibit agents from: “engaging in activities that create a conflict of interest in the effective representation of NFL players”;<sup>140</sup> “engaging in conduct involving dishonesty, fraud, and deceit”;<sup>141</sup> “providing or offering money or any other thing of value to any player or prospective player to induce or encourage that player to utilize his/her services”;<sup>142</sup> and “providing materially false or misleading information to any player or prospective player in the context of recruiting the player as a client.”<sup>143</sup> The NFLPA also has a voluntary program to certify financial advisors in order to monitor their conduct.<sup>144</sup> Despite the NFLPA’s regulations, designed to protect their members against agent misconduct, scandals continue to arise every season.<sup>145</sup>

Enforcement of current agent regulations at the union level is difficult because each players association has different requirements for becoming an agent, maintaining certification status, and procedures for investigating and resolving complaints. In addition, professional leagues have no legal authority to become directly involved with agent regulation, because it is an inner-union matter.<sup>146</sup>

137. *See id.* § 9 (describing procedural requirements for committee).

138. *See NFLPA Regs.*, *supra* note 128 (describing amendments to NFLPA regulations).

139. *See id.* § 3(A)(14) (noting new amendment for mandatory compliance with state and federal law); *see also id.* § 3(A)(17) (providing for fiduciary relationships); *id.* § 3(A)(18) (emphasizing compliance requirements).

140. *See id.* § 3(B)(8) (providing further player protection).

141. *See id.* § 3(B)(14) (explaining dishonesty in any form will not be tolerated).

142. *See id.* § 3(B)(2) (prohibiting inducement through monetary mechanisms).

143. *See NFLPA Regs.*, § 3(B)(4), *supra* note 126 (reemphasizing importance of candor in the player-agent relationship).

144. *See NLRA*, *supra* note 54 (describing pioneering program).

145. *See supra* notes 11-18 (noting persistence of scandal within industry).

146. However, leagues can support union regulations in the CBA. For example, the NBA CBA prohibits teams from negotiating with agents who have not been certified by the NBPA. Teams are fined \$20,000 for violating this rule. *See 2005 Collective Bargaining Agreement*, art. XXXVI, § 2, NAT’L BASKETBALL PLAYERS ASS’N

Players' associations exist to help their members negotiate wages, hours and terms and conditions of employment and were not intended to police the rough and tumble world of agent behavior.<sup>147</sup>

#### V. CO-REGULATION OF SPORTS AGENTS-THE NEW SPORT AGENT OVERSIGHT BOARD

Congress' passage of SPARTA was well intended, but evidence has shown that it is infrequently enforced and should be amended.<sup>148</sup> In order to strengthen the enforcement of SPARTA, as well as ensure consistent enforcement of players association rules, NCAA rules, the UAAA and to ensure consistent ethical standards nationwide, the Sport Agent Accountability Board (SPAAB) should be created by Congress. The SPAAB will be modeled after the PCAOB of the Sarbanes-Oxley Act of 2002.<sup>149</sup> The PCAOB itself was built upon the previous structure of regulation performed by the AICPA by conducting audits of accounting firms with publicly traded clients and enforcing legal and ethical standards.<sup>150</sup>

The SPAAB will not be a government agency, but an independent nonprofit corporation, run by five members with impeccable reputations in the sport industry.<sup>151</sup> The FTC will appoint all SPAAB members after seeking nominations and input from professionals from college sports, the players associations, professional sport leagues, and governing bodies for individual amateur and professional sports. Two of the members shall have been sport agents.<sup>152</sup> One member shall have had a background in college athletic administration, one in professional team sport, and one in an individual sport such as golf, tennis or track and field.<sup>153</sup> None

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(Dec. 16, 2009), *available at* [www.nbpa.org/sites/default/files/ARTICLE%20XXXVI.pdf](http://www.nbpa.org/sites/default/files/ARTICLE%20XXXVI.pdf) (identifying \$20,000 fine).

147. *See* NLRA, *supra* note 54 (detailing procedures to achieve such goals).

148. *See* Zagier, *supra* note 25 (noting that more than half of states with sports agent laws have not yet revoked or suspended any licenses).

149. The citations to Sarbanes-Oxley in this section refer to the sections of the Act that define the structure, duties, and responsibilities of the PCAOB, which are used as a guide in the proposed creation of the SPAAB. *See* Sarbanes-Oxley Act § 101, 15 U.S.C. § 7211 (2006) (detailing structure, duties, and responsibilities of Public Company Accounting Oversight Board).

