Recommendations to Improve NCAA Division I Infractions Practices
LEAD1 Association Infractions Working Group
October 2021

In late April 2021, LEAD1 Association ("LEAD1"), the association that represents the 130-member athletic departments of the National Collegiate Athletic Association (NCAA) Division I Football Bowl Subdivision (FBS), created a working group comprised of its athletic directors, and administrators to examine issues related to NCAA enforcement practices. Over the past several months, the working group, chaired by Tom Holmoe, Director of Athletics at Brigham Young University, examined issues related to cooperation (including self-reporting and self-detection), timeliness of outcomes, severity and consistency of penalties, transparency, composition of the NCAA enforcement staff and Committee on Infractions (COI), and the Independent Accountability Resolution Process (IARP). The working group was divided into three subcommittees among those topics. The following recommendations from our working group provide an actionable plan to improve NCAA Division I infractions practices.

Executive Summary: We recommend sixteen (16) actions:

1. ***More clear and better outlined standards should be created for schools to receive credit for cooperation (including exemplary), self-reporting, and self-detection;***
2. ***The NCAA should establish and publish "landmark" cases corresponding with each potential "major" allegation so that institutions can more effectively compare their actions to established case precedent;***
3. ***Cooperation, self-reporting, self-detection should be more clearly delineated and analyzed separately in each case. Sufficient cooperation, self-reporting, and self-detection should be more heavily weighted into the NCAA's penalty matrix;***
4. ***Clearer standards should be created for each type of allegation, particularly head coach responsibility and academic misconduct;***
5. ***Greater conflicts of interest "checks" should be conducted to mitigate the perception that investigators may be inherently biased based upon having formerly investigated an institution and/or a particular category of infractions cases;***
6. ***The NCAA should publish who the investigators are in each case solely to the membership;***
7. ***Penalties levied from the COI should be more narrowly tailored targeting bad actors, rather than punishing innocent student-athletes never involved in the egregious conduct;***
8. ***The NCAA should create more opportunities to work collaboratively with the membership, particularly compliance officers and athletics directors, to increase communications, education, and feedback about infractions processes;***
9. ***To mitigate timing issues in infractions cases, there should be a standard established for considering new information during an investigation, better and codified time restraints should be implemented, particularly at the investigation stage, the NCAA should convene a new group to review and streamline the volume of paperwork as part of major infractions cases, and the COI should provide a "quick-look review" to cases that are agreed upon through the Negotiated Resolution and Summary Disposition paths;***

(10) Strong consideration should be given towards individuals who have worked on campus, particularly as an athletics director or in compliance, when hiring NCAA enforcement staff;
(11) The majority of COI members should have an athletics director or compliance background from a Division I campus;
(12) There should be a more objective standard for referring cases into the IARP;
(13) The NCAA should create more transparency about the details of the IARP process;
(14) Decisions rendered in the IARP should be appealable;
(15) NCAA enforcement staff should not be involved in the IARP, including investigating, but for, mere administrative functions; and
(16) The NCAA should adopt a mediation component within the IARP using neutral arbiters if both sides agree to a set of facts upon completion of an investigation.

I. Cooperation, Self-Reporting, and Self-Detection

NCAA member institutions are explicitly bound by governing legislation to cooperate and self-report. Bylaw 19.2.3 states that "current and former institutional staff members, and prospective and enrolled student-athletes of member institutions have an affirmative obligation to cooperate fully." Many infractions cases must be built on knowledge possessed by individuals who are no longer under control of the institution, or even prospective student-athletes, and the NCAA cannot compel these individuals to cooperate. These challenges highlight the importance of institutional cooperation, including self-reporting, and the need to reward and encourage institutions to detect illicit activities.

Yet, based upon case law, our working group believes that more deference should be given to institutions, who, in their best efforts cooperate, self-report, and self-detect.[1] We believe that the same weight is currently given to institutions whether they self-report 45 potential violations, or five (5) in a given time period. The standard for exemplary cooperation is also unclear and seemingly unattainable. Despite the NCAA's good faith attempts to mitigate subjectivity among enforcement staff, there seems to be a disconnect between the national office and the membership that cooperation in one case might not translate to credit for cooperation in another similar case based upon the particular NCAA enforcement staff charged with handling the case. Because of this inconsistency in terms of who gets credit and who does not, and how much credit is given, institutions learn little from NCAA enforcement actions.

