

**WINNERS NEVER DOPE AND FINALLY, DOPERS NEVER WIN:
USADA TAKES OVER DRUG TESTING OF UNITED STATES OLYMPIC ATHLETES**

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"Doping contravenes the fundamental principles of Olympism and sports and medical ethics."¹

INTRODUCTION

Prior to the 2000 Sydney Summer Olympic Games, the critics within, and as well as outside of, the United States Olympic Committee (USOC) and other sports governing bodies, including the United States National Governing Bodies (NGBs)² and International Federations (IFs),³ advocated that the United States should do more to eradicate the perceived performance enhancing drug problem among United States Olympic athletes.⁴ Due to this international and national criticism, then current USOC Executive President, Bill Hybl, on June 15, 1999 created the USOC Select Task Force on Drug Externalization.⁵ The mission of the Select Task Force on Drug Externalization was to bring experts and professionals, within and outside of sports,

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¹ OLYMPIC MOVEMENT ANTI-DOPING CODE, ch. II, art. 1, *available at* http://www.olympic.org/ioc/e/org/medcom/medcom_antidoping_e.html (last revisited Jan. 24, 2002) [hereinafter CODE].

² For any sport which is included on the program of the Olympic Games, ... Paralympic Games, or the Pan-American Games, a NGB may be recognized after proving amateur sports status, proving that it is the sole NGB for its sport, and completing an application of eligibility. For the sport that it governs, an NGB may: (1) represent the U.S. in the corresponding international sports federation; (2) establish national goals and encourage attainment of those goals; (3) coordinate the amateur athletic activity for that sport in the U.S.; (4) exercise jurisdiction over international amateur athletic activities, sanction international amateur athletic competitions in the U.S., and sanction sponsorship for international amateur athletic competitions outside the U.S.; (5) conduct amateur athletic competitions (including national championships, and international amateur athletic competitions) and establish procedures for determining eligibility standards for participation; (6) recommend individuals and teams to represent the U.S. in the Olympic, Paralympic, and Pan-American Games; and (7) designate individuals and teams to represent the U.S. in international amateur athletic competitions. *See* Ted Stevens Olympic and Amateur Sports Act, Ch. 2205, II, § 220524 (hereinafter "Sports Act").

³ IFs "are responsible for the integrity of their sport on the international level." Introduction of the Int'l Olympic Sports Fed'ns, at http://www.olympic.org/ioc/e/org/if/intro_if_e.html Jan. 24, 2002). "They establish playing and eligibility rules, set the schedule of events and select the referees, judges and other officials to 'run' their respective sports at the Olympic Games as well as other international competitions." *Id.* There are 35 Olympic IFs and 28 internationally recognized Federations. *Id.*

To ensure consistency in the Summer as well as in the Winter Olympic Games, the [IFs] have created two associations: the Association of Summer Olympic International Federations (ASOIF) and the Association of International Winter Sports Federations (AIWF)[,]... [which] discuss common problems, organize their events calendars and act as liaisons between the [IFs] and the IOC. *Id.*

⁴ Leslie Horna, *U.S. Anti-Doping Agency*, OLYMPIC COACH, Fall 2000 at 6, 6.

⁵ *Id.*

together in order to determine if a new external anti-doping program should be established in the United States and, if so, to recommend what that program should accomplish.⁶

After months of study and examination of the existing United States anti-doping program, the National Anti-Doping Program (NADP),⁷ the Externalization Task Force determined that it would be in the best interest of the United States to establish an independent, external entity that would be responsible for all drug testing of all athletes in the Olympic Movement within the United States.⁸ Based on this recommendation, the United States Anti-Doping Agency (USADA) was established to eradicate doping in sport and "eliminate the perception that the USOC and the [NGBs were] not doing everything within their power to eliminate doping by United States athletes."⁹

In Section II, this article describes the climate under which USADA took over Olympic drug testing in the United States and explains why the old NADP was viewed as problematic although not necessarily so. In Sections III and IV, this article discusses the formation of USADA and analyzes the legal framework of USADA's Protocol for Olympic Movement Testing, highlighting the improvements of this legal structure. Lastly, Section V concludes by showing that the new anti-doping regime in the U.S. under USADA is and should continue to be successful in eradicating drug use in sports and ensuring the world that U.S. athletes are clean.¹⁰

II. THE NADP

*"They will constantly be under international scrutiny on these issues. Because the U.S. is the most winning country in the Olympics, they should certainly be in the lead in showing they have a clean team."*¹¹

A. Background

The timing of the transfer of athletic drug testing jurisdiction to USADA could not have been better following the allegations of drug use levied against the United States and its athletes during and since the Sydney Games.¹² In fact, in 2003, the United States continued to address these very accusations before the IOC in Lausanne, Switzerland. USADA took over the drug testing for the Olympic Movement in the U.S. in the volatile aftermath of Sydney.¹³

⁶ *Id.*

⁷ See UNITED STATES OLYMPIC COMMITTEE NATIONAL ANTI-DOPING PROGRAM POLICIES AND PROCEDURES, § 2.2 (on file with the author) [hereinafter NADP].

⁸ Horna, *supra* note 4, at 6.

⁹ *Id.*

¹⁰ USADA's mission statement is:

The U.S. Anti-Doping Agency (USADA) is dedicated to eliminating the practice of doping in sport, including U.S. Olympic, Pan American and Paralympic athletes. USADA is the independent anti-doping agency for Olympic sports in the United States, and is responsible for managing the testing and adjudication process for the athletes. USADA is dedicated to preserving the well being of sport, the integrity of competition and ensuring the health of athletes through research initiatives and educational programs.