150. *See* AICPA Code of Professional Conduct, § 51, *supra* note 69, (stating code's purpose of guiding members' performance of professional responsibilities).

151. *See* Sarbanes-Oxley Act § 101(b), 15 U.S.C. § 7211(b) (2006) (identifying that PCAOB has nonprofit corporation powers); *see also* § 101(e)(1), 15 U.S.C. § 7211(e)(1) (identifying PCAOB's five member board composition).

152. *See* § 101(e)(2), 15 U.S.C. § 7211(e)(2) (requiring two certified public accountants on PCAOB).

153. *See id.* (suggesting importance of board members' backgrounds).

of the members of SPAAB, concurrent with their service on the SPAAB, shall be employed as an agent by any other person, or engaged in any other professional or business activity, and they may not be engaged in employment or practice in the sport industry.<sup>154</sup>

Funding for SPAAB would be derived from the primary stakeholders.<sup>155</sup> Funding would be split amongst the players associations, NCAA, major college conferences (SEC, PAC-12, Big 12, etc.), professional leagues, and through licensing fees paid by the agents. This Board would replace the sports agent regulation work done by these groups and thereby, it would redirect their current expenses toward the costs of operating the SPAAB. Funding would be pro-rated based upon the stakeholder's level of reliance on the SPAAB. For instance, the Southeastern Conference may have far more need for the SPAAB and pay a larger fee, than a smaller conference such as the Ivy League. Organizations in self-regulating industries often contribute financially to the governing institution. For example, the PCAOB is funded through fees paid by public companies being audited and by public accounting firms, which register and pay a pre-determined amount based on their number of clients.<sup>156</sup> Audit firms are overseen by the PCAOB to ensure that the system is working properly. The PCAOB provides confidence over the entire audit process, protects the investment of audit fees, and adds to public trust in the validity of financial reporting. Prior to the creation of the PCAOB, the purchase of audit services could be viewed as payment within a self-regulating industry. Public companies are analogous to athletes and sport organizations, while the agents are analogous to the professional service audit firms.

The SPAAB will promulgate rules, regulations, and a code of conduct for the certification and discipline of all agents who represent professional athletes in the United States. The chief duties of the SPAAB will be to certify sports agents who intend to conduct business in the U.S., establish quality control and ethical standards for those agents, conduct inspections of sports agent firms, conduct investigations and disciplinary proceedings and impose appropriate sanctions and enforce compliance with agent laws and regula-

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154. See § 101(e)(3), 15 U.S.C. § 7211(e)(3) (detailing similar bar for PCAOB members from engaging in other professional or business activity).

155. See § 109, 15 U.S.C. § 7219 (detailing similar funding methods for PCAOB).

156. See *PCAOB Rules, Section 7: Funding*, PUB. CO. ACCOUNTING OVERSIGHT BD., [http://pcaobus.org/Rules/PCAOBRules/Pages/Section\\_7.aspx](http://pcaobus.org/Rules/PCAOBRules/Pages/Section_7.aspx) (last visited Dec. 26, 2011) (detailing similar allocation and assessment of fees for PCAOB).

tions.<sup>157</sup> The SPAAB will have the power to hire staff, attorneys, and investigators. It will have subpoena power and the power to compel testimony in order to fulfill its mission.<sup>158</sup> The SPAAB shall cooperate on an ongoing basis, and take public comment from constituency groups from professional and amateur sport to ensure that any standard, rule, or regulation promulgated by the SPAAB is appropriate.<sup>159</sup>

Many groups devote attention to preventing agent malfeasance with limited or ineffective results. While these groups may balk at being asked to fund the new SPAAB, they are concurrently devoting resources toward solving problems with little or no positive results.<sup>160</sup> Rather than have these organizations continue to devote financial and intellectual resources, the SPAAB will be funded through their pooled resources. Given the consolidation of resources and similar interests, the funding for the SPAAB may involve fewer resources than is currently allocated to the matter. Although reducing cost is not the primary intent of the organization, this new regulatory body is designed to provide better oversight for similar costs.

