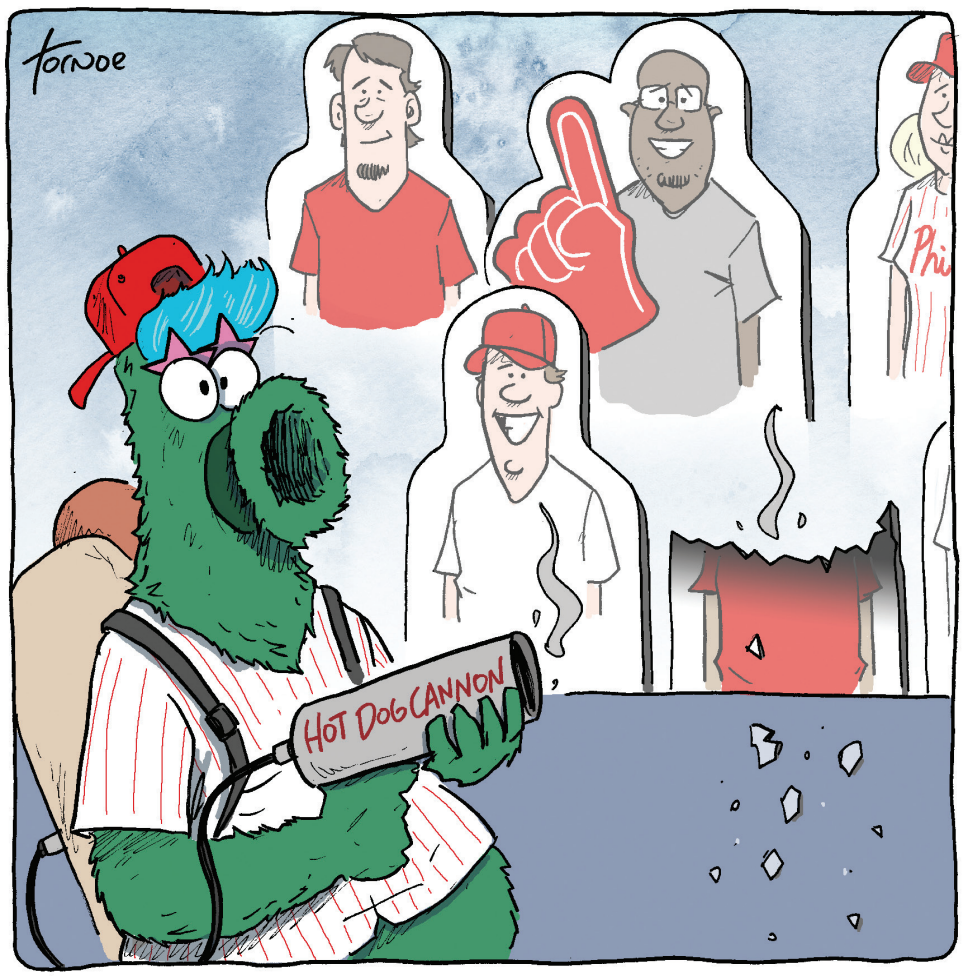
OPINION

Colleges need new playbook to prepare for NIL rules



BY TYRONE THOMAS

THE NCAA'S BOARD OF GOVERNORS announced its support for rule changes that would allow compensation for third-party endorsements by college athletes without any adverse effect on eligibility. While this represents a fairly substantial change in position for the NCAA, it is not surprising in light of the pending federal antitrust-based challenges to its restrictions on payments beyond cost of attendance, and factoring the numerous states that have passed or proposed legislation that would allow compensation to student athletes. There are still a number of steps to play out as the three divisions of the NCAA need to prepare guidelines for this area (which interestingly, could have different forms) and be targeted for approval in January 2021 for implementation in the 2021-2022 academic year.

There will undoubtedly be many social media entities, athletic apparel companies and agents who will have immediate interest in taking advantage of this change. Because of this, the job of ensuring both legal and athletic compliance just became much more difficult. The commercial considerations of monetizing publicity rights is now accelerated to the moment a high school student decides where he/she will attend college to play a sport, if not sooner.

For perspective, it is key to understand what remains prohibited in college athletics:

- College athletes are still not employees, irrespective of payments from third parties, and thus remain outside the scope of labor and employment laws including with respect to minimum wage, workers compensation and occupational safety.
- Colleges are still limited to cost of attendance with respect to the financial incentives they may provide to student athletes. In other words, there is still no "pay for play."
- Compensation by any person or entity for athletics participation or performance is forbidden.
- Schools and conferences may not play a part in facilitating name/image/likeness opportunities for their respective student athletes.
- NIL opportunities cannot be tied to attendance at a particular institution.
- Student athletes can no longer be restricted from opportunities that are available to college students generally.
- Any marks of the respective universities are not to appear in the commercial opportunities of the student athletes.

As a matter of the law of publicity rights, colleges were forbidden from conducting activities to enrich themselves based on the NIL of their respective student athletes. This is unchanged by the current rule changes and was previously front and center in the O'Bannon litigation. It will now be an additional challenge for colleges to prevent their respective stakeholders from attempting to do what it cannot do itself.

What should institutions do in the interim? The average college student is not an expert on contracts or intellectual property issues. Colleges should expect to create resources and facilitate independent educational tools that will help all within athletics understand not only guardrails to maintain college athletic eligibility, but also address resources in dealing with agents, perils with social media, and maintaining their own privacy interests. They should also consider issue-specific resources in these areas:

- **FRAUD:** An irony in the new regulatory regime is that many critics who called for such changes in order to end the black market for hidden deals with student athletes now concede that monitoring the legitimacy and nature of the NIL relationships will be extremely difficult. It will be incumbent for the examination process related to eligibility to extend deeper in the high school history of prospective student athletes since they will now be sought after at an earlier time. Similarly, athletic departments should expect to conduct some form of baseline briefing on warning signs for predatory relationships as part of the orientation process for the new season.
- **CONFLICTS WITH COMMERCIAL RELATIONSHIPS:** Imagine if NFL draft pick Justin Herbert entered into a commercial agreement with Adidas when he came to the University of Oregon, an institution that maintains Nike founder Phil Knight as one of its largest donors. Further imagine Herbert attempting to wear Adidas apparel whenever he was interviewed off the field, irrespective of whether it was conducted in connection with athletic competition. There will need to be a mechanism to address real and apparent conflicts of interests that may arise between the interests of the universities (or their athletic staff) and their student athletes.
- **EFFECT OF BEHAVIOR/MORALS CLAUSES:** As student athletes begin to take advantage of opportunities, there will be an increase in them being governed under contracts with morals clauses — protections placed in contracts to allow companies to terminate the relationship in the event of illegal or harmful behavior. What effect will the invocation of such a provision by a third-party place on the respective college to similarly take remedial action? What if the improper or controversial behavior is on the part of the sponsoring company itself?
- **PRIVACY RIGHTS/FERPA:** Perhaps one of the least understood areas of privacy law in its application to college athletics is the Family Educational Rights and Privacy Act, the federal statute that governs privacy protections for the education records of all students. Generally, the outside commercial activity of students would not fall in its purview, but what about communications between institutions and third parties that would affect their active standing as a student? There will need to be safeguards created, with the additional caveat that a number of large college athletics programs are sponsored by public institutions who may find themselves facing public disclosure requests under the Freedom of Information Act.

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