

2012 November 6

INADO Update #10.3

WADA ExCo/FB Documents November 2012 Significant Matters for NADOs/RADOs (3)

Draft 2.0 of the 2015 World Anti-Doping Code

Dear Colleagues: this is the third of three updates summarising significant matters from the documents WADA has released for its November ExCo and Foundation Board meetings. Please take some time to assess and to discuss these matters with your government representatives. This is critical to ensure that the Public Authorities on the WADA ExCo and Foundation Board are properly briefed to advocate for NADO interests in WADA decision-making. And so they can otherwise play the most constructive role possible around the WADA table.

Agenda Item 7.2, Attachments 2, 3 and 4: 2015 World Anti-Doping Code Draft 2.0

The three documents that have been prepared are a clean copy of Draft 2.0 (Attachment 2), a red-lined copy show the changes from Draft 1.0 (Attachment 2) and a red-lined copy showing the changes from the 2009 Code.

To permit this update to be send today, and in the brief time available, I describe only major changes and with little comment at this time. I apologise if I have missed anything significant. If I have, please let me know as soon as possible. However, changes that should be of concern to NADOs are highlighted in red.

Changes from Draft 1.0 to Draft 2.0

- The new reference to proportionality in the “Purpose, Scope and Organization” section at the start of the Code has been redrafted:
 - “The *Code* ~~shall be applied in a manner that respects~~ has been drafted giving consideration to the principles of proportionality and human rights and is presumed to be in accord with those principles.”
- Part 1, Doping Control, Introduction, Comments the last paragraph’s references to criminal and employment matters has been adjusted:
 - “These sport-specific rules and procedures aimed at enforcing anti-doping rules in a global and harmonized way are distinct in nature from criminal and civil proceedings. They are, therefore, not intended to be subject to or limited by any national requirements and legal standards applicable to ~~criminal proceedings or employment matters~~ such proceedings, although they are intended to be applied in a manner which

respects the principles of proportionality and human rights.”

- Articles 2 and 7: the B sample analysis is returned to the Code.
- Article 2.1: the Comment discussing “strict liability” is further streamlined. Article 2.1.2 of the 2009 Code (sufficient proof of presence of a prohibited substance in a sample), which was deleted in Draft 1.0, is reinserted.
- Article 2.2 (Use or Attempted Use): the Comment contains a new paragraph:
 - “For example, Use may be established based upon reliable analytical data from the analysis of an A Sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organization provides a satisfactory explanation for the lack of confirmation in the other Sample.
- Article 2.3: this anti-doping rule violation is now termed: “Evading or Refusing Sample Collection.”
- Article 2.4: the proposed term “High Priority Testing Pool” is replaced by the existing term “Registered Testing Pool.” Of course the same change is made in other places.
- Article 2.10 (Prohibited Association): this new anti-doping rule violation only applies if an athlete has had written notification of the support person’s disqualifying status.
- **Article 4.4 (Therapeutic Use): this article is largely re-written. It includes this clarification in Article 4.4.3.2, which I think is of grave concern:**
 - **“An International Federation is encouraged to recognize the TUE granted by the National Anti-Doping Organization, unless it is not satisfied that the relevant conditions for such grant have been met. **If the International Federation denies the Athlete’s TUE application, that denial automatically reverses the TUE granted by the National Anti-Doping Organization for National Events.** However, if the Athlete seeks review by WADA or if the Athlete or the National Anti-Doping Organization subsequently appeals against the International Federation’s decision, the Athlete may still rely on his TUE for purposes of National Events pending determination of the review and appeal.”**
[Emphasis added]
- Article 5 (Testing): is completely re-written. It now incorporates the test coordination provisions that were in Article 15. It also includes a new provision relating to testing of athletes providing whereabouts information (Article 5.6).
- Article 6.1 (Use of Approved Laboratories): there is a new Comment:
 - “For cost and geographic access reasons, WADA may approve specific laboratories which are not fully WADA-accredited to perform particular tests--for example, analysis of blood which should be delivered from the collection site to the laboratory within a

set deadline. Before approving any such laboratory, WADA will ensure it meets the high analytical and forensic standards required by WADA.”