USADA's Mission at http://www.usantidoping.org/what_is/mission.htm (Last visited Jan. 24, 2002).

¹¹ Vicki Michaelis, *IOC: U.S. Drug Testing Better*, USA Today, May 17, 2001 at 6C (quoting Johan Olav Koss).

¹² See *id.*; See generally, Alan Abrahamson, *USATF is Issued Deadline by USOC*, LA Times, January 30, 2004.

¹³ See *id.*

The USOC's NADP for the quadrennial 1996-2000 had perceived but not actual problems.¹⁴ Importantly, after several independent inquiries into the practices under the NADP, including the McLaren Commission; the *IAAF v. USATF* decision; and the recent IOC inquiry, no credible facts or evidence of any drug cover-up by the U.S. has been proven.¹⁵ Under the NADP, the USOC administered all drug testing, but relied on the NGBs to perform certain activities and duties integral to the program.¹⁶ The testing program included both in-competition (IC) and no advance notice (NAN) drug testing for Olympic and Pan American athletes.¹⁷

The USOC contracted with two IOC-accredited laboratories, the only two such laboratories in the United States at the time, for analysis of the samples.¹⁸ The laboratories were responsible for receiving the samples collected by the USOC and analyzing them for prohibited substances.¹⁹ The laboratories analyzed the samples for either a full menu or a short menu of prohibited substances depending on the type of test.²⁰ An IC sample received a full menu, while a NAN sample only received a short menu.²¹ If the laboratory declared a sample positive or elevated, in accordance with the NADP, it would notify the USOC in writing, which would then notify the athlete, as well as the athlete's NGB, that the athlete had tested positive.²² Following the confirmation of the B sample analysis and the declaration of the sample as positive or elevated, the USOC would turn the test results over to the NGB.²³ The NGB was then responsible for prosecuting or bringing disciplinary action against the athlete under its own administrative procedures.²⁴

B. Perceived Conflicts of Interest

The USOC was accused of having a conflict of interest in its role as the administrator of all drug testing.²⁵ Critics of the NADP believed the USOC had an interest, financial and

¹⁴ See generally, NADP *supra* note 7.

¹⁵ See *IAAF v. USATF*, CAS 2002/O/401

¹⁶ *Id.* at §§ 2.1-2.3. These duties included compiling athlete whereabouts information and bringing disciplinary action against athletes who had tested positive under the NADP. *Id.* at §§ 2.3 (d), (f) – (g).

¹⁷ In-competition testing is testing at competition events. *Id.* at §§ 7.1-7.2. For example, an athlete who wins a medal or is a top finisher is notified following the event that he or she must provide a urine sample for testing. Upon notification, the athlete has one hour to report to the Doping Control Station in order to provide his/her urine sample. *Id.* at Attach. 4, para. 2. The NAN test is collected, not at a competition, but outside a competition and without advance notice of the test. *Id.* at §§ 8.1-8.9. A Crew Chief or person who collects the urine sample would locate the athlete at his or her residence, school or training location and collect the athlete's urine sample. *Id.* at Attach. 6. The policy was to test for substances like steroids that an athlete could remove from his or her body for a competition, but which would still enhance the athlete's performance. *Id.* at §§ 8.1-8.3.

¹⁸ See *id.* One of the laboratories is located at the University of California at Los Angeles ("UCLA") and the other was located at Indiana University ("Indiana"). The laboratory at Indiana closed in the fall of 2000 when its director, Larry Bowers Ph.D. was hired by USADA as the Senior Managing Director, Technical and Information Resources.

¹⁹ See NADP, *supra* note 7, at §§ 6.6-6.9.

²⁰ See *id.* A full menu was used for IC testing since certain substances like ephedrine gave an athlete a temporary advantage but would exit an athlete's body within a short period of time and provide no lasting benefit if taken only during training.

²¹ NADP, *supra* note 7, at §§ 7.2, 8.3.

²² *Id.* at § 6.10. An elevated test applies to certain substances naturally produced in one's body such as testosterone. *Id.* at Attach. 1, ch. II, § C.

²³ *Id.* at § 6.13.

²⁴ *Id.* at §§ 6.16-6.19.

²⁵ Michaelis, *supra* note 11, at 6C; see also, Lynn Zinser, *Individual Sports Thrilled Testing, Enforcement Off Their Hands*, THE GAZETTE (Colo. Springs, Colo.), April 9, 2001, available at 2001 WL 6765842.

otherwise, in having its best athletes participate on all international teams.²⁶ Thus, its interest in drug testing elite athletes was questioned since the USOC's interest was fielding the best team possible. Importantly, despite several thorough investigations, never has any evidence of this alleged conflict or its effects been shown.

Likewise, the NGBs appeared to have a similar conflict in their role of administering alleged doping offenses under their procedures, as they were directed to do by the NADP.²⁷ Since the NGB usually had a direct interest in promoting the athlete against whom it was supposed to bring disciplinary action, critics questioned whether the NGB had sufficient interest or incentive to find that the athlete had committed a doping offense.²⁸ Again, following several investigations no credible evidence has been offered to substantiate these claims. Interestingly, this same structure of the sport entity prosecuting its own athletes occurs around the world with little, if any, concern, adding further proof that the accusations of conflicts are merely unfounded attacks on the U.S.²⁹

Lastly, the administrative expense and resource burden involved in administering a doping case was too great for many NGBs to handle, which made legitimate discipline actions very difficult.³⁰ For the smaller NGBs, the burden of prosecution made it extremely difficult to allocate the financial and human resources necessary to create a legitimate process.

