

Compliance

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Staying in Bounds: College Athletics Pose Compliance Hurdles

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While intercollegiate athletics are an important part of the college community, they are also big business. Each year, college sports generate billions of dollars in revenues for the NCAA and its member institutions. As with other business organizations, the enormous revenues generated through athletic programs create pressure to win and, with that pressure, temptation to engage in conduct inconsistent with universities' institutional mission and the rules of the NCAA.

There have been numerous attempts to address the special compliance challenges confronting universities and their athletic departments. The NCAA has amended its constitution and bylaws frequently, attempting to legislate compliance through voluminous regulations of matters large and small. Separately, a blue-ribbon panel established by a private foundation has made recommendations aimed at protecting the ideal of the amateur student-athlete. And some commentators have suggested paying college athletes as a means of relieving the tension between the prohibition of financial remuneration and the billions in revenues generated by the athletes' efforts.

Yet neither the enhanced NCAA rules nor the proposed reforms offer a panacea for the day-to-day enterprise risk created for some of America's finest institutions of higher learning by their popular and profitable athletic programs. As debates over systemic reform continue, individual universities are best served by continuing to draw from compliance principles used by large



corporations, carefully tailored to the special challenges of college sports.

Big Money

The NCAA is a diverse member association composed of more than 1,000 schools across three divisions as well as more than 200 conferences and related associations.¹ While the NCAA's member institutions offer students the opportunity to participate in over 40 men's and women's varsity sports, the Division I men's basketball and football programs generate the lion's share of revenues for all programs.

Through a 14-year, \$10.8 billion media rights agreement with CBS Sports and Turner Broadcasting, the annual March Madness basketball tournament generates more than 80 percent of the NCAA's revenue.² Similarly, according to an NCAA report, in 2010-11, college football's Bowl Championship Series (BCS) generated more than \$180 million in revenue through five postseason bowl games.³ Not only do schools and conferences receive significant income from these pools, but they are cashing in directly as well. According to press reports, the 12 schools that

make up the Big Ten each received more than \$25 million last year from the conference's athletics revenue,⁴ while the Pac-12's television deals could be worth as much as \$4.3 billion over 12 years.⁵

The impact of athletic programs on colleges and universities around the country extends far beyond media and merchandising revenues. Studies suggest that successful sports teams may increase alumni donations⁶ as well as the quantity and quality of the applicant pool.⁷

These benefits come with significant risks. Overemphasizing sports that generate a profit and enhance a university's popularity can endanger the ideals of academic excellence and amateurism that are supposed to form the core of college athletics. Indeed, newspapers and magazines are replete with stories of recruiting violations, academic scandals, improper payments to athletes, and lapses in judgment caused by the fear of damaging a cash cow.

More Money, Same Problems?

The challenges faced by college athletics programs are hardly novel. In 1929, the Carnegie

Foundation for the Advancement of Teaching found that recruiting in college athletics had become corrupt, that professionals had replaced amateurs, that education was neglected, and that commercialism ruled the day.⁸ While the concerns are not new, the explosion of revenues generated by college sports has increased both the incentive to cheat and the adverse consequences associated with getting caught.

In 1989, the Knight Foundation convened a blue-ribbon panel to address the “corruption [that] had engulfed big-time college sports in the 1980s.” The transmittal letter accompanying the first report of the Knight Commission on Intercollegiate Athletics sounded the alarm that “abuses in athletics had reached proportions threatening the very integrity of higher education.” According to the Knight Commission, during the 1980s the NCAA censured, sanctioned, or put on probation more than half of the universities playing at the NCAA’s top level; one-third of such top-level schools had graduation rates under 20 percent for basketball players; and a survey of professional football players found that nearly one-third had accepted illicit payments in college.⁹

Over the 20 years from 1991 through 2010, the Knight Commission produced a series of reports proposing various reforms. The core recommendation of the Knight Commission reports issued between 1991 and 1993 was a “one-plus-three” model of governance. The “one” stood for increasing presidential authority over athletics, which in some cases lacked strong, centralized oversight at the university level. This executive would then oversee the “three” aspects of academic integrity, financial integrity, and independent certification.

