# Report to Knight Commission on Intercollegiate Athletics on Title IX and the NCFA

## The College Sports Governance and Structure Committee

May 20, 2021

Submitted by:

**Church Church Hittle + Antrim**

Kelleigh Fagan
Kaitlyn Collyer
Charlotte Westerhaus-Renfrow

ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

# Table of Contents

Executive Summary ........ 2
Title IX Substantive Issues ........ 5
What does Title IX require/protect? ........ 5
What entities are required to comply with Title IX? ........ 5
How does Title IX apply to athletics? ........ 6
What is the current Title IX landscape? Specifically, what issues do institutions currently face in terms of Title IX compliance? ........ 10
What areas of Title IX are implicated by the above proposed questions? ........ 11
What challenges would institutions face in attempting to comply with Title IX based on the above proposed questions? ........ 13
What legal challenges could the NCFA face relative to Title IX? ........ 14
Conclusion on Substantive Title IX Considerations ........ 16
Title IX Procedural Issues ........ 16
Executive Branch and Relevant Agencies ........ 17
Legislative Branch ........ 19
Judicial Branch ........ 20
Role of Collegiate Sports in Promoting Gender Equity ........ 20



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

## Executive Summary

The Knight Commission on Intercollegiate Athletics ("KCIA") has proposed creation of a National College Football Association ("NCFA") for purposes of a separate and distinct governing body for the highest level of Division I football. Naturally, questions have arisen as to the legality of such a structure and the challenges it may face. The two specific questions that KCIA asked Church Church Hittle + Antrim to address related to the NCFA and Title IX were, in summary (1) if the NCFA had different rules than the NCAA, what could be the impact on Title IX compliance (referred to in this report as "substantive considerations") and (2) what legal processes are available to determine if and how Title IX applies if there are different rules for NCFA student-athletes than NCAA student-athletes (referred to in this report as "procedural considerations").

To unpack and analyze those questions, the report that follows this Executive Summary goes into significant detail on the history and application of Title IX, the federal agencies that promulgate regulations on and enforce Title IX, and how case law has evolved certain aspects of Title IX.

To distill that analysis into more manageable information, at various sections in the report, we have provided key legal conclusions. This Executive Summary brings those key conclusions together to highlight the most important components of the analysis conducted.

Before providing those key legal conclusions, we have derived the following overall conclusions regarding the intersection of the NCFA and Title IX:

1. Member schools of the NCFA will continue to be subject to Title IX, just as each are now as member schools of the NCAA.
2. Title IX currently poses legal, reputational, and financial risks to universities and colleges. There is even greater scrutiny on Title IX compliance in the current collegiate sports landscape with budget cuts schools are facing due to COVID-19 and in the wake of the gender disparities that occurred in women's collegiate sport championships for certain winter and spring sports in 2021. This same scrutiny will likely exist notwithstanding the creation of the NCFA.
3. Creating the NCFA based on the principles delineated in the Transforming the D-I Model Report ("Reform Report") likely maintains the status quo regarding Title IX.
4. If creation of the NCFA results in a level-set of revenue distribution across Division I as described in the Report, institutions may be in a financial position to provide greater monetary support to advance Title IX purposes.

<u>Key Legal Conclusions on Substantive Considerations</u>

**Member schools of the NCFA would be subject to Title IX**. The first part of the report addresses substantive Title IX considerations. Title IX applies to institutions that receive federal funds, including through loans that students receive. Therefore, Title IX will apply to essentially every institution that could be a prospective member of the NCFA. The Office for Civil Rights ("OCR") of the Department of Education ("DOE") enforces Title IX.

> Because NCFA member schools will be required to comply with Title IX, each must demonstrate compliance with three components: (i) equal participation opportunities for male and female student-athletes; (ii) proportionate athletics aid for male and female student-athletes; and (iii) a laundry list of treatment areas, such as facilities, equipment, access to coaching, and publicity. If the NCFA's member schools adopted different rules than NCAA rules that would presumably result in male student-athletes (through football) having greater benefits than female student-athletes, the greater benefits would most likely trigger scrutiny of whether schools are providing equal treatment under the laundry list areas of Title IX. Schools must ensure male and female student-athletes receive


ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

equitable treatment in those areas. As a basic (and extreme) example, if all men's sports at a school have access to locker rooms but no women's sports do at that same school, then that school would likely be unable to demonstrate that this disparity was due to nondiscriminatory factors and would therefore be in violation of the Title IX laundry list area requiring equal treatment in the provision of locker rooms, practice and competitive facilities.

**If member schools of the NCFA offer different benefits to male student-athletes than their female student-athletes, those different benefits could implicate the treatment areas under Title IX, and institutions could be responsible for determining how to offer offsetting benefits for female student-athletes.** KCIA posed two specific examples of benefits the NCFA could offer that may impact an institution's Title IX compliance obligations: (1) if NCFA football student-athletes were permitted to conduct group licensing activities but NCAA student-athletes were not so permitted; or (2) if the NCFA as a governing body set up a medical trust fund for football student-athletes to access post-graduation.

The Title IX implications under either of these scenarios are uncertain. It is possible group licensing does not implicate Title IX at all. Although the NCFA rules would provide football student-athletes the *opportunity* to engage in group licensing, third parties would technically provide the benefit through the licensing agreements. However, this outcome is unlikely based on how OCR views what one may call indirect benefits in other areas. Another possibility is that OCR views this rule within the "recruiting" or "publicity" areas of the laundry list. A third possibility is that OCR's analysis does not fall into an enumerated laundry list area but, instead, OCR looks at the rules as an additional treatment area (or within a new treatment area that may broadly look at name, image, likeness benefits as a whole), which it is authorized to do. The analysis on the medical trust fund follows similar logic as the group licensing analysis. However, there is a specific laundry list treatment area delineated in the regulations as the provision of medical care and treatment that specifically looks at the provision of insurance. OCR could choose to evaluate the medical trust fund under that treatment area. The report provides analysis on how case law and past efforts to amend Title IX could provide guidance for how OCR or a court may decide these issues.

**Another key area of uncertainty in this analysis is whether the NCFA itself could be subject to Title IX.** Based on the current law, the NCAA is not subject to Title IX, which likely means the NCFA would not be either, unless the NCFA exerts significantly more control over its member institutions than the NCAA. Case law demonstrates that the more controlling authority a membership organization exerts over its members, the more likely the organization itself could be subject to Title IX. The report addresses in more detail how that greater control could look.

Conclusions on Procedural Considerations

The second part of the report addresses procedural Title IX considerations. Specifically, because uncertainties in this area of law do exist, how can those uncertainties become certain? The short answer is that there will likely never be any complete certainty on these questions, short of an exemption from Title IX or federal legislation that specifically addresses them. However, the executive branch, through the DOE, can issue legally binding regulations or interpretative guidance (that is not necessarily legally binding but persuasive authority) that could address these uncertainties. The most appealing aspect to this process is the ability for input from the public and interested parties like the NCFA. However, these regulations or guidance are often subject to rescission by subsequent administrations. Federal legislation would provide the most long-lasting


ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

and uniform answers but is likely the most difficult to obtain in the current political climate. Lastly, courts often resolve gray areas of law, but they first need an actual dispute to resolve and resolution through litigation is typically a lengthy process.