With these questions over the perceived problems of the NADP as the backdrop, the USOC contracted with USADA to take over all drug testing for Olympic athletes in the U.S. with the goal of eliminating the widely held perception that the U.S. was soft on dopers.³¹

III. THE USADA START UP

*"USADA condemns the use of prohibited substances. It is both dangerous to an athlete's health and contrary to the ethics of sports."*³²

USADA "has contracted with the [USOC] to conduct drug test[s, provide] results management for [athletes] in the Olympic movement within the United States and to provide educational" and research programs.³³ The USADA Protocol for Olympic Movement Testing (Protocol) establishes the independence of USADA, which is set up as a non-profit, non-governmental agency located in Colorado Springs, Colorado.³⁴ Although critics are still concerned with the payment for services USADA receives from the USOC,³⁵ as well as the fact that USADA is based in the same city as the USOC,³⁶ the only direct legal relationship between

²⁶ Zinser, *supra* note 26.

²⁷ See NADP, *supra* Note 7, at §§ 2.3 (f) – (g).

²⁸ See *supra* note 7.

²⁹ See *Supra* note 15.

³⁰ See *id.*

³¹ See generally UNITED STATES ANTI-DOPING AGENCY PROTOCOL FOR OLYMPIC MOVEMENT TESTING (2001) (on file with the author) [hereinafter PROTOCOL].

³² John Meyer, *Teen Fencer Gets One-Year Suspension for Use of Drug*, DENVER POST, May 2, 2001, at D2 (quoting Terry Madden).

³³ *Id.*

³⁴ United States Anti-Doping Agency, *What is U.S. Anti-Doping Agency (USADA)?*, at http://www.usantidoping.org/files/factsheet11_00.pdf. (last visited Jan. 24, 2002) [hereinafter USADA website].

³⁵ See Alan Abrahamson, *Blackmun Left in Limbo as USOC Meets*, L.A. TIMES, April 30, 2001 (indicating USADA will receive \$14.8 million of the USOC's \$488.7 million four year budget).

³⁶ United States Olympic Committee, *Contact Us*, at <http://www.usoc.org> (last visited Feb. 20, 2002). See *id.*

the USOC and USADA is a contract for services.³⁷ Although USADA has a contract with the USOC, the USOC does not have direct control of USADA, the collection samples or the results management process.³⁸ In addition to its contract with the USOC, USADA receives part of its funding from the federal government.³⁹ The day-to-day operations of USADA are managed by a CEO who is hired by a Board of Directors.⁴⁰ The USADA Board of Directors is independent of the USOC and any NGB.⁴¹ Also, no current athletes are permitted on the Board or are permitted to be employed by USADA.⁴² Additionally, USADA has adopted a strict conflict of interest policy for its employees, officers and directors.⁴³ In light of the criticisms of the NADP, USADA has successfully distanced itself from the actual or apparent control or influence of the USOC or an NGB with respect to drug testing and adjudication of athletes. This separation has given it the actual independence needed to answer the critics around the world.⁴⁴

IV. THE USADA PROTOCOL FOR OLYMPIC MOVEMENT TESTING

*"I want to create a system of deterrents."*⁴⁵

A. Who can be tested by USADA?

USADA has the legal authority to test "any athlete who is a member of a NGB."⁴⁶ By this definition, USADA can test anyone who participates either in a youth league or at an elite level, as long as he or she is a member of an NGB.⁴⁷ Additionally, USADA can test "any athlete participating at a competition sanctioned by the USOC or a NGB"⁴⁸ or any "foreign athlete who would otherwise be subject to testing by USADA, the USOC a NGB, or any other athlete who has given consent to testing by USADA."⁴⁹ Important for international credibility purposes, USADA can test "[a]ny athlete who has been named by the USOC or an NGB [to an Olympic or Pan American team or who] is competing in a qualifying event to represent the USOC or an NGB in international competition."⁵⁰ This provision allows USADA to test athletes who enter qualifying events such as Olympic trials or Pan Am Games trials or athletes who have been named to teams that compete internationally.⁵¹ This is a critical piece of the Protocol since it provides assurance to the athletic world that generally no U.S. athlete who has not potentially gone through the drug testing of USADA will be placed on an international team.⁵²

³⁷ See PROTOCOL, *supra* note 37, at § 1.

³⁸ See generally PROTOCOL, *supra* note 36.

³⁹ USADA website, *supra* note 39, at *USADA Funding*.

⁴⁰ See generally USADA website, *supra* note 39.

⁴¹ See *id.* at *What is U.S. Anti-Doping Agency (USADA)?*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ USADA website, *supra* note 39, at *USADA Leadership*.

⁴⁵ John McLaughlin, *Frank Shorter's Quest to Rid Olympics of Drugs*, DELTA SKY, available at <http://www.deltasky.com> (last visited May 7, 2001).

⁴⁶ PROTOCOL *supra* note 36, at § 2 (a).

⁴⁷ *Id.*

⁴⁸ *Id.* at § 2 (b).

⁴⁹ *Id.* at §§ 2 (c) – (d).

⁵⁰ *Id.* at § 2 (e).

⁵¹ *Id.*

⁵² See generally *id.* Also, this allows a certain level of confidence to all athletes in knowing that they are competing on a level playing field during tryouts and competitions. The victim of a doping offense is primarily the clean

Additionally, the USOC Executive Committee enacted the USOC Anti-Doping Policies, which USADA enforces.⁵³ These policies include Section 5 which requires athletes not normally NGB members to be included in the USADA OOC testing program. This section of the USOC's policies was specifically aimed at ensuring that even professional athletes participating on U.S. Olympic, Pan American or Paralympic teams were included in OOC testing.