In 2000, the Knight Commission noted progress by the NCAA and its member institutions, but cited the need for further reforms.¹⁰ Thus, the 2000 report proposed a new iteration of the “one-plus-three” model: the formation of a “Coalition of Presidents” that would seek academic reform, de-escalation of the financial “arms race,” and de-emphasis of the commercialization of college athletics.

Ten years later, the Commission focused on the rise of athletic department expenditures and the widening gap between money spent per student and money spent per athlete, noting, for example, that in 2008 the Southeastern Conference spent \$144,592 per athlete, but only \$13,410 per full-time-enrolled student.¹¹ The 2010 report made three main recommendations: achieve greater transparency in athletic spending, reward practices that prioritize academic values, and treat college athletes as students first.

Following each of these reports, the NCAA membership debated and implemented some—though certainly not all—of the Knight Commission’s proposals. The NCAA Division I Manual has

expanded over time and now contains more than 450 pages of rules governing college programs, addressing everything from fundamental principles such as academic eligibility, amateurism, and the prohibition of gambling, to minutiae, such as rules specifying the dimensions and contents of “institutional note cards” sent to recruits.¹²

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Effective Aug. 1, 2013, the NCAA implemented a new enforcement structure with four levels of infractions: Level I violations, “Severe breach[es] of conduct,” include lack of institutional control, academic fraud, and failure to cooperate with an NCAA investigation; Level II violations, “Significant breach[es] of conduct,” include failure to monitor; multiple recruiting, financial aid, or eligibility violations; and other serious violations not rising to Level I; Level III violations, “Breach[es] of conduct,” encompass misconduct that is isolated or limited in nature; and Level IV violations, “Incidental issues,” are inadvertent, technical, or isolated infractions.¹³ Depending on the number and seriousness of violations, punishments imposed on a university’s athletic program can include loss of scholarships and eligibility for postseason play. Such sanctions can adversely affect revenues and recruiting, and can cripple a program for years to come.

Challenges in Universities

In many ways, the Knight Commission’s recommendations and other efforts to reform college sports attempt to apply the central elements of a corporate compliance program—board and executive involvement in compliance and ongoing monitoring and certification efforts—to universities and their athletic departments. Indeed, despite the appeal inherent in pursuing sweeping systemic changes, carefully applying the core elements of an effective corporate compliance program can help mitigate the risks associated with big-time athletics programs. This article outlines several elements of corporate compliance programs that can be crafted to the particular needs and resources of a university.

High-level oversight by the board of trustees and the president. Whether viewed through the

prism of the one-plus-three model proposed by the Knight Commission or the NCAA’s requirement of institutional control over athletic departments, a university’s board of trustees and president are responsible for promoting and encouraging ethical conduct and a commitment to compliance. This is accomplished by (a) delegating day-to-day responsibility to competent individuals with sufficient access to the trustees and president to ensure that any issues will be reported promptly to the highest levels of the institution, (b) allocating sufficient resources to the compliance effort, (c) regularly reviewing and monitoring the performance of both the compliance program and responsible persons, and (d) ensuring that risks are evaluated and mitigated. In satisfying their oversight obligations, trustees and presidents must account for several unique aspects of their athletic programs that require special attention.

First, coaches depend on fielding winning teams for job security; a successful coach can command multi-million dollar salaries and generate millions in additional revenues for the institution. This compensation model can create the perception that the coach is more important to the school than faculty members, deans, and even the president himself. For example, after Ohio State’s former head football coach was alleged to have committed several serious infractions, the school’s president reportedly joked that rather than considering firing the coach, he hoped the coach would not fire him.¹⁴ Joking aside, a university’s leadership must convey their commitment to compliance and make clear that even the most successful coaches will suffer negative consequences if they fail to abide by the standards set by the university, the conference, and ultimately the NCAA. By holding coaches accountable for violations that occur on their watch, and refusing to hire successful coaches with a track record of violations at other programs, an institution’s trustees, president, and athletic director will set the “tone at the top” that long-term compliance is more important than short-term success.

