11/18/08

On July 28, 2008 Richard McCormick, President of Rutgers University, requested Mr. Alfred C. Koeppe and Mr. Albert R. Gamper, Jr. to serve as co-chairs of an ad hoc committee to review various matters associated with the operation of the University and its athletics department and report its findings and recommendations to the President and the Chairman of the Board of Governors (Dr. M. William Howard, Jr.) by fall 2008.

Committee Members:

Alfred C. Koeppe, co-chair

Albert R. Gamper, Jr., co-chair

Dennis Bone

Justice James H. Coleman, Jr.

Judge Frederick B. Lacey

Gabriella Morris

Patricia Nachtigal, Esq.

Hollis A. Copeland

Abram J. Suydam

Staff Advisory Support:

Leslie Fehrenbach, Secretary of the University

Jonathan Alger, Vice President and General Counsel

John Wolf, Associate Vice President and Deputy General Counsel

Charge:

The President's Charge focused on recent issues regarding the University's Division of Intercollegiate Athletics (DIA). It directed the Committee to "probe deeply" into those issues, assess the transparency of transactions and information, examine the department's contracts and relationships with sports marketing firms, review the internal control environment within the DIA, and recommend improvements in practices and procedures.

Methodology and Process:

While the Charge's focus was understandably on the DIA, the Committee recognized that a review of DIA's internal control environment should, in order to be complete, include an understanding of the overall governance structure of the University and its effectiveness. The DIA is an important part of the University's structure, not fundamentally different in terms of its obligations from any other department. The

Committee reviewed the roles and obligations of the President, the Board of Governors (Board) and its committees, and the DIA in the existing system of rules, regulations and protocols to identify sub-optimal standards and to recommend positive changes to the DIA and overall governance structure.

The Committee pursued two parallel but interdependent paths:

1. an objective analysis of the factual issues involving DIA; and,
2. an assessment of the effectiveness of the University's governance structure, particularly as it relates to the DIA.

The DIA analysis examined whether internal controls were lacking and whether there was adherence to applicable rules, regulations or standards imposed by the State of New Jersey or by the University through its Chief Executive Officer or its Board.

This aspect of the review involved both document inspection and, where necessary, in-person interviews of the principals who were involved in the relevant incidents described below, either directly or by nature of their position at the University. In order to understand how the governance process functioned, special attention was paid to references in minutes of meetings of the Board and its committees to matters of interest.

The Committee's focus on the University's governance structure and how it operates in practice proceeded from the DIA inquiry but also stood on its own.

Presumably, the governance structure of the University should apply to all of its divisions and departments. To the extent that there are opportunities to improve that structure not only for the DIA but for the University at large, those measures should be identified for consideration.

The composition of the Committee lent itself to these parallel tracks. It was composed of five independent members (those having no current relationship with the University) and four members from the Rutgers Boards of Governors and Trustees.

While all of the Committee members had the experience to address both areas effectively, there were two primary reasons that the initial labors were separated:

1. to ensure both the reality and the perception that the review of DIA was unbiased; and,
2. to capitalize on the institutional knowledge of the present Board members regarding the University's governance structure.

Accordingly, the Committee's independent members took the initial lead on the DIA inquiry while the Board members initially focused their attention on the governance issues. It was also recognized that these parallel tracks were interdependent and lines of communication would need to be open and clear.

The General Counsel of the University (Jonathan Alger) and the Secretary of the University (Leslie Fehrenbach) were the primary contacts between the Committee and the University for all communications and requests. The University extended its full resources to the Committee.

Board Structure and Governance at Rutgers

Historically, the Board of Trustees was the governing body of the University from the time of its founding as Queen's College in 1766 until the Trustees consented to the University's reorganization under New Jersey Law Chapter 61, Law of 1956 (NJSA:18A:65-1 *et seq.*). The 1956 state law (which memorialized the compact between the Trustees of Rutgers College and the State of New Jersey) created a Board of Governors as the governing body of the University. It also provided for the continuation of the Trustees as the Board of Trustees, which was empowered to act in an overall advisory capacity, to exercise certain fiduciary responsibilities over assets of the University in existence before 1956, and to elect five (5) members of the Board of Governors. In addition, the consent of the Board of Trustees is required for the appointment of a new President as well as the securing of debt by the University.

The Board of Governors has general supervision over and is vested generally with the government, control, conduct, management and administration of Rutgers. The Board of Governors delegates to the President and his or her administration specific responsibilities in the management and administration of its policies regarding, among other matters, the organization, administration, and development of the University. The Board of Governors functions through a system of standing committees: Intercollegiate Athletics; Audit; Budget and Finance; Buildings and Grounds; Education Planning and Policy; Executive Compensation, Nominations and Governance; Student Life; and Alumni and University Relations. These committees make recommendations for action to the full Board. The general responsibility of each committee is to advise the Board and make recommendations on matters relative to its designated function as a committee. Members of the Board of Trustees participate on each committee (except for the Committee on Executive Compensation, Nominations and Governance).

With regard to Athletics in particular, for many years there was an Athletics Trustee Advisory Committee (ATAC). It had a limited advisory role under the auspices of the Board of Trustees. The Board of Governors established a Committee on Intercollegiate Athletics in November 2002, which met for the first time in February 2003.

In February 2005, the charge of the Committee on Intercollegiate Athletics was substantially clarified to provide principles and practices as guidelines for the exercise of the committee's responsibilities. In relevant part, it reads as follows:

> The Committee shall provide oversight and broad policy formulation in intercollegiate athletics in a manner consistent with oversight of other units of the institution.
>
> The Committee shall protect the fiduciary responsibilities of the Board of Governors, which is ultimately responsible for ensuring that the athletic program reflects the institution's educational mission and values. In order to protect the fiduciary responsibilities of the Board of Governors, the

Committee will receive reports from the Director of Intercollegiate Athletics on critical personnel and operational matters, including significant contracts or amendments thereto. These reports will include significant changes in the terms of the employment contracts (salary, length, etc.). Significant change shall mean changes other than those that take place in the ordinary course of business (e.g., normal University salary program, benefits, expenses, minor details or interpretations).

In particular, the Committee will have the opportunity to meet the finalist for appointment as coach of each of the three so-called “revenue” sports (i.e., men’s and women’s basketball, and football), and will be kept apprised of the contracts (and any related amendments thereto) of these particular head coaches. The committee will also be kept apprised of any other contracts with major financial implications for the athletics program and the University.

The Committee will be consulted by the President and others with regard to overall goals for the university’s athletics program, and will receive annual reports with regard to the progress achieved toward those goals.

Overview

As a threshold matter, it should be noted that even though the University’s overall performance is strong and admirable in many categories, there has been a series of very critical press articles involving the DIA. In particular, *The Star-Ledger* has published articles about particular decisions and transactions related to the DIA. This report is not intended to be a point-by-point analysis of the assertions in those articles, but rather an independent inquiry with a focus on understanding the facts and identifying possible areas for improvement in University policies, practices and governance.

Like other major research universities, Rutgers University is a large, complex, decentralized institution with many different components. Given its complicated structure and multi-faceted mission, perceived weaknesses in the structure and governance of the institution have surfaced in the past (see for example the recent report of the State of New Jersey Commission of Investigation on public higher education) and remedial actions have been implemented. There is no question, however, that the changing culture of a rapidly developing National Collegiate Athletic Association (NCAA) Division I Sports program has placed additional stress on the system.

In recent years intercollegiate athletics have come to occupy an increasingly more prominent role at Rutgers University. Rutgers has long been regarded as an excellent public research university, and it is now developing a more prominent athletics reputation in line with other highly rated comprehensive public research universities. As a strategic matter, over the past decade the University has decided that carefully targeted investments in athletics can increase the visibility of the institution and therefore shed light upon the University’s many fine academic programs and research initiatives.

The University points out that when over 40,000 fans fill every available seat in Rutgers Stadium for a home football game, a spirit of energy and unity captures the University community as well as the State.

It should be noted, however, that this emphasis also has its risks—the principal one being that when individuals who are not aware of Rutgers' many extraordinary academic and programmatic achievements think of the University, it is often in terms of its intercollegiate athletics programs. To the extent that such programs further the positive image of the University and enhance opportunities for students, they are beneficial. When those programs are the subject of negative publicity, such publicity can be potentially harmful to the institution as a whole.

This risk is not unique to Rutgers. The role of intercollegiate athletics in a university is a prime and recurring topic of analysis. One observation in that regard posits that because an athletics department has strong external constituencies (boosters, legislators, alumni), its connection to internal university authority can become attenuated. This tendency toward independence is facilitated both by the culture of organizational autonomy treasured in a university structure and by the fact that athletics departments have little dependence on other departments in the university.

The possibility that this disconnected relationship is, or could be, the case for Rutgers highlights the need for effective internal control in the governance and operation of its increasingly high-profile athletics program and is, in fact, the genesis of this request to this Committee by the President.

It is helpful to understand the purpose and importance of internal controls. For Rutgers, like other institutions, the system of internal control is designed to provide reasonable assurance that operations will proceed effectively and efficiently, that financial reports are reliable and that processes and procedures comply with applicable laws, regulations and internal policies.

