

STEROID REGULATION IN PROFESSIONAL SPORTS: SARBANES-OXLEY AS A GUIDE ♦

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I. INTRODUCTION

Most of humankind, and specifically Americans, are passionate about winning, no matter what the level of competition. This excitement largely explains the “win-at-all-costs” approach to work and play.¹ This passion is often most apparent when the stakes are

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¹ WILL CARROLL WITH WILLIAM L. CARROLL, *THE JUICE: THE REAL STORY OF BASEBALL’S DRUG PROBLEMS* 26 (Ivan R. Dee 2005) [hereinafter *THE JUICE*]; Rick Collins, *Changing the Game: The Congressional Response to Sports Doping Via the Anabolic Steroid Control Act*, 40

at their highest, as they are in both American professional sports² and corporations.³ In order to win, many professional athletes⁴ and corporate executives, such as chief executive officers (“CEOs”) and chief financial officers (“CFOs”),⁵ are willing to resort to performance enhancing products or strategies to acquire the “necessary edge,” whether or not the means used are legal or ethical.⁶ These unscrupulous executives and athletes are hunting for new products and people to help them navigate below the radar of regulators.⁷ While corporate executives rely on “cooking the books,”⁸ complex financial derivatives, and off-balance sheet transactions,⁹ professional athletes use various forms of steroids,¹⁰

NEW ENG. L. REV. 753, 762 (2006) [hereinafter *Changing the Game*].

² See PAUL D. STAUDOHR, *THE SPORTS INDUSTRY AND COLLECTIVE BARGAINING 2* (ILR Press 1986) (“American culture has a particular fascination with winning, which explains some of the attention given to competitive sports and the boom in these sports at the professional level.”); see also ANGELA J. SCHNEIDER & THEODORE FRIEDMANN, *GENE DOPING IN SPORTS: THE SCIENCE AND ETHICS OF GENETICALLY MODIFIED ATHLETES 6-7* (Elsevier 2006) (“[G]iven the opportunity, athletes and their trainers and handlers will resort to many illicit techniques and substances to provide a competitive advantage in sports”); Paul H. Haagen, *The Players Have Lost that Argument: Doping, Drug Testing, and Collective Bargaining*, 40 NEW ENG. L. REV. 831, 849 (2006) (“Sports competition at any serious level is about excess.”).

“Professional sports” refers to the four American major, professional sports leagues: Major League Baseball (“MLB”), National Football League (“NFL”), National Basketball Association (“NBA”), and National Hockey League (“NHL”). Recommendations made within this Note, however, are applicable to all sports leagues and teams, whether professional or amateur.

³ See Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 314-15 (2007) (citing academics and financial professionals who recognize that corporate executives used their power to enrich themselves at the expense of investors). The difference between the compensation packages, or “perks,” offered to professional athletes and corporate executives are becoming almost identical. See HOWARD BRYANT, *JUICING THE GAME 156-57* (Penguin Books 2006) (citing MLB players’ compensation packages that include use of team private planes and membership to exclusive golf courses, which are often given to corporate executives).

⁴ See Bill Pennington, *Steroid Report Depicts a 2-Player Domino Effect*, N.Y. TIMES, Dec. 16, 2007, § 1, at 1 (quoting Davey Johnson, manager of the Los Angeles Dodgers in 2000, as saying “everyone is looking for some edge.”).

⁵ See Ramirez, *supra* note 3 at 313 (“CEOs continue to enjoy too much autonomy over the public corporation.”).

⁶ See THE JUICE, *supra* note 1, at 19 (quoting an unnamed baseball player as saying, “I had to find an edge now, and it wasn’t hard to find,” in reference to finding and obtaining steroids and other IPEDs); *id.* at 45 (“[I]t is obvious baseball players have been involved in chemical warfare, seeking the ‘edge’ that will give them an advantage and make them a lot of money.”).

⁷ Larry E. Ribstein, *Sarbanes-Oxley After Three Years 366* (Univ. of Ill. Coll. of Law, Law and Econ. Working Papers, Working Paper No. 30, 2005) [hereinafter *SOX +3*].

⁸ “Cooking the books” refers to “the deliberate manipulation of accounting numbers to meet the

earning[s] goals of managers, especially those wishing to cash in on mega-grants of stock options.” Michael G. Alles & Srikant M. Datar, *How Do You Stop the Books from Being Cooked? A Management Control Perspective on Financial Accounting Standard Setting and the Section 404 Requirements of the Sarbanes-Oxley Act*, 1 INT’L J. DISCLOSURE & GOVERNANCE 119 (2004).

⁹ *SOX +3, supra* note 7, at 366.

¹⁰ See Richard D. Collins, *Of Ballparks and Jail Yards: Pumping Up the War on Steroids*, 30-NOV CHAMPION 22, 24 (2006) (“Steroid use in sports is widely viewed as cheating”); John Burge, *Legalize and Regulate: A Prescription for Reforming Anabolic Steroid Legislation*, 15 LOY. L.A. ENT. L. REV. 33, 33 (1994) (citing James E. Wright, Ph.D., *Flex Seminar: Anabolic Steroids, the Real Story*, FLEX, May 1993, at E) (“[Steroids] can make you bigger, stronger faster

human growth hormones (“HGH”), and other illegal performance-enhancing drugs (“IPEDs”).¹¹ Athletes routinely cite the desire to receive high salaries¹² and to “make it” the reasons for using IPEDs.¹³

Steroid usage in professional sports taints the playing field, violates principles of trust and fair play, and puts our nation’s athletes at risk. Since steroid usage has become more prevalent amongst professional athletes, teenage and amateur athletes are following suit.¹⁴ American athletes and youth are facing serious danger.¹⁵ Our nation’s role models are setting the wrong examples, while team owners and coaches are looking the other way.¹⁶ The Sarbanes-Oxley Act of 2002¹⁷ (“Sarbanes-Oxley,” “SOX,” and

and more aggressive, all of which are more highly valued by today’s society than ever before. These characteristics bring respect, power and sometimes financial rewards.”). See also MICHAEL MANDELBAUM, *THE MEANING OF SPORTS: WHY AMERICANS WATCH BASEBALL, FOOTBALL, AND BASKETBALL, AND WHAT THEY SEE WHEN THEY DO* 133 (Public Affairs 2004) (“Over the decades football players have become stronger, faster, and, most conspicuously, through diet, weight training, and sometimes chemical stimulants . . . , bigger. Players weighing three hundred pounds or more, once rare, had, by the end of the twentieth century, become common.”).

¹¹ See THE JUICE, *supra* note 1, at 11 (advocating the use of the term “illegal performance-enhancing drugs, or IPED for short” as a better term to describe “drugs that have been determined to offer an unfair competitive advantage or have a deleterious effect on health”). Hereinafter, “IPEDs” refers to performance-enhancing drugs generally, including steroids, steroid precursors, and HGH.

¹² See BRYANT, *supra* note 3, at 96 (recognizing that “Home runs meant more money,” and providing examples where a significant increase in the number of home runs hit resulted in a related significant increase in salary); THE JUICE, *supra* note 1, at 44 (quoting Ken Caminiti, a one-time member of the San Diego Padres, as saying: “Look at all the money in the game The salaries are through the roof. So you can’t say ‘don’t do it’ when the guy sitting next to you is as big as a house and he is going to take your job and make the money.”).

In November 2007, Alex Rodriguez and the New York Yankees entered into a ten-year contract worth over \$270 million. Murray Chass, *Yankee and Rodriguez Receive Approval for Deal*, N.Y. TIMES, Nov. 25, 2007, § 8, at 7. In the NBA, the 2006-2007 salaries for the fifty highest-paid players ranged from nearly \$9.5 million to \$21 million. *Top 50: Highest Paid Active Players for the 2006-07 Season*, SI.COM, Dec. 14, 2006, available at <http://sportsillustrated.cnn.com/2006/basketball/nba/top.50.salary/index.html>.

¹³ *Id.* at 17.

¹⁴ As of December 11, 2007, twelve players tested positive for IPEDs, and were suspended from the MLB and the NFL since the start of the year. Michael S. Schmidt, *Doping Experts Find Loopholes Beyond Baseball*, N.Y. TIMES, Dec. 11, 2007, at D1 [hereinafter *Loopholes Beyond Baseball*]. During the same period, federal and state criminal investigations identified approximately twenty athletes, from the same sports, involved in the use of IPEDs. *Id.*

¹⁵ Women are not exempt from risk. Former track star Marion Jones became the first athlete to serve jail time in connection with the use of IPEDs. Patricia Hurtado, *Marion Jones Gets Six-Month Term for Obstruction*, BLOOMBERG, Jan. 11, 2008, <http://www.bloomberg.com/apps/news?pid=20601079&sid=a0wy4caHfSdE&refer=home>; see also *infra* p. 240 and note 295 (providing more information concerning the conviction of Jones).

¹⁶ See Holly M. Burch & Jennifer B. Murray, Comment, *An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation*, 6 SPORTS LAW. J. 249, 250 (1999) (“Most people believe that athletes are role models inherently because of the influence their actions have on people who follow their successes and failures daily, particularly children.”); see also THE MEANING OF SPORTS, *supra* note 10, at XVI. (“Each of the three sports [baseball, football, and basketball] is a cultural practice, and like other cultural practices each has a social function.”).

¹⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in various sections of 15, 18, 28, and 29 U.S.C.) (2007).

“the Act”) is instructive on how to reduce IPED usage, and creates consequences for those benefiting from and not taking measures to stop such usage.

In the past, Congress proposed legislation and threatened intervention to regulate IPED testing in professional sports.¹⁸ However, nothing has come to fruition despite the leagues’ repeated promises to change and implement more stringent rules and testing.¹⁹ While the professional sports leagues have made a little progress in their IPED regulations, Congress should make good on its threat to act since the leagues and players associations failed to implement changes.²⁰ Sarbanes-Oxley provides a framework to implement legislation to regulate IPED testing and regulation in professional sports.

Academics identified three primary factors that led to prolific use of accounting fraud, and subsequent bankruptcies, necessitating the passage of Sarbanes-Oxley. First, corporate executives became “unusually competitive, over-confident and unethical.”²¹ Second, novel and creative financial products made the detection of fraud more difficult.²² Lastly, investors became less cautious, guarded, and skeptical.²³ Each of these factors, albeit with a different set of actors, is present in the situation involving the prevalence of professional athletes using IPEDs.

Just as use of IPEDs in professional sports is lacking the appropriate oversight and deterrence features necessary to protect children and teenagers, Sarbanes-Oxley sought “[t]o protect investors by improving the accuracy and reliability of corporate disclosures.”²⁴ SOX’s regulatory scheme can provide legislatures and the

¹⁸ MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* 221 (Gotham Books 2006) (citing the Senate Commerce Committee’s threat that “[i]f baseball’s leaders didn’t enact a tougher steroid program, Congress would do it for them.”).

¹⁹ See *infra* pp. 209-10 and notes 74-75 (describing six proposed Congressional bills to regulate IPED testing in professional sports, and the fact Congress did not enact one bill into law).

²⁰ In 2004, Senator John McCain, of Arizona, told Selig and Fehr that, “Your failure to commit to addressing [the use of steroids in baseball] straight on and immediately will motivate [the Senate Commerce Committee] to search for legislative remedies. The status quo is not acceptable. And [Congress] will have to act in some way unless the major league players union acts in the affirmative and rapid fashion.” BRYANT, *supra* note 3, at 333. In January 2005, Selig and Fehr announced a modified steroid testing program, suspending a player ten days after his first test and for one year after his fourth positive test. FAINARU-WADA & WILLIAMS, *supra* note 18, at 263. “But given all the loopholes and limits in the plan, it was unlikely a player would test positive two times, let alone four.” *Id.*

²¹ SOX +3, *supra* note 7, at 366.

²² *Id.*

²³ *Id.* at 366-67.

²⁴ Sarbanes-Oxley Act of 2002 pmb. See 148 CONG. REC. E1470-02 (Opening Statement of Rep. Gephardt) (“We need to apply our values to governing. Our values tell us that accountability and responsibility must be operating principles in our markets, especially for the corporations that form the bedrock of our capitalistic system.”).

professional sports leagues with an example of an appropriate framework for how to best regulate the use of steroids and other IPEDs. The appropriateness is further attributable to the similarity in factors that ultimately contributed to the events leading to the passage of SOX, and to the circumstances that now mandate more effective regulation of IPEDs in professional sports.²⁵ Specifically, the current professional sports' IPED testing procedures and guidelines do not provide the appropriate incentives and penalties to adequately discourage the use of IPEDs by professional athletes. These guidelines provide loopholes for the leagues to protect the confidentiality of their players, while ultimately enabling the athletes to continue competing and using the IPEDs.

The recent revival of congressional and media attention focusing on the use of steroids in professional sports helped initiate attempts at reformation; however, more must be done to reduce the use of IPEDs within sports.²⁶ Today, children have begun to use the same substances that professional athletes continue to be accused of, and test positive for, using.²⁷ Just as Congress responded to the public distrust and disgust the scandals with Corporate America, Congress should intervene in the testing and regulation of the use of steroids and other IPEDs in professional sports. In the past, Congress responded to "adolescents' increased use of anabolic steroids, which posed serious health concerns, and the increased use of anabolic steroids by people other than elite athletes, warranting the enhanced federal efforts to limit access and availability of performance enhancing drugs."²⁸ Congress further explained that its proposed regulation of IPEDs in professional sports was "to protect the integrity of professional sports and the health and safety of athletes generally by establishing minimum standards for the testing of steroids and other performance-enhancing substances by professional sports leagues."²⁹

²⁵ *Changing the Game*, *supra* note 1, at 762-63 ("Arguably, the cheating athlete is less akin to a drug offender than to a stock trader disclosing inside information, or to an executive with a valuable corporate secret he is looking to sell . . .").

²⁶ See Michael S. Schmidt, *2 Players Suspended in Drug Case*, N.Y. TIMES, Dec. 7, 2007, at D5 (reporting that MLB suspended two players for fifteen days after the men "[were] linked, through documentary evidence, to having received human growth hormone and steroids;" the players did not actually test positive for a banned substance).

²⁷ GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL SR-9, 15-17 (Dec. 13, 2007), <http://files.mlb.com/mitchrpt.pdf> [hereinafter MITCHELL REPORT].

²⁸ Adrian Wilairat, Comment, *Faster, Higher, Stronger: Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL'Y 377, 378 (2005).

²⁹ Clean Sports Act, H.R. 2565, S. 1114, 109th Cong. (2005). See also MANDELBAUM, *supra* note 10, at 280-81 (discussing the facts that the use of IPEDs threatens the future importance of professional sports and that the use of IPEDs discredits professional athletes' au-

The professional sports leagues had many years and numerous opportunities to devise and implement more effective IPED testing procedures and penalties; however, much of what was done seems only titular in form—a lot of rhetoric without much change or deterrence implemented. Further, the leagues' proposals seem to be only tentative measures and lack the formality necessary to effect change.³⁰ Professional sports leagues and their respective teams need consistent incentives, penalties, and systems in place to more effectively deter the use of IPEDs by their respective athletes.³¹ If appropriate steps are not taken to deter and prohibit the use of IPEDs in professional sports, not only will athletes suffer adverse health consequences,³² but it will be “impossible to succeed without drugs. . . . [Either] cheat or lose.”³³

Part II of this Note provides a brief history of the use of performance enhancing drugs in sports. Part III briefly summarizes the NBA's, NFL's, MLB's, and NHL's existing IPED testing policies, procedures, and penalties. Where appropriate, the section highlights potential loopholes in the testing systems. Part IV provides an overview of events that led up to Congress passing Sarbanes-Oxley and applies two principles of Sarbanes-Oxley—CEO and CFO personal liability and the creation of an independent regulatory board—to the regulation of IPED usage in professional sports.³⁴ Lastly, Part V identifies potential obstacles that may arise

thenticity).

³⁰ See *infra* pp. 230 (describing the Partnership for Clean Competition).

³¹ The use of steroids and other prohibited substances for medical purposes is beyond the scope of this Note.

³² See THE JUICE, *supra* note 1, at 47-72 (describing the side effects of IPED usage).

³³ FAINARU-WADA & WILLIAMS, *supra* note 18, at 18; see also SHAUN ASSAEL, STEROID NATION 218-19 (ESPN Books 2007) (identifying a split among MLB players: those who only publicly opposed IPED testing, and those who really were “tired of giving up 500-foot home runs.”).

³⁴ While there are numerous potential areas in which SOX provides guidance on how to better regulate the use of IPEDs in professional sports, this Note focuses on four areas. The limited scope of this Note is not intended to indicate a limited application of the SOX framework. For example, § 806 provides protection to “Whistleblower” employees and prohibits a company from “discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing] against an employee” who comes forward and reports illegal or unethical practices of his or her employer. Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(a) (2007). Section 806 is not discussed in detail in this Note; however, it is easily applicable to IPED regulation by providing similar protection can be offered to players or any other person wanting to disclose the use of IPEDs. See MITCHELL REPORT, *supra* note 27, at 205 (suggesting a “Hot Line for Reporting Anonymous Tips”).

SOX does not contain an educational component; the absence of a discussion on an educational component to effectively combating the use of IPEDs in professional sports should not be interpreted to be an indication that education is not important. While many academics and legislatures believe that in order to effectively combat the use of steroids, both at the professional level and amongst children and teenagers, because SOX does not address this issue, it is beyond the scope of this Note. See Will Carroll, Keynote Address, *The Real Story of Baseball's Drug Problems*, 40 NEW ENG. L. REV. 711, 714 (2005) (citing Steroid Use in Sports, Part II: Examining the National Football League's Policy on Anabolic Steroids and Related Substances: Hearing Before the H. Comm. on Gov't Reform, 109th Cong. 55 (2005) (statement of Gary I. Wadler, Associate Professor, New York

in effectively applying the SOX's structure to the fight against IPED usage.