Ultimately the level of oversight provided by the SPAAB will determine the size of the budget and the fees needed for operations. The primary benefit is having a central organization with the job of investigating claims in an independent fashion. The SPAAB would be tasked with setting industry standards, ethical standards and accreditation standards. The SPAAB would also help set quality standards for what services athletes could expect from their agent. Numerous instances of inadequate representation or omission of duties have occurred in the past several years, including failing to execute clauses in signed contracts on the player's behalf.<sup>161</sup> While players may have legal retribution in these situations, the SPAAB would also serve as a conduit for the athlete to seek action in these situations. Quality standards would be consistent throughout all sports to minimize errors of competence and exploitation.

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157. See § 101(c), 15 U.S.C. § 7211(c) (describing similar duties of PCAOB).

158. See § 101(f), 15 U.S.C. § 7211(f) (describing similar powers granted to PCAOB).

159. See § 103(a)(4), 15 U.S.C. § 7213(a)(4) (describing similar powers granted to PCAOB).

160. See generally Coates IV, *supra* note 40.

161. See *NFLPA Suspends Agent Poston for Two Years*, ESPN (Jul. 28, 2006, 1:27 AM), <http://sports.espn.go.com/nfl/news/story?id=2530936> (detailing instance of player contract dispute).

In defining and assessing quality standards, measurement metrics would be designed by the board based on specific outcomes of an agent's work as well as surveys from athletes. Common metrics would help create similar language and comparative attributes amongst agents. The additional transparency of the metrics and analysis creates higher standards and helps identify areas for industry-wide improvement. The defining of measurement metrics is not intended to identify "failing" agents, as each client may have different needs and desires. However, this process could be used in a confidential manner to boost quality of representation. Detailed information, including scores on certain areas, would only be shared with the agent and would not be available to competitors or athletes. In this manner, the SPAAB would not have the authority to create metrics that reward or punish certain agents. Instead this information is designed to help educate and build the skills of a player representative.

Almost every professional service industry maintains some form of certification, even if not required for participation. These accreditations boost the credibility of the agent and would eventually become the industry norm. In this manner, social pressure can be exerted on agents to receive the certification and on players to select agents with the appropriate skills for their needs. A single entity to coordinate and confirm registrations and eligibility would simplify the process and allow the SPAAB to better serve the contributing organizations and agents.

Within 180 days after the SPAAB has been established all persons of companies who intend to or are representing athletes must have applied for and be certified as agents by the SPAAB.<sup>162</sup> It will be a violation of SPARTA for a person or company to represent a professional athlete without obtaining SPAAB certification. The SPAAB shall consult with sport industry constituent groups and create an application that ensures that sport agents possess appropriate education, experience, and moral character. Licensing of specific agents would be conducted centrally by the SPAAB, just as the AICPA certifies accountants. The SPAAB would offer licensing in numerous duties of athlete representation including contract negotiation, financial services, marketing, and legal assistance. This tailored approach provides detail to athletes as they shop for agents with differing areas of expertise. To represent an athlete, all agents involved with either an athlete's recruitment or finances must pass

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162. See Sarbanes-Oxley Act § 102, 15 U.S.C. § 7212 (2010) (detailing similar mandatory registration for public accountants).



at least one licensing examination. This includes all runners, contract negotiators, marketers, financial advisors, and legal support. Agents could hold multiple certifications, but must pass the exam in a given area to conduct these activities. Structurally, this licensing process is similar to how medical doctors must pass specific exams in an area of expertise. To become a pediatric or oncology specialist, additional certification beyond passing the boards is required. The licensing program described here recognizes the many divergent duties of a sports agent and attempts to create signaling mechanisms towards competence in a given area. This also reflects the reality of the team of agents that supports a player off the field.

Enforcement of UAAA and SPARTA through the SPAAB would be similar to the state of California's implementation of the Talent Agency Act.<sup>163</sup> In this state law, claims are brought by musicians, acting talent, and others to a Labor Commissioner if an individual feels their manager or agent is in violation of the law. Agents are licensed by the Commissioner, who has the authority to strip someone of their ability to practice, as well as to impose financial or other remedies.<sup>164</sup> A one year statute of limitations ensures that claims are filed and addressed in an expedient manner.<sup>165</sup> The SPAAB would function in a similar manner to the Labor Commissioner and handle the minor violations by canceling contracts and agent fees where a client was obtained illegally. This eliminates some of the financial incentive for engaging in prohibited behaviors. More serious violations would be referred to a state or federal attorney for prosecution under UAAA and SPARTA. All stakeholders in the system (players, universities, unions, and leagues) would have the authority to bring a claim before the Board. Competing agents would not have this privilege due to conflicts of interest.