For those within a university, the presence of clear rules defines the limits of accountable (and non-accountable) decision-making. For those outside of a university, open access to relevant information (transparency) provides the foundation for understanding and judging the quality of those decisions.

But even the most thoughtful system of controls can be jeopardized if individuals are free to ignore or to override them, or if top management fails to enforce them. While some officers of the University have higher levels of responsibility than others (the Chief Financial Officer, Internal Auditor and General Counsel, for example), and the Board has a crucial oversight role, ultimate accountability for establishing, maintaining and monitoring a system of internal controls, and the setting of an accountable tone-at-the-top, rests with the President.

With this in mind, each of the three issues noted below will be discussed in terms of its factual basis; the relevant laws, rules regulations and standards in place at the time; and the role of the Board, the President, the DIA, and other involved University departments. Involvement by the Board of Governors or Trustees, Board committees, or senior management at the time of the events discussed is noted where this Committee was able to find evidence of it.

Any violations or shortcomings in resources, judgment, leadership or governance in the particular instances reviewed will be identified and remedial actions to address root causes will be recommended.

The Initial Nelligan Sports Marketing Contract and Its Extensions

I. <u>Nelligan solicited Rutgers in 1999-2000</u>

During the Fall of 1999, T.J. Nelligan, principal of Nelligan Sports Marketing (Nelligan) and a former employee of Host Communications (a sports marketing company), contacted Robert E. Mulcahy III, Athletics Director (AD), to determine the University's interest in engaging Nelligan as its sports marketing provider. During this period, Mr. Mulcahy spoke with other sports marketing companies (including Host Communications) and conferred with other Big East institutions that used Nelligan for their sports marketing services. Mr. Nelligan presented at least two proposals to Mr. Mulcahy in January 2000.

With respect to Mr. Mulcahy's authority to enter into these discussions, it is relevant that his appointment letter in 1998 stated that he had "responsibility for the entire Division of Intercollegiate Athletics at Rutgers-New Brunswick, including all administrative and budgetary responsibilities." The appointment letter further stated that his "immediate budget supervisor will be the Senior Vice President and Treasurer, Mr. Joseph P. Whiteside" and that "[o]n all other matters, including the replacement of coaches, your direct reporting line will be to the President."

There was no legal requirement for Rutgers to issue a formal Request for Proposal (RFP) for these marketing services. <u>Rutgers v. Kugler</u>, 110 <u>N.J.</u> <u>Super.</u> 424 (Law Div. 1970), <u>affirmed</u>, 58 <u>N.J.</u> 113 (1971), cited later by <u>Fine v. Rutgers</u>, 163 <u>N.J.</u> 464, 470 (2000) ("public bidding statutes do not apply to Rutgers because Rutgers was not subject to those statutes before the enactment of the Rutgers law"). There also was no clear internal policy requiring competitive bidding for this service. While the University's Procurement Department (which was an area for which the Senior Vice President and Treasurer was responsible) had a policy, it was couched in the context of the procurement of goods (commodities, equipment, supplies, and the like), rather than services. For example, in a section called "Bidding Procedures," the policy said that the bids should specify "brand name, model number or other means of identifying the merchandise the bidder proposes to furnish." The only service identified in the policy is the service of equipment. Therefore, it is not at all clear that this policy even applied to the selection of Nelligan.

However, even if this policy were deemed to be applicable to the acquisition of services of the type provided by Nelligan, there was no requirement that the University employ a formal bidding process. The Senior Vice President and Treasurer was authorized to waive the policy's bidding procedures where the goods or services were so unique that no competitive sources were available. In this case, at the time Nelligan was selected only a handful of companies provided collegiate sports marketing services. Nelligan was headquartered in New Jersey, and was the only such company in the Northeast. There was little interest in the Rutgers athletics program at the time. As noted earlier in this section, the AD spoke with other sports marketing companies and with other Big East institutions that were using Nelligan. The AD ultimately concluded that the financial arrangements proposed by Nelligan were the most favorable to Rutgers.

It is unclear whether then-President Fran Lawrence was aware of Mr. Mulcahy's early contacts with Host and Nelligan, but it is known that Mr. Whiteside endorsed the proposed relationship with Nelligan.

There is no record of Board or Office of General Counsel (OGC) involvement when the University was considering entering into an agreement with a sports marketing company. As noted in Section III below, in 2001 the Senior Vice President and Treasurer executed the University Rights Agreement on behalf of Rutgers.

II. On February 21, 2000 Mr. Mulcahy signed a Letter of Understanding with Nelligan

Rutgers, by Mr. Mulcahy, and Nelligan signed a letter of understanding dated February 21, 2000 for a 3-year sports marketing engagement with "an option for an additional three (3) years based upon achieving mutually agreed to revenue objectives." Nelligan agreed that Rutgers would retain all of the sponsorship revenues up to the amount of the revenue base that existed prior to entering into the agreement with Nelligan, which was estimated to be $1,589,000 (later adjusted to $1,530,000). Nelligan's expenses based upon a mutually agreed upon budget were to be paid from these revenues, and Nelligan would be entitled to all revenue up to $150,000 above the pre-Nelligan revenue base of $1,530,000. The parties would split the revenues thereafter based upon agreed-upon percentages at various revenue levels.

Mr. Mulcahy's authority to execute the letter on Rutgers' behalf appears to be consistent with the scope of his authority defined in his appointment letter. Indeed, Mr. Mulcahy frequently signed contracts on behalf of Rutgers, as did his predecessor, Athletics Director Fred Gruninger. There is no record of Board involvement nor is there any evidence of involvement by OGC prior to the execution of the February 21, 2000 letter. However, on February 29, 2000 the minutes of the meeting of the ATAC of the Board of Trustees reflect that there was a discussion of the hiring of Nelligan as the University's sports marketing firm. President Lawrence and Mr. Whiteside were present at this meeting.

III. DIA requested OGC to review the proposed agreement with Nelligan in April 2000

Following execution of the February 21, 2000 letter of understanding, Nelligan submitted to Mr. Mulcahy a draft of the proposed contract on March 22, 2000.

The April 18, 2000 minutes of the meeting of the ATAC reflect that the Associate Director of Sports Marketing (Mr. Kevin MacConnell, now Deputy Athletics Director) addressed the selection of Nelligan and some of the University's expectations in the area of sports marketing. Mr. Whiteside was in attendance.

DIA forwarded a proposed contract to OGC for the first time on April 27, 2000. This was the first knowledge OGC had of the marketing arrangement, even though Nelligan began providing sports marketing services to Rutgers in early April 2000.

Beginning in May 2000, OGC reviewed the proposed agreement in consultation with several other University offices. OGC prepared several memoranda concerning contractual issues; however the reviewing process was delayed because of the time it took Nelligan to respond to these issues. OGC discussed the proposed agreement with Mr. Whiteside, who on May 9, 2000 stated that he wished to proceed with the agreement and that the President and the ATAC were of that mind. The ATAC was chaired by then Board of Trustees Vice Chair Ron Giaconia. The Chair of the Board of Governors (then Rich Levao) was an ex officio member of that Committee.

There is no recording of the ATAC's endorsements in the minutes of that committee and no record of any discussion of this matter before the full Board. However, the October 4, 2000 minutes of the ATAC meeting do refer to the work Nelligan was doing for Rutgers. Then Senior Vice President and Treasurer JoAnne Jackson, Mr. Whiteside's successor, was present at this meeting. (Ms. Jackson commenced employment October 2, 2000; Mr. Whiteside's last day of work was October 16, 2000.) It was not until April 18, 2001 that Ms. Jackson executed, on behalf of Rutgers, an exclusive three (3) year (April 1, 2000 to June 30, 2003) sports marketing agreement with Nelligan that we hereafter refer to as the University Rights Agreement.

IV. Amendments were made to the University Rights Agreement in 2002

On November 27, 2002 Mr. Mulcahy and Nelligan signed a letter amending the University Rights Agreement to address the situation of Nelligan securing multi-year sponsorship agreements on behalf of Rutgers where the term of those sponsorships would extend beyond the term of the University Rights Agreement. The November 27, 2002 letter also referenced the provisions of the April 18, 2001 University Rights Agreement that provided that if $2.3 million in revenues was achieved, the University Rights Agreement would be automatically extended (see March 18, 2003 entry below).

The November 27, 2002 letter also referenced the provision of the April 18, 2001 University Rights Agreement that the parties intended to negotiate with respect to a new agreement. The November 27, 2002 letter stated that if the University Rights Agreement was not automatically extended and not extended by way of negotiations, then Nelligan could, during the term of the agreement, enter into multi-year sponsorship agreements that extended beyond its term. Both the November 27, 2002 letter and the later mentioned August 7, 2003 letters also contain an amendment to the University Rights Agreement that provides that with respect to any of Rutgers' sponsorship agreements that existed prior to the Rutgers-Nelligan relationship, if those agreements were renewed, Nelligan would be entitled to 30% of the revenues above the annual revenues received during the last year of the agreement negotiated by Rutgers.

There is no record in the minutes of any meeting of the Board of Governors, or of the ATAC of their involvement in this amendment, nor is their any evidence of its review by the President, OGC or other University executives.