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

## I. Title IX Substantive Issues for NCFA

**Question Presented: If NCFA rules were to permit FBS/NCFA athletes to have a significantly different experience (financially or otherwise) under the NCFA than Division I rules would permit for athletes in all other NCAA sports, what could be the impact on defining Title IX compliance and on potential legal challenges to compliance (for example, if the NCFA were to allow for group licensing opportunities for football athletes but the NCAA were not to allow that practice for athletes participating in sports that it governs?).**

### A. What does Title IX require/protect?

In its original form, federal legislators intended for Title IX to expand opportunities for women and girls in the classroom. Title IX's charge is very simple: the law prohibits discrimination "on the basis of sex" in education programs and activities that receive federal funds.[1] The language of the law does not require creating opportunities for one sex over the other; however, the federal government recognizes "[p]articipation in intercollegiate sports has historically been emphasized for men but not women," which caused low participation rates for women in sports. Title IX protections in athletics have generated a sharp increase in girls and women's participation in sports.[2] As Title IX approaches its 50th anniversary, although the letter of law has not changed, the bounds of its application and jurisdiction continue to evolve.

### B. What entities are required to comply with Title IX?

The two key inquiries for understanding the application of Title IX in the context of the NCFA are (1) whether the NCFA member institutions are subject to Title IX and (2) whether the NCFA as a separate entity is subject to Title IX.

The basic rule regarding applicability of Title IX is that institutions that (1) offer an "education program or activity;" and (2) receive federal funds must comply with Title IX. The definition of federal funds includes grants and loans provided to students. Institutions are taken as a whole and do not parse out whether specific departments or programs directly receive federal funds.[3] Therefore, if an institution receives federal funds, all its programs and activities are required to comply with Title IX.[4] Undoubtedly, to answer the first key inquiry in the preceding paragraph, member institutions of the NCFA will be required to comply with Title IX.

While the question of whether individual athletic departments are required to comply with Title IX is settled, the question of whether membership organizations, such as the NCAA or the proposed NCFA, are also required to comply with Title IX is less settled. In the past, litigants have attempted to hold membership organizations responsible for Title IX compliance by advancing the argument that the membership organization is made up of members that are themselves subject to Title IX, so the membership organization should be subject to Title IX, too.

The United States Supreme Court has addressed one aspect of this "membership" argument and in doing so, made it clear that the NCAA's receipt of membership dues from federally funded institutions was not sufficient to bring the NCAA under Title IX jurisdiction.[5] The Supreme Court declined to decide, however, the question of whether the NCAA could be

---

[1] 20 U.S.C. § 1681

[2] 34 C.F.R. § 106.41(a)

[3] The Civil Rights Restoration Act of 1987 specifies that recipients of federal funds must comply with civil rights laws, including Title IX, in all areas, not just the particular program or activity that received federal funding.

[4] *Haffer v. Temple University,* 688 F.2d 14 (3rd Circuit 1982)

[5] *NCAA v. Smith*, 525 U.S. 459 (1999)



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

subject to Title IX jurisdiction as a result of the fact that federal funds recipients ceded "controlling authority" over its athletics program to the NCAA.

The District Court in Hawaii recently revisited the "controlling authority" argument on a motion to dismiss, challenging whether a high school athletic association was responsible for complying with Title IX. In reviewing the Motion to Dismiss, the District Court found that the Plaintiffs alleged sufficient facts to state a plausible claim that the athletic association could be subject to Title IX because of (1) its indirect receipt of federal funds and (2) the association had controlling authority over high schools' athletic programs. Specifically, plaintiffs alleged that (1) employees of federally funded programs not only take part in, but serve as executive directors and members of the athletic association and (2) the athletic association has controlling authority over items such as competitive facilities; scheduling of seasons, games, and tournaments; travel; publicity and promotion; and budget.[6] In its decision, the District Court also noted that other districts had ruled that an entity has controlling authority over a federally funded program is also subject to the anti-discrimination provisions of Title IX (*see Williams v. Bd. Of Regents of Univ. Sys. Of Georgia,* 477 F.3d 1282 (11th Cir. 2007) (stating "if we allowed funding recipients to cede control over their programs to indirect funding recipients but did not hold indirect funding recipients liable for Title IX violations, we would allow funding recipients to. . .avoid Title IX liability."); *Horner v. Ky. High Sch. Athletic Ass'n,* 43 F.3d 265, 271-72 (6th Cir. 1994); *Cmtys for Equity v. Mich. High Sch. Athletic Ass'n.,* 80 F. Supp. 2d 729, 735 (W.D. Mich. 2000) (ruling that "any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid).[7]

Key Conclusions Regarding Entities Subject to Title IX

- Unless an exemption applies to a certain institution, all potential member institutions of the NCFA will be required to comply with Title IX.
- Organizations like the NCAA are not currently subject to Title IX simply because its members, who are subject to Title IX, may pay dues to the NCAA.
- Presumably, if the NCFA has a similar "look and feel" to the NCAA in terms of governing its member institutions, then the NCFA as a governing body would not be subject to Title IX. However, its member institutions would still be required to comply with Title IX.
- If the NCFA exerts more control over its governing bodies than organizations like the NCAA, it increases the likelihood that the NCFA could be subject to Title IX.

### C. How does Title IX apply to athletics?

[6] *See e.g. A.B. by C.B. v Hawaii State Department of Education and Oahu Interscholastic Association*, 386 F. Supp. 3d 1352 (D. Hawaii 2019)

[7] See below for additional discussion regarding potential application of the "controlling authority" theory to the NCFA.



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

In terms of achieving gender equality,[8] athletics presents a unique set of challenges. Unlike employment or college admissions, gender is not an irrelevant characteristic in athletics.[9] Institutions must have some way of determining whether they comply with Title IX's mandate to provide equal athletics opportunities, despite the fact institutions largely maintain single-sex teams.[10] Title IX does not require schools to sponsor a women's program for every men's program. Instead, Title IX offers schools a flexible approach to respond to the differing athletic interests of men and women.[11] While Title IX starts with the premise that men and women deserve equal access to educational opportunities, the DOE recognizes through it regulations that providing rigidly, or identical, equal opportunities is not practical.

Title IX does not, however, carve out any exceptions for any specific sports and does not allow any economic justifications for discrimination.

As Congresswoman Patsy Mink explained when the idea of an economic exception to Title IX was proposed "[t]he implication is that sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from Title IX."

When Congress passed Title IX in 1972, it authorized the Department of Health, Education and Welfare (Department of Education's ("DOE") predecessor) to implement regulations outlining how institutions that receive federal funds ("recipients") can comply with Title IX.