Although the pool of athletes who are subject to testing by USADA appears extremely broad, USADA's jurisdiction has limitations.⁵⁴ USADA may not use its testing "to harass any athlete."⁵⁵ In spirit, USADA's primary testing focus is on athletes participating in international competition.⁵⁶ At the same time, USADA's jurisdiction is sufficiently broad to ensure that it combats all athletic doping within the Olympic Movement in the United States.⁵⁷

B. What Substances are Prohibited?

Under the Protocol, USADA agrees that all laboratory tests on samples collected by USADA will be analyzed by IOC-accredited laboratories and that the "laboratories [will] follow the standards established by the IOC or WADA."⁵⁸ Additionally, USADA tests for the classes of prohibited substances and methods set forth in the rules of the applicable International Federation ("IF").⁵⁹ Thus, the athlete will be tested for the substances and methods prohibited by his or her IF, not substances prohibited by USADA, an NGB, or the USOC. USADA effectively uses the IF lists to ensure that all United States athletes are in compliance with the highest and, typically, the most stringent rules with respect to doping by athletes in international competition. USADA's use of IF lists also ensures consistency in testing menus for athletes of a particular IF.

Notably, due to no fault of USADA, some IFs may have different lists of prohibited substances than the lists of prohibited substances of other IFs. Some IFs even have different prohibited substances within the sport.⁶⁰ For example, under UCI, the International Federation for Cycling, an athlete is subject to testing for tetrahydrocannabinol (THC) during IC testing but only for cyclists in the downhill mountain bike discipline.⁶¹ Cyclists in the other UCI disciplines are not tested for THC at all. Soon, the World Anti-doping Agency (WADA) will have a uniform list of prohibited substances and methods which IFs will adopt. This will provide uniformity among all sports. IFs may have the flexibility to make additions to the WADA list for its particular sport.

Frequently, there is debate as to whether a particular substance on the prohibited list is truly performance enhancing and, similarly, whether it should be put on the Code's, WADA's or

athlete who loses a position on a team to a doper. And, of course, the integrity of the sport is tarnished by a doping offense as well since it is compromised anytime an athlete violates the rules of the sport and goes undisciplined.

⁵³ See USOC Anti-Doping Policies.

⁵⁴ See generally PROTOCOL.

⁵⁵ *Id.* at § 2.

⁵⁶ *Id.*

⁵⁷ See generally *id.*

⁵⁸ *Id.* at § 3 (b).

⁵⁹ *Id.* at § 3 (c).

⁶⁰ See UCI Anti-Doping Examination Regulations.

⁶¹ See *Id.* USADA has replaced the NAN term for OOC or out-of-competition testing. OOC is similar to NAN testing in that the OOC testing is not testing immediately following a competition, but it is testing which occurs usually without prior notice and the athlete is tested at his or her residence or training location. OOC testing unlike NAN testing is short notice testing where the athlete is notified shortly before the test and is expected to report at a certain time for testing.

the IF's list of prohibited substances.⁶² Typically, the IFs rely on the expertise of the IOC and now WADA by adopting verbatim their lists of prohibited substances.⁶³ In many doping cases, the athletes attempt to argue that no performance enhancing effect of the particular substance exists in the athlete's system. However, given the strict liability definition of doping of most IF rules and of the WADA Code, the actual performance enhancing effect is not material to the offense.⁶⁴ For example, in the *Raducan v. Int'l Olympic Committee*⁶⁵ case, even though arguments were made that pseudoephedrine for gymnasts, and specifically in Ms. Raducan's case, was not performance enhancing, the arbitrators who heard her case were not persuaded by this argument since pseudoephedrine was on the prohibited substance list of the athlete's IF and was detected in the athlete's urine sample collected following the competition.⁶⁶ The well-published result of this case was a public warning and forfeiture of a gold medal achieved during the 2002 Summer Olympic Games.⁶⁷ Some IFs have specific rules stating that the actual performance enhancement or lack thereof is immaterial to proving the doping violation.⁶⁸

Despite the potential for inconsistencies in the IF rules concerning which substances are prohibited, USADA has deferred to the rules of the IFs for the substances it tests and enforces.⁶⁹ While not currently harmonized among all the IFs, hopefully, all IF rules, including the sections addressing prohibited substances and methods, will be harmonized in the near future with the adoption of the WADA Code and List. Once the IFs harmonize their rules, USADA's Protocol will automatically incorporate these new IF rules for tests performed by USADA.⁷⁰

C. Who Handles Results?

USADA is "responsible for [all] results management of all tests performed by it and all other tests [by] which the applicable IF rules require the initial adjudication to be done by an NGB."⁷¹ USADA will conduct results management for all United States athletes tested under USADA's testing jurisdiction.⁷² USADA may also handle the results management or adjudication for all United States athletes who are tested internationally and have a positive sample.⁷³ In the past, some IFs' procedures were to forward positive results of a United States athlete to the athlete's NGB (or the IF's nation federations) while other IFs handled their own adjudication.⁷⁴ Now, for those IFs who refer their cases to national federations, if a United

⁶² See *supra* note 32.

⁶³ See, e.g., Ass'n Int'l De Boxe Amateur Rules for International Competitions or Tournaments, Rule XXII (A), available at <http://www.uiba.net/aibar.html> (last visited Jan. 30, 2002) & Int'l Wrestling Fed'n Rules, Rule 4, available at http://iwf.net/iwf/con_rul/antidoping.doc (last visited Jan. 24, 2002).