V. <u>On March 18, 2003 the University Rights Agreement was extended</u>

On March 18, 2003 Ms. Jackson signed a letter dated January 17, 2003 acknowledging the automatic extension of the University Rights Agreement through June 30, 2006. The University Rights Agreement contained a provision for an automatic three (3) year extension if revenues exceeded $2.3 million.

There is no record in the minutes of the full Board or of the ATAC indicating that either of these bodies was apprised that Nelligan had achieved the revenue level necessary for automatic extension of the University Rights Agreement, nor is there any evidence that OGC was so informed.

VI. <u>On August 7, 2003 the University Rights Agreement was amended</u>

On August 7, 2003 Mr. Mulcahy and Nelligan amended the University Rights Agreement to address the situation of Nelligan securing multi-year sponsorship agreements on behalf of Rutgers where the term of a sponsorship agreement would extend beyond the term of the University Rights Agreement. The letter sets forth the amounts that Nelligan would receive from any such sponsorship agreement if Rutgers were not to renew the University Rights Agreement. This is the same agreement that is reflected in the November 27, 2002 letter described in Section IV. There is no information that explains why Mr. Mulcahy signed two letters containing the same agreement. There is no record of the involvement of the President, OGC or the Board in this matter.

VII. <u>On April 28, 2004 the University Rights Agreement was extended</u>

On April 28, 2004 Mr. Mulcahy and Nelligan signed an Addendum to the University Rights Agreement extending the University Rights Agreement through June 30, 2017.

The Addendum provided that Nelligan would purchase and install a scoreboard and other equipment in the football stadium. DIA was of the view that a new scoreboard was needed because the old one was antiquated and had no replay capability. Unable to identify funding within the University, DIA entered into an agreement with Nelligan whereby revenue generated from scoreboard advertising would not be part of the calculation of gross revenues for purposes of calculating royalty payments to Rutgers until the cost of the scoreboard was paid off.

OGC advised DIA on the drafting of the Addendum and was informed by DIA that the extension of the University Rights Agreement was linked to the fact that it would take some period of time for Nelligan to pay off the scoreboard. The Addendum also modified the commission schedule of the University Rights Agreement such that the University would receive a greater share of revenues above the $3,000,000 level than provided for in the original University Rights Agreement.

Mr. Giaconia (Chair of the Board of Governors' newly formed and strengthened Committee on Intercollegiate Athletics) apparently knew of this arrangement and the March 5, 2004 meeting minutes of that Committee reflect that it was reported that a new scoreboard would be installed. Mr. Giaconia also mentioned this at the Committee's meeting of October 12, 2004. The minutes reflect that it was reported that Nelligan would purchase the scoreboard and pay for it with sponsorship revenues from the scoreboard.

Summary

Mr. Mulcahy's appointment letter of 1998 vested him with the "entire" responsibility for Rutgers University Athletics with direct line accountability for "budget" matters to the Treasurer and to the President for all "other" matters.

During this period (2000-2004) Mr. Mulcahy engaged in negotiations and reached agreement with Nelligan on four occasions (February 21, 2000; November 27, 2002; August 7, 2003; and April 28, 2004).

In entering into all of these agreements on behalf of Rutgers University, Mr. Mulcahy was acting within the scope of his authority, consistent with prior practices and consistent with applicable laws. Importantly, while the initial contract and successive amendments were not competitively bid, there was neither a legal obligation nor clear internal policy requiring him to do so.

Mr. Lawrence and Mr. Whiteside were involved in the February 21, 2000 agreement prior to its execution and Ms. Jackson executed the University Rights Agreement on April 18, 2001. There is no record of any executive review of the November 27, 2002, August 7, 2003 and April 28, 2004 agreements, which were executed by Mr. Mulcahy.

The minutes of the Board and related Athletics Committee meetings reveal that the Athletics Committee was made aware of the University's commitment to use a sports marketing firm (as evidenced by the February 21, 2000 letter signed by Mr. Mulcahy) about one week after the letter was signed and that the Committee was made aware of the plan to install a new scoreboard almost eight weeks before the April 28, 2004 agreement was executed. There is no additional record of Board involvement on any of these matters.

The records also show that OGC became aware of the February 21, 2000 agreement only after it was signed by Mr. Mulcahy. OGC was not involved in the November 27, 2002 and August 7, 2003 agreements at any point. It did discuss the April 28, 2004 agreement with Athletics before it was executed and did advise on the language of the agreement, but not the terms.

There are a number of points to be made here:

It would have clearly been the better path if Mr. Mulcahy's 1998 appointment letter had, in its grant of authority, described the manner in which that authority was to be exercised. This was not the case, however, and it did not identify situations where either President or Board review and approval would be required. In retrospect, the vesting of Mr. Mulcahy with this level of authority set the stage for much of what follows in this report.

It may have been the expectation, at the time, that Mr. Mulcahy's dual direct reporting accountability to the Senior Vice President and Treasurer and to the President was adequate to ensure thoughtful inter-departmental consideration of significant matters and that the President and Senior Vice President would recognize those issues which suggested or required Board consideration. In fact, what occurred some time after 2002 was that senior executive management became less involved in Rutgers Athletics and that Mr. Mulcahy's exercise of unilateral decision-making increased. This, coupled with the failure to prescribe initial internal controls and the absence of a well-defined and well-documented contract review and approval process rendered Mr. Mulcahy's decisions, regardless of their wisdom, subject to criticism after the fact.

With respect to the Board, senior management's failure to solicit the Board's involvement or approval deprived the Board of the opportunity to exercise its proper oversight role. Complicating this situation was the failure of Board committees to bring contract matters (on those occasions when they were aware of them) to the attention of the full Board of Governors. It should be noted that for most of this period (1999-2004), the Athletics committees of the Board of Trustees and of the Board of Governors had limited charters.

Finally, the failure of the University to establish controls (through standards or by the exercise of senior executive authority) might have, or could have, been viewed by Mr. Mulcahy and others in the University as tacit endorsement of an increasingly insular manner of doing business.

All of this is helpful in understanding the following section.

The Engagement of Coach Schiano and Various Agreements Thereafter

VIII. In December 2000 Rutgers engaged Coach Schiano as its head football coach

On December 7, 2000 Mr. Mulcahy, for Rutgers, and Coach Gregory Schiano signed the Coach's initial Employment Agreement, for the term of December 1, 2000 to January 15, 2006. Coach Schiano's duties included the following: cooperation in the production and marketing of radio and television shows as well as cooperation in efforts to secure sponsors and financial support. The contract also permitted Coach Schiano, subject to

University approval, to engage in outside commercial endorsements that he secured on his own and to retain that income to be paid directly to him.

The negotiation and execution of this contract would seem to be within the broad scope of authority granted to Mr. Mulcahy in 1998. Mr. Mulcahy had conversations regarding candidates and salary levels with President Lawrence and Mr. Whiteside as well as with the then Chair of the Board of Governors, Kevin Collins, all of whom endorsed the selection of Coach Schiano.

There is no record in the minutes of full Board consideration.

IX. <u>On January 17, 2003 the term of Coach Schiano's contract was extended from January 15, 2006 to January 15, 2008</u>

This extension was discussed by Mr. Mulcahy, Coach Schiano and incoming President McCormick (who became President on December 1, 2002). The context here is the following: penalties in the form of a loss in scholarships had been imposed by the National Collegiate Athletic Association (NCAA) on the football program as a result of NCAA rules infractions by the Athletics Department that preceded Coach Schiano's employment. One of the considerations by Mr. Mulcahy and President McCormick in extending the contract was that the Coach would be provided a fair chance to succeed.

There is no record of Board involvement in this extension.

X. <u>On February 28, 2006 Rutgers and Coach Schiano extended the January 17, 2003 Employment Agreement</u>

Following a meeting in December 2005 of Mr. Mulcahy, Vice President for Administration Karen Kavanagh, and Executive Vice President for Academic Affairs Phil Furmanski, in an agreement by Mr. Mulcahy and Coach Schiano signed on February 28, 2006, the term of Coach Schiano's contract was extended from January 15, 2008 to December 31, 2012, and other contract terms were modified. The Coach's duties described in the initial Employment Agreement of December 7, 2000 remained unchanged. This extension was discussed by the AD and the President, but there is no record of involvement by the Board.

XI. <u>In December 2006 Rutgers and Coach Schiano again entered into negotiations leading to another contract extension</u>

Rutgers had finished the 2006 football season ranked 12th nationally and had appeared in its second consecutive bowl game. The University informed us that it had been advised and believed that Coach Schiano had been approached by two other major universities regarding their head football coaching vacancies.

Beginning in December 2006 Rutgers representatives and Coach Schiano's representatives began negotiating another amendment to this contract.

The Board’s Athletics Committee was made generally aware of these renegotiations on November 30, 2006 at a meeting chaired by Mr. Giaconia, then Vice Chair of the Board of Governors. President McCormick and Vice President and General Counsel Alger attended this meeting. The minutes of the meeting reflect a discussion of employment contracts:

> Mr. Mulcahy reviewed with the committee the status of the employment contracts of Coach Stringer and Coach Schiano. He discussed possible adjustments to their contracts and the committee agreed with the approaches suggested by Mr. Mulcahy.