In 1979, HEW implemented regulations requiring recipients to demonstrate compliance with three separate areas: (1) participation opportunities, (2) athletics aid and (3) the "laundry list."[12]

1. Participation Opportunities: Institutions must effectively accommodate the interests and abilities of students to the extent necessary to provide equal opportunity[13] in the selection of sports and levels of competition.[14]

   An institution may demonstrate effective accommodation one of three ways:

   a. Substantially proportionate participation opportunities. Under this method, the Office for Civil Rights[15] ("OCR") of the DOE compares each sex's full-time

[8] The DOE's regulations state institutions are responsible for providing "equal opportunity." This term can be confusing in its application, but the DOE explains that equal opportunity does not mean identical opportunity. The examples provided in the enumerated sections below explain how OCR applies "equal opportunity." In order to be consistent with the exact language used in the regulations, we have used the word "equal" throughout where applicable and when appropriate, provided explanation or language from the appropriate authority. In practice, "equal" how OCR defines it means much closer to the common use of the word "equitable."

[9] *Cohen v. Brown University*, 101 F.3d 155, 178 (1st Cir. 1996).

[10] 34 CFR 106.41(c) uses the word "equal opportunity." Specifically, this regulation states: "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." The 1979 Policy Interpretation goes on to explain how OCR defines compliance with the mandate to provide "equal opportunity" and outlines that "equal" is more flexible than it sounds and does not require a rigid mirror image of opportunities.

[11] *Kelley v. Board of Trustees*, 35 F.3d 265, 271 (7th Cir. 1994).

[12] 41 Fed. Reg. 71,413 (December 11, 1979).

[13] Equal opportunity does not require schools to integrate their teams or provide exactly the same sports for both sexes. 41 Fed. Reg. 71,417-18 (December 11, 1979).

[14] 34 CFR 106.41(c)

[15] The Office for Civil Rights is the Department of Education's enforcement arm. OCR evaluates, investigates and resolves Title IX Complaints.



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

undergraduate enrollment rate with the number of athletic participation opportunities[16] offered to that sex. OCR does not require exact proportionality. Rather, an institution would comply even if there was a disparity in the opportunities if the disparity would not be sufficient to sustain a viable team. This method is often referred to as a "safe harbor," meaning if an institution can demonstrate it offers opportunities for its men and women that are "substantially proportionate" with their respective enrollment numbers, the inquiry into effective accommodation will end here. To illustrate this concept, the regulations do not require an institution to offer 100 opportunities for men to participate in intercollegiate athletics and 100 opportunities for women to participate in intercollegiate athletics. Instead, OCR would look at full-time undergraduate enrollment at that school. If women make up 60% of the full-time undergrad population, then OCR would expect women to have 60% of the athletic participation opportunities. In OCR parlance, this means the institution is "effectively accommodating" its students interests and abilities and therefore is providing "equal opportunity."

b. Demonstrate a history and continuing practice of program expansion for the underrepresented sex. If an institution cannot demonstrate it provide substantially proportionate opportunities, it may attempt to expand participation opportunities. Institutions demonstrate compliance with this test by showing it has a history of responsiveness to the developing interests and abilities of the underrepresented sex. Not only does this method look to the past, but it also reviews continuing remedial efforts by institutions to expand opportunities. It gives institutions the opportunity to acknowledge that they do not currently meet the letter of the law, but they have a plan in place to achieve equal opportunity. Eliminating teams for the overrepresented sex is not the same as expanding teams for the underrepresented sex. In fact, OCR strongly discourages eliminating participation opportunities to bring numbers into compliance.

c. Fully and effectively accommodate the interests and abilities of the underrepresented sex. Lastly, where an institution cannot demonstrate that it meets one of the prior two prongs, it can show that even though it does not offer equal[17] athletics participation opportunities, the underrepresented sex does not have the interest or ability to form an additional varsity-level team. Institutions demonstrate this by proactively sending surveys to enrolled and committed students to determine the level of ability and interest in its population.

2. Athletics Aid: Female and male student-athletes must also receive athletics scholarship dollars proportional to their participation.[18] An institution complies if the amount of aid available to each sex is divided by each sex's number of participants and each sex receives proportionately equal amounts. By way of example only, if an institution has a male to female student-athlete population of 55% to 45%, then the institution would comply with Title IX if it awarded 55% of

[16] Actual participants on the team. *Cohen v. Brown University*

[17] *See* Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (1996): "The [1979] Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide **equal** athletic opportunity." An institution provides equal athletic opportunity when it responds to the interests and abilities of the underrepresented sex.

[18] 41 Fed Reg 71413

its athletics scholarship dollars to male student-athletes and 45% to female student-athletes. Similar to participation opportunities, OCR does not require the amounts to be exact. If the disparity is one percent or less, there is a strong presumption the disparity is based on legitimate and nondiscriminatory factors.

In 1994, the federal government passed the Equity in Athletics Disclosure Act ("EADA"), which requires institutions to report certain gender equity information on an annual basis. Specifically, schools are required to report information related to spending on men's and women's programs and athletics aid offered. The DOE uses the EADA data to prepare its annual report on gender equity in collegiate athletics to Congress and provides some oversight into whether schools meet their mandate to provide substantially proportionate athletics aid.

3. Laundry list: Federal regulations also require equal[19] treatment of female and male student-athletes in the eleven provisions mentioned below. In determining whether an institution complies, OCR generally reviews the availability, quality and kinds of benefits, opportunities and treatment afforded members of both sexes. An institution can comply if the compared program components are equivalent, meaning equal or equal in effect. When disparities are identified between men's and women's teams, i.e., if a men's team receives a superior benefit in some way, OCR considers whether the benefit provided to the men's program was offset by an unmatched benefit provided to any of the teams in the women's program. Essentially, OCR takes a wholistic approach and reviews each program component and each team and does not consider each component in a vacuum. Identical benefits, opportunities or treatment are not required, provided the overall effect of any differences is negligible. Even if the benefits are not equal, an institution still may comply if the differences are the result of non-discriminatory factors.

   For example, differences in the operation of a sport may lead to differences in treatment areas. Specifically, football may require special facilities and equipment. In addition, recruiting related expenditures may fluctuate from year-to-year to fit the specific needs of a team. Lastly, events that have more draw require additional staffing to accommodate the larger crowd sizes and facilities. This is a sex-neutral fact but may disproportionately benefit male sports based on their attendance size.

   Once OCR identifies disparities, however, and if it finds no evidence of offsetting benefits, OCR considers whether the differences between the benefits provided to the men's and women's programs are negligible. Where the disparities are not negligible, OCR examines whether the disparities are the result of legitimate, nondiscriminatory factors. If OCR finds no legitimate, nondiscriminatory reasons for the disparities, OCR then determines whether the identified disparities resulted in the denial of equal opportunity to male or female athletes, either because the disparities collectively were of a substantial and unjustified nature or because the disparities in the program component were substantial enough by themselves to deny equal athletic opportunity.