⁶⁴ See Code Definition of Doping.

⁶⁵ CAS 00/011, 111 (Sept. 28, 2000).

⁶⁶ *Id.* at 113, 118-22. The arguments for Raducan included that the pseudoephedrine, which is commonly found in cold medicine, found in her urine did not provide a competitive advantage and may have impaired her skills. *Id.* at 120.

⁶⁷ *Id.* at 122.

⁶⁸ See UCI Rules.

⁶⁹ PROTOCOL, *supra* note 36 at § 3 (d).

⁷⁰ *Id.*

⁷¹ *Id.* Results management is a term, which describes the process by which USADA will handle test results once they are received by USADA and may encompass concepts like adjudication, prosecution and/or disciplinary procedures for positive tests. *Id.* at § 9.

⁷² *Id.* at § 3 (d).

⁷³ *Id.*

⁷⁴ See generally FINA Rules.

States athlete tests positive in an international test, USADA, not the NGB, is responsible for the results management of the positive sample.⁷⁵ Even though USADA was not the sample collector and had not contracted with the laboratory for the sample analysis, USADA is responsible for bringing disciplinary action against this athlete.⁷⁶ Importantly, USADA is not bound by its Protocol mandates regarding collection, laboratory analysis of samples or documents provided for samples not collected or analyzed by USADA. In these cases, USADA only acts as the adjudicator of the positive test.

D. What Type of Tests are Conducted by USADA?

In determining which athletes will be selected for testing, "USADA [typically] will ... follow the NGB or IF selection procedures."⁷⁷ Despite the NGB or IF selection procedures, USADA has broad discretion and "retains the [power] to test any athlete that it chooses, with or without cause or explanation."⁷⁸

Typically, the competition selection formulas used by the IFs or NGBs select the top two or three finishers and possibly an additional random selection for IC testing.⁷⁹ Thus, by testing the top finishers, the IFs and NGBs are assured that their top performers, who are most likely to compete internationally on behalf of the United States, are being tested by USADA. This also ensures that the top finishers of the particular competition are competing clean. Additionally, many IFs now require testing for a world record to count. If testing is not performed within a certain time period following a world record being set, the record will not stand.⁸⁰

The second type of testing program that USADA has the authority to test is out-of-competition testing (OOC).⁸¹ In assisting in determining whom USADA will select for OOC, USADA "will carefully consider selection formulas [and] requests for target selection of particular athletes which are proposed by the USOC or ... particular NGB."⁸² In this process, USADA, with each NGB, will come up with its own pool of athletes in the OOC pool.⁸³ Importantly, the OOC pool should include top-ranked athletes in each particular NGB, primarily those who have the greatest chance of participating in international competition.⁸⁴ And, USADA has been given the authority to test athletes OOC for reasons for no reason, including those under its jurisdiction but not in the OOC pool. This is an important aspect of USADA's success to have sufficient discretion to select which athletes it will test regardless of their status.

⁷⁵ See PROTOCOL, *supra* note 36 at § 3 (d). Prior to USADA, once the NGB received notice of a positive test from an IF or other international testing body, the NGB was responsible for bringing disciplinary action against the athlete. NADP, *supra* note 7, at § 2.3 (f) – (g). PROTOCOL, *supra* note 36, at § 3 (b). Also, a new procedure under USADA is that USADA will notify the USOC of any case referred from the IF via the NGB. *Id.* at § 3 (d).

⁷⁶ *Id.* ad § 3 (d).

⁷⁷ *See id.*

⁷⁸ *Id.* at § 5. The issue of who to test raises the possibility that athletes will directly contact USADA and request USADA to test other athletes. Presumably, athletes can turn other athletes suspected of cheating into USADA for testing.

⁷⁹ *See generally* FINA Rules.

⁸⁰ *See* FINA Rules.

⁸¹ PROTOCOL, *supra* note 36 at § 5.

⁸² *Id.*

⁸³ *See generally id.*

⁸⁴ *See id.* Importantly, international competition is not limited to just the Olympic, Pan American or Paralympic Games.

Every athlete in the OOC testing pool has the responsibility of fully and accurately completing the USADA Athlete Location Form on a quarterly basis.⁸⁵ This form provides the location information of the athlete at all times, which is critical to USADA's OOC testing program success since the location information allows USADA to locate the athletes for no advance notice testing.⁸⁶

E. Missed OOC Test Policy

The USOC also has adopted a policy with respect to "missed tests."⁸⁷ Under the OOC testing program, "it is the responsibility of each athlete designated by an [NGB] for [OOO testing] to provide USADA with up to date location information . . . so that he or she can be located for [OOO] testing."⁸⁸ The athletes who have a quarterly Athlete Location Forms on file are also required to update their location information throughout the quarter if it differs from the location information submitted on their quarterly Athlete Location Forms.⁸⁹ Thus, if an athlete is not available for testing at the location specified on his or her Athlete Location Form, the athlete must notify USADA of where he or she will be on any particular day for testing.

