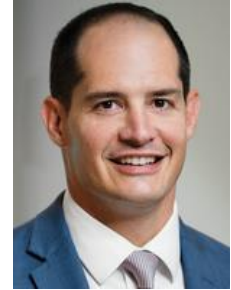


Compliance Homework For Schools After 'Varsity Blues'

By **Brandon Essig and Brian Kappel** (March 19, 2019)

On Sept. 26, 2017, colleges and universities were rocked by news that coaches at several high-profile basketball programs had been implicated in a federal bribery and racketeering prosecution brought by the U.S. Department of Justice. The news was stunning. Criminal statutes and tactics like wire taps normally used to target mobsters, street gangs and corrupt politicians were being brought to bear on the world of elite college hoops.



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Although news of the DOJ's prosecution was shocking, the effects of that prosecution have been mostly isolated. The National Collegiate Athletic Association required all of its member institutions to reassess student-athlete eligibility and investigate potential violations in their men's basketball programs, and schools are still discovering new facts relevant to the general subject matter of the prosecution (and taking action against coaches and players involved).



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However, only a small subset of the higher education industry was directly affected by subpoenas or other contact with criminal investigators from the FBI. The DOJ's findings were and are a big deal — especially to those implicated — but the limited reach of that investigation and its focus on schools with big-time, name-brand college sports programs meant that it hardly represented an existential threat to most institutions of higher learning.

That all changed last week with the DOJ's announcement that it had again used the same mob-fighting toolkit to investigate and bring criminal charges against dozens of individuals from across the United States for bribery related to the undergraduate admissions process. This time the institutions involved are not just those that participate in major college athletics; these institutions include the most elite academic universities in America.

Thus, the bribery risk in higher education is no longer narrow, nor is it limited to a particular sector of the industry. All of higher education in America — an industry with hundreds of billions of dollars of economic impact annually — is on notice that it has or could potentially have a bribery problem.

Having the benefit of such notice, colleges and universities should take proactive steps to address this potential problem, because the future enforcement efforts of regulators will likely continue to be robust, and any instances of bribery perceived to have resulted from inadequate institutional efforts on that very issue could have devastating consequences.

It is our view that colleges and universities should meet this new challenge by making sure that their institutional risk management operations implement the best practices from the world of corporate compliance. Because of the prominent role of college athletics in these scandals, this will certainly mean integrating athletics compliance efforts into an institution's larger risk management operations. If they have not already done so, schools might also consider going the route of corporate America and either hiring or designating a chief compliance officer, who is responsible for coordinating the institution's entire compliance function.

The Regulators Are (Probably) Coming

Higher education should understand that its regulators are also on notice of the industry's potential bribery problem. By regulators, we mean all of them — accrediting agencies, the NCAA, law enforcement, state legislators and Congress.

Colleges and universities should anticipate the possibility of aggressive regulation of all aspects of their operations susceptible to monetary influence and corruption much like their corporate counterparts in the late 1970s. That example is particularly apt here because it was in the 1970s that the exposure of widespread corruption and bribery on the part of American companies operating overseas prompted statutory reform by Congress.

The most enduring example from that era is the Foreign Corrupt Practices Act, which not only created criminal penalties but also imposed upon companies the obligation to implement compliance programs to curtail the practice. Since that time, other corporate reform statutes like the Sarbanes-Oxley Act of 2002 have imposed similar regulations and compliance burdens on American corporations.

Such legislation has not come yet for higher education, but the NCAA's active enforcement regime has imposed compliance obligations on collegiate athletic programs that parallel the corporate reforms passed by Congress. As a result, many colleges and universities employ NCAA compliance professionals that operate in very similar ways to their corporate counterparts. This is good, because the institutional knowledge exists for most schools. Unfortunately, it is often the case that a collegiate athletics department's compliance operations are siloed and cut off from the school's larger risk management functions.

The Corporate Model

Corporate compliance programs are built around the dictates of the United States Sentencing Guidelines. Chapter 8 of the guidelines defines the seven elements of an effective compliance program, summarized as follows:

- Policies and procedures to prevent and detect misconduct;
- High-level organizational oversight of compliance (board, president, etc.) and dedicated personnel with day-to-day responsibility for the compliance function;
- A program to communicate and train relevant personnel on ethics and compliance;
- A program to audit and evaluate compliance;
- A means of anonymous reporting of misconduct;

- Enforcement with incentives and discipline; and
- Remediation of known misconduct and a periodic assessment of risks in an entity's operations.[1]

The sentencing guidelines exist as a tool to calculate sentences for convicted criminals, but the elements of a compliance program set out above have become the minimum standard of corporate practice and the U.S. Department of Justice expects that all institutions will use Chapter 8 of the guidelines as a prospective planning tool to detect and prevent misconduct.

Thus, given the department's demonstrated willingness to aggressively pursue what it perceives as corruption in higher education, every college and university's president and governing board should be thinking about their existing institutional compliance functions through this lens.