No further details are recorded in the minutes.

XII. <u>Stadium expansion issues were raised for the first time by Mr. Mulcahy with OGC during the negotiations in December 2006</u>

Some time on or before December 4, 2006, Mr. Mulcahy asked OGC to prepare draft letters to Coach Schiano concerning the University’s enlargement of the seating capacity of the stadium. The OGC prepared four versions of a letter on December 4, 2006. Each version stated that the University desired to enlarge the seating capacity of the stadium in the event 23,000 paid full season tickets for football games at Rutgers were sold. The letters also made reference to the exercise of the University’s best efforts to create additional seating, either by enclosing the open end of the stadium or by enlarging other seating areas.

It is important to note, because these issues later were linked together, that none of these letters contained an unqualified promise by Rutgers to enlarge the stadium and none linked the expansion of the stadium to the liquidated damages clause in Coach Schiano’s contract (see XIII below).

XIII. <u>A liquidated damages clause was included in Coach Schiano’s contract when he was first hired on December 7, 2000 and also included in the February 28, 2006 Employment Agreement Extension</u>

Coach Schiano’s initial Employment Agreement contained a liquidated damages clause. This "buyout" clause provided that, because it would be difficult to assess the damages suffered by the University were Coach Schiano to terminate the contract prior to the conclusion of its term, he would be obligated to pay Rutgers a fixed amount of money if he terminated his employment between March 1 and prior to the end of that year's football season.

A different liquidated damages clause was included in the February 28, 2006 Extension which also contained a clause that linked the Coach's “buyout” to the parties’ discussions about a housing arrangement. The “buyout” payment provision would apply only if the University and Coach Schiano reached agreement on a housing arrangement—which they did. This was the first appearance of the concept of linking a University obligation to the "buyout" sanction.

XIV. A term sheet on the next contract extension was signed on December 5, 2006

On December 5, 2006 the National Football Foundation held a dinner function in New York City at which Brian Leonard, a Rutgers football student-athlete at the time, was one of the honorees. This event was attended by Mr. Mulcahy; Deputy Athletic Director Kevin MacConnell; Coach Schiano and his agent Bryan Harlan; Mr. Giaconia; President McCormick; and other Rutgers representatives.

Mr. Mulcahy apparently was led to believe he had to act quickly to ensure that Rutgers would not lose Coach Schiano's services to another university, having heard that day that Coach Schiano had met with representatives of another major university, presumably (according to Mr. Mulcahy) to discuss that institution's head football coaching opportunity. During the afternoon of December 5, prior to the dinner, Mr. Mulcahy met with Mr. Schiano and his agent Mr. Harlan (as did Mr. Giaconia), although President McCormick (who was at the dinner) did not meet with Mr. Harlan.

Mr. Mulcahy stated that he and Agent Harlan signed a term sheet some time after Mr. Giaconia met with Agent Harlan. Mulcahy also stated that he believes President McCormick was briefed before the term sheet was signed; however, it is unclear what level of detail was provided by Mr. Mulcahy to President McCormick. The President does not recall a conversation on this issue and did not see the term sheet at that time.

Below is a typed version of the term sheet dated December 5, 2006 that reflects the terms of the revision of Coach Schiano's contract as agreed to by Mr. Mulcahy and Mr. Harlan. These are the 2007 amounts in thousands:

salary	450
guarantee	500
FB supplement	400
longevity	250
house	100
camp	250
total	1950

It is noted that while there is no reference on the term sheet to third-party compensation, there are handwritten notes of Mr. Mulcahy at the bottom of the term sheet regarding the expansion of the football stadium, but without linking the expansion to the "buyout" provision of Coach Schiano's contract. The handwritten notes read as follows:

Stadium

1. Time frame

    Have plan & design

with dates-

2. Dates phase I-Club Seats

   Phase II-

   Phase III-End zone permanent

   seats-

XV. <u>The full Board of Governors was briefed on the contract extension discussions on December 6, 2006</u>

As previously noted, Mr. Giaconia (Chair of the Board's Athletics Committee) had met with Coach Schiano's agent on December 5, 2006. The next day he reported to the full Board of Governors that the details of a proposed contract extension with improvements to the contract were being finalized by the parties.

Mr. Giaconia pointed out that approximately 90% of the funding for the proposed enhancements would be derived from outside of the University through corporate sponsorship and private donations.

Notably, there was no reference to linking the stadium expansion to the "buyout" provision of the Coach's contract.

XVI. <u>On or about December 20, 2006 Mr. Mulcahy informed OGC that the "buyout" provision in Coach Schiano's contract would be linked to the stadium expansion issues and asked that a letter ("Side Letter February07") be drafted for that purpose</u>

On December 20, 2006, OGC furnished Mr. Mulcahy with a draft version of a new amendment to Coach Schiano's contract (i.e., Addendum I), discussed more fully below in section XIX.

It is important to note that this new contract amendment, Addendum I, as eventually signed on February 16, 2007, did not contain language about the stadium expansion or about linkage to the "buyout," although OGC had been informed about Mr. Mulcahy's agreeing to the linkage of stadium issues to the "buyout." Over the next couple of months (December 2006-February 2007), the AD worked with OGC on Side Letter February07, which linked proposed stadium improvements to the "buyout."

XVII. <u>On or about January 17, 2007, OGC provided a copy of the draft Addendum I and the proposed Side Letter February07 to Jeffrey Apfel, Senior Vice President for Administration and Chief Financial Officer of the University</u>

In a series of communications to OGC, with copies to the President and other University executives, Mr. Jeffrey Apfel, the Chief Financial Officer (CFO) of the University, noted that he was unaware of the stadium expansion commitment until he read it in the drafts of proposed Side Letter February07, and criticized the University for failing to involve the Budget and Finance Chair and Committee as well as the full Board in the proposed terms of Side Letter February07, including its proposed linkages to the Coach's buyout clause.

Mr. Apfel and President McCormick discussed these issues, but Mr. Apfel's opinions and observations were not brought to the attention of the Board.

XVIII. During the negotiations on Addendum I, it was proposed that Nelligan contribute to the Coach's compensation

During negotiations over the contract extension and compensation improvements for Coach Schiano that ultimately resulted in Addendum I, the Coach's representatives broached the subject of Coach Schiano entering into a personal services agreement with Nelligan. Specifically, they suggested that a portion of Coach Schiano's compensation "come through" Nelligan in order to achieve certain tax advantages and in order to avoid highlighting the overall value of his new compensation package.

DIA has reported that the President was made aware of this proposal and its rationale, but the President has no recollection of that discussion and the Board's minutes do not discuss this issue.

XIX. On February 16, 2007 Rutgers and Coach Schiano signed Addendum I to the February 28, 2006 Employment Agreement Extension (Addendum I)

The final draft of Addendum I was sent by OGC to Mr. Mulcahy and Agent Harlan on February 2, 2007, and on February 16, 2007 it was executed. Of note, there is no record of a report on the status of the contract negotiations in the minutes of the February 8, 2007 meeting of the Board's Athletics Committee.

Addendum I extended the Coach's contract from December 31, 2012, to December 31, 2016, and supplemented other terms. Of note**,** the compensation package in Addendum I was structured as follows, different from that set forth in the term sheet:

The term sheet set forth the following (in thousands):

salary	450
guarantee	500
FB supplement	400
longevity	250
house	100
camp	250
total	1950

The February 16, 2007 Addendum, however, was structured as follows:

base salary	450
extra compensation	500
football supplement	550
longevity incentive	100
loan forgiveness	100
total	1700

The University's Press Release of February 16, 2007 announcing Addendum I read as follows:

> Rutgers University and head football coach Greg Schiano have agreed to a four-year contract extension that will run through the 2016 season, it was announced today by Director of Athletics Robert E. Mulcahy III. Under the new contract, Schiano's compensation will increase to $1.5 million per year.
>
> Increased financial resources generated by the football program, including corporate sponsorships and record ticket sales, will fund the contract increase.
>
> The four-year extension also includes three elements that reward longevity and show a mutual commitment by Rutgers and Schiano including a house loan funded by private donations and annual longevity bonus for Schiano. The contract also includes a buyout, which begins at $1 million.

The $1.5 million annual compensation referenced in the press release seems to be a product of the $1.95 million overall compensation reduced by the longevity incentive ($100,000), forgiveness of the Coach's house loan ($100,000), and the prospective Nelligan Personal Services Agreement, discussed in sections XXII and XXIII ($250,000).

It should be noted, given the representations in the Press Release, that the University later guaranteed the "Nelligan" payment to the Coach (see XXIII).

XX. <u>The liquidated damages clause contained in Addendum I was referenced in proposed Side Letter February07</u>

The "buyout" clause in Addendum I set forth an amount that Rutgers would receive if Coach Schiano were to terminate his contract prior to its expiration. The amount varied depending upon when the termination occurred.

As requested by Coach Schiano's agent, Mr. Harlan, Mr. Mulcahy, on behalf of Rutgers, committed in Side Letter February07 to the Coach that a series of improvements would be made to the stadium and that the "buyout" and liquidated damages clause in Addendum I would be void if the stadium improvements were not fulfilled. President McCormick was aware of this proposed agreement. There is no record of Board involvement.