II. HISTORICAL BACKGROUND OF PROFESSIONAL ATHLETES' USE OF STEROIDS

A. *The Use of Steroids and Other Performance Enhancing Drugs by Professional Athletes*

The use of performance enhancing drugs by athletes is not a new phenomenon. Just as in Corporate America immediately prior to the enactment of Sarbanes-Oxley, there was, and continues to be, a perfect storm of events to signal to the federal government that regulation is necessary. Although there is only limited scientific research supporting these claims, athletes use IPEDs for increasing strength and muscle size, enhancing muscle definition, reducing body fat, shortening recovery time after a difficult training session or competition, and having more energy to train longer and more intensely.³⁵

Historians acknowledge that athletes, dating back to the ancient Greeks and possibly earlier, used "any available means,"³⁶ such as teas and diet alterations, ointments and rubs, to increase their performance levels and attempt to ensure victory.³⁷ In the past, many of these tactics merely provided athletes with "psychological support" or intimidated the competition.³⁸ Athletes began using steroids in sports in the 1950s when the Eastern European and Soviet bloc athletes initially used steroids to enhance their strength and performance for competitions.³⁹ By the 1960s, the use of steroids became prevalent among American weightlifters⁴⁰ and football players in the NFL.⁴¹ As the use of steroids by athletes

University School of Medicine)).

³⁵ THE JUICE, *supra* note 1, at 48, 61.

³⁶ SCHNEIDER & FRIEDMAN, *supra* note 2, at 3.

³⁷ *Id.* at 3; Maxwell J. Mehlman et al., *Doping in Sports and the Use of State Power*, 50 ST. LOUIS U. L.J. 15, 17 (2005).

³⁸ SCHNEIDER & FRIEDMAN, *supra* at 2, at 3.

³⁹ Heather M. Feuerhelm, *The Win at Any Price Syndrome: Steroids in Athletics*, in SPORTS AND THE LAW: MAJOR LEGAL CASES 71 (Charles E. Quirk ed., Garland 1996). See generally Mehlman, *supra* note 37, at 17-26 (providing a thorough historical overview of the use of IPEDs in sports).

The federal government regulated the distribution of steroids since the 1930s under the Food, Drug, and Cosmetic Act ("FDCA"), which prohibited the drug's distribution without a doctor's prescription. Steven Grinspoon, M.D. & Ellen Seely, M.D., *Is Adolescent Steroid Abuse/Misuse Rampant?*, ENDOCRINE NEWS, Apr. 2006, at 12, available at http://www.endo-society.org/publications/periodicals/endo_news/tri_point/upload/Adolescent_Steroid_AbuseMisuse_Rampant.pdf; see Burge, *supra* note 10, at 40-48 (citing James E. Wright, Ph.D., *Flex Seminar: Anabolic Steroids, the Real Story*, FLEX, May 1993, at E) (describing Congress' approach to criminalizing the use steroids). During the 1930's, people generally used steroids to treat skeletal problems, malnutrition, and anemia. Feuerhelm, *supra* note 39, at 71.

⁴⁰ Feuerhelm, *supra* note 39, at 73.

⁴¹ ASSAEL, *supra* note 33, at 58.

continued to spread, athletic governing organizations began to establish regulations to regulate IPED use and testing.⁴² In 1975, the International Olympic Committee (“IOC”) banned steroids “because [they] might give an unfair advantage to the athletes who used performance-enhancing drugs.”⁴³ The severity of the problem did not gain public concern until 1988, when Canadian track and field star Ben Johnson tested positive for the steroid stanozolol, and resulted in the IOC stripping him of his gold medal awarded at the Seoul Olympics.⁴⁴ Johnson’s positive test confirmed not only what many suspected of Eastern European athletes, but revealed a promulgated problem of world-class athletes “using chemicals to enhance their performances.”⁴⁵

Moreover, this disturbing problem is no longer confined to serious athletes looking for increased strength and speed.⁴⁶ “In fact, according to most experts, use of the drug has become an epidemic in the amateur and professional sporting worlds, and is spreading into the high schools.”⁴⁷ In 2004, the National Institute on Drug Abuse reported “[n]early half a million middle- and high-schoolers admit to at least trying anabolic steroids.”⁴⁸

B. Congress’ Response to the Use of Performance Enhancing Drugs by Professional Athletes

Congress did not begin to take an active interest in the use of steroids until the late-1980s.⁴⁹ In addition to Johnson’s use of steroids at the Olympics, the media began focusing on steroid use in

⁴² Feuerhelm, *supra* note 39, at 73. For example, in 1968, the Winter Olympics required athletes to undergo drug testing “to keep sports ethical.” *Id.*

⁴³ *Id.*

⁴⁴ Haagen, *supra* note 2, at 837 (citing Laurie Mifflin, *Johnson’s Testing Leaves Questions*, N.Y. TIMES, Sept. 27, 1988, at D31).

⁴⁵ FAINARU-WADA & WILLIAMS, *supra* note 18, at 18.

⁴⁶ An investigation coordinated by the Albany County district attorney, P. David Soares, recently revealed that musicians 50 Cent, Mary J. Blige, Timbaland, and Wyclef Jean, and actor Tyler Perry may have purchased or used steroids and/or HGH. Bruce Lambert, *Prominent Entertainers Cited in Steroids Inquiry*, N.Y. TIMES, Jan. 14, 2008, at B3.

⁴⁷ Feuerhelm, *supra* note 39, at 71.

⁴⁸ Patrik Jonsson, *Steroid Scandals: The View from the Kids’ Locker Room*, CHRISTIAN SCI. MONITOR, Dec. 14, 2004, available at <http://www.csmonitor.com/2004/1214/p01s02-ussc.html>; see ASSAEL, *supra* note 33, at 234 (citing a 2000 study conducted by the University of Michigan finding 3.5 percent of high school seniors surveyed “admitted to using steroids at least once”).

⁴⁹ In 1988, two events spurred Congress’ interest in steroids. The first was the stripping of the gold medal from Canadian sprinter Ben Johnson after his record breaking 100-meter sprint at the 1988 Seoul, South Korea Olympics, because he tested positive for steroids. See ASSAEL, *supra* note 33, at 31-41, 49-52 (describing Johnson’s use of steroids, his performance in the 1988 Olympics, and his testing positive for steroids; also describing Congress’ subsequent regulations of steroids). The second event was the discovery that MLB player Mark McGuire used andro. BRYANT, *supra* note 3, at 141; Wilairat, *supra* note 28, at 381. At the time when the media discovered McGuire’s use of andro, the substance was legal, but it was banned under the MLB’s regulations; however, the NFL and National Collegiate Athletic Association prohibited its use. ASSAEL, *supra* note 33, at 162-63.

professional and other amateur sports, as well as the “silent epidemic” of use by high school athletes.⁵⁰ Between 1988 and 1990, Congress held several hearings to determine the extent of the chemical problem and whether the Controlled Substance Act⁵¹ should be amended to add anabolic steroids as a controlled substance.⁵² Ultimately, in 1990, Congress passed the Anabolic Steroid Control Act (the “ASCA”),⁵³ which categorized anabolic steroids as a schedule III controlled substance,⁵⁴ amended the definition of “anabolic steroids” to include “any drug or hormone,”⁵⁵ and made the possession of steroids without a prescription a felony.⁵⁶ The ASCA classified twenty-seven anabolic steroids as controlled substances, under Schedule III of the Controlled Substance Act.⁵⁷ Congress hoped these revisions to the Controlled Substance Act would help to deter steroid trafficking and protect children and teenagers, while preserving fair competition in sports.⁵⁸

⁵⁰ *Changing the Game*, *supra* note 1, at 754.

⁵¹ 21 U.S.C. § 801 (2007).

⁵² When then-Senator Joseph Biden called the hearing before the Senate Judiciary Committee to order on May 9, 1998, he sought to “[equate] steroids to cocaine,” a schedule II controlled substance. ASSAEL, *supra* note 33, at 50. Then-Senator Biden found it difficult to demonstrate that steroids meet the two key characteristics of a schedule II controlled substance: “that they were addictive and psychoactive.” *Id.*; see also *Anabolic Steroids Control Act of 1990: Hearing on H.R. 4658 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong. 90 (1990); *Abuse of Steroids in Amateur and Professional Athletics: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong. 92 (1990); *Steroids in Amateur and Professional Sports—The Medical and Social Costs of Steroid Abuse: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 736 (1989); *Legis. to Amend the Controlled Substances Act (Anabolic Steroids): Hearing on H.R. 3216 Before the Subcomm. on Crime of the H.R. Comm. on the Judiciary*, 100th Cong. 1 (1988).

⁵³ Pub. L. No. 101-647, Sec. 1902, 104 Stat. 4851 (1990) (codified as amended in selected sections of 21 U.S.C.).

⁵⁴ A schedule III controlled substances “has a potential for abuse less than the drugs or other substances in schedules I and II;” “has a currently accepted medical use in treatment in the United States;” and “[a]buse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.” 21 U.S.C. § 812(b)(3)(A)-(C) (2007).

⁵⁵ This amendment broadens the legal definition of a steroid.

⁵⁶ See 21 U.S.C. § 333(e)(3) (2007) (“Any conviction for a violation of paragraphs (1) and (2) of this subsection shall be considered a felony violation of the Controlled Substances Act [21 U.S.C.A. § 801 et seq.]”); see also *Changing the Game*, *supra* note 1, at 754-55 (discussing the ASCA).

⁵⁷ 21 U.S.C. § 812(c) (2007). Under the ASCA, the Drug Enforcement Agency has a five-tier classification system to categorize all federally regulated substances and drugs based on potential for abuse, medical use, and potential for physical and psychological dependence. *Id.* § 812(b); see also *id.* § 818(c) (listing the eight factors, ranging from “potential for abuse” to potential “risk . . . to public health,” to classify each a drug). As a result, possession of any of these prohibited substances became punishable with up to one year in prison and a fine of at least \$1,000. *Id.* § 844(a) (2007).

⁵⁸ See Jeffrey A. Black, *The Anabolic Steroids Control Act of 1990: A Need For Change*, 97 DICK. L. REV. 131, 138 (describing how legislatures responded to evidence that steroid use and distribution was a worsening problem and spreading to young people); see also *Changing the Game*, *supra* note 1, at 754 (citing Burge, *supra* note 10, at 45) (“Congress’s apparent main concern, focused on the purported need for legislative action to solve an athletic ‘cheat-

Over the next decade, however, the issues the ASCA sought to rectify continued to worsen while new issues arose pertaining to the use of and testing for IPEDs.⁵⁹ Domestic and international efforts did not significantly impede further advancements in the science and technology used to develop more powerful IPEDs.⁶⁰ IPED testing processes could not, and still cannot, keep up with the new IPEDs used by athletes.⁶¹ The IOC decided to act in 1999, and created the World Anti-Doping Agency (“WADA”), an independent oversight agency, to monitor, to coordinate, and to promote “the fight against doping in sport in all its forms.”⁶² The United States Olympic Committee also recognized the need for a similar independent agency, and in 2000 created the United States Anti-Doping Agency (the “USADA”).⁶³ The USADA has “full authority to execute a comprehensive national anti-doping program encompassing testing, adjudication, education, and research, and to develop programs, policies, and procedures in each of those areas.”⁶⁴

President George W. Bush brought the use of performance enhancing drugs back into the spotlight when he referenced the problem in his 2004 State of the Union Address.⁶⁵ In response,

ing’ problem. Congress decided that legislation could curtail sports cheating.”).

⁵⁹ In 1998, Congress enacted the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered sections of 5 U.S.C., 8 U.S.C., 10 U.S.C., 12 U.S.C., 14 U.S.C., 15 U.S.C., 16 U.S.C., 18 U.S.C., 19 U.S.C., 21 U.S.C., 23 U.S.C., 25 U.S.C., 26 U.S.C., 27 U.S.C., 28 U.S.C., 29 U.S.C., 31 U.S.C., 38 U.S.C., 39 U.S.C., 40 U.S.C., 41 U.S.C., 42 U.S.C., 46 U.S.C., 48 U.S.C., 49 U.S.C., and 50 U.S.C.), which mandated studies on the effects of steroids on “high school students, college students and other adults.” *Id.* § 2402. The Act also established punishment for a person who distributes or possesses with the intent to distribute. *Id.* § 2403(e)(1), (2).

⁶⁰ THE JUICE, *supra* note 1, at 106.

⁶¹ For example, the Bay Area Laboratory Co-operative (“BALCO”) manufactured and distributed tetrahydrogestrinone (“THG”), or “the Clear,” and other substances undetectable by drug tests in place at that time and not prohibited under federal and sports leagues’ regulations. THE JUICE, *supra* note 11, at 13. The Clear is a steroid, however, “the Cream,” another product created and manufactured by BALCO, is not a steroid. *Id.* The Cream is a “concentrated version of a prescription testosterone gel.” *Id.* On September 3, 2003, federal and state agents raided BALCO based on an anonymous tip to the United States Anti-Doping Agency (“USADA”). ASSAEL, *supra* note 33, at 224; Joseph M. Saka, Comment, *Back to the Game: How Congress Can Help Sports Leagues Shift the Focus from Steroids to Sports*, 23 J. CONTEMP. HEALTH L. & POL’Y 341, 342 (2007); Jack Curry, *4 Indicted in a Steroid Scheme That Involved Top Pro Athletes*, N.Y. TIMES, Feb. 13, 2004, at A1.

⁶² World Anti-Doping Agency, Mission & Priorities, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=255> (last visited Jan. 20, 2008).

⁶³ U.S. Anti-Doping Agency, USADA History, <http://www.usada.org/who/history.html> (last visited Feb. 2, 2008).

⁶⁴ *Id.* USADA’s prohibitions and code are consistent with that of the WADA. See U.S. ANTI-DOPING AGENCY, USADA’S GUIDE TO PROHIBITED SUBSTANCES AND PROHIBITED METHODS OF DOPING 7 (2008), *available at* <http://www.usada.org/files/active/athletes/2008%20Guide.pdf> (“USADA is a signatory to the World-Anti-Doping Code (WADC) and has implemented the requirements to meet the Code, including the WADA 2008 Prohibited List.”).

⁶⁵ President George W. Bush, State of the Union (Jan. 20, 2004), *available at* <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (stating that “[t]o help children make right choices, they need good examples. Athletics play such an important role in our society, but, unfortunately, some in professional sports are not setting

Congress again held a series of hearings to determine how best to draft broader and stricter steroid laws⁶⁶ and then-Senator Joseph Biden of Delaware and Senator Orrin Hatch of Utah introduced a new bill that modified the ASCA.⁶⁷ Then-Senator Joseph Biden of Delaware stated, “Steroid use by young people is a serious health issue. A lot of kids don’t know [how] harmful this stuff really is.”⁶⁸ Then-Senator Biden added,

Products like [androstenedione (“andro”) and other prosteroids are marketed to kids and young athletes as an effective way to increase muscle mass. However, I have serious concerns about the safety of these substances The manufacturers of these products are violating the spirit of the Controlled Substances Act and putting young people at risk.⁶⁹

Senator Orrin Hatch of Utah also recognized that “[s]teroid products are dangerous They hurt the public health. They are giving sports a black eye, and they endanger kids.”⁷⁰ Following these hearings, Congress enacted the Anabolic Steroid Control Act of 2004 (the “amended ASCA”), which President Bush signed into law on October 22, 2004.⁷¹ The amended ASCA added eighteen substances, including andro and THG, to its definition of anabolic steroids.⁷² Each of the substances added to the list were not steroids *per se*, and some were even marketed as nutritional supplements.⁷³

Throughout 2005, Congress held numerous hearings on IPED use in professional sports and introduced six steroid and steroid-testing bills in both the House of Representatives and the Senate.⁷⁴ Each of the proposed bills required professional ath-

much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message – that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.”)

⁶⁶ See *Anabolic Steroid Penalties: Hearings on H.R. 3866 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. (2004); *Anabolic Steroid Control Act of 2004: Hearings on S. 2195 Before the S. Comm. on the Judiciary*, 108th Cong. (2004); see also *Changing the Game*, *supra* note 1, at 756.

⁶⁷ Press Release, Congress Cracks Down on Steroid Use, Biden-Hatch Bill That Bans Designer Steroids Goes to President, U.S. FED NEWS (Oct. 10, 2004) [hereinafter Congress Cracks Down on Steroid Use].

⁶⁸ *Id.*

⁶⁹ Press Release, Senator Orrin G. Hatch, Hatch, Biden Seek to Ban Designer Steroids (Oct. 24, 2003), http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=39c41206-5b74-451e-8fe5-65f7e8593990&Month=10&Year=2003.

⁷⁰ Congress Cracks Down on Steroid Use, *supra* note 67.

⁷¹ Pub. L. No. 108-358, 118 Stat. 1661 (2004) (codified as amended at 21 U.S.C. §§ 802-11 (2007)).

⁷² *Id.* § 802(1)(A). In 1998, the media revealed that McGuire used andro, which led to a surge in usage. FAINARU-WADA & WILLIAMS, *supra* note 18, at 51. Andro is a steroid precursor, which, once ingested, is converted by the body into steroids. *Id.*

⁷³ THE JUICE, *supra* note 1, at 181.