- Article 6.4 (Standards for Sample Analysis and Reporting): there is additional sentence that responds to an extent to the concern about requiring all samples to be testing for all prohibited substances, which is contrary to intelligent/intelligence testing, so that the Article now reads in part:
 - “... Anti-Doping Organizations may collaborate with WADA in establishing Sample analysis menus appropriate to their particular sports and circumstances. WADA may approve Sample analysis menus for less than the full list of Prohibited Substances. Absent WADA approval, laboratories shall analyze all Samples for the full list of Prohibited Substances and Prohibited Methods (as appropriate to In-Competition and Out-of-Competition Testing), using all analytical methods available to the laboratory. Less than full-menu Testing on every Sample will be authorized by WADA for specific sports.”
 - “[Comment to Article 6.4: The objective of this Article is to extend the principle of “intelligent testing” to the Testing menu so as to most effectively and efficiently detect doping. WADA will develop ...]”
- Article 7.1: is new and entitled “Authority to Conduct Results Management” and includes results management provisions that were in Article 15. However, the first sentence of Article 7.1 is new, as is the Comment:
 - “Results management and the conduct of hearings for an anti-doping rule violation arising from Sample collection by, or discovered by, a National Anti-Doping Organization involving an Athlete who is not a national, resident, license-holder or member of a sport organization of that country **shall be administered as directed by the rules of the applicable International Federation.**” [Emphasis added]
 - “No absolute rule is established for managing results and conducting hearings where a National Anti-Doping Organization tests a foreign national Athlete over whom it would have had no jurisdiction but for the Athlete's presence in the National Anti-Doping Organization's country. **Under this Article, it is left to the International Federation to determine under its own rules whether, for example, management of the case should be referred to the Athlete's National Anti-Doping Organization, remain with the Anti-Doping Organization that collected the Sample, or be taken over by the International Federation.**” [Emphasis added]
- Article 8.1 (Fair Hearings): is considerably altered, removing the detailed list of principles to be followed, which are replaced in the Comment by reference to the requirements of the *European Convention on Human Rights*:
 - “This Article contains basic principles relative to ensuring a fair hearing ~~for Persons asserted to have committed anti-doping rule violations~~ as set forth in Article 6.1 of the European Convention on Human Rights. This Article is not intended to supplant each

Signatory's own rules for hearings but rather to ensure that each Signatory provides a hearing process consistent with these principles.”

Is this acceptable to non-European NADOs and their governments?

- Article 10.2 (Ineligibility for Presence, Use or Attempted Use): now provides for a 4 year period of ineligibility in a number of circumstances.
- Article 10.3.1 (Ineligibility for Evading, Refusing or for Tampering): now provides for a 4 year period of ineligibility “unless the Athlete can establish that the commission of the anti-doping rule violation was neither intentional nor reckless, in which the case the period of Ineligibility shall be two (2) years.”
- Article 10.4 (Specified Substances, including Contaminated Substances): the provisions on Specified Substances are streamlined, and the new provisions on Contaminated Substances and Substances of Abuse largely rewritten. The maximum period of ineligibility for Substances of Abuse is one year.
- Article 10.5.3.1 (Substantial Assistance): the requirement that an ADO be able to “establish” a case with substantial assistance is now relaxed to being able to “bring forward” a case.
- Article 10.6 (Aggravating Circumstances): is deleted because of the increase in sanctions elsewhere in Article 10.
- Article 10.15 (Limited Participation in Olympic Games): this “Osaka Rule” provision is removed.
- Article 11.2 (Consequences for Team Sports): instead of “two or more” team members, now requires “more than two.”
- Article 13.2 (Appeals from Decisions): now includes a right to appeal a decision not to recognise a decision of another ADO under Article 15. **This suggests that ADOs may choose not to recognise each other’s Code-complaint decisions! That strikes me as an unacceptable and divisive possibility.**
- Article 13.2.4: a new article to permit cross-appeals before CAS.
- Article 13.4 (Appeals from Decisions Granting or Denying a Therapeutic Use Exemption): this article is rewritten to be consistent with the change to Article 4.4 that an IF refusal to recognise a NADO TUE automatically invalidates the NADO TUE.
- Article 14.2 (Notice of Anti-Doping Rule Violation Decisions and Request for Files): now includes a provisions requiring the written decisions to include a justification for why the maximum potential sanction was not imposed in certain cases.
- Article 15 (Mutual Recognition): is drastically reduced in scope and detail, in part because of movement of the testing and the results management provisions, noted above. **This would**