The USOC "missed test" policy incorporates USADA's procedure for determining when an athlete participating in the OOC program has a "missed test."⁹⁰ USADA's missed test procedure obligates the USADA Doping Control Officer (DCO), or person collecting the urine, "to make a reasonable effort to locate the athlete for testing."⁹¹ At a minimum, "before reporting to USADA that an athlete is unavailable for testing[,] the DCO is specifically required to visit all locations on the Athlete Location Form . . . provided by the athlete" for that day.⁹² Upon submission of an unavailable athlete to USADA, the CEO of USADA will review the case and any information from the athlete.⁹³ If, in the discretion of the USADA CEO, "there appears to be a reasonable basis for calling this a 'missed test,' then within 30 days of receipt of the Unavailable Athlete Form[,] the CEO will send [a letter to] the athlete, with a copy to the NGB, inviting the athlete to provide a written explanation why this should not be counted as a 'missed test.'"⁹⁴

At this point, the athlete will have the opportunity to respond as to why he or she was not at the location provided on his or her Athlete Location Form and, "[b]ased on the athlete's response[s] and further investigation if necessary, the CEO [will determine] whether to treat the attempt . . . as a 'missed test.'"⁹⁵ If there is an occurrence that prevents the athlete from reasonably informing USADA, such as the athlete was involved in a car accident, was hospitalized, or otherwise unable to reasonably inform USADA, then this most likely should rise to the level of a reasonable basis for not being at the location specified. Certainly the fact that

⁸⁵ *Id.* at § 5 & Annex A.

⁸⁶ *Id.*

⁸⁷ *See generally* USOC POLICY, *supra* note 164, at § 2.

⁸⁸ *Id.* at § 2(a).

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ USADA PROCEDURE REGARDING MISSED TESTS, at § A, Step 1 (publicly available at www.usantidoping.org) [hereinafter USADA MISSED TESTS].

⁹² *Id.*

⁹³ *See id.* at § A, Step 2.

⁹⁴ *Id.*

⁹⁵ *Id.* at § A, Step 3.

the athlete went out of town on vacation or competed at an out of town event would not be a reasonable basis for failing to notify USADA. The athlete has an affirmative duty under this policy to anticipate schedule changes and to immediately notify USADA when their location information changes from what they have previously submitted. If not, the athlete will suffer the consequences of his or her failure to notify USADA of such location changes.⁹⁶

If the athlete chooses to contest the CEO's determination, "the athlete may . . . request an administrative review of the CEO's determination. [This review will] be conducted by a three member panel composed of members of the USADA Board of Directors or their designees."⁹⁷ Under the USOC Policy, "[a]ny athlete having three missed tests within a rolling 18 month period [is] ineligible . . . for a period of two years from the athlete's last missed test."⁹⁸ Again the benefits lost by the athlete are that

the athlete will not be permitted to (i) participate in Olympic trials, Pan Am games, or Paralympics; (ii) be a member of an Olympic, Pan Am, or Paralympic team; or, (iii) have access to the training facilities on the Olympic Training Center or other programs and activities of the USOC including, but not limited to, grants, awards or employment.⁹⁹

Thus, if the athlete has three missed tests and is going to be sanctioned for these three missed tests, the athlete has the right to a full hearing to determine whether these three missed test will be considered missed tests.¹⁰⁰ From a legal standpoint the athlete has two opportunities to contest each missed test. First, the athlete can contest the single missed test through an administrative process before a three-member panel of USADA Board of Directors or their designees.¹⁰¹ Second, the athlete can again contest the missed test before he/she is sanctioned, after having three separate missed tests.¹⁰²

Hopefully, athletes will recognize the possibility of a sanction and the loss of certain benefits if they do not comply with USADA's OOC testing program, which requires them to keep their location information updated with USADA at all times. If the athlete assists in this process, USADA will not waste financial and human resources trying to locate athletes for testing. Essentially, the effectiveness of the program should increase by testing more athletes and not having athletes intentionally or unintentionally avoid or miss tests.

F. Retirement Policy

One of the policies adopted by the USOC aids USADA in addressing athletes who retire from their sport.¹⁰³ The policy requires that "any athlete [who is] enrolled in the USADA [OOC testing] program who wishes to be removed from the program on account of retirement[, to] notify USADA and the athlete's [NGB] in writing in order for [their] retirement . . . to [take

⁹⁶ See generally *id.* at § A.

⁹⁷ *Id.*

⁹⁸ USOC POLICY, *supra* note 164, at § 2 (b).

⁹⁹ *Id.* at § 6.

¹⁰⁰ See USADA MISSED TESTS, at § A, Step 4.

¹⁰¹ *Id.* It is important to note that the USOC Policy is in addition to any IF rule with respect to retirement or "missed tests." Thus, an athlete who has a missed test or ineffective retirement could lose the identified USOC benefits as well as other benefits per the athlete's IF.

¹⁰² *Id.*

¹⁰³ See generally *id.* at § 1.

effect]."¹⁰⁴ Now, thanks to the policy adopted by the USOC, the athlete has an affirmative duty to notify in writing their NGB and USADA of their retirement before the retirement becomes effective.¹⁰⁵

This policy should eliminate the potential problem that existed under the NADP where a Crew Chief would arrive at the athlete's location for a sample collection and the athlete would [claim that he or she had retired from their sport] and would refuse to provide a sample. The Crew Chief would have no idea whether or not the athlete had retired and would often times be at the mercy of the athlete who would simply claim that he or she had retired just to avoid the test, even when he or she was still actively competing. Obviously, this was an easy out for the athlete. The athlete could claim retirement and avoid providing the sample which could contain positive identification of drug use. Although some NGBs and IFs have retirement policies which discipline athletes in these scenarios,¹⁰⁶ not all IFs or NGBs have such policies. Now, due to the USOC's policy, there is a strict retirement policy and athletes can be sanctioned for violating this policy.¹⁰⁷

Under the new retirement policy, any athlete who does not provide proper notice and refuses to be tested because of his or her alleged retirement, will "be [declared] 'ineligible' within the meaning of [the USOC Policy] for . . . 2 years following such refusal" in addition to any IF sanctions.¹⁰⁸ The USOC Retirement Policies will aid USADA in attempting to close all the potential loopholes available for athletes to avoid providing urine samples for testing. These policies will substantially aid in ensuring all United States athletes are rigorously drug tested and that no athletes who are using performance enhancing drugs are representing the United States.