⁷⁴ The MLB’s lenient performance enhancing drug standards were also the focus of Sen-

letes, in specified sports leagues, to be subjected to random drug testing. While the bills varied in how to best accomplish this objective,⁷⁵ each provided for public disclosure of all positive results,⁷⁶ and mandated a two-year suspension for the first violation and a lifetime ban for the second violation.⁷⁷ Ultimately, however, none of the proposed legislation became law, and discussions regarding federal regulation of IPED usage in professional sports quieted as professional sports leagues claimed they would change their testing procedures and penalties for testing positive for using IPEDs.

C. *MLB and the Mitchell Report*

In an effort to protect the integrity of baseball, in March 2006, Allen “Bud” Selig, commissioner of the MLB, appointed former Senator George Mitchell and the law firm, DLA Piper,⁷⁸ to in-

ate hearings. Specifically, the Senate Commerce, Science and Transportation Committee held hearings relating to the Clean Sports Act, H.R. 2565, S. 1114, 109th Cong. (2005), the Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong. (2005), and the Professional Sports Integrity and Accountability Act, S. 1334, 109th Cong. (2005). On April 26, 2005, Representative Clifford Stearns introduced the first steroid-testing bill, the Drug Free Sports Act. H.R. 1862, 109th Cong. (2005) [hereinafter *the original Stearns bill*]. Representative John Sweeney introduced the Professional Sports Integrity Act of 2005, H.R. 2516, 109th Cong. (2005), three weeks later. The following week, Senator McCain and Representatives Henry Waxman and Thomas Davis introduced the Clean Sports Act of 2005, S. 1114, 109th Cong. (2005), and the Office of National Drug Control Reauthorization Act, H.R. 2565, 109th Cong. (2005). Representative Stearns later introduced a revised version of the Drug Free Sports Act on June 28, 2005. H.R. 3084, 109th Cong. (2005) [henceforth *the revised Stearns bill*]. The following day, Senator Jim Bunning introduced the Professional Sports Integrity and Accountability Act. S. 1334, 109th Cong. (2005). On November 3, 2005, McCain and Bunning ultimately combined their bills and co-sponsored the Integrity in Professional Sports Act, S. 1960, 109th Cong. (2005). See generally Brent D. Showalter, Comment, *Steroid Testing Policies in Professional Sports: Regulated by Congress or the Responsibility of the Leagues?*, 17 MARQ. SPORTS L. REV. 651, 660-64 (2007) [hereinafter *Congress or Leagues?*] (describing the bills introduced in Congress requiring IPED testing in professional sports).

⁷⁵ All of the proposals target baseball, basketball, football, and hockey. S. 1960 § 4(7); S. 1334 § 3(5); H.R. 3084 § 2(2); S. 1114 § 3(4); H.R. 2565 § 201(a)(2), § 723(4); H.R. 2516 § 3(2); H.R. 1862 § 2(2).

The original Stearns bill required only one test per year. H.R. 1862 § 3(1). The other proposed bills required three, four, or five tests per year. S. 1960 § 6(c)(1)(A); S. 1334 § 5(d)(1)(A); H.R. 3084 § 3(a)(1); S. 1114 § 4(b)(1)(A); H.R. 2565 §§ 201(a)(2), 724(b)(1)(A); H.R. 2516 § 4(b)(1).

⁷⁶ S. 1960 § 6(d)(3); S. 1334 § 5(e)(2)(A); H.R. 3084 § 3(a)(5)(B); S. 1114 § 4(b)(9); H.R. 2565 §§ 201(a)(2), 724(b)(9); H.R. 2516 § 4(b)(7); H.R. 1862 § 3(4)(B).

⁷⁷ S. 1960 § 6(d)(1); S. 1334 § 5(e)(1); S. 1114 § 4(b)(7)(A); H.R. 2565 §§ 201(a)(2), 724(b)(7)(A); H.R. 2516 § 4(b)(6); H.R. 1862 § 3(4)(A). The revised Stearns bill contains less severe penalties. The bill requires a one-half year suspension for the first offense, a one year suspension for the second offense, and a lifetime ban for the third offense. H.R. 3084 § 3(a)(5)(A). The Major League Baseball Players Association (“MLBPA”) criticized the proposed penalties under the Drug Free Sports Act of 2005 as “too severe.” Donald M. Fehr, Executive Director, Major League Baseball Players Association, Statement Before the Committee on Energy and Commerce, United States House of Representatives (May 18, 2005), available at http://mlb.mlb.com/content/printer_friendly/mlb/y2005/m05/d18/c1054142.jsp [hereinafter *Fehr’s 2005 Statement*].

⁷⁸ Donald M. Fehr, Executive Director, Major League Baseball Players Association, Statement Before the United States House of Representatives Committee on Oversight and Government Reform 8 (Jan. 15, 2008), available at <http://oversight.house.gov/documents/20080115120252.pdf> [hereinafter *Fehr’s 2008*].

investigate the alleged use of steroids in professional baseball.⁷⁹ Over twenty-one months, Mitchell interviewed current and former baseball players, club officials, coaches, managers, trainers, and team physicians, and read through thousands of pages of relevant documents.⁸⁰ Selig gave Mitchell extensive powers to investigate players' use of steroids during the years 2002 to 2006, but not the power to subpoena players.⁸¹ On December 13, 2007, Mitchell released the report and named eighty-six MLB players who Mitchell connected to the use and/or purchase of steroids and other IPEDs.⁸² Mitchell explicitly noted, however, that IPED use was not limited to those named in the report.⁸³ The report does not recommend disciplining current players for prior use of IPEDs, "except in those cases where [the Commissioner] determines that the conduct is so serious that discipline is necessary to maintain integrity of the game."⁸⁴

The Mitchell Report made twenty-one recommendations "[t]o prevent the illegal use of performance enhancing substances in Major League Baseball."⁸⁵ Selig announced his commitment to "embrace" each recommendation, and acknowledged that additional efforts, beyond those enumerated, will be necessary.⁸⁶ The MLBPA criticized the Report as "quite dated," and "reveals virtually nothing about drug use under [the] current new agreement,

Statement]. See DLA Piper, George J. Mitchell, http://www.dlapiper.com/george_mitchell/ (last visited Feb. 2, 2008) (describing Mitchell's political career and indicating that he joined DLA Piper in 2003).

⁷⁹ Press Release, Major League Baseball, Commissioner's Statement Regarding the Mitchell Report (Dec. 13, 2007), *available at* http://mlb.com/news/press_releases/press_release.jsp?ymd=20071213&content_id=2325226&vkey=pr_mlb&fext=.jsp [hereinafter *Commissioner's Mitchell Statement*]; Duff Wilson & Michael S. Schmidt, *Baseball Braces for Tough Report from Mitchell*, N.Y. TIMES, Dec. 13, 2007, at D1.

⁸⁰ MITCHELL REPORT, *supra* note 27, at SR-25-26.

⁸¹ Tim Lemke, *Mitchell Report May Not Have a Clear Target*, WASH. TIMES, Dec. 11, 2007, at C1.

⁸² Sean Gregory, *Mitchell Named Names. Now What?*, TIME, Dec. 13, 2007, *available at* <http://www.time.com/time/nation/article/0,8599,1694552,00.html>. Legal academics and experts criticized the report due to its reliance on only two witnesses and on hearsay evidence. See, e.g., Don Walker, *Report Relies on Hearsay Evidence: Legal Experts Poke a Few Holes in Findings on Steroids*, J. SENTINEL (Wis.), Dec. 13, 2007, *available at* <http://www.jsonline.com/story/index.aspx?id=696676> (discussing the "shortcomings" of the Mitchell report and summarizing various legal experts' opinions of those shortcomings).

⁸³ MITCHELL REPORT, *supra* note 27, at SR-2.

⁸⁴ *Id.* at SR-33, 307.

⁸⁵ *Id.* at 285. The federal government indicated that it does not plan to have a role in implementing the recommendations named in the Mitchell Report. Transcript of Briefing by White House Press Secretary Dana Perino, Dec. 13, 2007, *available at* <http://usinfo.state.gov/xarchives/display.html?p=texttrans-english&y=2007&m=December&x=20071213162232xjsnommiS0.2650568>.

⁸⁶ Commissioner's Mitchell Statement, *supra* note 79. It is important to acknowledge that the Mitchell report "offers no real closure to the steroid era." Gregory, *supra* note 823. Some of the recommendations made in the Report will be easier for Selig and the MLB to implement, while others will be more difficult because of the necessity of the MLBPA's involvement and approval. *Id.*

i.e. 2006 and 2007.”⁸⁷ Donald M. Fehr, executive director of the MLBPA, continued to defend the MLB’s current drug program as “a strong and effective one, [which] has been improved even in the last two years. The report does not suggest that the program is failing to pick up steroid use which it is possible to detect.”⁸⁸

III. OVERVIEW OF EXISTING IPED TESTING REGULATIONS IN PROFESSIONAL SPORTS

Since professional sports athletes unionized,⁸⁹ the respective players associations “must collectively bargain over terms of any drug policy, prior to implementation.”⁹⁰ The collective bargaining process can act as an obstacle in realizing more comprehensive drug testing requirements and severe penalties.⁹¹ Specifically, players associations have historically opposed the inclusion of stringent drug testing requirements and related substance prohibitions because of concerns of invasion of privacy, suspension, and fines.⁹² Due to the collective bargaining process, each of the professional sports leagues adopted distinct, and potentially conflicting, rules and procedures for preventing, detecting, and penalizing the use of IPEDs.⁹³

⁸⁷ Fehr’s 2008 Statement, *supra* note 78, at 8.

⁸⁸ Press Release, Major League Baseball Players Association, Statement of MLBPA Executive Director, Donald M. Fehr (Dec. 13, 2007), available at <http://mlbplayers.mlb.com/pa/releases/releases.jsp?content=121307b>.

⁸⁹ The MLBPA represents MLB players in their negotiations with the league, team owners, and other third parties. Similarly, the National Football Players Association (“NFLPA”) represents the players of the NFL; the National Basketball Association Players Association (“NBPA”) represents the players of the NBA; and the NHL Players Association (“NHLPA”) represents the players of the NHL.

The NBA and NBPA negotiated the first collective bargaining agreement (“CBA”) in 1964, followed by the MLB and MLBPA in 1968. *See, respectively*, NBA Players Association, NBPA History, <http://nbpa.com/history.php> (last visited Jan. 20, 2008); MLB Players Association, MLBPA Basic Agreement, <http://mlbplayers.mlb.com/pa/info/cba.jsp> (last visited Sept. 3, 2007). *See generally* Showalter, *supra* note 74, at 654-56 (describing history of collective bargaining in professional sports).

⁹⁰ Allan H. “Bud” Selig with Robert D. Manfred, Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL’Y REV. 35, 48 (2004). The National Labor Relations Act (“NLRA”) governs the collective bargaining process. National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994). “Professional sports are covered by the NLRA because the National Labor Relations Board ruled that professional sports leagues are an industry affecting interstate commerce, which is the requisite nexus to be covered under the NLRA.” Saka, *supra* note 61, at 654 n.19 (citing MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 513 (2005)).

⁹¹ Haagen, *supra* note 2, at 840; *see also* Saka, *supra* note 61, at 349.

⁹² Saka, *supra* note 61, at 349 (citing Selig & Manfred, *supra* note 90, at 81).

⁹³ *See* Haagen, *supra* note 2, at 840 (recognizing that since the professional sports leagues have approached drug testing and regulation of IPED use as any other workplace issue, it has been deferred to the collective bargaining process). *See generally* Paul A. Fortenberry & Brian E. Hoffman, *Illegal Muscle: A Comparative Analysis of Proposed Steroid Legislation and the Policies in Professional Sports’ CBAs that Led to the Steroid Controversy*, 5 VA. SPORTS & ENT. L.J. 121, 127 (2006) (comparing the NFL’s, MLB’s, NBA’s, and NHL’s policies against steroid use by their players).

A. Major League Baseball

For years, the MLB refused to acknowledge that its players had a problem with steroids or other IPEDs⁹⁴ despite the media's and players' accusations and statements to the contrary.⁹⁵ Moreover, the MLBPA fought "suspicionless drug testing" based on assertions that such a practice would be an invasion of privacy.⁹⁶ Even after the players association and the league finally agreed to include a drug testing policy in their CBA in 2002,⁹⁷ "the MLBPA continued to defend both its record in responding to the issue of performance-enhancing drugs, and to insist on negotiating terms that provided for relatively less punitive sanctions and greater procedural protections for its members."⁹⁸ Under the 2002 testing, a player who tested positive for steroids did not receive any form of punishment.

In 2007, the MLB and MLBPA adopted a revised Major League Baseball's Joint Drug Prevention and Treatment Program.⁹⁹ The stated purpose of this program is:

(1) to educate Players . . . on the risks associated with using Prohibited Substances . . . ; (2) to deter and end the use by Players of Prohibited Substances; and (3) to provide for . . . an orderly, systematic, and cooperative resolution of any disputes that may arise concerning the existence, interpretation, or application of this agreement.¹⁰⁰

The policy prohibits the use of steroids listed in Schedule III of the Controlled Substance Act, as well as any "steroids that are not covered by Schedule III but that may not be lawfully obtained or used in the United States (including 'designer steroids')."¹⁰¹ Under the MLB program, players are tested before spring train-

⁹⁴ "Baseball is free of drugs." JONATHAN FRASER LIGHT, *THE CULTURAL ENCYCLOPEDIA OF BASEBALL* 220 (McFarland 2005) (quoting Peter Ueberroth, then-Commissioner of MLB). Even as the league attempted to institute drug testing, the MLBPA pushed back and refused to include drug testing into the CBA. Showalter, *supra* note 74, at 659.

⁹⁵ Burch & Murray, *supra* note 16, at 255; *see also* Haagen, *supra* note 2, at 843.

⁹⁶ *Id.* at 841 (citing *Steroid Use in Professional and Amateur Sports: Hearing Before the United States Senate Committee on Commerce, Science and Transportation*, 108th Cong. (2004) (statement of Donald Fehr, Executive Director and General Counsel, Major League Baseball Players Association)).

⁹⁷ MLB Collective Bargaining Agreement (2007), available at http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf (last visited Feb. 28, 2009) [hereinafter MLB CBA]; *see* MLB.com, Drug Policy in Baseball Event Timeline, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited Jan. 22, 2008).

⁹⁸ Haagen, *supra* note 2, at 843.

⁹⁹ MAJOR LEAGUE BASEBALL, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM (2007), available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf> [hereinafter MLB DRUG PREVENTION PROGRAM].

¹⁰⁰ *Id.* at pmb1.

¹⁰¹ *Id.* § 2(B). The Program requires 1200 additional random tests throughout the season, of which only 375 may be conducted in the off-season. *Id.* § 3(A)(2).

ing, and again randomly during the season.¹⁰² Notably, the MLB program does not limit the number of tests to which a player may be subjected.¹⁰³ In addition, athletes may be tested for “reasonable cause” if the testing committee believes the player sold, distributed, possessed, or used an IPED or any prohibited substances during the previous twelve-month period.¹⁰⁴ Penalties imposed against an athlete for testing positive range from a fifty game suspension¹⁰⁵ to expulsion from MLB.¹⁰⁶

The MLB took additional steps to strengthen its IPED testing procedures by implementing a number of the recommendations made in the Mitchell Report.¹⁰⁷ For example, the MLB created the Department of Investigations,¹⁰⁸ which is responsible for investigating violations of MLB rules and regulations, including players’ alleged use of IPEDs, and “other threats to the integrity of the game.”¹⁰⁹ Despite the improvements in the MLB’s program, the system still contains distinct loopholes. Specifically, a player’s positive test results remain confidential, since, as the MLB states, “confidentiality . . . is essential to the Program’s success.”¹¹⁰

¹⁰² *Id.* § 3(A)(1).

¹⁰³ *Id.* §§ 3-4.

¹⁰⁴ *Id.* § 3(C). Further, if a player tests positive for an IPED, the MLB program requires the athlete to undergo three unannounced tests during the subsequent twelve months. *Id.* § 5(A). If a player tests positive for stimulants, the MLB program requires the athlete to submit to six random tests of the following twelve months. *Id.* § 5(B). Additionally, if a player tests positive or is suspected of drug abuse, the program requires the athlete to participate in either the Administrative Track or the Clinical Track. *Id.* § 4(A).

¹⁰⁵ *Id.* § 8(B)(1).

¹⁰⁶ *Id.* § 8(B)(3). If a player tests positive for multiple prohibited substances, the athlete must adhere to the longer suspension. *Id.* § 7(K)(1). If a player tests positive for multiple prohibited substances, instead of being subject to penalties for each individual substance for which he tested positive, the athlete “shall be considered to have tested positive for the category of Prohibited Substances that, given his testing history, will result in the longest suspension.” *Id.* § 7(K)(2). These penalties apply both at the major and minor leagues.

Id.

¹⁰⁷ See Bloomberg News, *Acting on Mitchell Report*, N.Y. TIMES, Jan. 8, 2008, at D5; Press Release, Major League Baseball, Major League Baseball Acts on Mitchell Recommendations (Jan. 7, 2008), available at http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080107&content_id=2341094&vkey=pr_mlb&fext=.jsp&c_id=mlb.

¹⁰⁸ See MITCHELL REPORT, *supra* note 27, at 287-90 (recommending that MLB establish a Department of Investigation).

¹⁰⁹ Press Release, Major League Baseball, MLB Establishes Department of Investigations (Jan. 11, 2008), available at http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20080111&content_id=2343802&vkey=pr_mlb&fext=.jsp&c_id=mlb; Jim Molony, *MLB Launches Dept. of Investigations*, MLB.COM, Jan. 11, 2008, http://mlb.mlb.com/news/article.jsp?ymd=20080111&content_id=2343864&vkey=news_mlb&fext=.jsp&c_id=mlb.