XXI. Side Letter February07 regarding stadium improvements with linkage to the "buyout" clause in Addendum I was signed by Mr. Mulcahy

Side Letter February07 Side Letter contained signature lines for both Mr. Mulcahy and Coach Schiano. It appears that on or about February 19, 2007 Mr. Mulcahy signed it and, as provided in the document, gave it to Coach Schiano to sign, thus apparently concluding the agreement on the terms the Coach had requested. Clearly, President McCormick had this understanding (but see section XXV below).

XXII. Mr. Mulcahy signed an undated Addendum II to the University Rights Agreement

Sometime in early 2007, logically after or coincident with the execution of Addendum I, Mr. Mulcahy signed an undated Addendum II to the University Rights Agreement. Addendum II provided that Nelligan agreed to pay $250,000 of royalties (that Rutgers would otherwise have received) to Coach Schiano or his LLC.

Paragraph 2 of this agreement requires Nelligan to provide Rutgers with an accounting of the royalties collected and specifies that the $250,000 shall be paid to Schiano's LLC "until otherwise instructed in writing by Rutgers University."

There is no record of Board involvement in this matter.

XXIII. Nelligan entered into a Personal Services Agreement with the Coach and the University guaranteed the payment terms

Completing the chain of contracts here: Coach Schiano and Nelligan entered into a Personal Services Agreement on April 30, 2007 by which Nelligan agreed to pay $250,000 to Schiano or his LLC in exchange for "the services of Schiano for promotions, endorsements and personal appearances in conjunction with Broadcasts, Programs and other Covered Activities as permitted under the University Rights Agreement."

The Personal Services Agreement further specifies that "any personal services required to be performed by Schiano shall be consistent with his employment agreement with the University."

While Rutgers was not a signatory to this agreement, two months later in a July 2, 2007 letter from Mr. Mulcahy to Coach Schiano, Rutgers guaranteed the payment of the $250,000 in the Personal Services Agreement.

There is no record of Board involvement in this matter.

XXIV. On February 27, 2008 the Internal Audit Department (IAD) of Rutgers University released its Audit Report on the control environment at DIA

On February 27, 2008 the Internal Audit Department (IAD) of Rutgers University released its Audit Report on the control environment at DIA which included, among other critical findings, observations on Nelligan's administration and accounting practices as they related to royalty payments—which were the source of Nelligan's contribution to the Coach's compensation.

Internal Audit recommended, among other things, that the University execute its right to audit Nelligan's accounting settlement statement and related records as provided in the Nelligan contract; and consider terminating the head football coach's personal consulting arrangement with Nelligan and add his $250,000 compensation as a payroll expense directly on Rutgers' books.

DIA agreed that IAD should conduct an audit of Nelligan's royalty settlements, and suggested that the recommendations on the Coach's personal consulting agreement be discussed with the President, the AD and the General Counsel.

On June 26, pursuant to a request by the Audit Committee of the Board, OGC engaged KPMG (the University's external auditor) to conduct a contract compliance review of Nelligan. This engagement includes a thorough review of the accounting and reporting systems for the recording of revenues and the calculation of royalties pursuant to the University Rights Agreement. It also includes an on-site inspection of transactions to determine whether there are instances of non-compliance. On October 23, 2008 the scope of that review was expanded, so as to include additional transactions entered into by Nelligan at the request of Rutgers, as well as barter transactions.

XXV. <u>Eighteen months after Side Letter February07 was signed by Mr. Mulcahy, it was learned that Coach Schiano had elected not to sign it</u>

On July 21, 2008 OGC received a phone call; both Mr. Mulcahy and Coach Schiano were on the line. Together they told OGC that the Coach had never signed Side Letter February07, and that the Coach had decided not to do so. Over the course of the period between February 2007 and July 21, 2008, President McCormick had not been informed that Coach Schiano had not signed Side Letter February07.

On July 22, 2008 a *Star-Ledger* reporter telephoned President McCormick while he was in California. In the course of the conversation, the reporter asked about an arrangement linking possible stadium expansion to the liquidated damages in Coach Schiano's buyout clause. President McCormick of course knew about Side Letter February07 and was aware it had been signed by Mr. Mulcahy. He was not aware that it had not been signed by Coach Schiano. He assumed that it was contractually binding on the parties, and indicated to the reporter that there was such a contract, explaining what was done was to ensure that the University would not lose Coach Schiano's services. He subsequently learned that, in fact, it had not been signed by Coach Schiano.

Mr. Mulcahy explained that after he saw the story in the *Star* Ledger of July 23, 2008, he was contacted by the press for reaction. On that day, Mr. Mulcahy issued a statement indicating as follows:

> As President McCormick said yesterday, during contract negotiations following the 2006 season, there were numerous discussions and drafts relating to the continued development of the football program including the stadium project. In

> good faith, all parties agreed to move forward on these matters in a timely manner and thus no documents, other than the ones already released, were executed.

On September 16, 2008, OGC spoke with Agent Harlan regarding the status of Side Letter February07. Harlan stated that while the parties talked about the side letter, it was deemed not necessary because Rutgers was moving ahead in good faith with the stadium expansion project, and in the scheme of things the “buyout” amount was too small to be of any consequence.

It was also the case that Side Letter February07 had long since become outdated in part due to the reference to luxury boxes—which had at one time been discussed but which were removed from the stadium expansion plan long before it was approved by the Board of Governors.

Summary

During this period (2000-2008) there were four contracts executed between the University and Coach Schiano: the initial Employment Agreement of December 12, 2000 and three contract extensions—January 17, 2003; February 28, 2006; and February 16, 2007 (Addendum I). Senior management (the President, Treasurer, or Executive Vice President for Academic Affairs) was involved in all of these contracts.

There is no record in the minutes of the full Board of its consideration or approval of any of these contracts. The Chair of the Board was aware of the initial Employment Agreement and there are entries that refer to a briefing by the Chair of the Athletics Committee to the full Board early in the development of Addendum I.

There also was a side letter linking the Coach’s “buyout” clause to the expansion of Rutgers Stadium signed by the AD but not by the Coach (Side Letter February07). Senior management was aware of Side Letter February07 (President, Chief Financial Officer, Associate Vice President for Finance, Vice President for University Budgeting, and Executive Vice President for Academic Affairs).

In an email exchange with the OGC on which members of senior management were copied, the CFO was critical of the contract process itself, the underlying financial analysis and the lack of Board involvement.

There is no record that the CFO’s concerns were brought to the attention of the Board nor is there any record of Board consideration or approval of Side Letter February07. We have been informed that the Board first learned of its existence when it was the subject of a newspaper article on July 23, 2008. The President first learned that Side Letter February07 had not been signed by the Coach immediately thereafter, at the same time as the Board.

There also was a contract executed between Mr. Mulcahy and Nelligan in early 2007 providing that Nelligan would agree to pay the Coach $250,000 out of the royalty fees otherwise to be paid to the University (Addendum II).

There is no record that the Board or its Committee on Intercollegiate Athletics reviewed or approved this arrangement.

On February 27, 2008 the Internal Audit Department (IAD) of Rutgers University released its Audit Report on the control environment at DIA which included, among other critical findings, observations on Nelligan's administration and accounting practices as they related to royalty payments—which were the source of Nelligan's contribution to the Coach's compensation.

Finally, two months after a personal services contract for $250,000 was executed between Coach Schiano and Nelligan on April 30, 2007, a letter was signed by the AD on July 2, 2007 wherein Rutgers guaranteed those payments.

There is no record that the Board was informed of the letter's existence.

It is clear from the review of the Schiano contract matters in this section, summarized above, that the trajectory set by the initial broad grant of authority to the AD without well-defined controls and clear guidelines; an uninformed Board on certain critical matters; and passive involvement by the President created an increasingly problematic environment for appropriate levels of engagement and accountability in the review and approval of certain significant decisions involving intercollegiate athletics. There is also no question but that the pace of a growing athletics program added to this situation.

For example: the absence of a disciplined contract development, review and approval process, coupled with the DIA's perceived need for expedient processing, created situations where the DIA's election to use less precise (and more subject to interpretation) "Side Letters" replaced formal contracts and OGC became substantively involved late in the process.

There were a number of occasions, in this period, where the University's interests would have been much better served if the DIA had communicated openly, and on a timely basis, both up the chain of command and across departments. This was a fundamental failing on the AD's part.

Clearly, had the AD elected to solicit inter-departmental counsel, to apprise the President on a timely basis and be more inclusive, the consequences of the lack of adequate internal controls would not have been as serious. There is also no question that the President's failure to exercise fully his ultimate authority on these matters, to seek the counsel of the Board in certain instances, and to test the basis of DIA decisions exacerbated this situation.

With respect to the Board of Governors, the absence of clear rules and regulations prescribing the athletics matters to be brought to its attention handicapped the Board's exercise of its oversight ability. The consequences were evident in the manner in which the Board dealt with itself and how management dealt with the Board.

