June 22, 2023
12:00-1:00 PM CST

ATHLETIC COMPLIANCE UPDATE

CLE Webinar Series Presented by Bricker Graydon and Southern Illinois University School of Law
We are not giving legal advice today.
Please consult with your legal counsel regarding specific situations.
Use chat function to ask general questions and hypotheticals. We encourage questions!
Our team is particularly experienced in:

- Title IX compliance and investigations, including the NCAA Policy on Campus Sexual Violence (check out our Title IX and athletics resource page here)
- Operationalizing Name, Image and Likeness
- Student-athlete safety and well-being
- Enforcement investigations
- Eligibility reviews
- Policy and procedure reviews, including student-athlete handbooks
- Intellectual property portfolio development and management
- Multimedia streaming rights agreements, product licensing, and sponsorship
- Facilities compliance
- E-sports

Background
- Former student-athlete
- Mid-American Conference
- LSU Athletic Compliance Office

Athletic Compliance Resource Center
Athletic Compliance, Ohio NIL, NIL, name, Image, likeness, Title IX, sexual misconduct, NCAA, e-sports

Bricker & Eckler Attorneys At Law
UPCOMING EVENTS

THE ATHLETIC DIRECTOR’S TOOLKIT SERIES:

BALANCING COMPLIANCE AND COMPETITIVE SUCCESS IN AN ERA OF CHANGE

For athletic directors, athletic administrators, compliance, general counsel and other positions on campus that works with athletics.

All Noon-1:30p.m. EST

Session 1: Title IX and Athletics | What Every Athletic Administrator Needs to Know
- Tuesday, July 11, 2023

Session 2: Student-Athlete Conduct and Health, Safety, and Well-being
- Thursday, July 13, 2023

Session 3: Athletic Operations and Revenue Generation in an Ever-Changing Climate
- Tuesday, July 18, 2023

Session 4: The Future of College Athletics | Practical Tips and Takeaways in Anticipating the "New Normal"
- Thursday, July 20, 2023
Title IX and Athletics Update
Name, Image, and Likeness
NCAA Attestation and Forms
Student-Athlete Employment
Sports Betting
TITLE IX AND ATHLETICS UPDATE
TITLE IX ATHLETIC COMPLIANCE

1. **Substantial Proportionality**: whether the percentage of athletic participation compared to full-time undergraduate enrollment is "substantially" proportional

2. **History and Continuing Practice**: whether you are adding opportunities for the underrepresented sex

3. **Interests and Abilities of Students**: whether you are fully accommodating the interests and abilities of the underrepresented sex
TITLE IX REGULATIONS

- Keep an eye on DOE
  - "The Department will engage in a separate rulemaking to address Title IX’s application to the context of athletics and, in particular, what criteria recipients may be permitted to use to establish students’ eligibility to participate on a particular male or female athletic team"

- OCR released resources to assist with Title IX and Athletics
Participation Requirement (three-prong test)

- **Balow v. Michigan State Univ.** (6th Cir. Feb. 1, 2022)
  - Participation Prong 1: emphasis on participation gap and a "viable team"
- **Navarro et al. v. Fla. Inst. of Tech.** (M.D. Fla. Feb. 17, 2023)
  - Whether esports amounted to a genuine participation opportunity for Title IX counting purposes
  - 2008 Guidance Letter and *Quinnipiac* case
THE ATHLETICS NPRM

- Addresses participation based on gender identity
- REMINDER:
  - These are proposed regulations. None of this has been finalized, and you are not required to comply until finalization has occurred (likely October 2023)
  - Cannot possibly cover all 116 pages of the draft document here, but I will try and focus on what we believe are the biggest changes in terms of impact
OLD RULE IS STILL GOOD!

- Still permits schools to offer separate male and female teams (34 CFR 106.41(b))
- Must provide equal athletic opportunities to women and men:
  - Participation (the “three prong test”)
  - Athletic Scholarships
  - Other treatment and benefit areas (the “laundry list” items)
WHAT DOES THE RULE SAY?