¹¹⁰ MLB DRUG PREVENTION PROGRAM, *supra* note 99, at 6, pmb1. See also *id.* at 7 (listing situations in which a player’s confidentiality and participation in treatment should be maintained).

B. National Football League

When the NFL initiated its IPED program during its 1987-88 season, it became the first professional sports league to implement such a program.¹¹¹ The league did not initially impose a penalty for testing positive. However in 1999, the NFL imposed a four-game suspension for any player found testing positive for steroids.¹¹² Historically, the media and legislators have lauded the NFL's drug testing program as superior compared with the other professional sports leagues.¹¹³

The NFL requires players to be tested at least once a year, usually during preseason.¹¹⁴ The NFL can also randomly select players to be tested during the regular season, and up to six times during the off-season.¹¹⁵ Penalties for testing positive range from suspension without pay for a minimum of four regular and/or postseason games, to suspension without pay for a period of at least twelve months.¹¹⁶

Despite these seemingly strict requirements and standards, the NFL's CBA contains flaws and loopholes to avoid a positive test result.¹¹⁷ Due to the "regimented" nature of the testing schedule, players know that on days which games are played, they will not be tested.¹¹⁸ "[A]ntidoping experts say the framework and timing of NFL testing allows players ample room to outmaneuver the tests, particularly if they are using amphetamines and fast-acting steroids that can be quickly flushed from the body."¹¹⁹ Further, the league's CBA contains a confidentiality clause that maintains "[t]he confidentiality of players' medical conditions and test re-

¹¹¹ ASSAEL, *supra* note 33, at 13, 59.

¹¹² *Id.* at 59.

¹¹³ See Judy Battista, *How Good is the 'Best' Drug Policy*, N.Y. TIMES, Oct. 14, 2005, at D4; Mike Freeman, *N.F.L. is Seeing Fewer Flaws in Testing Players for Drugs*, N.Y. TIMES, Oct. 7, 2001, § 8, at 7; Kathy Kiely, *Focus on NBA, NHL to Improve Drug-Testing Policies*, USA TODAY, Nov. 15, 2005, http://www.usatoday.com/sports/basketball/nba/2005-11-15-nhl-nba-drug-testing-sidebar_x.htm; Mark Maske, *NFL Ahead of MLB on Steroids*, WASH. POST, Dec. 16, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A4452-2004Dec16.html>.

¹¹⁴ NFL Collective Bargaining Agreement Art. XLIV § 5 (2006-2012), available at <http://www.nflplayers.com/images/fck/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> [hereinafter NFL CBA]. See also, NFL, Policy on Anabolic Steroids and Related Substances (2008), http://www.nflplayers.com/images/fck/2008%20Steroid%20Policy%20_Final%20Version_.pdf [hereinafter NFL Steroid Policy]. Pursuant to the NFL CBA, teams may not test each player more than twenty-four times per year. NFL Steroid Policy, *supra* note 27, § 2.

¹¹⁵ *Id.* § 3(A) ("Each week during the regular season, ten (10) players on every team will be tested. By means of a computer program, the Advisor will randomly select the players to be tested Players will be required to test whenever they are selected, without regard to the number of times they have previously been tested.")

¹¹⁶ See *id.* § 6. The NFL has an appeals process under which a player can contest a positive test result. See *id.* § 10.

¹¹⁷ *Loopholes Beyond Baseball*, *supra* note 14.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

sults will be protected to the maximum extent possible, recognizing that players . . . will come to the attention of and be reported to the public and the media.”¹²⁰ In addition, NFL players solicit the help of doctors to prescribe substances in forms that carry fewer detectable chemical byproducts.¹²¹ Players also recruit doctors who monitor their testosterone levels to ensure they remain “within ranges that arouse no suspicion or ‘[blow] no whistles.’”¹²²

C. National Basketball Association

The NBA last revised its IPED testing policy and standards under its 2005 CBA.¹²³ The 2005 CBA does not distinguish between players based on the number of years a player is in the NBA, as the old CBA did,¹²⁴ and requires players to be tested for prohibited substances no more than four times per season.¹²⁵ Penalties for testing positive for steroids, IPEDs, and masking agents range from suspension for ten games and mandatory entrance into a treatment program,¹²⁶ to immediate dismissal and disqualification from any association with the NBA or any of its teams, which comes into play after testing positive for a fourth time.¹²⁷

Unlike the NFL, the NBA’s CBA requires that if a player is suspended or disqualified for using a performance-enhancing drug, the particular drug “shall be” disclosed publicly when the player’s penalty is announced.¹²⁸ This publicity requirement, how-

¹²⁰ NFL Steroid Policy, *supra* note 27, § 13(A).

¹²¹ See *United States v. Shortt*, 485 F.3d 243, 244 (4th Cir. May 10, 2007); see also NFL CBA, *supra* note 127, § 1 (indicating that “TEAM PHYSICIANS may not prescribe, supply, or otherwise facilitate a player’s use of Prohibited Substances.”).

¹²² *Shortt*, 485 F.3d at 244.

¹²³ See *NBA’s Collective Bargaining Agreement Finalized and Signed*, USA TODAY, July 30, 2005, http://www.usatoday.com/sports/basketball/nba/2005-07-30-cba-finalized_x.htm?POE=SPOISVA.

¹²⁴ See NBA Salary Cap FAQ, <http://cbafaq.com/appendix> (last visited Jan. 20, 2008) (comparing the differences between the 1999 NBA CBA and 2005 NBA CBA). Under the old, 1999 NBA CBA, the league’s drug testing policy distinguished between “first-year players” and veteran players. 1999 NBA Collective Bargaining Agreement (1999) [hereinafter 1999 NBA CBA], available at <http://www.nbpa.com/downloads/CBA.pdf>. First-year players could be tested no more than once during training camp. *Id.* at art. XXXIII, § 6(a)(i)-(ii). However, while veteran players could also be tested no more than once during training camp, veterans were not tested during the regular season. *Id.* at art. XXXIII, § 7(a)(i)-(ii).

¹²⁵ 2005 NBA Collective Bargaining Agreement (2005) [hereinafter 2005 NBA CBA], available at http://www.nbpa.com/cba_articles.php (last visited Feb. 28, 2009), art. XXXIII, § 6(a). See also Press Release, National Basketball Association, CBA Principal Deal Points (Aug. 4, 2005), available at http://www.nba.com/news/cba_summary_050804.html (providing summary of the 2005 NBA CBA).

¹²⁶ *Id.* § 9(c)(A).

¹²⁷ *Id.* at art. XXXIII, § 9(c)(D). After two years, a player dismissed for testing positive for IPEDs may reapply for reinstatement to the NBA. *Id.* at art. XXXIII, §§ 11-12. Further, if a player, after entering a treatment program, fails to comply with the CBA’s requirements and does not have a reasonable excuse for such failure, he is fined \$5,000 per day for each day he fails to comply. *Id.* at art. XXXIII, § 10(c)(i).

¹²⁸ *Id.* at art. XXXIII, § 3(a). See *id.* at Exhibit I-2 (listing prohibited substances); see also

ever, is later undermined by a subsequent provision. Specifically, if a player voluntarily admits to using a performance-enhancing drug, “[n]o penalty of any kind will be imposed.”¹²⁹ In addition, the NBA does not conduct any testing in the off-season.¹³⁰ Not testing in the off-season provides a convenient loophole for players in that they can stop using an IPED before returning to training so that the substance is not detectable.¹³¹

D. National Hockey League

The NHL first implemented its “Performance Enhancing Substances Program” under the league’s 2005 CBA,¹³² although allegations that its players used IPEDs began more than ten years earlier.¹³³ The list of prohibited substances is based on substances banned by WADA,¹³⁴ but changes to the list can be made and agreed to by both the NHL and NHLPA.¹³⁵ Every year, the league requires players to submit “up to” two randomly scheduled tests,¹³⁶ with at least one test performed as part of a team-wide test,¹³⁷ but no test is performed in the off-season.¹³⁸ Penalties for a positive test range from a twenty-game suspension, without pay, and mandatory referral to the league’s Substance Abuse/Behavioral Health

NBA Players Association, Prohibited Substance List 2008-09 Season, <http://www.nbpa.com/documents/ProhibitedSubstanceList2008-09season.pdf> (listing substances that will be added to the list of Prohibited Substances for the 2008-09 NBA season); Press Release, National Basketball League, NBA Collective Bargaining Agreement Ratified and Signed (July 30, 2005), *available at* http://www.nba.com/news/CBA_050730.html (stating that under the 2005 NBA CBA, “penalties for use of performance-enhancing drugs have been increased.”).

¹²⁹ *Id.* at art. XXXIII, § 9(a) (iii).

¹³⁰ *See id.* at art. XXXIII, § 6(a) (indicating that testing is performed during the season); *id.* at art. I, § (iii) (defining “Season” as “the period beginning with the first day of training camp and ending immediately after the last game of the NBA finals.”).

¹³¹ *Loopholes Beyond Baseball*, *supra* note 14.

¹³² NHL Collective Bargaining Agreement (2005), art. 47, *available at* <http://www.nhl.com/cba/2005-CBA.pdf> [hereinafter NHL CBA]. The CBA states, the “primary purposes the education of Players regarding the health risks posed by the use of prohibited performance enhancing substances; the treatment of Players who have used Prohibited Substances; and the deterrence and prevention of such use through education, random no-notice testing and the imposition of disciplinary penalties where appropriate.” *Id.* at art. 47.1.

¹³³ On August 8, 1992, John Kordic, an NHL player and user of steroids and cocaine, died on his way to the hospital after fighting with Montreal police officers; Kordic required two pairs of handcuffs to be restrained. THE JUICE, *supra* note 1, at 59. Following Kordic’s death, the then-NHL president, Gil Stein, called for the league to “address the issue of steroid use.” *N.H.L. Drug Policy Needed, Stein Says*, N.Y. TIMES, Aug. 11, 1992, at B13.

¹³⁴ Press release, National Hockey League, NHL, NHLPA Team Up Against Performance-Enhancing Drugs (July 22, 2005), *available at* http://www.nhl.com/nhlhq/cba/drug_testing072205.html [hereinafter NHL Press Release].

¹³⁵ NHL CBA, *supra* note 146, at art. 47.5.

¹³⁶ *Id.* at art. 47.6.

¹³⁷ NHL Press Release, *supra* note 134.

¹³⁸ *Loopholes Beyond Baseball*, *supra* note 14; *see also* NHL CBA, *supra* note 146, at art. 47.6 (stating that the league will test “during the period from the start of Training Camp through the end of the Regular Season”).

Program, to expulsion.¹³⁹ Positive results of the drug tests are kept confidential “to the extent practicable”¹⁴⁰ until the player exhausts the appeals process, or fails to appeal the finding.¹⁴¹

IV. APPLICATION OF THE SARBANES-OXLEY FRAMEWORK TO STEROID USAGE IN PROFESSIONAL SPORTS

A. *Corporate Fraud and Sarbanes-Oxley*

Starting in late 2001 with the collapse of Enron and continuing through mid-2002 with the scandals surrounding WorldCom, Adelphia Communications Corp., and Tyco International Ltd.,¹⁴² there was a “perfect storm” of events that evidenced for both investors and the federal government that Corporate America and its executives were overcome by greed, arrogance, and the use of financial edges to increase profits.¹⁴³ Despite hopes that it was a “few rotten apples,”¹⁴⁴ it became quite clear that accounting manipulation and other frauds were prevalent amongst public companies.¹⁴⁵ As a result, the public lost significant confidence in the stock market and demanded that Congress take action.¹⁴⁶ Warren Buffet summarized the situation aptly in his 2002 letter to Berkshire Hathaway investors:

Accountability and stewardship withered in the last decade, becoming qualities deemed of little importance by those caught up in the Great Bubble. As stock prices went up,

¹³⁹ NHL CBA, *supra* note 146, at art. 47.7(a)-(c). After two years from the date of suspension, the player can apply to for reinstatement to the league. *Id.* at art. 47.4(c).

¹⁴⁰ NHL Press Release, *supra* note 134.

¹⁴¹ NHL CBA, *supra* note 146, at art. 47.10.

¹⁴² Ramirez, *supra* note 3, at 322. *See generally* William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275 (2002) (providing a comprehensive analysis and chronology of the downfall of Enron).

¹⁴³ *See* 148 CONG. REC. E754-02 (daily ed. May 8, 2002) (statement of Rep. Farr) (“Enron’s overwhelming greed is beyond outrageous it may be criminal.”); Daniel A. Cohen et al., *Trends in Earnings Management and Informativeness of Earnings Announcements in The Pre- and Post-Sarbanes Oxley Periods* 37 (Feb. 1, 2005) (unpublished manuscript, available at <http://ssrn.com/abstract=658782>) (providing a timeline of the major financial scandals occurring in 2001 and 2002); Bratton, *supra* note 87, at 1281 (“Many saw [Enron] as an arrogant, uncooperative player.”).

¹⁴⁴ Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915, 924 (2003).

¹⁴⁵ *Id.* at 923-36 (describing the “Big Four Frauds,” Enron, Global Crossing, Ltd., WorldCom, and Qwest Communications International Inc.); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 4-7 (2002) [hereinafter *Market vs. Regulatory Responses*] (discussing Enron and other corporate frauds).

¹⁴⁶ On July 26, 2002, Eliot Spitzer, the then New York Attorney General, testified before Congress that investor polls and the stock markets’ performance indicated that investors had lost confidence in Wall Street. 148 CONG. REC. E1470-02 (daily ed. July 26, 2002) (statement of Eliot Spitzer, N.Y. Attorney General). *See also* Lyman P.Q. Johnson & Mark A. Sides, *The Sarbanes-Oxley Act and Fiduciary Duties*, 30 WM. MITCHELL L. REV. 1149, 1153 (2004) (characterizing this period as having “a ‘do-something!’ atmosphere”).

the behavioral norms of managers went down. By the late '90s, as a result, CEOs who traveled the high road did not encounter heavy traffic.¹⁴⁷

Prior to the passage of SOX, a number of other federal, state, and stock exchange regulations existed to oversee the governance of public companies and their accounting and financial reporting procedures.¹⁴⁸

On July 30, 2002, President George W. Bush signed the Sarbanes-Oxley Act of 2002 into law.¹⁴⁹ The purpose of Sarbanes-Oxley is “[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.”¹⁵⁰ SOX addresses many of the issues identified by Congress in its hearings and debates regarding the problems associated with Enron, WorldCom, and other companies that engaged in corporate and accounting fraud.¹⁵¹ “The Act adopts tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interests of workers and shareholders.”¹⁵²

Five years after SOX became law, it appears there is still no clear answer¹⁵³ whether or not the Act accomplished its stated goal of ending, or at least significantly deterring, unethical and corrupt corporate conduct.¹⁵⁴ The most often cited measure of SOX’s effect, whether positive or negative, is the Act’s impact on compa-

¹⁴⁷ Berkshire Hathaway, Inc., Annual Report (Form 10-K), at 16 (Feb. 21, 2003), available at <http://www.berkshirehathaway.com/2002ar/2002ar.pdf>.

¹⁴⁸ Cunningham, *supra* note 89, at 942.

¹⁴⁹ See President George W. Bush, Statement on Signing H.R. 3763, July 30, 2002, available at 2002 U.S.C.C.A.N. 543. The Senate passed the Act by a vote of 99-0 and the House of Representatives by a vote of 423-3. See, respectively, United States Senate, U.S. Senate Roll Call Votes 107th Congress-2nd Session, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=00192 (last visited Jan. 20, 2008); United States House of Representatives, Final Vote Results for Roll Call 348, <http://clerk.house.gov/evs/2002/roll348.xml> (last visited Jan. 20, 2008). See generally Elizabeth Osenton Lord, *Sarbanes-Oxley Aftermath of the Perfect Storm*, W. VA. LAW. 14 (June 2003) (discussing briefly the requirements of SOX). Sarbanes-Oxley is comprised of eleven titles, however only the titles and sections relevant to the scope of this Note will be discussed.

¹⁵⁰ Sarbanes-Oxley Act of 2002 pmbl.

¹⁵¹ Neil H. Aronson, *Preventing Future Enrons: Implementing the Sarbanes-Oxley Act of 2002*, 8 STAN. J.L. BUS. & FIN. 127, 132 (2002). Sarbanes-Oxley allocated power to the Securities Exchange Commission (“SEC”) to establish and enforce the rules and regulations necessary to carry out the purpose of the Act. Sarbanes-Oxley Act of 2002 § 3.

¹⁵² President George W. Bush, Statement on Signing H.R. 3763, July 30, 2002, available at 2002 U.S.C.C.A.N. 543.

¹⁵³ See Robert Prentice, *Sarbanes-Oxley: The Evidence Regarding the Impact of SOX 404*, 29 CARDOZO L. REV. 703, 703 (2007) (acknowledging “that [] empirical academic literature cannot conclusively settle the ongoing controversy over SOX 404, especially at this relatively early stage”).

