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Title IX Meets NIL: How Title IX Might Impact Future Revenue Sharing to College Athletes

Client Alert

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On Thursday, January 16, 2025, the U.S. Department of Education's (DOE) Office for Civil Rights released a fact sheet relating to guidance on Title IX and its interplay with Name, Image, and Likeness (NIL) payments to student athletes. Specifically, the fact sheet addressed the DOE's perspective on ramifications of the revenue sharing system set to be implemented as a result of the *House v. NCAA* settlement (as discussed in previous Client Alerts¹). As a reminder, universities will be able to share revenue with student athletes up to 22% of the average Power 5 school's annual athletic revenue if the *House* settlement receives final approval from Judge Claudia Wilken in April. For the 2025–2026 school year this number is expected to be to the tune of approximately \$20.5 million.

Many schools are planning to allocate a large portion of the allotted revenue to revenue driving sports, namely football and men's basketball. However, the latest fact sheet from the Department of Education could have schools rethinking their allocation plans. The DOE reiterated that Title IX should be considered at the forefront of any revenue sharing decisions made by schools. Title IX prohibits sex discrimination in education programs and activities and was passed in 1972 as part of the Education Amendments. Title IX regulations require schools to provide equal athletic opportunity, regardless of sex. Equal opportunity in athletic programs is assessed in three main areas:

1. The benefits, opportunities, and treatment given to male and female athletic teams;
2. The athletic financial assistance, including athletic scholarships, that a school awards to student-athletes; and
3. A school's accommodation of the athletic interests and abilities of its students.

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Specifically, the Department of Education clarified its opinion that any future revenue sharing distributions from a school to an athlete for NIL rights are classified as “financial assistance.” The DOE further stated that, “[w]hen a school provides athletic financial assistance in forms other than scholarships or grants, including compensation for the use of a student-athlete’s NIL, such assistance also must be made proportionately available to male and female athletes.”² In other words, if the revenue paid out by schools to athletes for NIL is paid unproportionately to men’s sports over women’s sports, then a school could be at risk of violating Title IX. The DOE essentially found that any payment by a school to use an athlete’s NIL is akin to an athletic scholarship, therefore requiring payment to be distributed equally among men and woman.

The DOE also clarified that it does not “offer specific guidance on Title IX’s application in the context of compensation provided for the use of a student athlete’s NIL by a third party, including an NIL collective.”³ This is because largely as of now, NIL collectives are third-party entities that do not receive federal funding, and therefore on the face would not be subject to Title IX liability. However, there are also ongoing challenges/lawsuits to this point. Specifically, there is a lawsuit against the University of Oregon “alleging the university deprives women of equal treatment and benefits, equal athletic aid and equal opportunities to participate in varsity college athletics in violation of Title IX.”⁴ That suit alleges that the school and its related NIL collective work so closely together that in tandem they violate Title IX. If Title IX does in fact apply to revenue sharing payments from schools, then NIL collectives likely will continue to be prevalent in the college athletics ecosystem (at least pending the outcome of the lawsuit mentioned above).

It should be noted that the fact sheet released by the Department of Education is not a law, regulation, legal opinion, or ruling, and was issued in the final days of the Biden administration. Because of this, many view the fact sheet as obsolete. In fact, the incoming Trump administration could take a different perspective on the issue and rescind the fact sheet. Congress and the Trump administration could also act by amending Title IX to explicitly exclude NIL. However, the specific position of the Trump administration on this issue is unclear as of right now.

If further clarification is not provided by the April deadline for final approval of the *House* settlement, Judge Wilken may address the Title IX arguments contained within the fact sheet. “If Title IX applies to the *House* settlement, the settlement’s parties might consider restructuring their deal so that instead of the college, which is subject to Title IX, paying the player would be the conference or NCAA, neither of which courts have held is governed by Title IX.”⁵

As with many of the legal issues in the college athletics landscape, guidance on this issue will surely change. While the legal effect of the fact sheet at this point is minimal, it definitely raises many future questions that will at some point be addressed during this ever-changing era of college sports. Our Sports and Entertainment Law Team at Butzel can help prepare clients for the future and keep them updated with any changes as they occur. Our team at Butzel can help ensure that clients are not only adequately prepared to survive the new era of college athletics but are set up in a position to thrive because of it. From athletes to universities and everyone in between, our team at Butzel can help make sure that you are successful in the future college athletics ecosystem. Please feel free to reach

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out to the authors of this Client Alert or your Butzel Attorney with any questions or concerns.

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[1] The NCAA's Game Changing Antitrust Settlement: Paving the Way for Colleges to Directly Pay Athletes

[2] Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities

[3] Fact Sheet: Ensuring Equal Opportunity Based on Sex in School Athletic Programs in the Context of Name, Image, and Likeness (NIL) Activities

[4] Eric Prisbell, *Female athletes file Title IX sex discrimination class-action lawsuit against Oregon*, on3.com (12/01/23)

[5] Michael McCann, *Dept. of Education's NIL, Title IX Fact Sheet Deserves Scrutiny*, Sportico.com (January 17, 2025, 9:00 AM)