G. What About the United States Professional Sports League?

The USOC passed a policy which mandates that athletes in sports with collective bargaining agreements be given the opportunity to participate in the USADA OOC testing program. By the policy, if the professional athlete does not participate, he or she will not be eligible to compete on an Olympic or other international team.

The professional sports leagues in the United States such as the National Hockey League (NHL), National Basketball Association (NBA), Association of Tennis Professionals (ATP), and Women's Tennis Association (WTA) are not generally governed by IFs, NGBs, or USOC. Thus, athletes participating in professional leagues are not subject to testing by USADA. The athletes in these leagues are subject to the jurisdiction of the IF, NGB and USOC only when they are named by an NGB to compete on an international team or named by the USOC to compete on an Olympic or Pan American Games team.

The testing procedures and the prohibited substances of the professional leagues sometimes are different from those of an IF. As independent business entities, the United States professional leagues create their own rules with respect to anti-doping and drug testing. And, many of the professional leagues collect their athletes' urine samples, contract with the laboratory for sample analysis, and handle all disciplinary proceedings for violations of the league's drug testing rules. Obviously, the perceived critiques of the NADP concerning conflicts of interest

¹⁰⁴ *Id.* at § 1 (1).

¹⁰⁵ *Id.*

¹⁰⁶ *See, e.g.,* IAAF Rules, *supra* note ____, at R 57 (5).

¹⁰⁷ USOC POLICY, *supra* note 164, at §§ 1 (1) - (2).

¹⁰⁸ *Id.*

with respect to collecting samples and prosecuting positive cases also could be made of the professional sports leagues.

So, it is a big and important step for the United States anti-doping program to include athletes not usually under an NGB's jurisdiction to be in the OOC testing program.

H. How are the Results Managed?

The first step in the results management process for a positive or elevated test or other doping violation is to turn the athlete's case over to a panel of the USADA Anti-Doping Review Board.¹⁰⁹ The USADA Anti-Doping Review Board consists of a group of experts independent of USADA, with medical, technical, and legal expertise.¹¹⁰ A typical Review Board will have at least three members that are selected on a case-by-case basis by USADA's Chief Executive Officer.¹¹¹

Before the Review Board meets, the athlete will be notified of the date by which the athlete must submit any written materials to USADA for USADA to transmit to the Review Board for its consideration.¹¹² The athlete does not have the opportunity to testify before the Review Board, nor does the athlete have the right to have a lawyer appear before the Review Board.¹¹³ The Review Board is not a hearing and the athlete only has the right to submit written documents for the Review Board's consideration.¹¹⁴ By a majority vote, the Review Board makes a recommendation to USADA, a copy of which is sent to the athlete "whether or not there is sufficient evidence of [a] doping offense to proceed" to a hearing.¹¹⁵

The burden of proof for a doping offense case to proceed is low. The evidentiary standard is whether there is "sufficient evidence of doping."¹¹⁶ Although the majority of the cases that reach the Review Board should most likely be found to have sufficient evidence of doping,¹¹⁷ the Review Panel will act as a filter and should recommend when there is not a sufficient basis to proceed.¹¹⁸

If the Review Panel recommends that there is an insufficient basis to proceed, it is required by the Protocol to provide a reasoned opinion of why it dismissed the case.¹¹⁹ For international credibility purposes, this will give USADA, the USOC, and the particular NGB an enormous amount of credibility by shifting the reasoning if USADA ultimately decides not to go forward after considering the Review Board's recommendation. The Review Board's recommendation will be forwarded by USADA to the USOC, the applicable NGB, the IF, and

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at § 9 (a).

¹¹¹ *Id.*

¹¹² *Id.* at § 9 (a) (i) (2). In the Code and most IFs, there is a strict liability standard to prove a doping offense. *See, e.g., id.* at ____ So, if a prohibited substance is found in the athlete's urine, it is a doping offense regardless of the intent of the athlete. *See, e.g., id.* at ____ So, it may be useless for the athlete to present evidence of lack of intent to disprove a doping offense.

¹¹³ *See* PROTOCOL, *supra* note 36, at § 9 (a) (i) (5).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at § 9 (a) (i) (6).

¹¹⁶ *Id.*

¹¹⁷ Given the strict liability of the Code and most IF rules, if the case reaches the Review Board, the laboratory has confirmed the test results and USADA has reviewed the documents, so more likely than not, there should be sufficient evidence of doping.

¹¹⁸ *See* PROTOCOL, *supra* note 36, at § 9 (a) (i) (6).

¹¹⁹ *Id.*

WADA.¹²⁰ At this point, notice to the IF and WADA is important for international credibility so that the international athletic community will understand USADA's process and will let all athletes know that the United States is serious about its anti-doping efforts and its discipline of accused dopers.