¹⁵⁴ Kathleen A. Lacey, Barbara C. George & Clyde Stoltenberg, *Assessing the Deterrent Effect of the Sarbanes-Oxley Act’s Certification Provisions: A Comparative Analysis Using the Foreign Corrupt Practices Act*, 38 VAND. J. TRANSNAT’L L. 397, 400 (2005).

nies' market value.¹⁵⁵ The analysis of market values can potentially be misleading, however, since it is difficult to isolate the specific factors affecting a company's stock price.¹⁵⁶

B. *Sarbanes-Oxley and Professional Athletes' Use of IPEDs*

At first glance, one apparent similarity between Corporate America and professional sports is the desire for success. Professional sports leagues, however, are continuing to become huge businesses concerned with generating significant revenues and a profitable bottom line.¹⁵⁷ Decisions are routinely made that do not ensure a victory on the field, but assuredly on the income statement, below the line.¹⁵⁸ Implementing a uniform IPED testing and treatment program, which contains the professional sports' leagues and other sporting organizations best-practices, is feasible since all four major professional sports leagues are "profit making enterprise[s]," with the same "motivations on the part of [every]one."¹⁵⁹

The sports leagues continue to defend their existing drug testing and educational programs,¹⁶⁰ and contend that no further government involvement is necessary to resolve the problem. This stance is maintained despite the fact that the problems have become nearly epidemic among professional athletes.¹⁶¹ The most

¹⁵⁵ See Jacqueline S. Hammersley, Linda A. Myers & Catherine Shakespeare, Market Reactions to the Disclosure of Internal Control Weakness and to the Characteristics of those Weaknesses under Section 302 of the Sarbanes Oxley Act of 2002 (Jan. 2007) (unpublished paper, available at <http://ssrn.com/abstract=951085>) (examining the movement of companies' stock prices in reaching their conclusion); see also *SOX +3*, *supra* note 7, at 375.

¹⁵⁶ *SOX +3*, *supra* note 7, at 375.

¹⁵⁷ See *infra* note 259 (providing revenue and profitability statistics for various profession sport leagues and teams). See also Kurt Badenhausen et al., *The Business of Football*, FORBES.COM, Sept. 13, 2007, http://www.forbes.com/2007/09/13/nfl-team-valuations-biz-07nfl_cz_kb_mo_cs_0913nfl_land_print.html (providing links to NFL team valuations); Michael K. Ozanian, *How 'Bout Them Cowboys?*, FORBES.COM, Sept. 13, 2007, http://www.forbes.com/2007/09/13/dallas-cowboys-stadium-biz-07nfl_cx_mo_0913nflintro.html (stating that the Dallas Cowboys are the highest valued NFL team, which is estimated to be worth \$1.5 billion).

¹⁵⁸ See JOSE CANSECO, JUICED: WILD TIMES, RAMPANT 'ROIDS, SMASH HITS, AND HOW BASEBALL GOT BIG 234-35 (Harper 2005) [hereinafter *Canseco Juiced*] (explaining how the Oakland A's added Canseco to the team's Disabled List because the team's owners did not want him to trigger his at-bats clause in his employment contract); but see BRYANT, *supra* note 3, at 111-12 (explaining that towards the end of Canseco's career, he "demand[ed] to be put on the disabled list.").

¹⁵⁹ *Loopholes Beyond Baseball*, *supra* note 14.

¹⁶⁰ See Selig *Fires Back, Defends Baseball's Drug-Testing Program*, ESPN.COM, Dec. 18, 2007, <http://sports.espn.go.com/mlb/news/story?id=3160254> (quoting MLB commission Bud Selig as saying, "I'm proud of where we are. We have the toughest testing program in American sports.").

¹⁶¹ In 2005, however, the MLBA stated: "We believe that such matters are not susceptible to a 'one size fits all' approach and are best left to those with knowledge of the workings of a particular sport. In fact, the testing regime we have established for Major League Baseball is more effective, frequent, and random than the proposed regime in the bill. Similarly, the bill also calls for 'tests to be administered by an independent party not affiliated with'

recent academic literature concerning the effects of Sarbanes-Oxley is generally favorable in describing the perceived effects of the Act. Many of the complaints voiced against Sarbanes-Oxley would not be applicable to a similar system established to regulate the use and testing of steroids and other IPEDs.

Despite the leagues' contentions otherwise, enough has not been done to improve IPED testing systems, and Congress must intervene. Sarbanes-Oxley provides a valuable model to follow in devising an appropriate regulation scheme. The proposed solution attempts to include prophylactic measures, rather than simply a system to respond to violations.¹⁶²

C. Congressional Authority to Regulate IPED Use by Professional Athletes

Congress has the authority to regulate the use of IPEDs by professional athletes under the Commerce Clause of the U.S. Constitution.¹⁶³ The Commerce Clause gives Congress the authority "to regulate Commerce . . . among the several States."¹⁶⁴ The Supreme Court recognizes that professional baseball,¹⁶⁵ football,¹⁶⁶

the professional league. No credible evidence has been brought forward to question the integrity of the administration of any drug testing program currently in force in any professional sport. The NFL and its union apparently have chosen to administer its program in-house, in the main. In baseball, as noted, the parties have retained reputable independent contractors for collection and analysis. Absent any actual evidence of abuse, each sport should be permitted to determine how best to effectuate its program." Fehr's 2005 Statement, *supra* note 77.

¹⁶² Cf., Antoinette Vacca, *Boxing: Why It Should be Down for the Count*, 13 SPORTS LAW J. 207, 214, (2006) ("While medical concerns are mentioned under the safety guidelines in legislation, most of the actual regulations affect the boxer only after he has been injured and do nothing to prevent the injury from occurring.").

¹⁶³ See Saka, *supra* note 61, at 354 ("Congress is . . . able to regulate professional sports leagues as it would any other industry engaged in interstate commerce."); see cf. John Beisner, *Sports Franchise Relocation: Competitive Markets and Taxpayer Protection*, 6 YALE L. & POLY REV. 429, 438-40 (1988) (explaining why the federal government is in the best position to regulate the relocation of sports franchises). Ultimately, there are many areas in which the federal government regulates to promote "the greater good" and well-being of society. Vacca, *supra* note 162, at 231. For example, there exists a standard maximum level of contaminants in foods and drugs, minimum automobile crash-test standards, mandatory levels of auto-emissions, flame-resistance standards for fabrics, and a prohibition of using cartoon characters in advertisements of alcohol and tobacco. *Id.* "All of these things are justified as reasonable governmental intrusions for the greater well-being and safety of ourselves and our children. . . . The government should exhibit this same commitment to public health in the sports arena." *Id.*

¹⁶⁴ U.S. CONST. art. I, § 8, cl. 3.

¹⁶⁵ *Flood v. Kuhn*, 407 U.S. 258, 282 (1972). Despite the recognition that professional baseball engages in interstate commerce, the sport enjoys an exclusion from federal antitrust laws. *Id.*; *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). The Supreme Court initially excluded professional baseball and its players from coverage under federal antitrust laws. *Fed. Baseball Club of Balt.*, 259 U.S. 200. Since then, the Supreme Court refused to reverse this line of precedent, deferring such action to Congress. *Flood*, 407 U.S. at 281-82, 284. In 1998, Congress responded and passed the Curt Flood Act of 1998, which partially reversed such precedent by giving MLB players the same rights under the antitrust laws as other professional athletes. Pub. L. No. 105-297, 112 Stat. 2824 (1998).

¹⁶⁶ *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).

basketball,¹⁶⁷ boxing,¹⁶⁸ “and, presumably, hockey and golf” engage in interstate commerce.¹⁶⁹

Congress relied on the Commerce Clause to regulate the sport of boxing¹⁷⁰ when it enacted the Professional Boxing and Safety Act¹⁷¹ and the Muhammad Ali Boxing Reform Act¹⁷² (collectively the “Boxing Acts”) in 1997 and 2000, respectively.¹⁷³ In fact, the history of Congress’ regulation of boxing largely parallels its history of regulating professional athletes’ IPEDs usage: an injury or incident causes negative publicity, thereby instigating numerous hearings, resulting in the introduction of legislation passed by one house, but not the other, so nothing actually becomes law and the issue is tabled until the next incident occurs and sets the same process in motion again.¹⁷⁴

Opponents of the federal government’s intervention in the regulation of boxing contended that this is an area of regulation best left to the states under the Tenth Amendment of the Constitution.¹⁷⁵ Opponents of use of IPEDs by professional athletes are

¹⁶⁷ *Haywood v. Nat’l Basketball Ass’n*, 401 U.S. 1204 (1971).

¹⁶⁸ *United States v. Int’l Boxing Club of N.Y., Inc.*, 348 U.S. 236 (1955); *Int’l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242 (1959).

¹⁶⁹ *Flood*, 407 U.S. at 283. The Supreme Court cited *Peto v. Madison Square Garden Corp.*, 384 F.2d 682 (2d Cir. 1967), *cert. denied* 390 U.S. 989 (1968), and *Deesen v. Prof’l Golfers’ Ass’n of Am.*, 358 F.2d 165 (9th Cir. 1966), *cert. denied* 385 U.S. 846 (1966), as support for recognizing hockey and golf, respectively, engage in interstate commerce and are not excluded from federal anti-trust regulations.

¹⁷⁰ The operation and management of boxing is distinct from other professional sports because there is not a players’ union to protect and to represent the athletes. Further, there is not “a single organization that enforced uniform guidelines and safety standards.” JACK ANDERSON, *THE LEGALITY OF BOXING: A PUNCH DRUNK LOVE?* 70 (Birkbeck Law Press 2007).

¹⁷¹ Professional Boxing Safety Act of 1996, 15 U.S.C. §§ 6301-6313 (Supp. V 1999).

¹⁷² Muhammad Ali Boxing Reform Act, Pub. L. No. 106-205, 114 Stat. 312 (2000).

¹⁷³ See Sen. John McCain with Ken Nahigian, *A Fighting Chance for Professional Boxing*, 15 STAN. L. & POL’Y REV. 7, 13-22 (2004) (recognizing Congress’ reliance on the Commerce Clause to enact the Boxing Acts).

¹⁷⁴ See Melissa Neiman, *Protecting Professional Boxers: Federal Regulations with More Punch*, 15 SPORTS LAW J. 59, 74-78 (2008) (describing the evolution of federal regulations of professional boxing); Vacca, *supra* note 162, at 213-16 (describing the chronology of Congress’ and the federal government’s attempt to regulate boxing). See also ANDERSON, *supra* note 170, at 70-75 (discussing the legislative intervention and the reform of boxing in the United States between 1990 and 2000).

¹⁷⁵ During the Senate Commerce Committee’s hearing on proposed steroid legislation, Fehr indicated that the MLBPA would challenge any proposed legislation Congress passes under the Constitution’s Fourth Amendment. Fehr’s 2005 Statement, *supra* note 77; *cf. Citing Privacy, Athletes Protest Drug-Test Rule*, N.Y. TIMES, Feb. 9, 2008, at B12 (reporting WADA received complaints that its “whereabouts rule for out-of-competition testing” violates athletes’ right to privacy. The rule “requires athletes to give three months[] notice of their location for one hour each day—seven days a week, between 6 a.m. and 11 p.m.”). The Fourth Amendment protects individuals from “unreasonable searches and seizures.” U.S. CONST. amend. IV. Challenges to the constitutionality of drug testing have been brought under the First, Fifth, and Fourteenth Amendment all failed. Saka, *supra* note 61, at 356 n.115 (citing Charles V. Dale, *Federally Mandated Random Drug Testing in Professional Athletics: Constitutional Issues*, CRS Report for Congress, May 9, 2005); see also *Veronia Sch. Dist. v. Acton*, 515 U.S. 646, 648 (holding that random drug urinalysis testing did not violate the Fourth Amendment, and that “not only were student athletes

making the same arguments.¹⁷⁶ Despite his general agreement with these contentions, Senator McCain strongly advocated for federal regulation of boxing based on his belief that, without such intervention, the sport would “continue its downward spiral toward irrelevance”¹⁷⁷ and its “physical and financial exploitation”¹⁷⁸ of boxers.

Congress relied on the Commerce Clause to promulgate such regulation due to the sport’s “use of channels in” and “instrumentalities of” interstate commerce.¹⁷⁹ For example, “rankings are determined by a boxer’s total record, regardless of where the match is held,”¹⁸⁰ and “promoters and boxers frequently use the channels of interstate commerce to circumvent state health and safety regulations.”¹⁸¹ Just as constitutional challenges of such boxing regulation “would likely fail,” so too would such challenges of federal regulation of professional athletes’ use of IPEDs.¹⁸²

D. Personal Liability

Congress concluded that corporate executives needed a reminder “that they should take seriously their responsibilities in the public company reporting system” when it passed Sarbanes-Oxley based on public perceptions and testimony from accounting industry executives.¹⁸³ Congress sent this message by making corporate executives personally liable for ensuring that their companies’ financial statements are accurate, and by requiring specific financial controls and systems are in place to ensure such accuracy.¹⁸⁴ Specifically, section 302 requires SEC-registered companies’ CEOs and CFOs to personally certify¹⁸⁵ that each annual and quarterly

included among the drug users but, . . . athletes were the leaders of the drug culture.”).

¹⁷⁶ ANDERSON, *supra* note 170, at 178.

¹⁷⁷ McCain & Nahigian, *supra* note 173, at 7.

¹⁷⁸ ANDERSON, *supra* note 170, at 179.

¹⁷⁹ McCain & Nahigian, *supra* note 173, at 13. The Supreme Court also determined that “while a boxing match is an intrastate affair, professional boxing revenues are derived largely from interstate broadcasts and endorsements, and promoters also use the channels of interstate commerce to negotiate contracts, lease arenas, and maintain training quarters.” *Id.* at 12 (citing *United States v. Int’l Boxing Club of N.Y., Inc.*, 348 U.S. 236, 241, 247 (1955)).

¹⁸⁰ McCain & Nahigian, *supra* note 173, at 12-13.

¹⁸¹ *Id.* at 13.

¹⁸² Neiman, *supra* note 174, at 92.

¹⁸³ Prentice, *supra* note 98, at 706. Legislators and the public believed corporate executives did not sufficiently monitor financial reporting procedures and results. Johnson & Sides, *supra* note 91, at 1178 (citing Public Company Accounting Reform and Investor Protection Act of 2002, S. REP. NO. 107-205 (2002)).

¹⁸⁴ Sarbanes-Oxley Act of 2002 § 302; *id.* § 906, 18 U.S.C. § 1350 (2007). *See id.* § 404, 15 U.S.C. § 7262 (2007) (detailing the internal financial controls and report required pursuant to SOX).

¹⁸⁵ Prior to passing SOX, the SEC ordered the CEOs and CFOs of 947 public companies to personally certify that their companies’ then-most recently filed financial statements were complete and accurate. SEC File No. 4-460: Order Requiring the Filing of Sworn Statements Pursuant to Section 21(a)(1) of the Securities Exchange Act of 1934 (Jun. 27, 2002), available at <http://www.sec.gov/rules/other/4-460.htm>.

“report does not contain any untrue statement of a material fact or omit to state a material fact necessary” and “fairly present in all material respects the financial condition and results of operations of the [company].”¹⁸⁶ Officers signing the reports are responsible for designing, implementing, and maintaining internal controls to ensure material information relating to the company is known to that officer.¹⁸⁷ An officer who falsely certifies the financial reports is subject to criminal penalties.¹⁸⁸ Further, under section 304, CEOs and CFOs for companies required to restate their earnings due to “material noncompliance” with securities laws or misconduct, must repay their respective companies any incentive- and/or equity-based bonuses and any gains from sales of the companies’ securities CEOs and CFOs personally made during the previous twelve months.¹⁸⁹ “The statutory language does not require the officer from whom a [reimbursement] is sought to have personally engaged in the misconduct that led to the restatement.”¹⁹⁰

For years, legislators and the public expressed the same dissatisfaction and frustration towards the professional sports team owners’ and managers’ regulation (or lack thereof) of IPED usage that they once felt towards Corporate America.¹⁹¹ In response,

¹⁸⁶ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302(a)(2)-(3), 15 U.S.C. § 7241(a)(2)-(3) (2007).

¹⁸⁷ *Id.* § 302(a)(4)(A)-(D).

¹⁸⁸ *Id.* § 902(c), 18 U.S.C. § 1349 (2007). Officers are also subject to civil liability under the Securities Act of 1933, 15 U.S.C. § 77a et seq. (2006) (“Securities Act”). Under the Securities Act, each person associated with a registration statement for the initial issuance of securities may be subject to civil liability if the statement contains any false statements of material facts or omissions of material facts that would make the statement misleading. *Id.* § 77k. Parties susceptible to liability include, “every person who signed the registration statement;” every person who is a director or identified in the registration statement as about to become a director; “every accountant, engineer, appraiser,” or any other professional expert whose statement or report appears in the registration statement; and every underwriter. *Id.* This Note does not assess the effectiveness of assignment of personal liability under the Securities Act.

Section 802 of Sarbanes-Oxley imposes civil and criminal penalties against “[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration.” Sarbanes-Oxley Act of 2002 § 802(a), 18 U.S.C. § 1519 (2007). Section 906 requires that the CEO and the CFO certify that the company’s financial statements comply with the reporting requirements of the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (2007) (“Exchange Act”), and SOX. Sarbanes-Oxley Act of 2002 § 906(a)-(b).

¹⁸⁹ Sarbanes-Oxley Act of 2002 § 304(a), 15 U.S.C. § 7243(a) (2007); see also Rachel E. Schwartz, *The Clawback Provision of Sarbanes-Oxley: An Underutilized Incentive to Keep the Corporate House Clean*, 64 BUS. LAW. 1, 2 (2008). Congress included this section to discourage corporate executives from focusing on short-term profits that would ultimately increase their personal compensations instead of accurately reporting their companies’ financial results. Johnson & Sides, *supra* note 91, at 1181-82.

¹⁹⁰ Schwartz, *supra* note 192, at 2.

¹⁹¹ Managers have more interaction with players and are in a position to both discover a player’s use of IPEDs and initiate change in procedure and team culture. Tony LaRussa, the manager for the Oakland A’s while Canseco played for the team, provides an appropriate case to demonstrate the appropriateness of assigning team managers persona liability. LaRussa “knew Canseco was using steroids because Canseco had told him so.”