Second, like corporate shareholders, alumni and boosters often condition their continued support on athletic success. However, unlike shareholders, alumni and boosters present compliance risks as their desire for immediate success can undermine an institution’s compliance regime.¹⁵ To mitigate this risk, a university’s trustees and president should consider limiting the access that potentially unaccountable “supporters” have to athletes and coaches. While this might reduce the willingness of some individuals to support the athletic department financially, establishing a culture of compliance often requires forgoing lucrative but suspect opportunities.

Third, and most important, the student-athletes themselves present a high-risk population of talented but immature 18- to 22-year-olds, who lack financial resources of their own but are the object of attention from third parties happy to reward them for their athletic efforts. Moreover, some of the highest-risk athletes lack a long-term commitment to the university: At best they expect to attend for five years, but increasingly their goal of a professional career leads to a “one and done” mentality and little concern for the academic community. While the Knight Commission and NCAA seek to maintain the ideal of the amateur student-athlete whose sole compensation is a free education, some commentators have argued that student-athletes should be paid.¹⁶ Paying student-athletes could reduce both the perceived hypocrisy of unpaid amateurs generating millions of dollars in revenue for their schools and the financial pressures that lead some players to accept improper payments for food or spending money. It should not, however, be viewed as a cure for all of the compliance challenges facing college athletic programs. Recruiting would still involve relentless pressures and risks; student-athletes would still face eligibility requirements; and star athletes inevitably would be offered under-the-table payments to supplement the permissible compensation. While it may not be possible to eradicate the risks inherent in the current system, trustees and presidents need to make clear that athletes are part of the university community, that misconduct will not be tolerated, and that standards of conduct will be applied consistently across conferences and the NCAA as a whole. This will uphold the institutional mission of their universities without putting compliant programs at a competitive disadvantage.

Effective prevention in the field. Establishing a positive “tone at the top” must go hand-in-hand with prevention efforts in the field. *First*, strong compliance requires clear policies that take into account the realities and goals of the regulated groups. The compliance program must translate the NCAA’s complex, arcane, and constantly evolving set of rules into comprehensible, context-specific guidance for athletes, coaches, trainers, and other participants in the process.

Second, these clear policies must be communicated through effective training and education. In particular, coaches, trainers, and athletic advisors—the people who spend the most time with student-athletes and who remain relatively constant over time—need regular in-person or online training sessions, including training on how to identify and respond to potential violations.¹⁷

Third, effective compliance requires risk assessment and abatement. Corporations regularly look to employees, contractors, and other stakeholders; media reports; and civil, criminal,

and regulatory challenges faced by industry peers to identify risks. They also use external audits and benchmarking studies to test their programs. These tools are similarly available to colleges, which can look to groups such as the National Association for Athletics Compliance (NAAC) for guidance on best practices for their compliance programs.¹⁸

Detection and disclosure. To facilitate detection of violations, there must be effective reporting without fear of retaliation. This is a special concern in the university setting where a whistleblower who fears being vilified for “bringing down” a beloved athletic program might opt to remain silent. An appropriate “tone at the top” empowers concerned individuals to articulate their concerns, but the university also should develop protected outlets for disclosure, such as compliance hotlines and anonymous email or website submission forms on the college’s website.

Once a compliance breakdown is detected, the institution must promptly investigate and remediate. Some issues can and should be addressed internally or by the school’s regular outside counsel, while others are sufficiently serious or implicate high-level personnel so that an independent investigation by outside counsel or investigators is appropriate. A prompt and thorough investigation by independent counsel, followed by steps to remediate the problem identified and modify the compliance program to avoid its recurrence, sends a message that the institution takes compliance seriously and will not “look the other way” in the face of potential misconduct.