seem to give NADO decisions less recognition and respect.

- Article 17 (Statute of Limitations): now 10 years for presence and for use or attempted use, and 14 years for all other anti-doping rule violations.
- Article 18 (Education): now includes more mandatory elements, and additional emphasis on “prevention”:
 - “Information programs should focus on providing basic information to Athletes as described in Article 18.2. Education programs should focus on prevention. Prevention programs should be values-based and directed towards Athletes and Athlete Support Personnel with a particular focus on young people through implementation in school curricula.”
- Article 20.3.9 (Roles and Responsibilities of International Federations): now includes the responsibilities to do follow-up investigations, as to cooperate with WADA investigations.
- Article 20.7.10 (Roles and Responsibilities of WADA): now gives WADA the authority to do investigations.
- Article 21.3 (Roles and Responsibilities of RADOs): a new article paralleling the roles and responsibilities of NADOs.
- Article 22.5 (Involvement of Governments): contains a new requirement that each government that does not have a NADO in its country will work with its National Olympic Committee to establish one. There is also a new Comment:
 - “This Article sets forth what the Signatories clearly expect from governments. However, these are simply “expectations” since governments are only “obligated” to adhere to the requirements of the UNESCO Convention.”
- Article 23.5.1 (Compliance with the Code): previous Article 23.4.1 is rewritten to add a new sentence:
 - “Compliance with the *Code* shall be monitored by WADA or as otherwise agreed by WADA. Compliance of anti-doping programs as required in Article 23.3 shall be monitored based on criteria specified by the WADA Executive Committee. ...”
- Definitions (Athlete): is rewritten, and not includes in the Comment a new sentence relating to recreational athletes:
 - “Thus, a National Anti-Doping Organization could, for example, elect to test recreational-level competitors but not require advance therapeutic use exemptions. In the same manner, a Major Event Organization holding an Event only for masters-level competitors could elect to test the competitors but not require advance therapeutic use exemptions.”

- Definitions (Contaminated Product): this term is now defined:
 - “Contaminated Product: A product which an Athlete or other Person could not have known contained a Prohibited Substance.”
- Definitions (International-Level Athlete): the definition contains a new Comment:
 - “The International Federation is free to determine the criteria it will use to classify Athletes as International-Level Athletes, e.g., by ranking, by participation in particular International Events, etc. However, it must publish those criteria in clear and concise form, so that Athletes are able to ascertain quickly and easily when they will become classified as International-Level Athletes. For example, if the criteria include participation in certain International Events, then the International Federation must publish a list of those International Events.”
- Appendix 2 (Application of Article 10): sets out the examples formerly in the Comment to Article 10.5.5.
- Appendix 3 (Period of Ineligibility – First Violation): two pages of tables summarising the correct sanctions for first anti-doping rule violations.

Proposals in Draft 1.0 that are **Not** Changed

- Article 2.4: the 12 month period for three missed tests or filing failures.
- Article 10.4 (Contaminated Products and Substances of Abuse): these proposals remain, although re-drafted as noted above.

Joseph de Pencier, J.D.
Chief Executive Officer
jcdep@me.com
+1.613.850.7553 (m)

iNADO is the Institute of National Anti-Doping Organisations. It promotes best practices by NADOs and RADOs, and is their collective voice.