Congress conducted numerous hearings and proposed legislation just as it did before it passed SOX,¹⁹² and it threatened the leagues that it would enact legislative IPED testing standards and more stringent penalties for violations of those standards.¹⁹³ Despite promises to act, the commissioners and team owners have done very little to self-regulate and seem to only get a strong verbal lashing.¹⁹⁴

Based on the relative effectiveness of Sarbanes-Oxley's guidelines in encouraging proactive accountability on the part of corporations, Congress should require team owners and managers to design, implement, and maintain internal testing procedures and related controls to ensure their athletes are not using IPEDs. The owners and managers of teams that fail to implement such a program should be assessed a fine based on the number of players testing positive for prohibited substances.¹⁹⁵ The potential for success associated with the threat of personal civil and criminal liability is illustrated by the discovery of corporate fraud at HealthSouth.¹⁹⁶ In August 2002, the company's former CFO, Weston Smith, hesitated in signing off on HealthSouth's second quarter financial compliance with the then newly-passed requirements and offering more severe penalties under SOX.¹⁹⁷ Prior to the passage of SOX, Smith signed off on the company's annual and quarterly reports, as required by the Exchange Act of 1934, knowing the reports misstated the company's results.¹⁹⁸

The applicability and effectiveness of Sarbanes-Oxley sanctions on CEOs and CFOs cannot be denied; further, the use of

BRYANT, *supra* note 3, at 107. The rules of baseball permitted LaRussa to notify his boss and take the problem up the chain of command, but Canseco was the team's best player. *Id.* LaRussa even went so far as protecting Canseco from the media to avoid "a high-profile disaster." *Id.* Arguably, the leagues' commissioners should be held personally liable, however a discussion of their potentially liability is beyond the scope of the Note.

¹⁹² See *supra* pp. 209-10 and notes 55-56 (discussing the hearings and proposed legislation).

¹⁹³ See Joshua Peck, Note, *Last Resort: The Threat of Federal Steroid Legislation—Is The Proposed Legislation Constitutional?*, 75 FORDHAM L. REV. 1777, 1778 (2006) ("The imminent threat of federal legislation produced a testing system in baseball that Congress feels is sufficient to clean up professional sports.").

¹⁹⁴ See BRYANT, *supra* note 3, at 331 (describing the testimony of Fehr and Selig before Congress).

¹⁹⁵ For example, if the New Orleans Saints had four players test positive for steroids, the team would be fined \$25,000 per player testing positive, or \$100,000. Tom Benson and Rita Benson LeBlanc, as owners, and Mickey Loomis, as Executive Vice President and General Manager, would be jointly and severally liable for the penalty. See New Orleans Saints, Staff, <http://www.neworleanssaints.com/Team/Staff.aspx> (last visited Feb. 1, 2009) (identifying the staff and coaches of the NFL team, the New Orleans Saints).

¹⁹⁶ See Steven M. Salky & Adam L. Rosman, *SOX on Trial*, DEAL, June 6, 2005, at 39-40, 45, available at www.zuckerman.com/files/Publication/d2f8e138-31ad-4e7b-95e4-d08e9aa85f63/Presentation/PublicationAttachment/91c1e2e6-a276-48fd-bb59-4eddf512a6ce/media.115.pdf.

¹⁹⁷ Jaclyn Taylor, Comment, *Fluke or Failure? Assessing the Sarbanes-Oxley Act after United States v. Scrushy*, 74 UMKC L. REV. 411, 412 (2005).

¹⁹⁸ *Id.* at 411; see *Market vs. Regulatory Responses*, *supra* note 91, at 35 (citing *Howard v. Everex Corp.*, 228 F.3d 1057, 1061-64 (9th Cir. 2000)).

such sanctions would greatly further the goals of professional sports enterprises while ensuring the integrity of professional team sports. By making CEOs and CFOs personally responsible for accurate financial statements, Congress sought to limit corporate executives' ability to rely on ignorance as a defense for alleged involvement in corporate fraud.¹⁹⁹ Just as SOX prevents corporate executives from defending their fraudulent and negligent actions by claiming, "I didn't know," the professional sports teams' owners and managers should likewise be prohibited from receiving protection from such a defense. Sports teams' executives should take responsibility for the illegal and unethical behavior that their inaction condones. Personal liability promotes personal responsibility. For example, former President George W. Bush stated he "wasn't aware of that at the time" when asked if he knew that some of his players used steroids while he was an owner of the Texas Rangers.²⁰⁰ Neither Congress nor the media made any further investigation into his knowledge or inaction concerning this situation. Had a section 304-like statute been in effect while President Bush owned the Rangers, he could have been held personally liable if any of his players tested positive for using IPEDs.

In assigning CEOs and CFOs personal responsibility under Sarbanes-Oxley, the Act does not specifically mention corporate officers' fiduciary duty to shareholders and other corporate constituents, however, SOX imposes responsibilities and penalties similar to those associated with such a duty.²⁰¹ The common law recognizes that corporations owe a duty to a larger group of constituents beyond just the shareholders, which includes "employees, consumers and local communities."²⁰² The notion that the com-

¹⁹⁹ Schwartz, *supra* note 189, at 3 & n.13; MIKE MORLEY, *SARBANES-OXLEY SIMPLIFIED* xi (Nixon-Carre 2005).

²⁰⁰ Press Briefing by Scott McClellan, White House (Feb. 7, 2008), available at <http://www.whitehouse.gov/news/releases/2005/02/print/20050207-9.html#11>; see also Murray Chass, *On Baseball; This Author Seems To Crave Notoriety*, N.Y. TIMES, Feb. 8, 2005, at D3. But see CANSECO JUICED, *supra* note 158, at 133-34 (alleging that President Bush and the team's general manager, Tom Grieve, knew that Canseco's "name was connected with steroids . . . [b]ut they never made an issue of it, or said anything to [him] or to any of [Canseco's teammates] about steroids."). President Bush was a managing general partner of the Texas Rangers from 1989 to 1994. *Team Owners Play Ball for Bush*, USA TODAY, Sept. 13, 2004, http://www.usatoday.com/news/politicselections/nation/president/2004-09-13-bush-baseball_x.htm.

²⁰¹ Johnson & Sides, *supra* note 91, at 1150. Prior to SOX, state laws and judicial interpretations of those laws primarily regulated corporate governance and fiduciary duties. *Id.* at 1151. With the adoption of the Act, federal law preempted many of these other areas of law, resulting in a more "rules-based approach to corporate governance, [which] contrast[s] the more fluid standards and duties-based approach of judicial fiduciary analysis under state law." *Id.*

²⁰² David A. Skeel, Jr., *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 WIS. L. REV. 669, 672 (1992). See *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 590 (recognizing that "that just as the conditions prevailing when corporations were originally created required that they serve public as well as private interests, modern con-

munity is a constituent of a corporation relies on the fact that a company benefits from being a member of the community.²⁰³

Unlike corporate law, where directors' and officers' fiduciary duties are well defined by common law precedent and state laws,²⁰⁴ assigning professional sports teams' owners and managers with fiduciary duties to their relevant constituents is largely academic.²⁰⁵ In order to create a legal duty similar to that of a corporation to the community in which it operates, Congress should impose a statutory-based duty on team owners and managers to the community in which the professional team is located. Arguments for owners' and managers' fiduciary duties should rely on an "emotional and economic interdependence" between professional sports teams and their communities.²⁰⁶ Public sports teams receive and provide benefits based on their membership in the community.²⁰⁷ The teams receive property tax breaks, public financing for new stadiums and training facilities, as well as revenue from ticket, food, and merchandizing sales.²⁰⁸ In addition, the teams create jobs and pay taxes.²⁰⁹ The reciprocal relationship a team develops with its community supports the expectation that the professional team will act in the best interest of the public.²¹⁰

In order to successfully deter illegal and unethical behavior in both Corporate America and professional sports, the participants must believe that the regulations and governing laws will be enforced, and that the penalty for failing to follow those regulations will be severe.²¹¹ Unfortunately, this has yet to be achieved. Dur-

ditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate").

²⁰³ See *A.P. Smith Mfg.*, 98 A.2d at 582-83, 586 (recognizing how the "substantial benefits" the corporation receives from the community creates a duty to the community).

²⁰⁴ Johnson & Sides, *supra* note 91, at 1192-96 (discussing corporate fiduciary duties).

²⁰⁵ See, e.g., John K. Harris, Jr., *Fiduciary Duties of Professional Team Sports Franchise Owners*, 2 SETON HALL J. SPORT L. 255, 256 (1992) (arguing sports teams should be characterized as public trusts). Trustees are personally liable for breaches in trust and breaches of the duty of loyalty. RESTATEMENT (SECOND) OF TRUSTS §§ 205-206 (1992).

²⁰⁶ Lindsay, *supra* note 205, at 922; see also Beisner, *supra* 163 (arguing the federal government should protect taxpayer investments in sports franchises when those franchises threaten to relocate to another community willing to give better financial incentives).

²⁰⁷ See BRYANT, *supra* note 3, at 154 ("[T]he name of the game in baseball was maximizing the local market.").

²⁰⁸ Alvin B. Lindsay, Comment, *Our Team, Our Name, Our Colors: The Trademark Rights of Cities in Team Name Ownership*, 21 WHITTIER L. REV. 915, 922 (2000). Academics argue the communities' "consumption" of the sports teams' products ultimately create fans, and as fans, a sense of beneficial ownership develops. Harris, *supra* note 200, at 275. But see Ryan Schaffer, Note, *A Piece of the Rock (or the Rockets): The Viability of Widespread Public Offerings of Professional Sports Franchises*, 5 VA. SPORTS & ENT. L.J. 201, 227 (2006) ("[F]rom a strictly legal point of view, there are no duties to the public that attach as a result of ownership of a local sports franchise.").

²⁰⁹ Lindsay, *supra* note 205, at 922.

²¹⁰ *Id.* (citing Matthew J. Mitten & Bruce W. Burton, *Professional Sports Franchise Relocations from Private Law and Public Law Perspectives: Balancing Marketplace Competition, League Autonomy, and the Need for a Level Playing Field*, 56 MD. L. REV. 57, 68-69 (1997)).

²¹¹ See Prentice, *supra* note 98, at 759-60 ("More important than the law, however, are perceptions of the law, for people's beliefs regarding the morality of behavior depend more

ing the six years since Congress enacted Sarbanes-Oxley, the SEC has used its power under section 304 only twice to hold a CEO and a CFO personally liable for the financial misconduct in which the executives were personally involved.²¹² “Yet, [during those six years,] there have been thousands of restatements, many involving some form of misconduct” for which the SEC should have held those companies’ CEOs and CFOs personally liable.²¹³ While Congress did not necessarily intend section 304 to be punitive, the provision must be enforced to deter future wrong doing by other corporate executives.²¹⁴ Similarly, in order to incentivize professional sports team owners and managers to deter the use of IPEDs by their athletes, the regulations holding them personally liable for their athletes that test positive for such prohibited substances must be strictly enforced.²¹⁵

However, the issue of who is in the best position to have knowledge of these illegal activities must still be resolved. Critics contend that corporate CEOs and CFOs are not best situated within a corporate structure to detect fraud.²¹⁶ The same argument can be made for team owners and managers. Despite contentions that executives are not best-positioned to monitor company controls and reporting standards, evidence shows that companies’ financial reports reflect less earnings management.²¹⁷ Arguably, enacting personal liability for team owners and managers might have a more profound effect. In Corporate America, officers are often indemnified under their corporation’s charter, as well as director and officer insurance policies. Neither the sports leagues nor the insurance industry offer a similar product for team owners to cover potential liability arising from a positive testing for IPEDs.²¹⁸

upon their peers’ views than upon the law’s stance regarding that behavior.”); see also Michael A. Perino, *Enron’s Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN’S L. REV. 671, 687-89 (2002) (discussing the required elements of effective criminal penalties).

²¹² See Schwartz, *supra* note 192, at 13-15 nn. 79-94 (discussing the two instances in which the SEC required a CEO and a CFO to reimburse their companies the amounts they received as compensation based on allegations of personal involvement in backdating stock options).

²¹³ *Id.* at 2.

²¹⁴ See *id.* at 27-34 (discussing whether section 304 is punitive or remedial).

²¹⁵ Team owners and managers could require the athletes testing positive for IPEDs partially indemnify them for the fines for which they are liable due to the athlete’s positive test result. See, e.g., Brian R. Cook, *The Deal with the Devil: “A Commentary,”* 40 NEW ENG. L. REV. 765, 767 (2006) (“The disgraced athletes are not feeling disgraced because they used [an IPED], they are disgraced because they got caught.”).

²¹⁶ J. Brent Wilkins, Comment, *The Sarbanes-Oxley Act of 2002: The Ripple Effects of Restoring Shareholder Confidence*, 29 S. ILL. U. L.J. 339, 353 (2005) (citing *Market vs. Regulatory Response*, *supra* note 91, at 37).

²¹⁷ One academic noted that “[n]o domestic scandals have been uncovered since SOX was implemented,” and there has been a decline in fraud litigation over the same period. Prentice, *supra* note 98, at 723-34.

²¹⁸ It is possible that owners could be indemnified by a player who tests positive for IPEDs

It is difficult to conclusively measure the benefits of CEO and CFO certification, although most studies indicate sections 302 and 304 of SOX ultimately improved Corporate America and the reporting of financial results.²¹⁹ The effectiveness of the certification requirements is difficult to quantify due to the difficulty in measuring the fraudulent and negligent behavior that the Act deterred.²²⁰ One academic analogized the requirement to airport security, in that both the costs of implementing the program and its failure are known and measurable in dollars, but the benefits are not.²²¹ The analogy is also relevant to regulation of IPEDs in professional sports. The costs of implementing more stringent testing requirements and fines levied on team owners and managers are quantifiable, but the number of players deterred from using IPEDs will likely never be known.

Other unquantifiable potential benefits from Sarbanes-Oxley are changes in “people’s beliefs as well as actions . . . [which] help alter corporate norms and culture.”²²² Senior executives set the tone and ethical standard to which the rest of the company follows,²²³ just as team owners and managers do the same for their players. Consequently, if team owners and managers implement a true “no-tolerance” standard in the testing for and regulation of IPEDs,²²⁴ a “culture of compliance” will be fostered, rather than one promoting “normal rules do not apply to us.”²²⁵ Moreover, team owners and managers should recognize that professional sports athletes are role models for children and teenagers.²²⁶ If

by writing such a provision in the player’s contract. The leagues’ players associations, however, would likely fight such a provision vehemently.

²¹⁹ Daniel A. Cohen et al., Trends in Earnings Management and Informativeness of Earnings Announcements in the Pre- and Post-Sarbanes Oxley Periods 30 (Feb. 1, 2005) (unpublished manuscript) (finding earnings management increased prior to SOX, and declined post SOX).

²²⁰ Prentice, *supra* note 98, at 723.

²²¹ *Id.* at 758.

²²² *Id.* at 759-60. *But see Market vs. Regulatory Responses*, *supra* note 91, at 19-25 (alleging “[SOX] itself may have contributed to creating conditions that are conducive to fraud.”).

²²³ See Prentice, *supra* note 98, at 759 (citing Enron “poisonous corporate culture” for this proposition).

²²⁴ The MLB currently has a near-zero tolerance standard for cocaine, with minimal reports of usage. THE JUICE, *supra* note 1, at 25. However, in the 1980s, the MLB experienced a problem with players using cocaine. See Roger I. Abrams, *Alcohol, Drugs, and the National Pastime*, 8 U. PA. J. LAB. & EMP. L. 861, 877 (2006) (discussing the Pittsburgh cocaine trials that revealed the extent of cocaine usage by baseball players).

²²⁵ Prentice, *supra* note 98, at 759-60.

²²⁶ See E. Tim Walker, Comment, *Missing the Target: How Performance-Enhancing Drugs Go Unnoticed and Endanger the Lives of Athletes*, 10 VILL. SPORTS & ENT. L.J. 181, 199 & n.107 (2003) (recognizing the effect professional athletes’ behavior has on students); Burch & Murray, *supra* note 16, at 25-59 (discussing two views on whether or not athletes are role models); Tom Farrey, Senators Want Over-the-Counter Andro Ban, ESPN.COM (Oct. 24, 2003), available at <http://espn.go.com/gen/news/2003/1024/1645745.html> (quoting House of Representative Tom Osborne of Nebraska, the former football coach at the University of Nebraska, as saying: “My son wanted to take andro because Mark McGwire did”). While professional athletes are not the largest users of IPEDs, they are the most visible and most likely to be role-models for children and the next generation of athletes. See

team owners do not prevent their athletes from using IPEDs, it is as though they are condoning such behavior and cheating.

E. *Independent Regulation Committee*

On January 11, 2008, in what appears to be another attempt to preempt any additional federal intervention into the regulation of steroids in professional sports, the MLB, NFL, and the United States Olympic Committee announced that the organizations founded the Partnership for Clean Competition (“PCC”) “to find more effective, but less expensive methods to detect and deter the use of performance-enhancing drugs in sports.”²²⁷ In conjunction with the USADA, which committed a total of \$1 million, each of the aforementioned organizations also committed to contribute \$750,000 for four years, and will have representatives on the PCC’s Board of Governors.²²⁸ The NBA, the NHL, and the Professional Golfers’ Association of America also agreed to participate, but commit less money than the aforementioned organizations.²²⁹ While the creation of the PCC is laudable and a good first step in curbing the use of IPEDs in professional sports, these efforts and levels of funding are unrealistic and inadequate.