   The treatment areas are as follows:

[19] *See* 34 CFR 106.41(c): Equal Opportunity. "A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunities for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors: [laundry list]." Again, equal does not mean identical in application.



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

i. Provision and maintenance of equipment and supplies: uniforms, apparel, sport-specific equipment/supplies, general equipment and supplies, instructional devices and conditioning and weight training equipment

ii. Scheduling of games and practice times

iii. Travel and per diem expenses

iv. Opportunity to receive coaching and academic tutoring

v. Assignment and compensation of coaches and tutors

vi. Provision of locker rooms, practice and competitive facilities

vii. Provision of medical and training services and facilities

viii. Provision of housing and dining services and facilities

ix. Publicity

x. Recruiting[20]

xi. Provision of support services

Key Conclusions Regarding Title IX's Application to Athletics

- Schools subject to Title IX must demonstrate compliance with all three prongs: (i) participation opportunities; (2) athletics aid; and (iii) laundry list areas.

- The participation prong can be met in one of the following three ways: (a) demonstrating substantially proportionate athletic opportunities based on the gender makeup of the general student body; (b) demonstrating a history and continuing expansion of athletic opportunities for the underrepresented sex; or (c) demonstrating full and effective accommodation of the needs and interests of the underrepresented sex.

- Analysis under the laundry list treatment areas does not require identical treatment. Rather, it must be equitable. OCR will not compare one benefit directly with another to find noncompliance. Rather OCR will view the benefits as a whole to determine compliance.

- The laundry list aspect is the most likely component to be affected by the questions posed regarding the NCFA.

## D. What is the current Title IX landscape? Specifically, what issues do institutions currently face in terms of Title IX compliance?

In the 1970s, federal lawmakers, concerned with the prospect that institutions would slash football budgets in order to comply with Title IX, proposed a series of amendments to Title IX that would carve an exception for revenue sports. Specifically, the amendments attempted to exempt revenue sports from consideration of whether institutions were in compliance with Title IX. Senator Roman Hruska, one of the bill's sponsors asked "Are we going to let Title IX kill the

[20] Although recruiting and provision of support services are not specifically enumerated as a "laundry list" area in 34 CFR 106.41, section (c) authorizes the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity, so OCR has included recruiting and provision of support services as two additional areas of compliance.



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

goose that lays the golden eggs in those colleges and universities with a major revenue-producing sport?"

Senator Hruska's apprehension never came to fruition. In fact, the reality is quite the opposite. Very few Division I schools even turn a profit, let alone fund all the other athletic programs. The NCAA publishes an annual report examining revenues and expenses at Division I schools. In 2019, the report noted that out of all Division I athletic departments, only 25 athletic departments generated more revenue than they spent, and all 25 were in autonomy five conferences. At FCS schools, expenses outpaced revenues at every institution.

To cover the gap between revenues and expenses, schools lean heavily on student fees to support athletics and continue spending at exorbitant rates. Lucrative television contracts incentivize schools to continue spending more than they make in hopes of recruiting better student-athletes, winning more games and launching their schools into prosperity.

In terms of Title IX, the spending on football has created an untenable situation. Spending on coaches' salaries, upgraded locker rooms and facilities, recruiting budgets and publicity of teams through primetime television contracts far outweighs funds spent on and publicity provided to women's teams in similar categories. In addition, oftentimes, a public narrative emerges that schools demonstrate they are more willing to cut men's teams in the name of Title IX compliance and budget constraints than they are willing to curb spending on football.[21]

### E. What areas of Title IX are implicated by the above proposed questions?

Beyond opportunities to field a team and to receive athletics aid, Title IX requires institutions to provide "equal treatment" of men and women in defined areas.[22] The defined areas are typically referred to as the "laundry list." If the member schools of the NCFA approve and pass rules that result in football student-athletes at those schools having greater benefits than the female student-athletes at those schools, because the female student-athletes are subject to less permissive NCAA rules, there are certain areas of the laundry list that would likely be affected. Specifically, if the member schools of the NCFA approve rules permitting football student-athletes the opportunity to engage in group licensing and female student-athletes at that same school are not so permitted due to NCAA rules, then the specific laundry list areas of (1) publicity and promotions; and (2) recruitment of student-athletes could be affected. If the NCFA football student-athletes a medical trust fund as a benet, then the specific laundry list areas of (1) provision of medical services or (2) recruitment of student-athletes could be affected. Federal regulations, however, also allow the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity, so it is possible OCR could consider the expansive or permissive rules as their own treatment area.

The laundry list is measured on availability, quality and kinds of benefits, opportunities and treatment afforded members of both sexes.[23] The 1979 Policy Interpretation goes into great detail on the laundry list areas. The analysis is not just what an institution spends in a particular area on female or male student-athletes but how those expenditures play out in reality.[24]

Further, when OCR analyzes compliance with the laundry list area, OCR does not conduct a singular one-to-one analysis. For example, simply because a men's basketball team takes a

---

[21] *See e.g.* Title IX major factor for colleges looking at sports cuts (apnews.com) ; College sports cuts fuel lawsuits claiming schools violate Title IX - The Washington Post; Title IX major factor for colleges looking at sports cuts | Boston.com; Is Title IX destroying men's programs? | TribLIVE.com

[22] 34 CFR 106.41(c)

[23] *See e.g. Biediger v. Quinnipiac University*, 928 F.Supp.2d 414 (March 2013)

[24] 41 Fed Reg 71416



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

charter plane and a women's basketball team takes a bus, OCR would not end its analysis there. Rather, OCR will review the treatment areas as a whole to determine whether the benefit provided to the men's program was offset by an unmatched benefit provided to any of the teams in the women's program.

Group Licensing

If the NCFA allowed group licensing opportunities for its student-athletes, it would open up opportunities for participating male football student-athletes to receive royalties from various initiatives such as video games, jersey sales, and memorabilia such as posters and figurines. Group licensing deals can be especially enticing for student-athletes who may lack popularity to sign individual deals but have a value as part of a group. Since the opportunity comes in conjunction with the offering of an "education program or activity," (because the NCFA member schools would have approved this opportunity) it is possible OCR could view this as an unequal opportunity realistically benefiting only male student-athletes and analyze this opportunity as its own area, rather than trying to fit it within one of the existing laundry list areas.