After the recommendation, USADA will notify the "athlete in writing whether USADA considers the matter closed, or, in the alternative, what specific charges or alleged violations will be adjudicated and what sanction ... USADA is seeking" to impose.¹²¹ The athlete, at this point, will have the opportunity to notify USADA within ten days if he or she desires to contest the sanctions sought by USADA.¹²² If the athlete accepts the sanction at this time, a public statement is made describing the violation. If the athlete chooses not to accept the sanction USADA seeks to impose, then the athlete will have the right to a hearing to determine whether the athlete has committed a doping offense and what sanction will result.¹²³ The athlete has two options when requesting a hearing for the alleged doping offense.¹²⁴

1. AAA/NACAS Hearing

First, the athlete has the right to have a hearing "take place before the American Arbitration Association ("AAA") using a single arbitrator (or a three arbitrator panel if demanded by either of the parties) selected from a pool of the North American Court of Arbitration for Sport [(NACAS)] Arbitrators who [will] also be AAA Arbitrators."¹²⁵ This option has created a unique and effective method for handling the adjudication of the alleged doping offense. The athlete, and only the athlete, has the right to choose the type of hearing under which the case will proceed.¹²⁶ This AAA/NACAS hearing takes place before a select group of AAA arbitrators who are also NACAS arbitrators.¹²⁷ Likewise, the Court of Arbitration for Sport (CAS) arbitrators are experts in the fields of sport and law and are entrusted to act fairly and efficiently in their capacity within the CAS structure.¹²⁸ This AAA/NACAS hearing process, with the right of appeal to a final and binding CAS hearing, provides the athlete with the opportunity for a fair procedure.

¹²⁰ *Id.* at § 9 (a) (i) (7).

¹²¹ *Id.* at § (b) (i).

¹²² *Id.* at § 9 (b) (i). The athlete has the opportunity to avoid a hearing and further delay in his or her case by accepting a sanction at this point. It makes some sense for certain doping offenses for the athlete to accept the sanction. For example, under IAAF rules, an ephedrine positive sanction is a forfeiture of the competition results and a public warning. *See, e.g.*, IAAF Rules, at _____. Although this would be a first doping offense, an athlete may wish to get the sanction behind him or her.

¹²³ *Id.*

¹²⁴ *Id.* at § 9 (b) (ii) – (iv).

¹²⁵ *Id.* at § 9 (b) (ii).

¹²⁶ *See id.* at § 9 (b) (iv).

¹²⁷ *See id.* at § 9 (b) (ii).

¹²⁸ *See* COURT OF ARBITRATION FOR SPORT CODE OF SPORTS-RELATED ARBITRATION, available at <http://www.tas-cas.org/english/code/textes/code.pdf> (last visited Jan. 24, 2002) [hereinafter CAS CODE]. CAS was created in 1983 to be the independent dispute resolution body of the IOC specializing in sports related disputes. *See* Court of Arbitration For Sport, *Presentation, Facts and Figures*, available at <http://www.tas-cas.org/english/presentation/frapresentation.asp> (last visited Feb. 21, 2002). The CAS is headquartered in Lausanne, Switzerland with offices in Denver, Colorado and Sydney, Australia. *See* Court of Arbitration For Sport, *Presentation, Where is the CAS based?*, available at <http://www.tas-cas.org/english/presentation/frapresentation.asp> (last visited Feb. 21, 2002).

2. *The CAS Hearing.*

The athlete, again within ten days following the notice from USADA indicating the particular sanction USADA is seeking to impose, has the right "to elect to bypass the hearing described above and to proceed directly to a single final hearing before CAS. Said hearing will be conducted in the United States."¹²⁹ This process will allow the athlete to have the full body of CAS, regardless of whether these members are in AAA, hear their case.¹³⁰ The critical difference with proceeding directly to CAS is that this hearing will "be final and binding on all parties and [is not] subject to further review or appeal."¹³¹

V. CONCLUSION

*"They're trying to claw their way back into the game, and I think that's great...."*¹³²

As of October 2, 2000, the United States has not only clawed its way back into the anti-doping effort, but has become the world's leader in establishing an effective anti-doping program. The new and improved USADA Protocol for urine collection and results management has effectively eliminated the conflict of interest allegations which existed under the former NADP and which became an international issue during the Sydney 2000 Summer Olympics.

Since the USOC is no longer responsible for the administration of drug tests and the NGBs are no longer responsible for bringing disciplinary action against athletes who tested positive, neither the NGB nor the USOC can be accused of influencing the decision that an athlete did not commit a doping offense. Now the independent agency, USADA is responsible for the collection and the administration of drug tests as well as the results management process for all positive tests. Additionally, the USADA structure for its results management process that takes into consideration the accused athlete's rights, while also considering the rights of clean athletes who are not doping but are competing against dopers. The USADA structure allows the athlete to have the maximum freedom to choose between two different hearing options once a positive test is declared. Furthermore, USADA has adopted the IF rules with respect to the prohibited substances and the definitions of doping to establish a doping offense, which has allowed for the most consistent use of the IF rules with respect to sanctions and doping prosecutions.

Finally, the USOC has also passed aggressive anti-doping policies directly aimed at assisting USADA in its mission to end doping among athletes in the Olympic Movement in the United States. The first policy, aimed at reducing refusals to test by athletes claiming retirement, effectively closes loopholes. Second, the USOC has taken a firm stance regarding athletes who do not update their athlete location information or are not at the location specified on their Athlete Location Form. The athletes now have the responsibility to directly update USADA of their location and now, as mandated by the USOC policy, will be sanctioned for failing to be at the locations indicated on their forms.

¹²⁹ PROTOCOL, *supra* note 36, at § 9(b)(iv).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Michaelis, *supra* note 11 (quoting Dick Pound).

Although the United States was harshly, albeit unfairly, attacked during and following the 2000 Sydney Olympic Games for their perceived ineffective anti-doping program, with the formation of USADA, the United States has moved to the forefront and should continue to lead the world in anti-doping efforts. Not only will the new system increase the effectiveness of the United States anti-doping program, but hopefully the improvements will influence other nations to actively pursue more fair and effective anti-doping programs.