NEW 106.41(b)(2)

If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

NO BLANKET OR ONE-SIZE-FITS-ALL BAN ON TRANSGENDER STUDENTS FROM PARTICIPATING
KEY TAKEAWAYS

- No blanket or one-size-fits-all ban on transgender students from participating
- College sports: "The Department expects that sex-related criteria that limit participation of some transgender students may be permitted, in some cases, when they enable the school to achieve an important educational objective, such as fairness in competition, and meet the proposed regulation's other requirements."
HOW THIS IMPACTS COLLEGES AND UNIVERSITIES

- It depends on a variety of factors! But generally, it will only require updating policies or training materials.
- First, are you looking at your intramural or club teams? Or your varsity teams?
- Second, who regulates the team’s athletic eligibility?
  - For all – your State
  - Intramural/club – likely institution, so review your policy if you have one
  - Varsity – most likely an athletic association, maybe your conference and institution
INTERCOLLEGIATE SPORTS

- These types of decisions and policies are often made at the conference and/or national governing body level (NCAA)
- But, keep in mind that compliance is on the institution
NCAA POLICY

- In 2022, the NCAA replaced their policy to a sport-by-sport approach.
- Several sport governing bodies that set criteria for certain non-school-based national and international competition, as well as postsecondary athletic competition, have announced plans to review their policies or have adopted or applied new policies regarding sex-related eligibility criteria:
  - USA Gymnastics
  - USRowing
  - USA Volleyball
NAME, IMAGE, AND LIKENESS UPDATE
THE STATS

- Football takes the lion's share, then men's basketball
- Around 14% of NIL compensation goes to women's athletes... more later!
**THE STATS**

**Deals at every Level**

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<th>Average</th>
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**What is "Other"?**

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<td>4.3%</td>
</tr>
<tr>
<td>Autographs</td>
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NCAA GUIDANCE

- Boosters - Recruiting inducements
  - Division I May 2022 NIL Guidance
  - Division II July 2022 NIL Guidance
  - Division III October 2022 NIL Guidance
  - NCAA Division I and II Third Party Involvement Policy Q&A

- Institutional Involvement
  - NCAA Division I Institutional Involvement in a Student-Athlete’s NIL Activities
NCAA INTERIM GUIDANCE ON THIRD PARTY INVOLVEMENT

A representative of athletics interests ("booster"), in part, is defined as an individual, independent agency, corporate entity (e.g., apparel or equipment manufacturer) or other organization promoting the institution’s intercollegiate athletics program.

Collective = "booster"
NCAA INTERIM GUIDANCE ON THIRD PARTY INVOLVEMENT

For All

NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for:
- enrollment decisions (e.g., signing a letter of intent or transferring),
- athletic performance (e.g., points scored, minutes played, winning a contest),
- achievement (e.g., starting position, award winner), or
- membership on a team (e.g., being on roster).

For Recruits

- No conversations between Boosters and recruits (or family members thereof for recruiting purposes)
- NIL agreements between a recruit and a Booster may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.
- Institutional coaches and staff may not organize, facilitate, or arrange a meeting between Boosters and a recruit.
- Institutional coaches and staff may not communicate directly or indirectly with a recruit on behalf of a Booster.

For Current

NIL agreements between a recruit and a Booster may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.
INSTITUTIONAL INVOLVEMENT

Permissible and Impermissible situations under:

- EDUCATION AND MONITORING
- SUPPORT FOR STUDENT-ATHLETE NIL ACTIVITY
- SUPPORT FOR NIL ENTITY/COLLECTIVE
- NEGOTIATING, REVENUE SHARING AND COMPENSATING
INSTITUTIONAL INVOLVEMENT

**SUPPORT FOR STUDENT-ATHLETE NIL ACTIVITY**

- Assistance with deal
  - Can inform student-athletes about potential NIL opportunities
  - Can work with an NIL service provider to administer a "marketplace"
  - Cannot engage in negotiations
- Services and equipment
  - Can provide stock photos/graphics and arrange a space for student-athletes to meet collectives
  - Cannot provide free services or offer equipment that are not available to the general student body
- Promotion
  - Can promote student-athletes' NIL activities, but...
  - Cannot allow student-athletes to promote while they are participating in required athletic activity
SUPPORT FOR NIL ENTITY/COLLECTIVE

- **School personnel**
  - Can assist an NIL entity with fundraising through appearances or by providing autographed memorabilia but cannot donate cash directly.
  - Cannot be employed by or have an ownership stake in an NIL entity.

- **Requesting funds from donors**
  - Can request donors provide funds to collectives and other NIL entities, provided the schools do not request that those funds be directed to a specific sport or student-athlete.