Compliance Integration — A New Paradigm for Higher Education

If they have not already done so, institutions of higher education need to evolve away from the current paradigm that sometimes isolates athletics compliance from institutional risk management.

First, it is axiomatic that compliance operations among individual sectors of any entity should not be isolated. Isolated compliance operations must self-police, and often do so uncritically and poorly.

Second, NCAA compliance professionals are trained to develop processes to detect the improper flow of money and benefits to those who are not supposed to receive them — the very essence of any good anti-bribery program. As a result, NCAA compliance professionals have learned lessons that can benefit a school's compliance efforts as a whole.

Third, effective Aug. 1, the NCAA will require college and university presidents and athletics directors to sign a certification of institutional compliance, much like what is required of corporate executives under Sarbanes-Oxley. In an enforcement environment where the DOJ has used NCAA violations as a predicate for criminal charges, this requirement should take on heightened importance.

Fourth, the integration of a school's athletics and institutional compliance functions is a force-multiplier that can make both more efficient and effective.

What All Schools Should Be Doing Now

So with all of this in mind, what are some practical things schools can do?

1. Assess or reassess current compliance operations with an emphasis on lines of communication.

No compliance program can operate effectively in the dark — information is key to identifying potential violations before they become actual violations, so schools should identify ways to share information among all of the departments that touch the athletics

admissions process.

At a minimum, athletics compliance or other administrators should be looped into the basic procedure for athletics admissions at every institution, opening the process up for additional scrutiny and review. Though having more eyes on the process does not guarantee success in identifying potential bribery issues, it certainly cannot hurt, especially if that process allows a "neutral" observer like an athletics compliance officer or an institutional risk manager to study athletics admissions trends and identify idiosyncratic decisions or other possible "red flags" that warrant further investigation.

2. Track admissions information over time and across sports programs.

Bribery and other NCAA violations are often difficult to spot in a vacuum but easier to identify as departures from normal practice. Although the information each institution may choose to track will likely differ based on its own processes and procedures for admission, a good starting point may be some level of limited comparison between the student-athletes a coach recruits and identifies for admissions priority and the team's final squad list at various points during the year.

Again, disparities do not necessarily signal that a school or a particular program has a bribery problem or an NCAA compliance problem, but that information can be useful in identifying areas for further investigative follow-up, if needed, and also for analyzing the efficacy of the institution's admission practices.

3. Conduct spot checks and introduce a measure of randomness into the picture.

We expect that few, if any, institutions have the resources or other personnel to conduct full background reviews on all of the applicants their coaches or other athletics administrators are supporting for admissions to determine if the information provided to the admissions department is accurate and complete. Nor could the expenditure of resources necessary for a full and complete review be justified based on the apparently isolated nature of the problem.. But as airline passengers understand by now, spot checks have a deterrent effect that greatly exceeds the likelihood that they will turn up evidence of a violation or crime.

Simply put, if an institutional employee knows that there is a chance that an admissions officer, compliance director or risk manager will uncover malfeasance by randomly selecting the faux-athlete admittee for additional screening, they will be far less likely to participate in the kind of bribery scheme that the DOJ described.

4. Continue education on NCAA compliance obligations and investigate as needed.

In addition to the criminal aspects of the bribery scheme described by the DOJ, the athletics personnel involved have potentially violated NCAA legislation requiring the reporting of income earned outside of an institutional salary. And while criminal charges are clearly the main event here, the possibility that a participant in this scheme might be susceptible to a "show-cause" order from the NCAA's Committees on Infractions preventing him or her from participating in college athletics for a set period of time (even at another institution) might have an additional deterrent effect.

So schools should continue educating their athletics personnel about the applicable NCAA rules as well as the ramifications of violating them. And as schools are no doubt doing currently, they should also conduct thorough and complete investigations of potential violations that do come to their attention, just as they would for any other potential

noncriminal violation.

5. Involve institutional leadership.

Institutions already have an obligation to monitor and control their athletics programs under the NCAA rules, and when all is said and done with the DOJ prosecutions, this obligation will likely expand into and involve other scholastic departments. Institutional leadership should be involved in decisions — at least high-level decisions — with such wide-ranging impacts across academic departments.

In addition, the NCAA's new requirement that college and university presidents and athletics directors certify compliance with NCAA rules means that institutional leadership must take a greater role in ensuring that there are policies and procedures in place to quickly identify and rectify compliance issues on campus.

6. Document, document, document.

No compliance program is foolproof, but we have found that institutions with strong compliance programs usually have implemented documentation practices and other requirements that allow them to quickly and easily demonstrate to regulators and other investigators the types of information they gathered and how they reached their conclusions — even if incorrect — about any particular issue, whether admissions or some other topic of compliance interest.

This need for documentation takes on even greater importance in light of our recommendation that schools look to Chapter 8 of the sentencing guidelines as a guide, since regulators will want to see evidence of each of those elements of an effective compliance program.

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[1] §8B2.1(b)(1)-(7)