We acknowledge that it is not out of the realm of possibility that OCR does not find that group licensing is within Title IX jurisdiction because although schools may allow it for certain student-athletes, the benefit those student-athletes receive is really from a third-party, not from the schools themselves. However, as discussed in more detail below, Title IX compliance requires equitable treatment in the area of fundraising. Ultimately, this area also results in a third-party funding some benefit and that fact alone does not remove it from Title IX jurisdiction. An example in a different context may be helpful here to demonstrate how an "indirect" benefit like a school permitting group licensing for one sport could be considered in the laundry list. In the recent case of *Portz v. St. Cloud State University* from the District Court of Minnesota,[25] the court exhaustively reviewed the many aspects of athletics department and in the treatment area of competitive and practice facilities, it found that female sports had insubstantial facilities compared to male sports. One finding included that the baseball team's fields used for competition were nicer and the field owner did all of the field maintenance. For softball, the fields were not as nice and the softball team had to maintain it. Even though the school did not directly maintain the baseball field, a third party did, the court still found a Title IX violation. Again, this is not a perfect analogy because one could argue that maybe the school did indirectly provide for the maintenance because the school may have paid for it in leasing those fields. That consideration, however, not was part of the court's finding. Instead, the court looked at the result of the differing benefits—baseball did not have to maintain; softball did.

In addition to the advantage on its face, group licensing may have other benefits as categorized by the "laundry list" treatment areas, neither of which are perfect fits for the group licensing example but are the most likely areas where analysis could fall.

Publicity and Promotions

Traditionally, the area of publicity and promotions focuses on the quality and availability of sports information personnel, access to other publicity resources and the quality and quantity of publications and promotional devices. While these areas focus on the time and resources dedicated to promote each sport, more permissive

[25] 401 F.Supp.3d 834 (Aug. 2019)


ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

name, image, likeness rules could naturally create opportunities for individual student-athletes and sports programs to bring more attention to their program and deny those same opportunities to other groups. In addition, if certain promotional services are outsourced, OCR may look at whether an institution provides that third-party support for brand building, among other functions, on an equal basis.

Recruiting

Recruiting focuses on (1) the opportunity to recruit; (2) financial and other resources available for recruitment; and (3) the differences in benefits and opportunities afforded prospective student-athletes. Using recent state-level NIL legislation as an example, it is clear state legislators see the more permissive rules as a recruiting advantage for programs within their state. More permissive rules for the NCFA could help facilitate the recruiting process by enticing prospective student-athletes with group licensing opportunities. For example, with a football team made up of more than fifty student-athletes, the market for NIL opportunities for a nose guard would likely not be as profitable than the market for NIL opportunities for the quarterback. If the NCFA allowed for group licensing, then those NCFA member schools could use group licensing as a recruiting tool, especially for the lesser-known football student-athletes. Coaches in female sports at that same school could not use that pitch in recruiting if NCAA rules do not permit group licensing. Somewhat analogous to football, the women's swimming team may have student-athletes with Olympic hopes that could have more NIL opportunities than a swimmer on the third leg of a relay team. The women's swimming coach could not use group licensing as an incentive in recruiting those female swimmers to the same school where the football coach could use that recruiting tool. Therefore, OCR could analyze a school permitting group licensing for a historically male sport but not permitting group licensing for female sports as inequitable.

Medical Trust Fund

If the NCFA establishes a medical trust fund for NCFA student-athletes, it could be viewed similarly to group licensing under the "recruiting" area because institutions could use this to recruit football student-athletes, even if the NCFA funds and administers this program. Further, one of the areas OCR looks at in reviewing medical services is the availability of health, accident and injury insurance. OCR could potentially see access to the medical trust fund as an unequal benefit for NCFA student-athletes.

Key Conclusions Regarding Impact of Differing Benefits

- The aspect of Title IX that is most likely to be implicated if the NCFA has different rules than the NCAA are the laundry list areas.
- The enumerated laundry list areas can be expanded at the Director of the OCR's discretion. Therefore, just because the group licensing example may not fall perfectly into one of the existing laundry list areas does not mean group licensing could avoid scrutiny under Title IX.
- Uncertainty exists as to how examples like group licensing could play out under Title IX.
- It is important to remember that OCR does not review benefits in a vacuum and will determine whether a disparity in benefits of a treatment area could be offset by another benefit.


ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

### F. What challenges would institutions face in attempting to comply with Title IX based on the above proposed questions?

The Knight Commission has asked if NCFA rules permitted greater opportunities for football student-athletes in terms of, for example, group licensing, whether that could create a Title IX compliance issue for institutions. In short, the answer is yes. Specifically, it is possible that OCR would view expanded NIL opportunities in the same vein as fundraising. Although fundraising is not one of the enumerated laundry list areas, OCR expects schools to provide equal opportunity to fundraise, which includes assisting its teams with fundraising, even where certain sports or coaches have a wider audience or excel at fundraising. It is possible OCR could view these NIL opportunities the same way. Even if an institution simply joins the NCFA and votes on the league rules, that may be enough for OCR to conclude that an institution limited NIL opportunities in a discriminatory fashion.

However, as noted above, federal regulations do not require institutions to provide identical benefits, opportunities or treatment provided the overall effect of any differences is negligible. Even if the benefits are not equal, an institution still may comply with Title IX if the differences are the result of nondiscriminatory factors or if institutions find ways to provide offsetting benefits to women's programs.

For example, approaching the group licensing "benefits" with a more flexible view, one could argue they fall in line with the example of additional staffing. Specifically, events that have more draw, require additional staffing to accommodate the larger crowd sizes and facilities. The same could be true for group licensing. If there is not a market for group licensing of women's teams, this may be a nondiscriminatory factor that forgives noncompliance.[26]

### G. What legal challenges could the NCFA face relative to Title IX?

In the above Section H that addresses potentially different rules, a student-athlete at an NCFA school could bring suit that because of the different rules, a Title IX violation has occurred. It is likely that in addition to the student-athlete's school, the plaintiff in that case would also name the NCFA as a defendant. Therefore, the differing rules could put both its member schools and the NCFA at risk.

How great a risk that is, though, is not definite. First, it is more likely that the Title IX impact of different NCFA rules will be felt on campus more so than by the NCFA as a governing body. Second, it is difficult to say with any certainty whether the NCFA as a membership organization would be subject to Title IX jurisdiction.[27] We can, however, draw some conclusions on potential legal challenges to the NCFA from the legal treatment of the NCAA over the years.

---

[26] As noted below in Section III, there is an opportunity for the proposed NCFA to recognize its podium and to advocate on behalf of women's sports. As the court in *Cohen v. Brown University* noted, "[i]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience." 101 F.3d 155, 179 (1st Cir. 1996). Further, the Department of Health Education and Welfare (DOE's predecessor) recognized that "[p]articipation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men." 44 Fed. Reg. at 71,419. The same may be said for interest in women's sports – because men's sports have historically been emphasized, the public pays greater attention to men's sports. The NCFA has an opportunity to help balance that attention, despite its proposed governance of a historically male sport.