- **Tickets and suites**
  - Can provide tickets or suites to NIL entities through sponsorship agreements, provided...
NIL RECENT DEVELOPMENTS

NCAA Enforcement
NCAA Infractions Case regarding Miami (FL) women's basketball had an NIL piece related to boosters + recruiting

Official Athletic Booster Clubs
Texas A&M is believed to be the first school whose official athletic booster organization also is directly fundraising NIL opportunities in this manner.

*New standard of review for evaluating NIL violations
IRS ON NIL COLLECTIVES

- 12-page memo clarifying that donations to collectives are **not** tax exempt
  - Because the NIL collectives substantially benefit the private interests of student-athletes and those benefits are “not incidental both qualitatively and quantitatively to any exempt purpose.”
- Dozens of collectives have been granted this status and are receiving millions in donations from boosters who are under the impression that their gifts fall under tax deduction.
- What does this mean for 501(c)(3) collectives?
State Law Rollback

Federal Legislation?
- NCAA President Baker is hopeful that there will be national NIL framework—whether through Congress or the NCAA—by the end of the year
- The association wants:
  - registry of deals' terms
  - certification of agents
  - mandate of a uniform standard contract for the deals
TITLE IX AND NIL?

- Closer a collective is aligned with an institution, the more likely Title IX will apply.
- As state laws are repealed, and institutions move closer to leading collectives, the Title IX risk will be even greater.

79% of compensation for women's sports athletes come from brand endorsement deals.
NCAA ATTESTATION & FORM UPDATES
NCAA ATTESTATION

1. ATTESTATION OF COMPLIANCE
   - Division I and Division III only

2. DIVERSITY, EQUITY AND INCLUSION REVIEW
   - Division I only

3. CAMPUS SEXUAL VIOLENCE ATTESTATION
   - All members
ATTESTATION OF COMPLIANCE

- Division I and Division III only
  - Each DI and DIII school or conference attest to compliance requirements for member schools, collaboration with the NCAA when an issue arises, and the importance of creating a culture of compliance on member campuses.
- Deadline: October 15
- Requirements: Each chancellor/president and director of athletics must sign
DIVERSITY, EQUITY, AND INCLUSION

- Division I institutions and conferences
- Deadline: August 1, 2023
- Responsibility to conduct a DEI review every four years as outlined in NCAA Bylaws 20.2.4.3 (institutions) and 20.3.4.2 (conferences).
- Requirements: Each chancellor/president and director of athletics must sign
WHAT DOES THE DEI REVIEW REQUIRE?

• There is no specific form
  ○ "The DEI Review Framework offers a sample format that schools can use to conduct a meaningful DEI review, adjusting it to best serve the individual campus."

Should gender equity/Title IX be part of the DEI review?

Yes.

Are there resources in addition to the NCAA DEI Review Framework that would be helpful to schools?

In February 2023, the Office for Civil Rights released three new resources to support equal opportunity in athletic programs consistent with Title IX of the Education Amendments of 1972. One of those resources focuses on equity in college sports: Title IX and Athletic Opportunities in Colleges and Universities A Resource for Students, Coaches, Athletic Directors, and School Communities (PDF) [ed.gov]
NCAA POLICY ON CAMPUS SEXUAL VIOLENCE

- All members!
- Deadline: November 3, 2023
- Requirements: Each chancellor/president, director of athletics and Title IX coordinator must sign
NEW POLICY ITEMS

4. Annual student-athlete disclosure/questionnaire
5. Institution takes reasonable steps to confirm student-athlete is being truthful
6. Written policy about collecting information from other schools

WHAT MISCONDUCT IS COVERED?

- Resulted in discipline through a Title IX proceeding
- Resulted in criminal conviction for sexual, interpersonal or other acts of violence
NCAA FORMS - DIVISION I

