

Best Practices for NIL Deals as Federal Regulators Step Up Enforcement of Misleading Endorsements

By Alonzo L. Llorens and Shayla J. Wright

The Federal Trade Commission is stepping up its monitoring of endorsement requirements that can impact universities and their student-athletes. There can be a significant liability risk tied to statements student-athletes make as part of NIL deals and, in some cases, their universities can bear that risk, too.

The latest guidance from the FTC is just one example of how the NIL landscape has been constantly evolving since the NCAA started allowing student-athletes to profit from the use of their names, images and likenesses in July 2021. Indeed, there have been moves by legislatures, courts, regulators and brands that have required universities and their compliance staff to adapt.

Fortunately, there are best practices that have emerged at this point, including in navigating the FTC's requirements and in the contract fundamentals that universities and their student-athletes should consider in every NIL deal. These include providing education to student-athletes on how the FTC defines a misleading endorsement, limiting the term and exclusivity provisions of contracts, and protecting trademarks and other intellectual property for universities and their student-athletes.

FTC REQUIREMENTS FOR ENDORSERS

In addition to NCAA rules and potential conference and state NIL rules, universities should stay up to date on what the FTC requires from them and their student-athletes. It only takes one social media post – a principal way that student-athletes across sports are making money – to bring on the risk of enforcement actions that include potential civil penalties or fines and ordering restitution for consumers.

The FTC has three requirements for people who endorse a commercial product or service:

1. The endorser must be making an honest statement.
2. The endorser must be a bona fide user.
3. The endorser must disclose its relationship to the brand and mark the content as an advertisement.

The first and the second requirements dovetail. Student-athletes must make honest statements about the products and services that they are endorsing. For example, if they endorse an energy drink for helping them gain muscle mass, but that's not true, they could potentially be on the hook for making a deceptive advertising statement. Student-athletes also need to be bona fide users of that energy drink at the time of making the endorsement. In simple terms, that means they need to have used the product enough to

back up their statements.

That said, universities should teach their student-athletes not to blindly read a script from a brand, as that is the simplest, fastest way for endorsers to put themselves at risk for FTC liability.

The third requirement is disclosing paid advertisements. On social media, this is often done with a simple #ad, #endorsement or #sponsored. Student-athletes can also show there is a relationship between themselves and the brand by simply thanking a brand or sponsor for a free product. However, keep in mind, that the endorsement disclosure must be in a prominent place. The FTC recommends the disclosure not be mixed into a group of hashtags or links, and if the endorsement is a video, the disclosure should be part of the video or audio, not simply uploaded in a description with the video.

Lastly, it is worth noting the FTC earlier this year **proposed more stringent advertising guidelines**, confirming its plans to step up its monitoring and enforcement of endorsement rules. Specifically, the new proposed rules make it clear that it does not matter if an endorser does not have direct knowledge that their statement was deceptive. The focus is the validity of the statement. Therefore, burying your head in the sand and taking a lackadaisical approach to the FTC rules will likely

lead to trouble.

Taking this one step further, the FTC's recent, proposed guidance also emphasizes that intermediaries can also be held liable for FTC violations. So, to the extent you have a student-athlete who promotes a product, fails to meet the three requirements and your school reposts it or otherwise disseminates that information, the university could also be on the hook for disseminating a deceptive advertisement.

For the reasons above, universities should be intentional about educating student-athletes on the FTC requirements. One simple mistake could not only result in significant penalties from the FTC, but it could also harm a student and their respective school's overall marketability and lead to fewer brand and sponsorship opportunities.

KEY LANGUAGE TO CONSIDER IN NIL CONTRACTS

Generally speaking, contracts present opportunities to bargain for a specific benefit while also protecting yourself from foreseeable and unforeseeable risks – and the same is true in the NIL space. In fact, universities can offer a valuable service to their student-athletes by teaching them about contract fundamentals, including a clear definition of services to be provided, compensation terms and choice of law provisions to address during their contract negotiations.

To that end, there are a number of contract provisions to consider before signing any NIL deal. However, here is an overview of some of the most important.

The first provision to highlight is the term of the contract. As you can imagine, the sponsor will try to lock in a student-athlete with as long a term as possible. As a general matter,

student-athletes should not agree to a term beyond their competitive period at the university. For the average freshman, that means it can't be more than three years. For student-athletes who may seek professional opportunities sooner than that, they should consider shorter terms, as their market value will increase once they enter the professional ranks.

Second is the licensing component of the contract, which sponsors often try to set in perpetuity. Student-athletes and their advisors should narrow that to a reasonable period to ensure that it is commensurate with the athlete's marketability and the likelihood of entering the professional ranks at some point in the future. Recognizing that parties can argue over "reasonable," this is an example of where universities and their advisors can offer additional value by explaining what they have seen work well in other NIL contracts.

The third provision is exclusivity, which almost every NIL contract requires. This is another provision to scrutinize and try to narrow as much as possible so that student-athletes can maximize the value of their NIL. For example, if the brand is in the soft drink business, the exclusive rights could be limited to the student-athlete's endorsement of soft drink products, rather than beverage products more broadly.

The next provision is force majeure, which the COVID-19 pandemic has elevated the importance of across the business world. In essence, this is the part of the contract that allows both parties to pause their responsibilities due to "an act of God." The obvious examples include pandemics and related shutdowns. War, terrorism, and other unforeseen events that could impact college

athletics should also be considered..

Additionally, contracting for approval rights can be useful to increase protection tied to FTC liability. Indeed, one way the rubber meets the road with FTC requirements is with approval rights in contracts. Student-athletes should reserve the right to opt-out of any contract that asks them to make a statement that would not meet the FTC's bar.

Moreover, an approval rights provision can also increase other protections, for example, by allowing a student athlete to opt-out of the contract if the brand wants them to make statements that could harm their reputations and marketability. This is another provision where reasonable sides can disagree, so offering perspective from universities and advisors who have found productive compromises can be valuable.

The last provisions involve intellectual property rights. For example, are the student athlete's intellectual property rights (trademarks for name, logos or slogans) protected? This has implications for universities as well, including if the school allows student-athletes to use its trademark or any other intellectual property.

Universities should consider adopting rules that dictate what the intellectual property rights and obligations are for its student-athletes in NIL deals, assuming your respective state legislature has not already passed a valid, applicable state law. The university rules governing intellectual property issues can be extremely helpful guides for the student-athletes with respect to social media and other NIL avenues.

Lastly, an important piece to remember is the equal application of a university's rules to men's and women's sports. Allowing the men's football team – but not the women's

volleyball team – to use a school trademark is a textbook example of a Title IX violation under federal civil rights law, which we will cover in our next column.

FINAL TAKEAWAYS

As the NIL space evolves, we have seen several legal issues compete with – and distract from – the business side of the ledger for universities and student-athletes alike. Investing time and resources in educating

student-athletes on NIL related issues, including when it comes to FTC requirements and contract fundamentals, can be a wise investment for universities and their compliance staff. Additionally, partnering with practical advisors and counselors can be invaluable as new issues arise.

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