[1] Our working group researched many recent cases, particularly where self-reporting is applied as a mitigating factor. The consensus is that self-reporting is generally being "applied" as a mitigating factor, regardless of how many violations are reported over a several-year period. In other words, it seems as if self-reporting is merely an expectation, and is being framed as a "mitigating factor," rather than actually having a significant impact on the penalties administered. *See NCAA*, University of Notre Dame Public Infractions Committee Report, January 21, 2021, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102888, (Notre Dame was "credited" for reporting an average of 17 secondary violations during a five-year period); *See NCAA,* University of Dayton Public Infractions Committee Report, April 22, 2021, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102900, (Dayton was "credited" for reporting an average of five violations per year during a five-year period).

In some cases, the standards to receive credit for self-detecting seem rather ill-defined, inconsistent, and unreasonable.[2] It should not matter whether an institution discovers a violation before NCAA investigators given that schools may have detection systems in place that operate more effectively at different times. The current system, unintendedly, incentivizes monitoring less given that failing to detect misconduct, with proper systems in place, is penalized greater than having no systems in place at all.

Recommendation One: More clear and better outlined standards should be created for schools to receive credit for cooperation (including exemplary), self-reporting, and self-detection. In the private sector, the SEC, for example, uses clearer elements as its standards for determining cooperation, such as remediation measures and whether companies self-detected prior to the discovery of misconduct. The standard for self-detection, in particular, needs to be clearer, as there is no explicit and legislated NCAA rule. In that vein, institutions who follow their own self-detection policies should be incentivized, and not penalized as aggravating weight. In addition, institutions who demonstrate sufficient documentation with regard to educating their departments and other stakeholders about NCAA rules compliance over a several-year period (considered within the previous five (5) years) should be explicitly legislated as an additional mitigating factor.

Recommendation Two: As an added piece to the NCAA's penalty matrix, the NCAA should establish and publish "landmark" cases corresponding with each potential "major" allegation so that institutions can more effectively compare their actions to established case precedent. Similar to the NCAA's waiver process, which relies upon case precedent and constantly evolves, the landmark cases associated with each allegation could be revisited on occasion to ensure named precedent is still applicable. Institutions and NCAA enforcement staff should collaborate to pick the appropriate cases for each allegation. This would help lead to more clear standards, predictability, and more timely outcomes.

Recommendation Three: Once more clear standards are established, cooperation, self-reporting, and self-detection should be more clearly delineated and analyzed separately in each case. To better incentivize institutions meeting these three standards, sufficient cooperation, self-reporting, and self-detection should be more heavily weighted into the NCAA's penalty matrix, where penalties that would otherwise be aggravated, become standard, and standard penalties, become mitigated.

II. Consistency and Severity of Penalties; and Transparency

Now a decade or so after its creation, our working group believes that the current penalty matrix sometimes leads to inconsistent and insignificant penalties, particularly with regard to academic

[2] *NCAA,* University of Missouri Public Infractions Committee Report, January 31, 2019, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102744, (where Missouri educated its tutors on rules violations, promptly self-reported the academic misconduct, and upon discovering the violations, implemented policies and procedures to improve its academic systems in place, yet the COI penalized the university for not having proper systems in place for "spot checking metadata on submitted assignments" -- a seemingly new created standard by the COI in its infractions decision report).

misconduct and head coach responsibility.[3] In addition, at the investigation stage, we believe that there are often inconsistencies in terms of allegations charged. Our institutions having the same investigator case after case contributes to these inconsistencies and creates a lack of objectivity in the enforcement process. We understand the difficulty of building a case without subpoena power, particularly when key witnesses are no longer students or employed staff members at an NCAA member institution. But there is a sentiment among our working group that there is real disconnect between the NCAA, and our member institutions, where in some cases, an institution and the enforcement staff may agree upon factual findings but are still required to adjudicate before the COI. There is also a growing perception among our working group that merely being heard by the COI is like a penalty itself, regardless of the outcome. Unpredictability from the COI bolsters this sentiment. In terms of severity of penalties, we also have concerns with respect to the COI applying aggravating factors towards institutions for essentially intentional employee misconduct.[4]

Recommendation Four: Clearer standards should be created for each type of allegation, particularly head coach responsibility and academic misconduct. The NCAA's current charging guidelines for head coach responsibility are broadly written and seem to be inconsistently applied based upon who the investigator is. If there were clear enough standards, we also believe that the determination as to whether there was adequate head coach control in a particular case should be decided before the case even gets to the COI. This would mitigate our concern that the guidelines change based upon which infractions members are hearing the case.

Recommendation Five: Greater conflict of interest "checks" should be conducted to mitigate the perception that investigators may be inherently biased based upon having formerly investigated an institution and/or a particular category of infractions cases.

Recommendation Six: To create more transparency, the NCAA should publish who the investigators are in each case solely to the membership (not to the general public). This should be done in a manner similar to what is already being done with the transfer portal and eligibility center where information is largely kept confidential. Making it known who the investigators are in each case will create more transparency and confidence in the overall enforcement process.