NCAA DIVISION I ANNUAL LIST OF REQUIRED FORMS AND ACTIONS

- January 15 deadline:
  - NCAA Membership Financial Report (President & AD)
  - NCAA IPP Health and Safety Survey (Athletics Health Care Administrator)
- February 15 deadline:
  - FBS Attendance Report (President & AD)
- June 1 deadline:
  - Federal Graduation Rate (Designated Institutional Personnel)
  - NCAA Graduation Success Rate (Designated Institutional Personnel)
- July 25 deadline:
  - Sports Sponsorship and Demographic Report (AD)
- August 1, 2023 (NOT ANNUAL - every 4 years)
  - DEI review
- August 31 deadline:
  - Report of Uses for Revenue Distribution (Designated Institutional Personnel & Conference)
- September 1 deadline:
  - Membership dues (AD, fiscal staff)
- Eight weeks after first day of classes:
  - Academic Progress Rate and Academic Performance Census (Designated Institutional Personnel)
- October 15 deadline:
  - EADA Report (AD and Designated Institutional Personnel)
  - Goes to the United States Federal Government Office of Postsecondary Education
- November 3 deadline:
  - Policy on Campus Sexual Violence Attestation
- Annually:
  - NCAA Catastrophic Sport Injury Reporting (Designated Institutional Personnel)
  - Concussion Reporting (Designated Institutional Personnel)
  - Based on school's policy: Athletically Related Income and Benefits
    - On file at the school
DI TRANSFORMATION COMMITTEE

Adopted:

- Holistic student-athlete benefits model and more health and safety guidelines
- More membership requirements
  - Education for student-athletes and staff on:
    - Mental health.
    - Strength and conditioning.
    - Nutrition.
    - Name, image and likeness.
    - Financial literacy.
    - Transfer requirements.
    - Career preparation.
    - Diversity, equity, inclusion and belonging.
    - Campus sexual violence prevention.
Division II and III Compliance Forms

- October 15 deadline:
  - **EADA Report** (AD and Designated Institutional Personnel)
    - Goes to the United States Federal Government Office of Postsecondary Education

- November 3 deadline:
  - **Policy on Campus Sexual Violence Attestation**
STUDENT-ATHLETE EMPLOYMENT
HISTORY OF AMATEURISM

• The NCAA model is based on amateurism: no "pay for play" or employment
• Former student-athletes started suing the NCAA based on antitrust theories (Sherman Act)
• Many cases supported this notion up until these past few years
• First case to really break the mold is *O’Bannon v. NCAA*, 802 F. 3d 1049 (9th Cir. 2015).
  ◦ Holding that NCAA compensation rules for Division I men's basketball players and FBS football players violated federal antitrust laws
More Lawsuits - FLSA

- **Berger v. NCAA**, 843 F.3d 285 (7th Cir. 2016)
  - Holding that student athletes were not employees and are not covered by the FLSA
- **Dawson v. NCAA**, 932 F.3d 905 (9th Cir. 2019)
  - Holding a student-athlete in a football program was not an employee of the NCAA or Pac-12 under the FLSA
  - *Currently being appealed to the Third Circuit*
**JOHNSON V. NCAA**

- **Facts**: Former and current Division I student-athletes sued the NCAA and member institutions seeking wages for their participation in athletics under FLSA.
- **District court**: Granted the institution's and NCAA's motion to dismiss and the Plaintiff's are appealing that decision.
- **Appeal level**: At oral arguments, the judges asked interesting questions surrounding:
  - Title IX
  - Substantial control
  - Scholarships

If the student-athletes succeed on appeal, what could this mean for those campuses?
ALSTON AND BEYOND

- Alston v. NCAA, 141 S. Ct. 2141 (2021)
- Ongoing cases:
  - *In re College Athlete NIL Litigation*, Case No. 4:20-cv-03919-CW (ND California)
    - Related to NIL "backpay"
  - Hubbard, et al. v. NCAA, et al., Case No. 4:23-cv-01593 (ND California)
    - Related to education-related compensation (Alston $) "backpay"
Last month, the National Labor Relations Board (NLRB) filed a complaint against the NCAA, Pac-12 Conference and the University of Southern California (USC) for unfair labor practices.

- Opportunity to collectively bargain
SPORTS BETTING
WHAT’S THE BET?

- Becoming more of an issue with the rise of legalized sports betting
- Still a impermissible under NCAA Bylaws (NCAA Bylaw 10.02.1)
- Could face penalties under state law, too
RECENT EVENTS

- Different organizations are paying close attention to the betting markets
  - U.S. Integrity
- Recent investigation into baseball - ended up with coaches being fired
- What can your campus do to avoid this situation?
  - Education!
MORE UPDATES
OTHER LEGAL ISSUES

- Revenue sharing
- Conference realignment
- Student-athlete health, safety, and well-being
- Student-athlete discipline and speech
- Student-athlete privacy
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THANK YOU!

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