

LEAD1
ASSOCIATION

**BEST PRACTICES IN
ATHLETICS COMPLIANCE
FOR ATHLETICS
DIRECTORS**

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& Contributors**

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Note that this white paper does not constitute legal advice, but rather, simply offers possible recommendations based on research and collaboration with experienced professionals.

Part I: Introduction

In light of some of the recent scandals in college athletics, colleges and universities now face new risks that require additional evaluation and scrutiny of existing compliance programs. Similar to the Sarbanes-Oxley Act of 2002 (SOX), a federal law that established sweeping auditing and financial regulations for United States (U.S.) public companies, per the NCAA's Commission on College Basketball recommendation, the National Collegiate Athletic Association ("NCAA") has recently imposed additional compliance obligations on collegiate athletics programs.¹

In this vein, the NCAA's recently enacted "attestation of compliance" legislation requires athletics directors to certify that the policies, procedures, and practices of its institution, staff members, and representatives of its athletics interest are in compliance with NCAA legislation "insofar as the director of athletics can determine."² More specifically, the NCAA's actual certification statement requires athletics directors to comply with the NCAA's legislation "as best [he or she] can determine." Accordingly, this requires athletics directors to certify compliance for the entire institution, including all staff of the institution, and representatives of athletics interests, which encompass not only university employees, but also third-party vendors and others.

This new legislation dovetails with the increased scrutiny that federal prosecutors place for NCAA rules violations.³ As a result, it is critically important that athletics directors assess the effectiveness of their compliance programs, similar to the practices instituted by many corporate compliance programs in the U.S, developed in response to enforcement actions and guidance provided by the U.S. Department of Justice (DOJ).⁴ Similar measures, if implemented and followed, may be sufficient to demonstrate institutional control and monitoring, serve as mitigation in infractions cases, and, thus, help limit potential risk of individual liability.

While the NCAA provides *Enforcement Charging Guidelines*, the following best practices provide additional specific recommendations following the NCAA's aforementioned new legislation.⁵ In addition to reviewing this paper, because every institution is different, athletics directors should also seek in-house and/or outside legal counsel to address their institution's particular needs.

¹ Commission on College Basketball, National Collegiate Athletic Association, (last visited Sept. 1, 2019) http://www.ncaa.org/sites/default/files/2018CCBReportFinal_web_20180501.pdf (recommending that NCAA rules provide significant penalties for athletics directors "if they knew or should have known of violations and did not address them").

² 2019-20 NCAA DIVISION I MANUAL § 18.4.2, at 344 (2019), available at <http://www.ncaapublications.com/productdownloads/D120.pdf>.

³ Understanding the NCAA hoops scandal: Who's involved, why it's illegal and what's next, Portland Business Journal, (last visited Sept. 1, 2019) <https://www.bizjournals.com/portland/news/2017/10/02/understanding-the-ncaa-hoops-scandal-hos-involved.html> (stating that federal prosecutors used annual certifications to help prove its case).

⁴ Evaluation of Corporate Compliance Programs, U.S. Department of Justice Criminal Division, (last visited Sept. 1, 2019) <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁵ Division I Enforcement Charging Guidelines, National Collegiate Athletic Association, (last visited Sept. 1, 2019) <http://www.ncaa.org/enforcement/division-i-enforcement-charging-guidelines>.

Part II: Recommendations

1) Promoting a Culture of Compliance

Facilitating Core Values: Athletics directors can help facilitate both university and athletics department core values by regularly communicating compliance expectations (both verbally and in writing) and training all student-athletes, athletics department staff, and university staff with day-today NCAA compliance functions. Likewise, incorporating such language into the hiring and performance evaluation processes for staff can help foster a culture of compliance.

Due Diligence in Delegating Authority: It is also critical that athletics directors ensure that individuals with compliance responsibilities have sufficient resources and autonomy (such as direct access to college and university governing boards) with respect to compliance activities.⁶ It is equally important that athletics directors exercise reasonable due diligence to make sure those individuals assigned compliance duties have been vetted to assess whether they have the necessary integrity.⁷

2) Policies and Procedures

Well-Documented Practices: Because the existence of misconduct does not mean that a compliance program was ineffective at the time of the offense, institutions with strong compliance programs have often implemented documentation practices that allow them to quickly and easily demonstrate to regulators the types of information they gathered, and how they reached their conclusions (even if those conclusions are ultimately incorrect).⁸ Following the NCAA's new attestation of compliance legislation, it is especially important that athletics directors, along with their counsel, review and analyze their institution's policies, procedures, and code of ethics currently in place and assess whether improvements need to be made.⁹

Further, institutions should require sub-certifications from athletics department personnel and those that provide any underlying data to the athletics department (including any university employee that plays a role in recruiting, financial aid, or admissions with respect to student-athletes).¹⁰ For example, required annual internal compliance certifications could include inquiries with respect to whether a certifying staff member has identified that all prospective student-athletes have a verified athletics profile.¹¹

Third Party Due Diligence: A well-designed compliance program should also apply risk-based due diligence to third party relationships, such as sneaker and apparel companies, boosters, agents, professional services, and others.¹² By way of example, institutions should have clear

⁶ Brandon Essig & Brian Kappel, Evaluation of Corporate Compliance Programs, Lightfoot Franklin & White, (March 19, 2019) <https://www.lightfootlaw.com/uploads/Compliance-Homework-For-Schools.pdf>.