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[3] *See supra* note 2, Missouri (2019), and *NCAA,* Mississippi State University Public Infractions Committee Report, August, 23, 2019, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102786, (where in one case, an institution received a one-year postseason ban, and the institution in the other case did not, despite very similar facts involving academic misconduct, when the employee at the institution that received the lesser penalty did not cooperate); *see also NCAA*, University of Florida Public Infractions Committee Report, December 22, 2020, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102886; *NCAA*, Texas A&M Public Infractions Committee Report, July 2, 2020, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102866, (where in both cases the head coaches were penalized with show-cause orders and recruiting restrictions despite disregard for NCAA recruiting rules).

[4] *See NCAA*, Georgia Tech Public Infractions Committee Report, September 26, 2021, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102902; *see also NCAA,* University of Southern California Public Infractions Committee Report, April 15, 2021, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102896, (where in both cases the COI essentially applied intentional employee misconduct as an aggravating factor against the institutions).

Recommendation Seven: Penalties levied from the COI should be more narrowly tailored targeting bad actors, rather than punishing innocent student-athletes, never involved in the egregious conduct. In that vein, a history of major infractions should only be considered within a contemporary lens (not given weight from five (5) or more years prior to the infraction, sometimes even before current student-athletes were born) and must be relevant. We also believe that more deterring penalties should be considered for misconduct, particularly with respect to head coach responsibility. Coaches who commit bad acts should be hit with longer game suspensions and larger fines should be levied to deter further misconduct. We believe that larger financial penalties or restrictions on recruiting can have just as (if not a greater) deterring effect than penalties that punish innocent student-athletes. Such penalties such as scholarship reductions, financial aid penalties, postseason bans, and elimination of records undermine our mission as an enterprise to provide broad-based opportunities for student-athletes, and also create unintended Title IX consequences.[5]

Recommendation Eight: To help mitigate the disconnect between NCAA enforcement staff and the membership regarding the perceived subjectivity depending upon whom among the NCAA enforcement staff is handling a case, the NCAA should create more opportunities to work collaboratively with the membership, particularly compliance officers and athletics directors, to increase communications, education, and feedback about infractions processes. In this vein, the NCAA should: (1) at least annually, produce and distribute to the membership a simple "lessons learned" document from recent cases for institutions to learn from other institution's recent infractions; and (2) visit member institutions more frequently to fully understand the policies, procedures, as well as rules education efforts compliance offices undertake.

III. Timeliness of Infractions Cases

The consensus among our working group is that NCAA enforcement proceedings take unreasonably long, particularly time spent in the initial stages with NCAA enforcement staff. We believe that the recommendations mentioned above, such as modifying the current penalty structure, and further incentivizing cooperation would help create more expedient outcomes. In addition, when NCAA enforcement staff investigates a particular case, the scope of their investigation should only be information that they are charged with investigating. In this regard, our working group believes that NCAA investigators should place greater weight on what institutions investigate on their own. There is also a sentiment among our working group that the longer it takes the NCAA to investigate a particular case, the more likely it is that institutions will self-report other potential violations while already under scrutiny. This is problematic because a newly reported violation may be "bundled" into the same case. This may have the unintended effect of incentivizing institutions to refrain from self-reporting so that the different violations do not get packaged together into one case. There is also a sentiment among our working group that sometimes an infractions case will "pass by" multiple offices within the NCAA, which may lead to inconsistent advice and impact the expediency of a case. At some

[5] *See NCAA*, University of Massachusetts, Amherst Public Infractions Committee Report, October 16, 2020, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102878; *see also, NCAA*, California Polytechnic University Public Infractions Committee Report, April 18, 2019, https://web3.ncaa.org/lsdbi/search/miCaseView/report?id=102770, (where in both cases, vacation of records penalties were imposed for essentially unintentional clerical errors).

point there is a diminishing return when an investigation takes an unreasonable amount of time. And, of course, the longer a case is, the more that institutions are forced to spend on outside counsel. Our working group, therefore, offers the following recommendations to mitigate these timing issues.

Recommendation Nine: (1) When new information is discovered that may extend the timing of an investigation, there should be a standard established for considering this new information within a reasonable timeframe. New information that is considered should be "significant." In addition, the further removed the new information is from the violation, the more significant the information should be; (2) Better and codified time restraints, particularly at the investigation stage, should be implemented in the NCAA's Enforcement Division I Operating Procedures; (3) the NCAA should convene a new group to review and streamline the volume of paperwork as part of major infractions cases as many of the materials required for these cases are redundant; and (4) the COI should provide a "quick-look review" to cases that are agreed upon through the Negotiated Resolution and Summary Disposition paths, thereby placing an increased emphasis on mediation throughout the enforcement system.