For example: because there were no guidelines of what athletics matters went to the full Board, there were a number of occasions where the Chair of the Athletics Committee became informed of substantive issues (e.g., contract extensions, compensation arrangements) but failed to bring them either to the Athletics Committee (whose revised Charter required such review) or to the full Board.

Similarly, there were a number of occasions where the President became informed of substantive issues involving athletics (the concerns of the CFO for instance) but failed to bring them to the full Board or to address them openly.

Certainly aggravating this situation, but difficult to assess, was the failure of senior management to adequately staff its Internal Audit Department, a situation which was repeatedly brought to the attention of the Audit Committee of the Board.

The Employment of the AD's Son by Nelligan

XXVI. <u>Before the formal University Rights Agreement was executed on behalf of Rutgers on April 18, 2001 the Nelligan Sports Marketing firm hired Mr. Mulcahy's son</u>

Nelligan hired Mr. Mulcahy's son on April 1, 2000. The University's Media Relations department informed OGC on April 4, 2001 (<u>i.e.</u>, more than 1 year after the son became employed at Nelligan) about the employment of the son by Nelligan. In fact, the employment had become public as early as the fall of 2000. The son's name appeared, along with other Nelligan staff members, in various Nelligan publications as well as in the Rutgers official program guide for the 2000-2001 basketball season.

Mr. Mulcahy had not discussed his son's employment with the President, OGC or any members of the Board before April 2001. Mr. Mulcahy considers it likely that he discussed it with Mr. Whiteside (his superior at the time) but has no precise recollection of that conversation.

Immediately after learning of this situation, OGC spoke with Mr. Nelligan and with Mr. Mulcahy regarding the circumstances surrounding the son's employment.

Mulcahy's son was an avid and accomplished golfer. He had served as Seton Hall University's golf coach in the 1980s. He had been a sales representative for Slazenger, a sports equipment and apparel company, with significant golf and tennis lines. He had significant contacts in the field of golf. Nelligan wanted to expand its operations into sponsorship of golf events and Mulcahy's son was a good match for Nelligan's needs at the time.

Mr. Nelligan informed OGC in writing by letter dated April 10, 2001 that he did not speak with Mr. Mulcahy before hiring Mr. Mulcahy's son. The son, according to Mr. Nelligan, had previous sales and management experience. He worked for Nelligan on new business development and not on Rutgers' matters, or any other college or university matters. Mr. Mulcahy also stated that his son had no role in the negotiations with Nelligan and that he learned from his son in a telephone call that he took the position with the firm. Mr. Mulcahy also stated to the OGC (and subsequently to this Committee) that he had no financial interest in Nelligan.

After reviewing the situation in April 2001, OGC recommended that if Rutgers were to enter into a formal contract with Nelligan, then Mr. Mulcahy should not be the individual to execute the proposed University Rights Agreement on behalf of Rutgers (see III above). OGC informed President Lawrence and Senior Vice President and Treasurer JoAnne Jackson (who had succeeded Mr. Whiteside) that the son worked for Nelligan.

President Lawrence, at a meeting with OGC on April 11, 2001, questioned whether Rutgers should proceed with execution of the formal contract with Nelligan and said he would speak with the Chair and Vice Chair of the Board of Governors. On April 18, 2001 JoAnne Jackson signed the University Rights Agreement on behalf of Rutgers. Mr. Nelligan signed the Agreement on April 20, 2001 (see III above).

It should be noted that for the period of time (April 2000-November 2002) when his son worked for Nelligan, Mr. Mulcahy's role vis-à-vis Nelligan was limited largely to being kept abreast of the amount of revenues generated by Nelligan. Periodically, he reviewed written reports and occasionally spoke with Nelligan's representatives about sponsorship prospects and sponsorship contracts that Nelligan had secured.

The day-to-day task of reviewing with Nelligan and approving proposed sponsorship contracts fell to Mr. Mulcahy's designee, Mr. MacConnell. Mr. MacConnell also was responsible for furnishing Nelligan with an inventory of signage and advertising space and for creating and monitoring the annual expense budget for sports marketing. Mr. MacConnell was assisted in the budget area by the Senior Associate Athletic Director for Finance and Administration and the Associate Athletic Director and Chief Financial Officer.

On occasion, a prospective sponsor wanted to meet Mr. Mulcahy, or Nelligan thought that such a courtesy meeting would help secure a sponsorship contract. Mr. Mulcahy would do so if it were important in securing the sponsorship contract. But this appears not to have been a regular occurrence.

XXVII. <u>OGC Reviewed the Situation in 2001</u>

As described above, the employment of the son by Nelligan came to OGC's attention on April 4, 2001, one year after the son had become employed by Nelligan and more than one year after Mr. Mulcahy signed the February 21, 2000 letter of understanding with Nelligan.

OGC, noting that Mr. Mulcahy played no role in securing employment for his son at Nelligan, that the son did not reside in Mr. Mulcahy's household, and that Mr. Mulcahy had no financial interest in Nelligan, was of the view that there appeared to be no conflict of interest but that the appearance of a conflict could be a concern.

There had been discussions between Nelligan and Mr. Mulcahy as far back as the fall of 1999 and Nelligan had presented at least two proposals to Mr. Mulcahy in January 2000 leading up to the signing of the February 21, 2000 Letter of Agreement with Nelligan. The letter set forth the essential terms of the agreement (i.e., the allocation of revenue between Nelligan and Rutgers, the term of the agreement and the provision for an automatic extension of the agreement upon Nelligan achieving an agreed upon revenue objective). All of this occurred more than one month prior to Nelligan hiring the son.

As noted in Section III above, OGC began reviewing the proposed University Rights Agreement in May 2000 and prepared several memoranda concerning issues in the proposed agreement. OGC consulted with several University offices and discussed the proposed agreement with Mr. Whiteside. At no time during its review of the proposed agreement was OGC aware of the fact that Mr. Mulcahy's son worked for Nelligan. That did not come to its attention until April 4, 2001, after it had already reviewed the proposed agreement and just two weeks before the final University Rights Agreement was executed on April 18, 2001.

As noted earlier, immediately upon learning of this situation OGC recommended that Mr. Mulcahy not be the person to execute the University Rights Agreement on behalf of Rutgers.

OGC contacted the son in April 2008 and was told that he left Nelligan in November 2002. On October 16, 2008, pursuant to Rutgers' request, Nelligan provided a letter dated November 18, 2002 and initialed by the son, in which the son stated that he was resigning as General Manager with Nelligan effective November 30, 2002. Mr. Mulcahy learned from his son in late October or early November 2002 that he intended to leave Nelligan. The son did not work at Nelligan after November 18, 2002, although he was compensated through November 30, 2002.

As noted above in Section IV, the AD and Nelligan signed a letter on November 27, 2002 amending the University Rights Agreement to address the situation of Nelligan securing multi-year sponsorship agreements on behalf of Rutgers where the term of those sponsorships would extend beyond the term of the University Rights Agreement.

XXVIII. <u>Evaluation of Conflict of Interest Standards</u>

There was no express prohibition in 2000-2001, and there is no express prohibition now, in the New Jersey Conflicts of Interest Law that prevents a child of a public employee from being employed by a company that does business with the public entity that employs the child's parent.

However, there was in 2000-2001, and there still is, a provision in the New Jersey Conflicts of Interest Law that prohibits a State employee (which for purposes of the Conflicts of Interest Law covers Rutgers' employees) from accepting "by himself or through his spouse or any member of his family … any gift, favor, service, employment or offer of employment or any other thing of value which he knows or has reason to believe is offered to him with intent to influence him in the performance of his public duties and responsibilities." NJSA 52:13D-14.

Because the facts do not indicate that Mr. Mulcahy knew that Nelligan was going to employ his son or that the job was offered to the son with intent to influence Mr. Mulcahy, there was no conclusion by the University administration that this provision of the law was violated. Of note, the Letter of Agreement was signed in February 2000, about one and one-half months before the son was hired by Nelligan.

The Conflicts of Interests Law also prohibited in 2000-2001, and still prohibits, a State employee from knowingly by himself, through his partners or through any corporation in which he owns or controls more than 1% of the stock, or by anyone else for his benefit, executing a contract worth more than $25.00 with the State. NJSA 52: 13D-19. Since the facts do not indicate that Mr. Mulcahy had an ownership interest in Nelligan, there seems to be no basis to conclude that this provision of the law was violated when Nelligan signed a letter of understanding with Mr. Mulcahy.

The Conflicts of Interest Law prohibited in 2000-2001, and still prohibits, a State employee from acting as the State's agent in a transaction with himself or with a company where he has an interest in the pecuniary profits (ownership of 10% or less of stock of a corporation is not an "interest" under this provision). NJSA 52:13D-20.

Since the facts do not indicate that Mr. Mulcahy had any interest in the pecuniary profits of Nelligan, there seems to be no basis to conclude that this provision of the law was violated.