Section 101 of Sarbanes-Oxley established the Public Company Accounting Oversight Board (“PCAOB” or the “Board”),²³⁰

Collins, *supra* note 10, at 24 (citing Peters R., Copeland J., & Dillon P., *Anabolic-Androgenic Steroids: User Characteristics, Motivations, and Deterrents*, PSYCH. OF ADDICTIVE BEHAVIORS, 1999, 13(3): 232-242; Parkinson A.B., Evans N.A., *Anabolic Androgenic Steroids: A Survey of 500 Users*, MED SCI SPORTS EXER, 2006, 38(4):644-51) (identifying “noncompetitive adult weight trainers mainly seeking improved appearance” as the largest group of steroid users).

²²⁷ Juliet Macur, *United Antidoping Program is Formed*, N.Y. TIMES, Jan. 11, 2008, at D5. See News Release, U.S. Anti-Doping Agency, United States Olympic Committee, United States Anti-Doping Committee, Major League Baseball and National Football League Announce Partnership for Clean Competition Anti-Doping Research Collaborative (Jan. 10, 2008), available at http://www.usantidoping.org/files/active/resources/press_releases/Press%20Release%20-%20Partnership%20for%20Clean%20Competition%20-%20January%202008.pdf [hereinafter *PCC Press Release*] (describing the purpose, structure, and source of funding for the PCC); Fehr’s 2005 Statement, *supra* note 65 (Disagreeing with federal government, the MLBPA stated “that a single federally mandated and operated drug testing program . . . is [not] the most effective or appropriate means to eliminate illegal performance enhancing drugs in professional sports in the United States. In fact, such an approach may create even more problems than it solves.”).

²²⁸ Macur, *supra* note 227.

²²⁹ PCC Press Release, *supra* note 227.

²³⁰ Both academics and the accounting industry challenged the constitutionality of the PCAOB. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-0217, 2007 WL 891675 (D.D.C. Mar. 21, 2007) (challenging the constitutionality and empowerment of the PCAOB); Steve Seidenberg, *Suit Challenges Sarbanes Audit Cop: Plaintiffs Say the PCAOB, Styled as a Private Corporation, Is a Government Agency in Disguise*, 5 No. 7 A.B.A. J. E-REP. 3 (2006); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005) (arguing “[the PCAOB’s] governmental objectives, governmental powers, and governmentally appointed board of members render it a public (or state) actor,” thereby violating the Constitution’s requirement for separation of powers).

The Free Enterprise Fund, a pro-business lobbying group, and Beckstead and Watts, an accounting firm, challenged constitutionality of the PCAOB, based on the Separation

which provides guidance on how to better structure an independent national oversight board to create and enforce IPED regulations for the professional sports leagues, while avoiding potential constitutional challenges.²³¹ The PCAOB “oversee[s] the audit of public companies that are subject to the securities laws . . . in order to protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports.”²³² The Board is also responsible for registration, standard creation and adoption, inspection, and discipline.²³³ The Act created the PCAOB as a private, non-profit corporation, and not a governmental agency or department of the federal government.²³⁴

During Congressional hearings concerning corporate accounting fraud and bankruptcies, testimony revealed

that the current system of governance [of the accounting industry] lacks sufficient public representation, suffers from divergent views among its members as to the profession's priorities, implements a disciplinary system that is slow and ineffective, lacks efficient communication among its various entities and with the SEC, and lacks unified leadership and oversight.²³⁵

Congress created the PCAOB because the accounting industry’s “combination of public oversight and voluntary self-regulation [was] extensive, Byzantine, and insufficient.”²³⁶ The PCAOB ultimately replaces the self-regulating entities that previously regu-

of Powers, Appointments Clause, and the Non-Delegation Doctrine. *Free Enter. Fund*, 2007 WL 891675, at *2. The District Court of Columbia upheld the constitutionality of the PCAOB. The court cited the SEC’s oversight of the Board and the SEC’s ability to remove members of the PCAOB for “good cause shown” in granting the PCAOB’s motion for summary judgment. *Id.* at *5 (internal quotation marks removed). The federal court also held that the Appointments Clause was not violated because the members of the PCAOB are “inferior officers” who the SEC has power to appoint. *Id.* at *4. Plaintiffs filed an appeal on April 13, 2007 in the Court of Appeals for the District of Columbia. PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, STRATEGIC PLAN (Mar. 31, 2008), at 11, *available at* http://www.pcaobus.org/About_the_PCAOB/Strategic_Plan.pdf.

²³¹ See generally *Free Enter. Fund*, 2007 WL 891675; Showalter, *supra* note 74, at 666-75 (providing an overview of the potential legal challenges, including constitutionality, associated with a federal law mandating IPED testing for professional sports leagues).

²³² Sarbanes-Oxley Act of 2002 § 101, 15 U.S.C. § 7211 (2007); see also *id.* § 103, 15 U.S.C. § 7213 (2007) (empowering the PCAOB to establish rules and standards to be used by registered public accounting firms in preparing and issuing audit reports).

²³³ Sarbanes-Oxley Act of 2002 § 101(c)(1)-(4).

²³⁴ *Id.* § 101(b) (stating, “[t]he Board shall not be an agency or establishment of the United States Government, . . . and have all the powers conferred upon a nonprofit corporation” and that “[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by reason of such service.”).

²³⁵ Public Company Accounting Reform and Investor Protection Act of 2002, S. REP. NO. 107-205 (2002) (testimony of Shaun O’Malley, Chairman, 2000 Public Oversight Board Panel on Audit Effectiveness, and former Chairman, Price Waterhouse LLP, before the Committee on March 6, 2002). Over the course of ten days, twenty witnesses testified that oversight of public company auditors required a strong oversight board. *Id.*

²³⁶ *Id.*

lated the accounting and auditing industry.²³⁷

These same problems and deficiencies currently plague the professional sports leagues' IPED testing programs. Particularly, academics and anti-doping experts recognize "the lack of independent supervision" as a factor contributing to inability of the professional sports leagues' inability to successfully implement an IPED testing and treatment program.²³⁸ To date, regulation of the use of IPEDs in professional sports came from two sources: first, the self-regulation by the sports leagues themselves, and second, federal and state legislation.²³⁹ This "two front system" does not seem to be effective. Adoption of a unified system by the professional sports leagues should realize a stronger, more consistent and comprehensive standard, covering testing, enforcement, penalties, and liabilities.²⁴⁰

In order to preserve its independence from the accounting industry, the Act explicitly outlined the required composition of the Board. While serving on the five-member Board,²⁴¹ the members are prohibited from holding outside employment or receiving any form of payments from a public accounting firm.²⁴² Moreover, only two of the five members can be, or previously have been, certified public accountants ("CPAs").²⁴³ Sarbanes-Oxley

²³⁷ See Nagy, *supra* note 230, at 983-96 (chronologically describing the accounting and auditing self-regulation efforts prior to the adoption of Sarbanes-Oxley).

²³⁸ See *Loopholes Beyond Baseball*, *supra* note 14 (citing anti-doping experts recognizing the need for independent supervision to close loopholes in IPED testing procedures). In 2005, however, the MLBA stated: "We believe that such matters are not susceptible to a 'one size fits all' approach and are best left to those with knowledge of the workings of a particular sport. In fact, the testing regime we have established for Major League Baseball is more effective, frequent, and random than the proposed regime in the bill. Similarly, the bill also calls for "tests to be administered by an independent party not affiliated with" the professional league. No credible evidence has been brought forward to question the integrity of the administration of any drug testing program currently in force in any professional sport. The NFL and its union apparently have chosen to administer its program in-house, in the main. In baseball, as noted, the parties have retained reputable independent contractors for collection and analysis. Absent any actual evidence of abuse, each sport should be permitted to determine how best to effectuate its program." Fehr's 2005 Statement, *supra* note 161.

²³⁹ *Changing the Game*, *supra* note 1, at 753.

²⁴⁰ Cf., Onnig H. Dombalagian, *Self and Self-Regulation: Resolving the SRO Identity Crisis*, 1 BROOK. J. CORP., FIN. & COM. L. 317, 320 (2007) (citing Order Granting Approval of a Proposed Rule Change Amending Rule 180 to Require Member Organizations to Use the Automated Liability Notification System of a Registered Clearing Agency, 72 Fed. Reg. 3896 (Jan. 26, 2007)) ("The most basic self-regulator function might be deemed *mutual* regulation . . . among members through rules that 'foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities.'").

²⁴¹ See Sarbanes-Oxley Act of 2002 § 101(e)(1). The SEC appoints the Board, following "consultation with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury." *Id.* § 101(e)(4)(A).

²⁴² See *id.* § 101(e)(3).

²⁴³ See *id.* § 101(e)(2). If one of the two CPAs is the chairperson of the board, the person "may not have been a practicing [CPA] for at least 5 years prior to his or her appointment to the Board." *Id.*

also empowers the SEC to grant the PCAOB with certain powers and responsibilities, which include establishing standards to govern public auditors, creating its budget, and investigating and inspecting public accounting firms.²⁴⁴ The PCAOB can also impose sanctions, ranging from a mere reprimand to monetary fines.²⁴⁵

In order to create an independent oversight board, the following membership criteria should be adopted. The USADA should have a larger role than currently assigned under the PCC. The USADA ought to adopt WADA's standards and a prohibited substance list.²⁴⁶ Relying on WADA's international perspective would be beneficial since the development, production, and use of steroids are international problems.²⁴⁷ Currently, only the NHL incorporates the Prohibited Substances List of the WADA Code, but the league and the players association reserve the right to amend the list, as per their agreement.²⁴⁸

The independent oversight board should also have athlete representation. The representatives, however, should not be executives of the leagues' players associations. Instead, the oversight board should form a committee comprised of athletes representing each sport, and elect a representative to sit on the board.²⁴⁹ The committee would "represent the views and rights of athletes

SOX's drafters intended the restriction on the chairperson's employment to decrease any potential influence or loyalty to a public accounting firm or other company, and thereby make the individual more objective. MORLEY, *supra* note 208, at 12.

²⁴⁴ See Sarbanes-Oxley Act of 2002 § 101(c). The SEC has the power to rescind the Board's authority, to limit the Board's authority, or to censure the Board. *Id.* § 107(d)(1)-(2). The SEC must approve the PCAOB's proposed rules before becoming effective. *Id.* § 107(b)(2). The SEC also has the power to add to, delete, or modify the Board's rules. *Id.* § 107(b)(5) (incorporating 15 U.S.C. § 78s(c)).

²⁴⁵ See *id.* § 105(c)(4)(D)-(E). Since its creation in 2003, the PCAOB assessed only one fine against one of the Big Four accounting firms. Judith Burns, *Deloitte Receives \$1 Million Fine*, WALL ST. J., Dec. 11, 2007, at C8. The Big Four accounting firms are Deloitte & Touche LLP, KPMG LLP, PriceWaterhouseCoopers LLP, and Ernst & Young LLP. *Id.* In 2007, the PCAOB censured and fined Deloitte \$1 million for the firm's audit of Ligand Pharmaceuticals Inc. *Id.* Prior to sanctioning Deloitte, the PCAOB took actions against ten smaller accounting firms and fourteen individuals. *Id.*

A public accounting firm sanctioned by the PCAOB can request the SEC's review. Sarbanes-Oxley Act of 2002 § 107(c)(2). The SEC can also modify sanctions imposed by the PCAOB. *Id.* § 107(c)(3).

²⁴⁶ See *supra* text accompanying note 50.

²⁴⁷ *But cf.* Haagen, *supra* note 2, at 838 (finding that the WADA Code is "an extremely athlete-unfriendly document"). For example, factories in Mexico manufacture steroids, which are sold in or imported to the United States, and China supplies many of the ingredients necessary to manufacture steroids, in addition to selling the finished steroid-product to other countries. See THE JUICE, *supra* note 1, at 19 (quoting a baseball player as saying: "A lot of the [other baseball players] lived in Arizona or Southern California in the off-season, and they'll just run down to TJ [Tijuana] for their shit," referring to the source of steroids); ASSAEL, *supra* note 33, at 249 ("If Mexico was the biggest source of steroids to the United States, China was the supplier to the world.").

²⁴⁸ See *infra* p. 217 and note 154 (discussing and citing the relevant NHL CBA article).

²⁴⁹ Selection criteria are beyond the scope of this Note, however, the suggestion seems feasible as the WADA has an athlete committee. World Anti-Doping Agency, Athlete Committee, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=291> (last visited Feb. 4, 2008).

in [professional sports], while providing insight and oversight into athletes' roles and responsibilities as it relates to" fighting the use of IPEDs by athletes.²⁵⁰ The committee members should also act as liaisons between the committee and board and the sports league they represent.²⁵¹

Additionally, the independent oversight board should have a medical, health, and research committee, with representatives sitting on the board. The committee's goal should be "[t]o provide expert advice to enable [the board and the professional sports leagues] to become a world leader on health, medical and research issues relating to drug free sport."²⁵² The committee should be tasked with the "monitoring of scientific developments in sports with the aim to safeguard [IPED] free sport practice, the overseeing of various scientific working groups in relation to the Prohibited List [of substances], Therapeutic Use Exemptions, and Laboratory Accreditation."²⁵³

To further protect the independence of the PCAOB, the board is self-funded.²⁵⁴ In order to register with the PCAOB, accounting firms must submit an application and pay an annual "support fee."²⁵⁵ The board bases the fee paid by the public-auditing firms on the number of clients that issue public financial statements.²⁵⁶ The registration fee and monetary sanctions provide the primary source of funding for PCAOB, and ensure the source of funding is independent and stable.²⁵⁷ In order to fund the na-

²⁵⁰ *Id.*

²⁵¹ *See id.*

²⁵² World Anti-Doping Agency, Health, Medical & Research Committee, <http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=294> (last visited Feb. 4, 2008).

²⁵³ *Id.*

²⁵⁴ Nagy, *supra* note 230, at 1021.

²⁵⁵ Sarbanes-Oxley Act of 2002 § 102(f), 15 U.S.C. § 7212(f) (2007). Under SOX, the Board is authorized to "assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports." *Id.*

²⁵⁶ *See* Press Release, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, Announcement of Registration Application Fees (Jul. 17, 2003), available at http://www.pcaob.org/registration/2003-07-13_release_2003-010.pdf [hereinafter PCAOB Press Release]. Fees range from \$250 to \$390,000. *Id.*

²⁵⁷ *See* Sarbanes-Oxley Act of 2002 § 109(c), (e)(1). Congressional testimony supported an independent source of funding. *See also The Fall of Enron: How Could It Have Happened?: Hearing Before Senate Comm. on Governmental Affairs*, 107th Cong. 37 (2002) (testimony of Arthur Levitt, Former Chairman, Sec. & Exch. Comm'n) ("The fact that the board is funded by the very firms for whom they set standards, who often come back to them and say, 'If you are going to set this standard, we are going to cut off your funding.' That is wrong. We have got to change their funding."); *Accounting Reform and Investor Protection Issues Raised by Enron and Other Public Companies: Hearings Before the Senate Comm. on Banking, Hous., and Urban Affairs*, 107th Cong. 532 (2002) (statement of Dennis R. Beresford, Chief Accountant, Sec. & Exch. Comm'n, 1987-1997). *But see H.R. _____, Financial Accounting Standards Board Act: Before the Subcomm. on Commerce, Trade and Consumer Protection of the H. Comm. on Energy and Commerce*, 107th Cong. 109 (2002) (statement of Edmund L. Jenkins, Chairman, Fin. Accounting Standards Bd.) (stating "[i]n my five years as Chairman of the FASB, no contribution to the FAF, or threat of withholding a contribution, if any

tional oversight board and the necessary level of testing, the national oversight board should assess membership and testing fees, similar to the PCAOB's assessment of registration and annual fees under SOX.²⁵⁸ The leagues, the teams,²⁵⁹ and the athletes should all contribute an annual membership fee, plus a testing premium based on the number of individuals to be tested per year.²⁶⁰ Athletes' fees could be assessed as a membership fee based on the athletes' salaries.²⁶¹

Under the existing fragmented system governing IPED testing, numerous procedural loopholes continue to exist, which allow rule violations to go undetected, undisclosed, and unpunished.²⁶² The proposed PCC does not address the lack of uniformity amongst the leagues, nor does it propose to close existing loopholes. A unified, national oversight board could address these issues.²⁶³

The national oversight board could establish a uniform set of

occurred, had any impact, in any way, on any of the decisions of the Board," but acknowledging that "a secure and adequate non-discretionary funding source for the FAF that might serve to strengthen the appearance of independence of the FASB").

²⁵⁸ See Sarbanes-Oxley Act of 2002 § 101(f)(5).

²⁵⁹ The individual sports teams are quite profitable. For example, during 2006, NFL teams earned between \$312 million and \$182 million, with the average operating income at \$17.8 million on revenues of \$204 million. Badenhausen, *supra* note 157. Further, professional sports teams are generating almost \$100 million per year in national broadcasting fees, with the league receiving over \$3 billion. *Id.*

The International Cycling Union ("UCI"), cycling's governing organization, recently announced its "Biological Passport" program. Alasdair Fotheringham, *Cycling: Riders To Be Banned From Tour De France Without Clean 'Passport'*, INDEPENDENT (London), Oct. 26, 2007, available at <http://www.independent.co.uk/sport/general/cycling-riders-to-be-banned-from-tour-de-france-without-clean-passport-397913.html>. The UCI, with assistance from WADA, will require all professional cyclists participating in the Tour de France and other elite events to create a medical profile that provides "a record of the baseline levels of a rider's biological 'markers'" to which race officials could compare to the data collected in doping tests at the events. *Id.* "The cost of the program is estimated to be around £2.5 million [approximately \$3.7 million, as of Oct. 28, 2002], much of which will be funded by the cycling teams." *Id.*

²⁶⁰ The national oversight board could also charge athletes registration or membership fees. Additionally, a "testing tax" could be added to ticket purchase prices.