IV. Composition of NCAA Enforcement Staff and COI

There is a sentiment among our working group that NCAA investigators and COI members have enormous bearing on outcomes, depending upon whom is working a particular case. As a result, institutions are forced to spend more and more money on outside counsel to strategically navigate the system, thereby taking resources away from student-athlete opportunities. Coupled with that reality, as a voluntary association, NCAA member institutions are ultimately responsible for establishing the rules and overseeing the infractions and enforcement processes. Yet, the NCAA is largely led by university presidents who have little involvement in intercollegiate athletics.[6] The reality is that athletics department staff, particularly compliance officers, are the practitioners most qualified to determine NCAA infractions cases. In fact, our working group researched that only approximately 25 percent of NCAA enforcement staff members have any campus compliance experience. Being judged by one's peers should be a minimal and reasonable ask.

In terms of composition of the COI, only nine (9) current members of the 24 have former athletics administration experience; only five (5) with compliance backgrounds. In addition, the time demands on COI members are extreme and it is rare that a COI member is retired or semi-retired. The rationale for the expansion of the COI from 10 to today's 24 was to "review cases more quickly and efficiently." The expanded COI, however, from which five (5) to seven (7) member panels are drawn seems to be more susceptible to inconsistent results, given that many of the enforcement guidelines still allow for substantial flexibility.

Recommendation Ten: When hiring NCAA enforcement staff, strong consideration should be given towards individuals who have worked on campus, particularly as an athletics director or in compliance. The majority of NCAA enforcement staff should have an athletics director or

[6] The NCAA's top governing committees, including the Board of Governors, and Board of Directors are comprised of university presidents and chancellors.

compliance background from a Division I campus. Composition of NCAA enforcement staff should also equitably represent institutions from all Division I conferences.

Recommendation Eleven: The majority of COI members should have an athletics director or compliance background from a Division I campus. Composition of the COI should also equitably represent people of color, as well as institutions from all Division I conferences. NCAA enforcement staff should also play a bigger role in COI proceedings to keep more rotating COI panels consistent in their approach.

V. Independent Accountability Resolution Process (IARP)

While the concept of using independent arbiters has merit, the actual IARP in place has major flaws. As a result, the NCAA should consider sunsetting this process at the conclusion of the FBI cases currently in the process. If that is not feasible, the process should be modified significantly.

First, the referral factors for getting cases into the process, such as "stale or incomplete facts," or "lack of acceptance of core principles of self-governance," seem preconceived, very serious for mere entrance requirements, and give NCAA enforcement ample latitude to refer cases into the process. ***Recommendation Twelve:*** There should be a more objective standard for referring cases into the IARP. The NCAA should consider only referring FBI cases into the process. Doing so would allow the FBI, and not NCAA enforcement staff, to determine what cases should be considered so "unique" that they cannot merely go through the traditional NCAA enforcement process.

Second, given that NCAA member institutions did not create this process, the NCAA must be more transparent about the details of it. Simply, procedural requirements are not clear enough for members who may find themselves in the process. ***Recommendation Thirteen:*** The NCAA should create more transparency about the details of the IARP process.

Third, without any case precedent, and the fact that institutions may be "compelled" to enter this process, institutions should have the ability to appeal decisions rendered in the IARP. ***Recommendation Fourteen:*** Decisions rendered in the IARP should be appealable.

Fourth, the IARP process was created based upon the premise that "volunteers who are members of fellow NCAA member institutions should not resolve cases….when the stakes are high." The IARP system was, therefore, created based on the intent to create actual neutrality and independence from the traditional enforcement system. ***Recommendation Fifteen:*** Because the IARP was created to have a "new set of eyes" on infractions proceedings, the main issue is how to create actual neutrality and independence from NCAA enforcement staff. As a result, NCAA enforcement staff should not be involved in the IARP, including investigating, but for, mere administrative functions.

Fifth, it is worth underscoring that none of the cases currently in the IARP have been resolved. On the issue of timing, there is currently no opportunity for mediation or settlement in the IARP, even if both sides agree to a set of facts after the investigation. Furthermore, hearing cases when there is agreement, adds to the time of the process, and creates a perception among the

membership that the IARP is simply being used as a "tool" by NCAA enforcement staff, otherwise without subpoena power. ***Recommendation Sixteen:*** The NCAA should adopt a mediation component within the IARP using neutral arbiters if both sides agree to a set of facts upon completion of an investigation.

Thank you for the opportunity to provide comment to the NCAA Infractions Process Committee. We would be happy to discuss our recommendations in further detail.

Sincerely,

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