[27] A question that could arise from this analysis is whether the College Football Playoff Administration, LLC ("CFP") could be subject to Title IX. Two aspects of the CFP could distinguish it from the NCFA. One, the members of the CFP limited liability company are the FBS conferences and University of Notre Dame. This ownership structure provides some additional layer between the schools (subject to Title IX) and the CFP. It could be viewed as a superficial layer, but it exists, nonetheless. Two, what the CFP appears to control



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

For example, the Supreme Court determined that the NCAA's receipt of membership dues was not sufficient to bring the organization under Title IX's jurisdiction. We would expect a court to reach a similar conclusion should an individual challenge that question related to the NCFA.

The "controlling authority" theory, however, has not been tested against the NCAA or a similar entity. As noted above, an entity could fall under Title IX jurisdiction if (1) employees of federally funded programs not only take part in but serve as executive directors and members of governing body or (2) the entity has controlling authority over items such as competitive facilities; scheduling of seasons, games, and tournaments; travel; publicity and promotion; and budget). Simply, the more control an entity exercises over a recipient of federal funds, the more likely it would be required to comply with Title IX.

In its *Transforming the NCAA D-I Model Recommendations for Change* ("Reform Report"), the KCIA discussed that "[a] national governance organization should control and be responsible for all national aspects of any sport which it administers, including its national championship and/or any revenue generated nationally from that sport or championship." In addition, the Reform Report often cites to the idea of curbing spending on coaches' salaries and focusing expenditures more on the health, safety and well-being of student-athletes. Depending on the ultimate structure of the NCFA, it is possible this level of control over federal fund recipients may bring the NCFA under Title IX's jurisdiction.

It is somewhat conceptually difficult to imagine the end result of the NCFA as a governing body being subject to Title IX. To consider this extreme, though, if the NCFA as a separate membership organization was subject to Title IX, then in order to comply with Title IX, it would have to demonstrate compliance with the three areas set forth above in Section I.C: participation opportunities, athletics aid, and laundry list treatment areas. There could be two potential conflicting views of this conclusion. One, because the NCFA only governs the sport of football, if it could demonstrate that there is not a large enough need or interest among females for a female football (or enough females who want to participate on the existing football programs), then it could comply with Title IX without having to offer football opportunities for women because it meets the participation opportunities prong. The other two prongs would flow from the participation prong – if there is no athletics aid or laundry treatment areas to provide to women because women are not interested in competing in football, then the NCFA is in compliance.[28] Second, and in stark contrast to the first view, the requirement to comply with Title IX could act as a complete bar to the existence of the NCFA because compliance would be nearly impossible.

Despite this analysis, it is important to keep in mind that as the NCAA currently exists and as the law currently exists, the NCAA is not itself subject to Title IX. If the NCAA exercises too much control over its members, that control could open it up to Title IX based on the controlling entity theory. The same analysis and potential risk would apply to the NCFA. If lesser control is exercised, then that risk diminishes. The more likely area of exposure for the NCFA is on its

---

publicly for the schools is more limited than what the NCFA could control. The CFP directly controls the College Football Playoff. The proposed NCFA would control a wide range of areas – eligibility, enforcement, health and safety, athlete education, revenue distribution and litigation. *See* at Reform Report at page 4. This second distinction could be critical under the "controlling authority" theory that courts are using to determine Title IX jurisdiction.

[28] There are some parallels to this analysis with single-sex schools, although the parallels do not align perfectly. Outside of the athletics Title IX analysis, Title IX also applies to admissions at a school. However, for admissions, Title IX does not apply to private schools. If a single-sex school is a private school and it does not have to comply with Title IX admissions requirements, it logically follows that there is not a demonstrated need or interest from the other sex at that institution for athletic interests. These schools are still subject to other aspects of Title IX, including investigatory aspects related to discrimination and harassment.


ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

member schools due to the potential impact of different rules for football student-athletes that have a disparate impact on how female NCAA student-athletes are treated.

Key Conclusions Regarding Legal Challenges

- Based on current legal precedent, the NCFA receiving membership dues from federally funded member institutions would not subject it to Title IX.
- If the NCFA were to exercise more controlling authority over member institutions, then it could risk being subject to Title IX.
- It is not clear exactly what is considered to be too much control to result in Title IX applying, though we have some guidance from existing case law.
- If the NCFA were to try to limit or control coaches' salaries for NCFA football coaches or spending on facilities, control schedules of each NCFA games, have budgetary requirements for NCFA institutions, and/or have employees of NCFA institutions that also serve in positions for the NCFA, it may trigger "controlling authority" over its federally funded members and be subject to Title IX.

### H. Conclusion on Substantive Title IX Considerations

There is inherent uncertainty when new concepts are introduced into existing legal frameworks. The existing legal frameworks can provide guidance and in some cases, concrete answers, but in most cases, significant uncertainty will exist. Even for areas that are seemingly well-settled, new court decisions or laws could undo or amend that certainty. These common legal principles are no different with these questions presented here regarding the potential impact of Title IX on the NCFA.

What we do know with certainty is that schools that will belong to the NCFA, and their football programs, will be required to comply with Title IX. That means that those schools must ensure participation opportunities for male and female student-athletes comply with Title IX; athletics aid for male and female student-athletes comply with Title IX; and laundry list treatment areas for male and female student-athletes comply with Title IX.

We also know with certainty that if the NCFA has different rules than the NCAA, and those rules potentially impact aspects of Title IX, then the schools will have to adapt to ensure they can still comply with Title IX in the face of those new rules.

What is somewhat less certain is exactly how OCR would view those different rules, largely because the different rules that we are entertaining here are significant shifts, and not at all contemplated, when Title IX was first enacted. The examples provided in the questions presented for this project specifically focused on rules that may provide football student-athletes with different benefits than student-athletes of NCAA sports. If those different benefits require NCFA schools to provide benefits in a manner than would mean male student-athletes receive better treatment under the laundry list of treatment areas, then Title IX compliance for those schools could be at risk. It is important to reiterate, however, that OCR takes a wholistic view when evaluating the laundry list to determine compliance. It does not look at one benefit in a vacuum. Rather, if the benefits in a treatment area that female student-athletes receive are equitable to those that male student-athletes receive, Title IX compliance is achieved.

What is the most uncertain about the intersection of Title IX and the NCFA is whether Title IX could apply to the NCFA as a membership organization. Case law instructs that simply because of a membership organization like the NCAA is made up of federally funded schools that are subject to Title IX individually and those schools pay dues to the NCAA, the NCAA is not itself subject to Title IX. However, if the NCAA, or an organization like the NCFA, exerts too much control over its member schools, then it is increasing its risk for potentially being subject as a

governing body to Title IX. Should this result, then this is the area that is most unknown—what does it mean for the NCFA as a governing body to be subject to Title IX.

For these areas of uncertainty, the next section addresses avenues the NCFA could pursue to gain clarity.