The SPAAB would also have the power of subpoena to gather information, a power that the NCAA, sport governing bodies, or players associations lack. Currently, those who have knowledge of a violation may have an incentive not to fully disclose information or to appear at an investigative hearing called by the NCAA or players associations. Under the current system, players may be uncomfortable to report their agent. Athletes may be swayed by friendship,

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163. See David Zelenski, *Talent Agents, Personal Managers, and Their Conflicts in the New Hollywood*, 76 S. CAL. L. REV. 979, 984 (2002) ("A quick reading of the TAA demonstrates that its purpose is to protect artists from their representatives' business practices.").

164. See *id.* at 985 (describing licensing requirement).

165. See *id.* at 986 (identifying that TAA established one year statute of limitations).

loyalty, or the sheer embarrassment of making a poor choice in an agent. The SPAAB would be able to subpoena documents or testimony for violations giving them sufficient power and authority to address problems in the industry.

An agent facing discipline from the SPAAB would be given due process and the right to defend themselves in a hearing against any accusations. One of the criticisms levied on the current system of player association regulation is the ability for unions to sanction agents without a proper appeals process.<sup>166</sup> By using private arbitration to resolve disputes between agents and players, players associations have chosen a system that limits judicial appeals to rare circumstances where an appellant must demonstrate that the arbitrator exceeded their scope of their authority, acted in an arbitrary manner, or applied their own brand of industrial justice, in order to reverse a decision.<sup>167</sup>

As with any legal proceeding, in a hearing before the SPAAB agents would have the right to produce their own evidence and address the charges brought against them. This new structure provides an outlet for fact finding and discovery with the help of the board, sport governing bodies, teams, leagues, fellow agents, unions, and athletes. Findings of malfeasance would involve punishments including probation, suspension, fines, and loss of licensure. The severity of the offense and eventual punishment would be determined by recommendations from the board's investigative team and members of the board.

Even though the knowledge is held at the individual level and agents control the output, firms should also be held to a standard when regulating agent behaviors. Corporations have sought to purchase this knowledge in an attempt to boost their portfolio of services and achieve synergies across other lines of their operations. In this manner, firms looking towards acquisitions may be incentivized to disregard an agent's methods of recruitment in order to reap the benefits of the affiliation with the athlete. The business being sought is indirectly the agent's client, with the agent serving as a conduit. Agents also have incentive to manipulate the system

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166. See Richard T. Karcher, *Fundamental Fairness in Union Regulation of Sports Agents*, 40 CONN. L. REV. 355, 400 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1068801](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1068801) (concluding that current appeals process has agents "caught between a rock and a hard place").

167. See *Garvey v. Major League Baseball Players Ass'n*, 532 U.S. 504, 510-11 (2001) (citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987)) ("But even 'serious error' on the arbitrator's part does not justify overturning his decision, where...he is construing a contract and acting within the scope of his authority.").

in an attempt to gain affiliation with a high profile agency. Minor punishments are inconsequential if the individual has used unethical means to increase their status. Likewise, agents may become dispensable to large firms once the athletes have provided benefits to the agency's diversified businesses. To mitigate both of these concerns, corporate agencies could also be held liable by the board for lack of agent oversight or conspiracy of conduct.

By holding firms responsible for the conduct of their employees, social pressure is exerted by co-workers to strengthen industry norms and practices. As a key component of self-regulation, peer oversight can be a more effective deterrent than rules and regulations. The consequences for a firm failing to properly incentivize employees are dramatic. For example, sanctions on the firm helped lead to the collapse of Arthur Andersen following their malfeasance in the Enron scandal.<sup>168</sup> Having the option to impose this type of penalty is crucial given the level of control and discretion held by individuals within a firm.

An additional benefit to regulating sports agents is the increased potential for innovation. The lack of effective regulation allows those in power to game the system towards their advantage, stifling new ideas that might benefit clients.<sup>169</sup> Enacting regulation levels the playing field, provides opportunity for talented agents to compete, and increases the chances for innovation within the industry.