²⁶¹ See, e.g., PCAOB Press Release, *supra* note 256 (describing the registration application fee schedule for accounting firms that file registration applications).

²⁶² If there is little threat of detection, there is no deterrence. See *Market vs. Regulatory Responses*, *supra* note 91, at 19 ("It is too simplistic to ascribe these [corporate] frauds to 'greed' without accounting for risk of detection."). One reporter noted that a player's conscience is the deciding factor: "From creating to cortisone, andro to amphetamines, and even Pedialyte to Red Bull, players will ingest whatever their conscience allows to gain an edge—or to avoid an ill-timed slump that can cost millions of dollars or even their careers." Alan Schwarz, *Issue May Really Be How Far Players Will Go to Gain an Advantage*, N.Y. TIMES, Jan. 7, 2008, at D5.

²⁶³ Other areas need attention as well. For example, players often learn about the "random" drug tests in advance, and are able "to get things by the tester" without much difficulty. THE JUICE, *supra* note 1, at 23. One player described his technique of evading a positive test result as simply handing the tester a "Bennie," or a hundred dollar bill. *Id.* The player rationalized "[i]t was a lot cheaper than taking a suspension." *Id.* In addition, despite the MLB's addition of HGH to its list of banned substances, the league does not currently test for the substance. Currently, the MLB "do[es] not test for HGH, because there is no scientifically reliable urine test available." Fehr's 2008 Statement, *supra* note 78, at 5.

testing procedures, enforcement policies, and a banned substances list, with corresponding penalties and liabilities. Congress' proposed IPED testing bills provide a useful framework with which to impose more stringent testing procedures and penalties than currently mandated by any of the professional sports leagues.²⁶⁴ The board should use the congressionally proposed 2005 bills as a starting point in drafting its own testing procedures, regulations, and penalties.

The professional sports leagues vary considerably in the amount of confidentiality afforded to a player who tests positive for IPEDs.²⁶⁵ Confidentiality can provide a large loophole that can weaken an otherwise effective IPED program. Under SOX, the board has the power to inspect public accounting firms "to identify and address weaknesses and deficiencies related to how a firm conducts audits."²⁶⁶ Specifically, under to § 104, the PCAOB must issue a report of its findings during the inspection of the public accounting firm.²⁶⁷ While the Inspection Report is made available to the public,

no portions of the inspection report that deal with criticisms of or potential defects in the quality control systems of the firm under inspection shall be made public if those criticisms or defects are addressed by the firm, to the satisfaction of the Board, not later than 12 months after the date of the inspection report.²⁶⁸

The purpose of this exception is to give an incentive to the firm to rectify the problem discovered during the inspection.²⁶⁹ Similar to the Inspection Reports prepared by the PCAOB when it reviews public auditing firms, the national athletic oversight board should issue reviews of the professional sports leagues' and the teams' implementation of the required testing and treatment standards.

Unlike the PCAOB's reports, the results of the leagues' and teams' performance should not be kept confidential. SOX's re-

²⁶⁴ See Showalter, *supra* note 74, at 664.

²⁶⁵ See *infra* pp. 212-18 (describing the professional sport leagues' existing IPED testing procedures).

²⁶⁶ PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, INSPECTION OF BLOOM & CO., LLP (Dec. 18, 2007), at 2, available at http://www.pcaobus.org/Inspections/Public_Reports/2007/Bloom.pdf.

²⁶⁷ Sarbanes-Oxley Act of 2002 § 104(g), 15 U.S.C. § 7214(g) (2007).

²⁶⁸ *Id.* § 104(g) (2). "Section 104(g) (2) of the Act reflects a legislative policy choice favoring the correction of quality control problems over the exposure of them." PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD, THE PROCESS FOR BOARD DETERMINATIONS REGARDING FIRMS' EFFORTS TO ADDRESS QUALITY CONTROL CRITICISMS IN INSPECTION REPORTS (Mar. 21, 2006), at 2, available at http://www.pcaobus.org/inspections/2006-03-21_release_104-2006-077.pdf [hereinafter *PCAOB Process Release*].

²⁶⁹ PCAOB PROCESS RELEASE, *supra* note 268, at 2. Failure to resolve the perceived problems "to the Board's satisfaction" results in the publication of the firm's defects so the firm will "suffer public exposure of the criticism." *Id.*

quirement to keep criticisms and potential defects confidential diminishes the potential benefits that could be realized by the inspection process. There is great value in learning from others' mistakes.²⁷⁰ Other public firms, or in the case of IPED use in sports, sports leagues, and teams, could certainly learn from the weaknesses found within another deficient system, thereby correcting any similar problems within their own processes. Identification of implementation problems will ensure that potential loopholes are closed throughout professional sports, while encouraging the adoption of the best practices.

While there are possible disadvantages to disclosing a team's quality control deficiencies—negative publicity, loss of product endorsement contracts, additional sanctioning, or potential litigation²⁷¹—the potential benefits would create an additional penalty to deter athletes from using IPEDs. By disclosing this information publicly, other athletes and children could see what can truly be lost whenever a professional athlete uses and tests positive for IPEDs. It must be shown that use of IPEDs does not only lead to hitting more homeruns, running more yards, or garnering more multi-million dollar contracts, but also serious moral and physical complications.

V. SOX: NOT A PERFECT GUIDE

Prior to the passage of Sarbanes-Oxley, a generally uniform set of statutes and procedures regulated public companies' financial reporting standards and governance.²⁷² In regulating IPED usage in professional sports, Congress faces a much more complex and disjointed regulatory scheme to legislate because each professional sports league has its own regulation scheme, set of testing standards, penalties, and enforcement guidelines.²⁷³

Further, fighting IPED usage requires addressing a different set of obstacles than Congress faced in regulating Corporate America and the accounting industry. Sports have become entertainment;²⁷⁴ fans want to be entertained and will pay to see records broken.²⁷⁵ After the MLB's 1994-95 strike, fans returned in record

²⁷⁰ See Francisco Ramos, Jr., *What Being a Lawyer Has Taught Me*, 25 No. 3 TRIAL ADVOC. Q. 8, 8 (2006) ("Learning from your mistakes is experience. Learning from others' mistakes is wisdom.")

²⁷¹ See, e.g., Natalie J. Kussart, Comment, *Reporting Medical Errors: The Good, the Bad, and the Ugly*, 31 S. ILL. U. L.J. 385, 398 (2007) (finding "there are several disadvantages to making hospital mistakes public: adverse publicity, fear of litigation and sanctions, and fear of disclosing confidential matters").

²⁷² See Securities Act, 15 U.S.C. § 77a et seq.; Securities Exchange Act, 15 U.S.C. § 78a et seq.

²⁷³ See *supra* pp. 212-18.

²⁷⁴ MANDELBAUM, *supra* note 10, at 5, 11.

²⁷⁵ Showalter, *supra* note 74, at 651.

numbers to see Jose Canseco, Mark McGwire, Sammy Sosa, and Barry Bonds, hit balls out of the ballpark and break home run records once thought unbreakable.²⁷⁶ American society and culture seem to ask for change, but their actions and dollar allocations say otherwise.²⁷⁷ There is a larger social issue beyond just the desire for wealth and fame that perpetuates the use of steroids;²⁷⁸ perhaps entertainment considerations now supersede competition, fairness, and athlete health as the most important quality in sports.

It will cost a significant amount of money to effectively implement any program to successfully catch and deter athletes' use of IPEDs. If the sports leagues take a larger financial role, an independent oversight board may not be the best solution to adopting a uniform IPED program. Instead, a self-regulatory organization ("SRO"), similar to the Financial Industry Regulatory Authority ("FINRA"), which acts as the regulator for all U.S. securities markets and firms,²⁷⁹ could be a better structure. An SRO would balance government regulation with a more "hands-off approach to day-to-day management."²⁸⁰ Ultimately, however, the sports leagues should more appropriately demonstrate their commitment to fighting IPED use among their athletes by allocating more money to fighting the problem. The members of the PCC committed \$10 million over four years.²⁸¹ Based on these numbers, the NFL and the MLB committed just 0.01% of their respective 2006 revenues to help the PCC combat the use of IPEDs in professional sports.²⁸²

Despite the PCC's stated commitment to raise additional funding, it will be significantly more expensive to properly "[form] a landmark research collaborative designed to further curtail the use of banned and illegal substances in sport" than the amounts of

²⁷⁶ The question becomes, would fans see players not hitting balls out of the ballpark or not hitting their 100th homerun for the season?

²⁷⁷ "There is simply too much money involved in international sports today. . . . [P]eople don't pay to watch losers, and corporations don't sponsor teams that can't bring home the gold. The athletes and officials realize this, so they're willing to do whatever it takes to win. And sometimes that means turning their backs on the drug problem." Burge, *supra* note 36, at 51 (citing ROBERT VOY, M.D. WITH KIRK D. DEETER, DRUGS, SPORT, AND POLITICS 13 (1991)).

²⁷⁸ For example, cartoon characters are often portrayed as muscular, which sends an early message to children that being big and strong is a desired physical feature. Burge, *supra* note 36, at 54.

²⁷⁹ Financial Industry Regulatory Authority, About FINRA, <http://www.finra.org/AboutFINRA/CorporateInformation/index.htm> (last visited Feb. 4, 2008).

²⁸⁰ Skeel, *supra* note 201, at 697.

²⁸¹ PCC Press Release, *supra* note 227.

²⁸² In 2006, the NFL earned \$7 billion in revenues, and the MLB earned \$6 billion. Stephen J. Dubner, *N.F.L. vs. M.L.B. as a Labor Market: A Freakonomics Quorum*, N.Y. TIMES, Nov. 28, 2007, <http://freakonomics.blogs.nytimes.com/2007/11/28/nfl-vs-mlb-as-a-labor-market-a-freakonomics-quorum/?scp=1&sq=mlb+revenue>.

money committed to the PCC.²⁸³ In order to be effective, “[b]ans must be enforceable and therefore require complex infrastructures for fair and just implementation.”²⁸⁴ It costs millions of dollars to develop and perfect new IPED testing systems.²⁸⁵ “The target is always moving, and science has to move with it, aiming just ahead;”²⁸⁶ developing new sciences and technologies to stay just ahead and effective is expensive, as WADA demonstrates. During its first two years of operations, WADA required an operating budget of over \$18 million.²⁸⁷ In 2007, WADA estimated it would spend over \$8 million just on research, and would require over \$25 million to operate for the year.²⁸⁸

The sport of cycling further illustrates the costs of implementing an effective IPED testing program. The Slipstream/Chipotle cycling team, which consists of twenty-three members, recently announced its “revolutionary drug-testing program.”²⁸⁹ The Slipstream/Chipotle testing regime requires that each of the cyclists’ urine and blood be tested once a week,²⁹⁰ which amounts to nearly 1200 tests per year.²⁹¹ Testing is conducted by UCLA’s Olympic Analytical Lab, an independent agency, which will cost the team approximately \$300,000 per year.²⁹² A professional NFL team has fifty-three players, which is twice that of the Slipstream/Chipotle team.²⁹³ Simply extrapolating the cost of testing Slip-

²⁸³ PCC Press Release, *supra* note 227.

²⁸⁴ SCHNEIDER & FRIEDMAN, *supra* note 36, at 5.

²⁸⁵ ASSAEL, *supra* note 33, at 168-69.

²⁸⁶ THE JUICE, *supra* note 1, at 106. Testing currently lags behind new IPED developments and needs “to be pro-active rather than forever reactive.” *Id.*

²⁸⁷ World Anti-Doping Agency, Funding, <http://www.wadama.org/en/dynamic.ch2?pageCategory.id=401> (last visited Jan. 20, 2008). A member of the Olympic movement initially estimated it would cost \$25 million to set up such a drug-testing agency. ASSAEL, *supra* note 33, at 167.

²⁸⁸ WORLD ANTI-DOPING AGENCY, 2007 BUDGET SUMMARY (2007), http://www.wadama.org/rtecontent/document/2007_Budget_Expenditures.pdf. In 2007, WADA budgeted for an income of approximately \$24.8 million. *Id.* WADA estimates the agency will receive contributions totaling approximately \$23.9 million from both the Olympic Movement and the countries participating in the agency’s efforts. WORLD ANTI-DOPING AGENCY, CONTRIBUTIONS TO WADA’S BUDGET 2008 I (2008), http://www.wadama.org/rtecontent/document/Funding_2008_En.pdf. The U.S. committed to contributing over \$1.7 million in 2008. *Id.* at 2.

²⁸⁹ John Henderson, *Drug Tests’ Right Turn: Vaughter’s Cyclists Welcome Weekly Exams*, DENVER POST.COM, May 23, 2007, http://www.denverpost.com/search/ci_5962732. Further, cycling events are increasing the frequency of athlete drug testing. Edward Wyatt, *California Race Increases Drug Testing*, N.Y. TIMES, Jan. 23, 2008, at D2.

²⁹⁰ Henderson, *supra* note 289.

²⁹¹ In comparison, during any week, the NFL randomly tests 320 players, out of a possible 1700 players. *Loopholes Beyond Baseball*, *supra* note 14.

²⁹² Henderson, *supra* note 289. Other sources estimate the cost of the Slipstream/Chipotle testing program to be approximately \$400,000. See Robyn J. Rosen, Note, *Breaking the Cycle: Balancing the Eradication of Doping from International Sport While Upholding the Rights of the Accused Athlete*, 25-SPG ENT. & SPORTS LAW. 3, 9 (2007).

²⁹³ Wikipedia, National Football League, http://en.wikipedia.org/wiki/National_Football_League (last visited Feb. 8, 2008).

stream/Chipotle to an NFL team would result in a cost of approximately \$1 million per year.

VI. CONCLUSION

On October 5, 2007, former track star Marion Jones admitted to using steroids.²⁹⁴ Following her admission of guilt, Jones tearfully apologized, saying “It is with a great amount of shame that I stand before you and tell you that I have betrayed your trust. . . . You have the right to be angry with me. I have let [my fans] down, I have let my country down and I have let myself down.”²⁹⁵ Nearly fifteen years earlier, retired National Football League player Lyle Alzado acknowledged he lied when he denied using steroids during his career as a professional athlete.²⁹⁶ During those fifteen years, both the United States federal government and American professional sports leagues made numerous ineffective attempts to curb the use of IPEDs, while attempting to address the related legal and ethical problems.²⁹⁷ The fact is, that over those fifteen years, professional athletes continued to test positive for IPEDs, and IPED usage has become more prevalent and widespread. These facts evidence the ineffectiveness of the prior efforts to deal with these issues.

Today, nearly every sport, both at amateur and professional levels, realizes that IPEDs threaten not only the integrity of their sport, but also their athletes’ health. There is evidence that the professional sports leagues are becoming stricter in their testing and regulation of their athletes’ use of IPEDs. The professional sports leagues recently announced their commitment to develop better and cheaper tests; however, it is unclear whether the leagues are truly willing to devote sufficient resources to make their statement a reality. In the past, the leagues’ promises to make their IPED testing more stringent were sufficient to table congressional legislation threatening to do it for them. The ques-

²⁹⁴ Duff Wilson & Michael S. Schmidt, *Olympic Champion Acknowledges Use of Steroids*, N.Y. TIMES, Oct. 6, 2007, <http://www.nytimes.com/2007/10/05/sports/othersports/05balco.html>

²⁹⁵ Lynn Zinser & Michael S. Schmidt, *Jones Admits to Doping and Enters Guilty Plea*, N.Y. TIMES, Oct. 6, 2007, at D1. Since pleading guilty to two counts of perjury in October 2007, Jones retired from track and field, returned the five gold medals she received in the 2000 Olympics, had her results erased from the track federation’s record books, and will serve six months in prison, two years probation, and perform 800 hours of community service. See Lynn Zinser, *Six-Month Sentence for Jones Meant to Be Message*, N.Y. TIMES, Jan. 12, 2008, at D3 (detailing Jones’ sentence for pleading guilty to two counts of perjury); Lynn Zinser, *Jones’s Soaring Career Has Turned Into Cautionary Tale*, N.Y. TIMES, Jan. 11, 2008, at D5 (describing Jones’ descent from stardom and the subsequent punishment she incurred due to lying about her use of IPEDs).

²⁹⁶ ASSAEL, *supra* note 33, at 81.

²⁹⁷ See Feuerhelm, *supra* note 39, at 71 (“Since the introduction of steroids to the athletic world, the ethical and legal problems have grown.”).

tion now becomes whether the leagues' new promises will result in tangible changes and more stringent regulations and penalties that will actually curtail IPED usage amongst their athletes.

Sarbanes-Oxley provides a set of standards and mechanisms to better hold corporate executives accountable for their financial misconduct; however, the jury is still out on whether its provisions are truly being effectively utilized to achieve its goal of ending such unethical and corrupt conduct. The most recent commentary on Sarbanes-Oxley is generally positive, and only points to pitfalls that are not applicable to the regulation of IPED use in professional sports. The Act provides Congress with an existing and tested framework with which to proceed. Congress threatened the professional sports leagues numerous times in the past, maintaining that it would impose regulations if the leagues failed. The present "epidemic" amongst professional athletes and society as a whole should motivate Congress to make good on its threats and regulate IPED testing in professional sports.

As the remorseful Marion Jones left the courthouse after being sentenced, Jones stated, "I truly hope that people will learn from my mistakes."²⁹⁸ Congress should learn from Jones and other disgraced athletes, and enact legislation based on Sarbanes-Oxley to discourage athletes, both young and old, from using IPEDs, and to stop sacrificing the integrity of sport and their own precious health.

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²⁹⁸ Harvey Araton, *Blinded and Broken by Ambition*, N.Y. TIMES, Jan. 12, 2008, at D1.

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