Lacking subpoena power and the ability to reward and protect whistleblowers, the NCAA regulatory regime depends heavily on self-reporting of even the most minor of transgressions.¹⁹ As with any enforcement regime, NCAA sanctions are often applied unevenly: Some schools investigate and self-report as required, while the same conduct at other schools may go undetected and unreported. In the corporate world, entities regularly weigh the nature and extent of the violations discovered, the ability to remediate the issues internally, and the costs and benefits of self-reporting in light of guidelines issued by the Department of Justice, the Securities and Exchange Commission, or some other government agency. The NCAA’s new enforcement regime, effective Aug. 1, 2013, rewards effective compliance by identifying self-detection, self-disclosure, and “exemplary cooperation” as mitigating factors for penalty purposes.²⁰

You Play How You Practice

The concerns expressed in the Carnegie Report in 1929, and in the Knight Commission reports from the 1990s, 2000s, and 2010, reflect a striking continuity: misconduct during recruiting,

amateurism giving way to professionalism, the emphasis of athletics at the neglect of education, and increasing commercialism. This continuity suggests that there are no easy fixes.

University compliance efforts face special challenges because of their people, their missions, and their unique place in American life. But just as in the business world, a successful compliance program must combine sound top-down structures with diligence on the ground, day in and day out. While this requires the commitment of significant time and resources, the chance to gather alongside the university community at Pauley Pavilion as championship banners wave from the rafters, or at Michigan Stadium as 115,000 people sing Hail to the Victors, seems well worth the effort.



1. <http://www.ncaa.org/wps/wcm/connect/public/NCAA/About+the+NCAA/Membership+NEW>.

2. <http://www.ncaa.org/wps/wcm/connect/public/ncaa/finances/revenue>.

3. Bowl Championship Series Five Year Summary of Revenue Distribution 2006-07 Through 2010-11, NCAA (2011).

4. Stu Durango, “Big Ten payouts to hit \$25.7 million per school,” St. Louis Post-Dispatch (May 18, 2012).

5. Steve Berkowitz, “Pacific-12 Schools Will See Big Payday from TV Deals,” USAToday (May 21, 2012).

6. Michael L. Anderson, “The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables,” NBER Working Paper No. 18196 (June 2012), available at <http://www.nber.org/papers/w18196>.

7. E.g., Devin G. Pope and Jaren C. Pope, “Understanding College Application Decisions: Why College Sports Success Matters,” *Journal of Sports Economics* (Nov. 26, 2008).

8. Howard J. Savage, et al., *America College Athletics*, Bulletin No. 23, New York: Carnegie Foundation for the Advancement of Teaching (1929).

9. Knight Commission, Introduction to the re-released 1991-1993 Reports (August 1999).

10. Knight Commission, *A Call to Action: Reconnecting College Sports and Higher Education* (2000).

11. Knight Commission, *Restoring the Balance: Dollars, Values, and the Future of College Sports* (2010).

12. NCAA Bylaw 13.4.1.1(i) (2013). The Division II and III Manuals run 368 and 284 pages, respectively.

13. NCAA Bylaw 19.1 (2013).

14. Pete Thamel, “Buckeyes’ Trials with Tressler Are Test for N.C.A.A.,” *N.Y. Times* (May 30, 2011).

15. NCAA Bylaw 13.02.14 (2013) (A booster involved in promoting the university can become a “representative of athletics interests” for whose conduct the university must answer).

16. E.g., Joe Nocera, “Let’s Start Paying College Athletes,” *N.Y. Times Magazine*, Dec. 30, 2011.

17. The main website of the University of Oklahoma’s compliance department, for example, features a Question of the Week as well as an archive of previous questions. See http://www.soonersports.com/ViewArticle.dbml?DB_OEM_ID=31000&ATCLID=208805707.

18. See <http://www.nacda.com/naacc/naacc-reasonable-standards.html>.

19. NCAA Bylaw 19.2.2 (2013).

20. NCAA Bylaw 19.9.4 (2013).