The Conflicts of Interest Law prescribed in 2000-2001, and still prescribes, certain ethical standards that apply to State instrumentalities, including Rutgers. These standards include the following prohibitions:

1. using one's position "to secure unwarranted privileges or advantages" for oneself or others. NJSA 52:13D-23 (e) (3);
2. acting in any matter in one's official position where one has any direct or indirect personal interest which might reasonably be expected to impair one's objectivity or independence of judgment or otherwise interfere with the performance of one's duties. NJSA 52:13D-23 (e) (1) and (4); and
3. acting in any way "that might reasonably be expected to create an impression or suspicion among the public having knowledge of his acts that he may be engaged in conduct violative of his trust" as an employee of a State instrumentality. NJSA 52:13D-23 (e) (7).

The Conflicts of Interest Law also contains a provision that acknowledges that certain conflicts are unavoidable and that the challenge in particular is to determine which conflicts are substantial and material. The statute says:

> Rules of conduct … should recognize that under our democratic form of government public officials and employees should be drawn from all of our society, that citizens who serve in government cannot and should not be expected to be without any personal interest in the decisions and policies of government;… that standards of conduct should separate those conflicts of interest which are unavoidable in a free society from those conflicts of interest which are substantial and material, or which bring government into disrepute. NJSA 52:13D-23(e)(8).

Direct Financial Interests of Employee

A State employee may not act in such a way that he personally benefits from a decision that is made in the course of fulfilling his duties on behalf of his employer. Thus, if Mr. Mulcahy had a financial interest in Nelligan it would have been improper for him to sign the contract or to steer the contract to Nelligan. The facts here do not indicate that Mr. Mulcahy had such an interest.

Direct Interest of Child or Spouse

A State employee also may not act in a way that secures unwarranted advantages or special benefits for children, a spouse or other relatives. Actions taken by State employees that provide special benefits to children and spouses, or that may be perceived as doing so, would violate the code of ethics. Thus, it would have been a violation of the code of ethics if Mr. Mulcahy had played a role in securing a job for his son with a company while he was negotiating a contract on behalf of Rutgers with that company. The facts here do not indicate that Mr. Mulcahy played any role in his son securing employment at Nelligan.

Indirect Financial or Personal Interests—Actions that May Involve the Interests of Relatives

Evaluation of situations that involve State employee involvement in business transactions with companies at which a relative of the State employee is employed are very much fact-based and depend on a variety of factors, including the timing of the State employee's role relative to the employment of the family member, the status and role of the family member in the company with which the State is doing business, the role of the State employee in the transaction or project involving the family member's employer and whether the transaction is one of high profile.

Conflicts of interest laws serve two public policy considerations. First, they ensure that public officials provide disinterested service and refrain from self-dealing and, second, they promote confidence in the integrity of governmental operations. Appearances of impropriety should be avoided. The appearance of impropriety does not mean that there is, in fact, actual impropriety. Recusal, or the process of disqualifying oneself from acting, is an appropriate course of action when there is a conflict of interest or appearance of a conflict of interest. The policy consideration of promoting confidence in the integrity of governmental operations is enough to conclude that recusal is required.

Mr. Mulcahy had responsibility for a department that had entered into a substantial business relationship with a sports marketing company that would continue for a minimum of three years. After entering into this relationship on behalf of the University he learned that his son had become employed by the same company (to work in areas that had nothing to do with the University). The son's employment at Nelligan had become public as early as the fall of 2000 when his name appeared, along with other Nelligan staff members, in various Nelligan publications as well as the Rutgers official program guide for the 2000-2001 basketball season.

While he believes it is likely that he disclosed the fact of his son's employment to Mr. Whiteside, he has no precise recollection on this point. (Mr. Whiteside's official retirement date was February 1, 2001, although his last day of work was October 6, 2000; he passed away in 2003.) There was no formal notice of the son's employment provided to Mr. Mulcahy's supervisors or to the OGC before April 2001.

It appears that during almost the entire period the son worked for Nelligan (April 2000 to November 2002), Mr. Mulcahy took no official action on the Nelligan account and that he did not sign any contracts with Nelligan during that period. Mr. Mulcahy knew in late October or early November 2002 that his son intended to leave Nelligan. The son submitted his resignation on November 18, 2002 and, although he was paid through November 30, did not work at Nelligan after November 18.

There is no basis to conclude that Mr. Mulcahy acted in a way that he knew to be improper or not in the best interests of the University.

The recommendation provided by the OGC in April 2001—that if Rutgers were to enter into a formal contract with Nelligan, Mr. Mulcahy should not be the one to execute the University Rights Agreement on behalf of Rutgers—was a proper application of the recusal process.

XXIX. <u>Summary</u>

Based upon the information available, there was no actual conflict of interest. However, Mr. Mulcahy's actions give rise to the appearance of a possible conflict. He should have disclosed the fact of his son's employment with Nelligan to his superiors within the University and/or sought advice from OGC once he learned of that employment in the spring of 2000.

Furthermore, he should have provided OGC the February 21, 2000 Letter of Agreement at the time that DIA requested OGC to review the proposed University Rights Agreement in April 2000, or as soon as he learned about his son’s employment at Nelligan, whichever occurred first.

Finally, given the close timing of events in November 2002, the more prudent course of action would have been for someone other than Mr. Mulcahy to execute the November 27, 2002 letter amending the University Rights Agreement.

Conclusions and Recommendations

With respect to the specific factual matters reviewed involving the DIA, the University operated with inadequate internal controls, insufficient inter-departmental and hierarchical communications, an uninformed Board on some specific important issues, and limited Presidential leadership.

This had become the case for a number of reasons, including that for the past decade the Athletics Director has functioned under a broad scope of authority, intended by the University to facilitate growth in the University's Athletics programs. Absent from this grant of authority was a system of controls or clear understandings regarding the manner in which DIA decisions would be subject to Board, senior executive and OGC review and approval.

This was a critical deficiency because as we have witnessed in the chronology of events, the AD pursued his charge with vigor but also in an increasingly insulated and ultimately counterproductive manner.

Adding to this problematic situation, the President, as immediate supervisor to the Athletics Director, did not choose to exercise sufficient direct control over DIA and also failed to bring certain substantive issues to the Board of Governors' attention (e.g., the CFO's concerns, the Coach's personal services contract with Nelligan). The failure to inform the Board in these instances precluded that body from exercising its proper oversight role.

With respect to the Board of Governors, the lack of clarity and prescribed protocols in its own committee review processes with respect to high-profile matters involving athletics handicapped its ability to fulfill its required oversight role. For example: there were a number of occasions where the Chair of the Athletics Committee became informed of substantive issues (e.g., contract extensions, compensation arrangements) but did not bring them either to the Athletics Committee or to the full Board with sufficient detail to permit the Committee or Board an opportunity, if it wished, to discuss fully the proposed change and its consequences.

It is also fair to observe that neither the Board nor its committees applied the level of questioning scrutiny to DIA matters that it had applied to other departments in the University.

With regard to issues related to intercollegiate athletics, it is clear that the University's internal controls must be improved; that the DIA (through the AD) needs to function in a significantly more open and collaborative manner; that the President must be a more affirmative leader with regard to these issues and that the Board should apply a higher standard of oversight to these matters as well.

It is a positive step that the President recently announced a number of measures designed to create a more accountable and transparent organization. A number of them complement this Committee's recommendations and they are recited below. But there are two pitfalls to be aware of here: first, the potential that the focus on obvious problems precludes thoughtful system-wide review; and second, the temptation to assume that one-time improvements can be effective without ongoing executive leadership and full organizational support.

Finally, in the broader context, it is important to note that the recent budget cuts at the University have been applied in a manner that has compromised its ability to administer the necessary level of internal controls. A clear example was the decision to allow the Internal Auditing Department staff to decrease to a level where its effectiveness was questioned. Going forward, considerably more thoughtful attention needs to be applied to the balancing of resources and the preservation of fundamental responsibilities. Even in difficult budgetary circumstances, administrative units that provide checks and balances to ensure accountability (such as internal auditors, financial and legal support, etc.) are central to the long-term health and appropriate functioning of a strong institution.

Rutgers University has become a large, complex organization subject to an increasing variety of rules, codes of behavior and regulations. In order to assure improved compliance with all of these forms of authority, with respect to internal controls consideration should be given to the following:

Designating the General Counsel as Chief Compliance Officer for the University with responsibility for policy and procedures, compliance monitoring, and enforcement.

Compliance procedures are meaningless if they are not enforced. In this capacity, the General Counsel should function as the primary architect and enforcer of compliance policies and procedures for the University, as well as the eyes and ears of the Board on compliance matters. In this respect, we recognize the President's recent announcement that the General Counsel's office will be provided the authority and resources necessary to develop this internal compliance function, working in conjunction with other units across the University. We suggest that this be done as soon as possible.

In furtherance of this compliance effort, forming of an Inter-departmental Committee on Risk Management.

This committee would make an important statement about the University's commitment to compliance and would provide a necessary forum for senior leadership consideration of institution-wide issues. While the University already has a risk management department, the committee recommended here would work with that department but would be responsible on an ongoing basis for identifying and considering issues that cut across the entire institution.

Reviewing existing lines of authority so that all personnel with substantial financial duties throughout the University have the benefit of the centralized oversight of the University's Senior Vice President for Finance and Administration (who serves as the University's CFO).

We noted that the DIA's policies and procedures have not been updated in some time and welcome the development of the new policies and procedures manual. We also concur with the decision to have the manual reviewed by outside, independent parties to assure best practices.