## II. Title IX Procedural Considerations Regarding NCFA

**Question Presented: What processes could the executive and legislative branches of government, or the courts, undertake to determine whether and how Title IX would apply if the conditions described in Section I (NCFA student-athletes having greater benefits than NCAA student-athletes)?**

The intersection of the NCFA and Title IX results in a wide range of potential implications: disparity in treatment areas of the laundry list and the NCFA as a governing body falling under Title IX jurisdiction. It is also possible, however, that the creation of the NCFA has very little consequence related to Title IX. When uncertainty exists in unsettled areas of law, concrete answers are not always possible. That is the case for the NCFA should it proceed without some authority addressing the resultant Title IX consequences. Should that occur, a risk/benefit analysis based on what the law requires as of the NCFA's inception is critical to determining a path forward. As of today, we know that (a) national governing bodies like the NCAA are not themselves as associations subject to Title IX because member schools that are subject to Title IX pay dues; (b) essentially every member institution that could join the NCFA is subject to Title IX; (c) the more control a governing body exercises over its members, the more likely it could be subject to Title IX; and (d) the national landscape of collegiate sports is focused on equity. These parameters can help shape decisions related to the creation of the NCFA to mitigate risk of Title IX issues, even if it cannot be eliminated.

However, at least to some degree, the federal government could speak in some form or fashion to provide clarity to these uncertainties. Avenues for the federal government to provide some clarity include through (a) the executive branch and relevant agencies; (b) the legislative branch; or (c) the judicial branch.

As a threshold matter, significant substantive changes to federal law almost certainly would require new legislation passed through Congress and signed by the President. Short of an amendment to Title IX to address the potential Title IX implications identified related to NCFA, regulations that implement Title IX can be modified or adopted within reason; interpretative guidance could be provided; or legal challenges could result in how Title IX is interpreted and applied.

### A. Executive Branch and Relevant Agencies

Title IX specifically authorized rulemaking authority to any agency that provides federal financial assistance to educational institutions. The DOE through its OCR, oversees Title IX and its promulgated regulations. The DOE is an agency of the executive branch. The DOE takes the law of Title IX and determines how it applies to those entities that must comply with it. The DOE and OCR can create policy on Title IX in multiple ways. Agency oversight includes both proactive responsibilities in the form of rulemaking, interpretation, and guidance and reactive responsibilities in the form of enforcement of Title IX.[29] OCR could use its proactive, reactive, or both, responsibilities over Title IX to address whether and how Title IX may apply if NCFA student-athletes have different opportunities for benefits than NCAA student-athletes.

---

[29] The Department of Justice also enjoys enforcement authority over Title IX.



ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

1. Rulemaking.

The President can sign and issue Executive Orders ("EO") to direct the DOE to take certain steps regarding Title IX. Agencies within the Executive Branch can also act on their own to promulgate regulations in an area over which it has legal responsibility. We have seen both approaches specifically on Title IX in the three most recent administrations. The Trump administration, through its Education Secretary, rescinded rules on Title IX from the Obama administration and later issued new Title IX regulations.[30] More recently, on March 8, 2021, an EO from the Biden administration directed the DOE to comprehensively review all components of Title IX.[31]

In addition to an executive order or agency-initiated rulemaking, lawsuits and petitions from, requests from other agencies or congressional committees, and studies and recommendations from agency staff can all lead to proposed rules in the rulemaking process.

Getting clarification on Title IX implications on the NCFA through this rulemaking process has advantages and disadvantages. Advantages include: (1) the NCFA would not need bipartisan support (through congressional approval) for rule changes given rule changes are a function of the executive branch through either the DOE on its own initiative or an EO; (2) the rulemaking process can sometimes result in new rules quicker than the process for new federal legislation; and (3) regulations from the federal government can help avoid a patchwork approach by state legislatures on similar topics. However, those advantages are not guaranteed and often the inverse can be true. For example, Education Secretary Betsy DeVos announced she was rescinding Obama administration guidelines on Title IX investigations in September 2017. The DOE subsequently issued final rules on Title IX in May 2020, with an effective date in August 2020 (the "2020 Title IX Regulations"). Nearly three years passed, including almost two years from the date of a proposed rule to a final rule. Other disadvantages of the rulemaking process may include (a) the regulations lack permanency in that a new administration can change or rescind a prior administration's actions; (b) the regulations are often subject to legal challenges; and (c) regulations can result in states taking a more expansive or modified approach to the topic. These other disadvantages also played out with the 2020 Title IX regulations. The current administration has intimated rescinding them; eighteen state attorneys general filed a lawsuit against the United States challenging the 2020 Title IX Regulations; and at least two states have passed state laws in response to those regulations.

One of the most appealing aspects of the rulemaking process, though, is the opportunity for input from organizations like the Knight Commission, or if the NCFA is already created, organizations like the NCFA. The Administrative Procedure Act governs the rulemaking process and requires that it be an open public process. There are various stages of rulemaking and multiple opportunities for input.[32] At a high level, the rulemaking process typically proceeds as follows:

1. Proposed rule is issued.
2. Notice and comment period for 30-60 days. An agency may hold public hearings during this time.
3. Agency may make changes to proposed rules based on comments.

---

[30] The substance of these new rules is not relevant to this analysis.
[31] The focus of this EO was to essentially determine whether the rules from the Trump Era should remain or be rescinded but EO directed a comprehensive review, as well. The outcome of this review could result in changes to Title IX's regulations and application.
[32] As noted in the RFP, the Knight Commission would need to avoid any lobbying efforts within these opportunities.


ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL

4. An agency could move to a subsequent notice and comment period or move to the final rule stage.
5. Final rule published in Federal Register, generally with an effective date no earlier than thirty days after publication.

The Knight Commission, NCFA, or another interested organization, could submit comments during any notice and comment period.

Sometimes, the rulemaking process takes a different shape than this typical path. Atypical rulemaking paths also include opportunity for public input.

- Prior to a proposed rule being issued, the agency may gather information on the topic through unstructured processes and informal conservations with individuals and organizations interested in the issues or may formally invite participation in shaping a proposed rule through an Advance Notice of Proposed Rulemaking.
- A member of the public (including an organization) can submit a "Petition for Rulemaking" to the agency. At that time, the agency could decide to announce the petition in the Federal Register and proceed to accept public comments.
- Through a Negotiated Rulemaking process, an agency can invite members of interest groups to meetings to attempt to reach consensus on a proposed rule.

Whatever form the rulemaking process takes, if rules are issued related to the Title IX questions presented here regarding the NCFA, interested organizations would have the ability to, at the very least, comment on proposed rules, but potentially play a more direct role, in the process.

2. Interpretative, Enforcement or Other Guidance.

Outside of, or in addition to rulemaking, OCR could also issue interpretative guidance on these Title IX issues through a "Dear Colleague" letter. Dear Colleague letters are a tool agencies like the DOE use to explain and interpret existing laws and regulations. These letters are non-binding legal authority. However, they are policy statements that give those that must comply with certain laws helpful guidance and are a good indication of the position OCR may take when enforcing Title IX. Like rulemaking, Dear Colleagues letters can be rescinded by future administrations. The lack of process required for issuance of these letters, though, makes it an attractive option for more immediate guidance.