⁷ Telephone Interview with RSM (September 2019).

⁸ Essig & Kappel, supra note 6; see also Evaluation of Corporate Compliance Programs, supra note 4.

⁹ Robert B. Barnett, Williams & Connolly (September 2019).

¹⁰ Id.

¹¹ Enrique J. Gimenez, Lightfoot's Take On Operation Varsity Blues, Lightfoot Franklin & White, (April 22, 2019) <https://www.lightfootlaw.com/news-insights/lightfoots-take-on-operation-varsity-blues>.

¹² Evaluation of Corporate Compliance Programs, supra note 4.

policies and reporting requirements associated with funds received, held, and expended by associated third parties.¹³ Requiring such third parties, who could possibly be viewed as a representative of the institution's athletics interest, to affirm compliance with university and athletics rules, such as implementing sub-certifications as described above, could also help mitigate potential third party abuse.¹⁴

Educating Non-Athletics Employees: The NCAA's Enforcement Charging Guidelines state that an institution's obligation to monitor extends "beyond its athletics compliance office."¹⁵ Thus, while athletics departments should appropriately tailor compliance education to athletics staff members, it is also worth mentioning the importance of educating non-athletics employees in other university departments. In other words, given that employees in non-athletics departments (such as admissions and financial aid), often play a critical role in athletics-related processes, such individuals should also receive compliance education.¹⁶

Media Planning: The press will be following any and all developments in this area. A violation of NCAA rules, including the new attestation requirement, could create significant adverse media exposure for athletics directors, athletics departments, and universities. Such unwanted media exposure should be considered as athletics directors consider compliance options. Therefore, athletics directors should have an informational media plan ready, as well as a plan to prepare a defensive media plan if the need arises. This necessitates having advisors (internal and external) in place and some material pre-written.¹⁷

3) Program Review and Monitoring

Internal and External Program Assessments: According to the DOJ, when examining corporate compliance programs, investigators consider whether the company has "identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks."¹⁸ Further, in considering when to bring charges, investigators consider remedial efforts to improve an existing compliance program and self-reporting violations.¹⁹

Thus, athletics directors should perform periodic internal and external assessments or "audits" (e.g., independent consulting activities designed to improve an organization's operations) of their compliance program to evaluate compliance risks, existing operational and financial controls,

¹³ AGB Statement on Board Responsibilities For Intercollegiate Athletics, Association of Governing Boards, (last visited Sept. 1, 2019) https://agb.org/wp-content/uploads/2019/01/statement_2009_athletics.pdf.

¹⁴ Greg Naviloff, Ron Nahass & Chris Fitzgerald, 10 questions every board should ask of its athletics department, RSM, (last visited Sept. 1, 2019) <https://rsmus.com/what-we-do/services/financial-advisory/forensic-accounting-and-fraud-investigations/ten-questions-every-board-should-ask-of-its-athletics-department.html>; see also Barnett, supra note 9.

¹⁵ Division I Enforcement Charging Guidelines, supra note 5.

¹⁶ Telephone Interview with Lightfoot Franklin & White (April 2019); see also Barnett, supra note 9.

¹⁷ Id.

¹⁸ Evaluation of Corporate Compliance Programs, supra note 4.

¹⁹ Id.

residual risks, and recommended program remediation to reduce risks to acceptable levels.²⁰ The results of such reports should then be distributed to the college or university's governing board.²¹

In addition, institutions should implement measures to identify and investigate unusual transactional activity within its books and records.²² For example, random "cross-checks," such as comparing lists of admitted student-athletes to final rosters, with a focus on lower risk areas (such as non-revenue sports) can help effectively deter misconduct.²³

Reporting Mechanisms: To mitigate potential fears of retaliation, athletics directors should further publish a number (such as a hotline), which may include mechanisms that allow for anonymity or confidentiality, where anyone, regardless of whether they are affiliated with the university, could report potential compliance violations.²⁴

Moreover, establishing incentives for compliance and disincentives for non-compliance can also have valuable deterrent effects. For example, publicizing disciplinary actions internally, while, at the same time, providing positive incentives (such as personnel promotions and rewards) can help facilitate compliance.²⁵

Part III: Conclusion

The NCAA's Commission on College Basketball stated that the "costs of compliance may be significant, but they should be small by comparison to the costs of being found in violation of NCAA rules."²⁶ While lack of resources is not an excuse for breach, institutions that implement a risk-based compliance program (where compliance resources are devoted to monitoring high-risk activities), however, can help limit the risk of potential violations by demonstrating good faith efforts to comply with applicable rules. Thus, while a strong athletic compliance program can never completely eliminate potential violations, it can reduce possible risks, and the magnitude of any harm.

²⁰ RSM, supra note 7.

²¹ Michael D. Akers & Gregory Naples, Internal Audit, Sarbanes-Oxley And Athletic Departments: An Examination And Recommendations For Reform, Marquette University, (last visited Sept. 1, 2019) https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1020&context=account_fac.

²² RSM, supra note 7.

²³ Lightfoot, supra note 16.

²⁴ Barnett, supra note 9.

²⁵ Evaluation of Corporate Compliance Programs, supra note 4.

²⁶ College Basketball Commission, supra note 1.