Conducting a full enterprise risk management review (ERM) for the University or, as a starting point, for DIA alone.

This has two potential benefits. A full ERM review (to include NCAA matters, for example) would supplement this Committee's very focused review and would help shape a more accountable culture in the University. This is because unlike audits conducted by outsiders (e.g., the current KPMG audit of DIA), an ERM review relies on the collaborative assessment of those within the organization who presumably know its strengths and weaknesses best. The benefits are in the process itself as well as the outcomes. For the DIA in particular, the comprehensive policy and procedures manual, under development, should serve as a valuable resource for this initiative.

Ensuring that the Internal Auditing Department is not only adequately staffed to meet the growing demands of the University but that its personnel also have the requisite skills and are fully empowered by senior management.

We note that the President has reported that there is now a plan in place to expand the internal audit staff. This plan should be implemented as soon as possible.

Overhauling the University's contract development, review and approval process for DIA.

The purpose here would be to take into account the needs of DIA for timely review while also ensuring comprehensive inter-departmental participation. The appointment of the new Deputy Director of Athletics for Finance & Administration, along with the completion of the policy and procedures manual, should be helpful steps in this regard.

Developing a signatory authority policy to codify and clarify approval authorities for contract letting that extends (depending on the level of commitment) to the President and the Board.

We note that the University is proceeding with a university-wide effort in this regard.

Ensuring that OGC is involved at the front end of the process when DIA is considering negotiations with vendors or agents to ensure that significant legal issues are identified and addressed (e.g. before the elements of a coach's contract are finalized).

Requiring the use of written contracts and forbidding the use of side letters without justification as defined by OGC.

Requiring that the President and AD approve all head coaches' compensation arrangements.

If the coach's compensation exceeds the President's, the contract must be reviewed by the Board of Governors' Athletic Committee and taken to the Board for approval. Any renewals, extensions or modifications must go through the same process.

With regard to any other personal service or employment contracts, all such arrangements where the annual compensation is in excess of $300,000 must be approved by the Board of Governors' Committee on Executive Compensation, Nominations and Governance. All other employment or personal service contracts (subject to a threshold determination) must be approved by the President. In this regard, the University has announced that it is examining the manner in which high-level employment contracts of all kinds (including coaches' contracts) are reviewed and approved.

Requiring that all no-bid or sole source contracts with an economic value in excess of $2.0 million should be reviewed by the appropriate Board of Governors committee and taken to the full Board.

All no-bid or sole source contracts must be justified.

With respect to the Board, consideration should be given to:

Empowering the Board's Executive Compensation, Nominations, and Governance Committee to assemble a list of potential candidates with necessary skills and experience for the purpose of advising the Governor as openings occur.

As statutory terms expire, the introduction of new Board members on a regular basis with fresh perspectives and complementary skills would ensure that the high quality of the Board is maintained and enriched.

Having the Audit Committee meet at least five times a year.

Reviewing the Charters, agendas and schedules of the committees of the Board in order to ensure that adequate time and attention is being applied to critical issues.

Clarifying the obligations of committees to the full Board so that there is no ambiguity regarding the appropriate role of each body.

Clarifying the obligations of the President to the Board so that the Board is fully involved on substantive matters on a timely basis.

We recognize the important role of the Board of Governors. Its members must be fully vested in the University's overall objectives. Indeed it has the obligation to review whether the President is acting in fulfillment of the duties of his office, as in the particular factual circumstances discussed here with regard to intercollegiate athletics. However, on issues related to intercollegiate athletics it is the President (with the support of the AD and others throughout the chain of command) who is accountable for the day-by-day decisions made at the University—as is also true for matters relating to other departments within the institution.

With respect to the President:

Rutgers is a large and complex institution. Its leadership lies first and foremost with its President. He bears a heavy responsibility. To succeed he must demonstrate to all that he is a forceful leader who believes in establishing lines of authority that will be clearly defined and adherence to which will be required, and where necessary, pointedly enforced. He must set a tone of executive and administrative control that emanates from his office. It is he who must speak for Rutgers and the more significant or contentious the issue, it is to him that everyone in the University and the public generally will look for evaluation and resolution.

As is evident from the preceding review, in the particular factual instances reviewed the President was too passive in exercising his authority over DIA and should have brought certain critical issues involving DIA to the attention of the Board. This combination resulted in a significant diminution of necessary oversight over DIA. We have been informed that the President's actions here are not indicative of his leadership generally. For the issues we reviewed and with respect to DIA, however, they clearly served to abet an increasingly insular manner of conducting business and inevitably contributed to the neglect of significant substantive matters. It is a fair question to ask, given the circumstances surrounding DIA, whether the President has in place the senior level organizational structure, adequate staff size, and organizational culture that he can rely on to provide him with thoughtful, informed and collaborative counsel on critical issues.

The University's internal controls can be improved, if leadership makes the decision to do so and remain steadfast in its execution. Going forward, with a stronger set of controls in place, the occasion for decisions that have not been fully vetted can be substantially mitigated. But this will only occur under the leadership of a committed President with the support of an equally dedicated Board of Governors.

On October 13, 2008, the President announced that he was taking certain steps to improve the administration and operations of the University. We assume that he will soon establish a schedule and structure to implement these plans and goals. The steps already taken and proposed next steps announced by the President are quoted below from the "Update to Rutgers Board of Governors on Policies and Practices to Enhance Governance and Accountability":

<u>Steps Already Taken</u>:

Implement ethics and conflicts of interest training and education

- The University is implementing new ethics training and education for all employees.
- This program addresses a wide range of potential conflict situations and also situations that may involve the appearance of impropriety. It includes a new, centralized website with the code of ethics, frequently asked questions, an online answer desk, and other resources.
- We currently provide annual training for all new board members on conflicts of interest and other related state ethics requirements.

Develop a plan to increase Internal Audit staff

- We have developed a plan to increase the size of the Internal Audit staff to increase the breadth and depth of its capabilities.
- Bruce Fehn, Senior Vice President for Finance and Administration, is reviewing the plan and will work with Joe Sikora, Director of Internal Audit, to implement it.

Appoint a Deputy Director of Athletics – Finance & Administration

- The University has appointed a Deputy Director of Athletics for Finance & Administration, Richard Costello (who is currently the Director of Athletics at Delaware State University). Mr. Costello will be starting in November.
- Under the terms of his contract, Mr. Costello's primary reporting relationship will be to the Senior Vice President for Finance and Administration. Of course, he will need to work very closely with the Division of Intercollegiate Athletics and with the Athletic Director and, in fact, will be located in those offices.
- In his new position at Rutgers, Deputy Director Costello will oversee all day-to-day administrative operations in the Division of Intercollegiate Athletics, including:
    - Athletic financial matters
    - Strategic planning
    - Budget preparation and management
    - Contract administration
    - Information technology
    - Ticket offices
    - Athletic financial aid administration.

Conduct a legal review of new athletic sponsorship agreements

- Pursuant to the University's contract with Nelligan Sports Marketing, all new athletic sponsorship agreements are being reviewed by the General Counsel's office before these contracts are finalized.

Develop a comprehensive manual on policies and procedures for Athletics and provide relevant training

- The manual has been drafted and is now under review by various offices around the University as well as external experts. We expect to complete the manual this fall.

Provide training and coordination for business managers

- We are providing training and information about university policies and resources for business managers in units across the University.

<u>Proposed Next Steps</u>

Establish a director of compliance/ethics

- We need a structure and point person to provide leadership and coordination for ongoing compliance initiatives in the areas of ethics and conflicts of interest, probably within the Office of General Counsel (which already has significant responsibilities in this area, and which works closely with units across the University).
- In conjunction with other offices (such as Human Resources, Internal Audit, etc.), this office could conduct regular training on compliance issues.
- This office could also create an inventory of other compliance offices and efforts within the University, facilitate regular updates to the Board of Governors, and help coordinate information and resources on compliance.
- I have instructed my staff to review models at universities across the country, and to assess our current and future needs, to help define the appropriate definition and scope for these responsibilities.

Update and articulate university-wide policies and practices with regard to the following:

- **Signatory authority for contracts**
    - I will appoint a working group to review existing signatory authority for all kinds of contracts and to develop a comprehensive policy and framework to clarify how each type of contract is to be reviewed and approved.
    - This policy and framework will be brought to the full Board of Governors once it is developed.

- **Review and approval of sponsorship agreement policies and practices**

    - Under the leadership of Kim Manning, Vice President for University Relations, I will establish a working group to review and update our policy and practices related to sponsorship agreements of all kinds.
    - The University's existing policy on sponsorships has been part of a larger policy that also covered advertising and charitable contributions. We have divided that single policy into three distinct policies to better address the current higher education business environment, and we have already updated the policies on advertising and charitable contributions.

- **Review and approval of high-level employment contracts**

    - We need to review the process for high-level appointments of individuals with significant leadership responsibilities and salary packages to clarify when such contracts should be reviewed and approved by the Board of Governors through its committee processes.
    - My administration is reviewing the full list of such positions across the University and will recommend options for consideration by the Board of Governors.