Beyond Dear Colleague letters, OCR may also issue other policy guidance and resources to assist in Title IX compliance.

Through its enforcement authority, OCR may issue case resolutions that impact Title IX compliance. Case resolutions are binding on the involved party but serve as guidance for non-involved parties. Case resolutions can be overturned by federal legislation, regulation, case law or differing policy interpretations later.

### B. Legislative Branch

The legislative branch becomes necessary to resolving uncertainties around the NCFA and Title IX if Title IX could act as an actual or potential bar to the meaningful existence of the NCFA. An amendment to Title IX passed by Congress and signed by the President would be the only path to a complete exemption to Title IX. If the legislative branch passes federal legislation, then the NCFA is set up for long-term clarity on Title IX given federal legislation is typically long-standing

and provides uniformity across the nation.[33] An amendment to Title IX, though, is a tall task that would require bipartisan support.

Past efforts to amend Title IX provide some glimpse into the possibility of future amendments and the uphill battle the NCFA would face. In 1974, Congress rejected the Tower Amendment, which would have exempted revenue-producing sports from Title IX compliance. That same year, the Javits Amendment was passed, which required Title IX regulations to include reasonable provisions considering the nature of particular sports. In 1975, the Tower Amendment was reintroduced and failed again.

That history, coupled with the current landscape of collegiate sports and the current makeup of Congress, underscores potential roadblocks to federal legislation that may be seen as diluting Title IX.[34]

### C. Judicial Branch

The judicial branch could be involved in the intersection of Title IX and the NCFA most likely through resolving legal challenges brought by individuals or entities with standing to challenge an aspect of Title IX. Specifically, if member institutions of the NCFA permit football student-athletes to have greater benefits, including permitting group licensing, than a female student-athlete at a member institution, a female student-athlete could file suit against her institution and the NCFA asserting that those more permissive rules result in a Title IX violation.

The judiciary's involvement in resolving Title IX implications on the NCFA would be inefficient in two ways: (1) litigation takes considerable time (and resources) and (2) unless the United States Supreme Court issues the decision, judicial decisions have authority only in certain geographic regions. Therefore, a decision in the Ninth Circuit of the United States Court of Appeals would not necessarily be legally binding on institutions in states subject to other appellate jurisdictions. Appellate courts could even be split and come to different conclusions on similar issues, resulting in circuit splits, and requiring schools in some states to abide by certain judicial decisions that schools in other states can ignore. Also problematic with relying on the judicial branch for clarity is that courts often decide issues on narrow, but dispositive, grounds. These circumstances occurred in *NCAA v. Smith* discussed above, in which case the Supreme Court decided that the plaintiff's argument that the NCAA was subject to Title IX simply because it was made up of member institutions that paid dues to the NCAA and those member institutions were subject to Title IX failed. That decision specifically left room for other factual scenarios to potentially result in a different outcome.

Any clarity on the impact of Title IX to the NCFA would require some development of a body of case law over several years.[35]

## III. Role of Collegiate Sports in Promoting Gender Equity

[33] Like states acting as a result of rulemaking, states could similarly pass state laws that are more expansive than federal laws.

[34] Proposed federal legislation on NIL is relevant here in that at least one bill introduced in 2020, and likely to be reintroduced in 2021, is expansive in that it requires the creation of certain commissions or agencies to review and monitor aspects of collegiate sports, including Title IX compliance. *See* College Athletes Bill of Rights proposed legislation from the 2020 legislative cycle.

[35] Some may see a slow timeline like this as a positive considering that based on what we know right now, organizations like the NCAA are not subject to Title IX. There is some value to incremental change that would likely come out of court cases as it may give more time to potentially obtain an exemption if that were required, have a rule or other guidance issued, or otherwise allow for planning to comply with Title IX.

This review leads to two potential legal conclusions on Title IX and the NCFA. First, as the law currently stands, the NCFA is not subject to Title IX. Second, it's possible that while its member institutions are subject to Title IX, the NCFA can still allow greater benefits to football student-athletes and the NCFA member schools find a way to remain compliant with Title IX. In either of these scenarios, the gender equity issues should not be ignored.

The NCAA, although not currently subject to Title IX, has historically, and continues to take an active and public role in promoting and supporting Title IX compliance of its member institutions. The NCAA provides significant Title IX and other diversity, equity and inclusion resources to member institutions. The Principle of Gender Equity is one of the association's core principles and NCAA bylaws require an institution to comply with federal and state laws regarding gender equity.[36] Even with these commitments, stakeholders in college sports often find that the NCAA has not done enough to ensure gender equity.[37] This sentiment was spotlighted nationally when student-athletes at the NCAA women's basketball tournament received different, and in most cases lesser, benefits than male counterparts at the NCAA men's basketball tournament. This event triggered several coaches of female sports to speak up about the inequities in women's sports—including in women's basketball and during other spring championships that followed.

Although the NCAA has tried to ensure and prioritize gender equity, it arguably has not used the full weight of its enforcement or political authority to do so. For example, the Principle of Gender Equity that is in the NCAA Constitution is without teeth. A review of NCAA major infractions shows that Principle of Gender Equity has not been cited in major NCAA cases when it is routine for other principles of the NCAA Constitution to be cited in major infractions cases.[38]

Should the NCFA proceed, even with some authority that clarifies or changes Title IX implications for the NCFA, the NCFA has an opportunity to be a leader in gender (and other) equity issues. The NCFA being the governing body for a historically male sport, yet maintaining a commitment to gender equity, both through its governance and actions, would set it apart from other organizations and demonstrate a self-awareness that other governing bodies in college sports may lack. A commitment to gender equity could include multiple forms, including ensuring diverse leadership that results in meaningful and impactful roles for women within the NCFA; holding member institutions accountable for gender equity expectations or rules, even if outside of the sport of football; meaningful distribution of revenue related to gender equity metrics and/or for diversity, equity and inclusion efforts; investments in providing opportunities for women and girls in football through play, coaching, and officiating; and advocating through appropriate and legal channels that NCAA student-athletes receive similar benefits as NCFA student-athletes.

Prioritizing equity is consistent with the governing principles that guided the reform recommendation of the NCFA[39] and a commitment to that principle should serve the NCFA well no matter the impact of Title IX on the organization.

---

[36] *See* NCAA Constitution 2.2.2 and 2.3 in the NCAA Division I 20-21 Manual.
[37] In the Spring 2021 NCAA Leadership Survey conducted by Athletic DirectorU and Athlete Viewpoint, 43.5% of Division I athletic directors and conference commissioners said that the NCAA's commitment to gender equity was about the same as five years ago, 28.7% said it was somewhat worse, 17.6% said it was somewhat better.
[38] *See* Constitution 2.1 on institutional control and Constitution 2.8 on rules compliance responsibilities.
[39] *See* Reform Report at p. 18.


ATTORNEY-CLIENT PRIVILEGED | CONFIDENTIAL