## VI. CONCLUSION

As an emerging service industry, sport agency would benefit from professionalization. Self-regulation and governmental regulations are often enacted in response to a negative image.<sup>170</sup> In place of the negative image, self-regulation demonstrates problem recog-

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168. See CARY COGLIANESE, THOMAS J. HEALY, ELIZABETH K. KEATING & MICHAEL L. MICHAEL, *The Role of Government in Corporate Governance*, REGULATORY POLICY PROGRAM REPORT RPP-08 17-22 (2004), available at <http://www.hks.harvard.edu/m-rcbg/research/rpp/reports/RPPREPORT8.pdf> (identifying the role of sanctions in collapse of Arthur Andersen).

169. See Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control Over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1728 (2008) ("So long as legal services are limited to conventional models of what it means to solve a client's legal problem, and the production of legal products is limited to members of the profession (those in practice and those on the bench), the ballooning complexity of law will remain largely uncontrolled").

170. See Thomas R. Wotruba, *Industry Self-Regulation: A Review and Extension to a Global Setting*, 16 J. PUB. POL'Y & MKTG. 38, 41. (Spring 1997) (identifying "correction of some economic or marketplace inequality" as motivation for industry self-regulation).

nition and a proactive approach to creating solutions. Rather than numerous agents operating under differing standards, regulation changes the dynamic to one where individuals are playing by the same rules. Most importantly, this proposal provides increased confidence in the abilities of an agent and gives athletes knowledgeable choices when making important decisions about agents. Reducing the levels of information asymmetry is a tangible benefit for athletes and agents alike through greater transparency. Micro-monitoring of agents is impractical. This proposal uses the structures created by professional service firms to access the knowledge of industry experts to influence behaviors, while utilizing the power of government regulation to enforce the norms in order to restore public confidence in the sport industry in the United States.

The enactment of this proposal is the beginning of the creation of a new legal and social structure that provides athletes with greater assurance of competent representation and career advice. It will also protect agents from having their clients raided by aggressive recruiters. By setting minimum standards for representation and pursuing exploitative agents, this proposal creates a uniform set of standards across sports that seek to protect players and agents, while boosting public trust in sports. Co-regulation allows those closest to the industry to set the standards of conduct while still providing the enforcement capabilities of government regulation.

This proposal differs from the current structure and other proposed solutions through the inclusion of a specific enforcement mechanism and recognition of a similar industry structure as with other professional services. Sport agency consists of a combination of law, marketing, negotiations, finance, and career advising. Organizing and regulating the industry based on systems from these fields, inclusive of industry-based and governmental enforcement mechanisms are the next steps in professionalizing this fledgling field. By working with Congress to implement self-regulation, the sport agent industry could eradicate problems that lead to exploitation of athletes and loss of confidence in the sporting structures. While this proposal is not naïve enough to assume that incentives to pay players or circumvent this system will be eliminated, it is a step towards addressing the situation. Through SPAAB, further changes to the regulatory structure are likely needed to address weaknesses or new challenges.

Commentators have used Sarbanes-Oxley as a model to eradicate steroid usage of professional athletes and others have sug-

gested that the UAAA and SPARTA be amended to improve enforcement.<sup>171</sup> Another commentator has suggested an oversight commission to improve enforcement of UAAA and SPARTA.<sup>172</sup> Our proposal differs as it is a broader approach to problems in the sport industry and proposes that the SPAAB bring the weight and power of the Federal government to bear on agent industry problems. The SPAAB provides a comprehensive solution to a long festering problem that has harmed athletes and ethical agents.

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171. See Sarah R. Heisler, *Steroid Regulation in Professional Sports: Sarbanes-Oxley as a Guide*, 27 CARDOZO ARTS & ENT. L.J. 199, 201-202 (2009) (finding Sarbanes-Oxley instructive on IPED usage reduction); see also Michael L. Martin, *It's Not Foul Unless the Ref Blows the Whistle: How to step up enforcement of the UAAA and Sparta*, 19 SPORTS LAW. J. 209, 210 (2012) (arguing that amendments are necessary for enforcement).

172. See R. Alexander Payne, *Rebuilding the Prevent Defense: Why Unethical Agents Continue to Score and What Can Be Done to Change the Game*, 13 VAND. J. ENT. & TECH. L. 657, 684 (2011) ("Establishing the Sports Agent Licensing and Oversight Commission (SALOC) by amending SPARTA, while leaving intact the current UAAA/SPARTA agency contract form and disclosure requirements, would provide a centralized mechanism to (1) enforce the registration disclosure requirements of the UAAA; (2) establish a single application process and fee; (3) monitor registered agents; and (4) bring suits, both criminal and civil, against non-registered agents who violate the law.").

