Legal Netlink Alliance
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NEWSLETTER
For thirty years, Legal Netlink Alliance has served the needs of clients worldwide.
SPRING 2024

Beware! The Corporate Transparency Act is Upon Us

By Brandon Jones

Beginning January 1, 2024, the Corporate Transparency Act ("CTA") goes into effect and will impose stringent Federal reporting requirements on many small businesses. The CTA was passed by Congress to enhance transparency in entity structures and ownership in an effort to help the government combat money laundering, foreign interference, fraud, and other illegal activities.

If you own an interest in or otherwise manage or control a corporation, limited liability company, or any other business entity formed by a filing with a secretary of state (whether in North Carolina or any other state), **please review this alert carefully and in its entirety**.

The CTA, codified at 31 U.S.C. § 5336, *et seq.*, and regulations promulgated by the U.S. Department of the Treasury, will require nearly all small businesses in the United States to file reports with the Financial Crimes Enforcement Network ("FinCEN"). Although the reporting requirements do not go into effect until January 1, 2024, all business entities formed at any time (including before January 1, 2024) are potentially subject to the CTA and will be required to file and update reports with FinCEN beginning on January 1, 2024.

Specifically, all applicable small businesses (referred to as "Reporting Companies") will be required to report various information to FinCEN about both the Reporting Company itself, and also about the Reporting Company's "Beneficial Owners." In addition, Reporting Companies formed after January 1, 2024, will be required to provide information about the person or persons who participated in filing the Reporting Company's formation documents with the secretary of state (called the "Company Applicant").

Although there are exceptions to the reporting requirements for some types of businesses, these exceptions are generally limited to very large companies, and to companies in industries that are already highly regulated by the Federal government. No business should assume that it is exempt from CTA reporting

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UPCOMING LNA EVENTS

LNA NA Spring General Meeting 2024
TULSA, OKLAHOMA
May 16, 2024 – May 17, 2024

LNA EU Summer Meeting 2024
BELGRADE, SERBIA
June 28 – 30, 2024

LNA NA Fall Meeting 2024
GREENSBORO, NORTH CAROLINA
September 18 – 21, 2024

ATHLETES & LAW

Athletes need a Coach (Attorney) to Compete in the NIL Landscape

For full article, use this link: Athletes Need a Coach (Attorney) to Compete in the NIL Landscape

By Rebecca Saksefski & D. Ryan McCray

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Unless you have been living under a rock for the past few years, you have heard the buzz surrounding name, image, and likeness ("NIL") in college athletics. In its first year alone, college athletes earned over an estimated $900 million. Even so, NIL is like the "red-headed stepchild" of intellectual property. While equally significant because of the potential profits involved, NIL does not enjoy the uniformity of federal law like its relatives – copyrights and trademarks. NIL law is (for the most part) left to the states to regulate. Not surprisingly, this has produced vast differences in the law. However, this is not the only wrinkle with which college athletes must contend. They must also remain compliant with the regulations of their respective institutions, athletic conferences, and the NCAA's bylaws, or face disciplinary action potentially jeopardizing their education, their eligibility, their team's success, and their institution's standing with the NCAA. Furthermore, while collectives have quickly risen to the forefront of the NIL-era, they may not be the best option for the athletes. Overall, as changes rapidly ensue, college athletes need guidance to navigate what has been termed the "wild, wild west" of college athletics. Each athlete could benefit from the advice of a personal attorney to "coach" them through surviving the potential pitfalls of NIL.

NIL Collectives at the Forefront

One might imagine college NIL deals looking similar to familiar professional endorsement deals like: Tom Brady and Under Armour; Patrick Mahomes and State Farm; or, Lionel Messi and Adidas. Certainly, there are some college athletes out there capitalizing on their NIL in a fashion akin to professionals. Take for example, LSU gymnast Olivia "Livvy" Dunne, or Colorado football player Shadeur Sanders. However, today the professional model is not the framework by which most college NIL deals are taking shape. Instead, the college NIL arena is being dominated by what are called "collectives."

An NIL collective is an entity which pools funds, facilitates NIL deals, and monetizes athlete's brands. A collective buys the athletes' rights to their NIL and pays them for it (handsomely in some cases). Collectives may be school-specific but must operate independent of the institutions. They are typically founded by prominent boosters and influential athletic supporters. Early NIL collectives were formed as both for-profit and non-profit entities. New IRS guidance has since undermined the benefits of a non-profit collective. Non-profit NIL collectives are, therefore, likely to become a thing of the past.

There are currently four types of NIL collectives:

1. **The marketplace model**, where the collective aligns athletes and businesses to generate endorsement opportunities similar to the way an agent would for a professional athlete.
2. **The donor-driven model**, where fans can donate funds on a one-time or subscription basis to then pay the athletes to satisfy the NIL deal obligations.
3. **The hybrid model**, where the collective provides endorsement opportunities as well as funds generated from fans' donations.
4. **The player-driven model**, where athletes get paid in exchange for the collective providing meet and greet opportunities and other athlete appearances via one of several online programs.

Although widely adopted, these collectives may not ultimately be the best option for the athletes.

What are some Issues for Athletes?

Even though NIL rights have been recognized for over half a century in the U.S., their application to college athletes (and yes, high school athletes in the small number of states where it's legal) is still in its infancy. Governing bodies are trying to find their foothold, which has left the athletes to fend for themselves. To capitalize on NIL, find success, and prepare for their futures in a way unavailable to prior generations of college athletes, today's young athletes need lawyers more than ever before.

The significant differences between the states regarding the right of publicity and NIL laws is the first major hurdle for athletes to navigate. Next, multi-layered NCAA regulations over an athlete's eligibility must be considered. Simply put, if you don't follow the rules, you don't play! Motivated to attract the best

college athletes by offering the best support system, athletic compliance departments across the country are establishing programs to assist athletes in navigating the applicable laws. Regardless, attorneys still stand alone as the best support for the athletes in this process.

Next, athletes must decide whether to go with an NIL collective or seek their own independent NIL deals. As of September 2023, there were an estimated 250 collectives focused on collegiate athletics. They now dominate the NIL arena. Collectives are the best option for the fans, boosters, and other donors because they provide greater access to the athletes and allow them the opportunity to provide direct support to the school's athletes. For those athletes who are unlikely to make the bigger NIL deals, collectives may make sense. It gives them a platform where they can still profit from their NIL, even if the individual incentives are much smaller. But there are potential red flags about which every athlete should be made aware, including:

- **Loss of bargaining power.** If the collective is seeking out and negotiating NIL deals on behalf of its athletes, will the collective negotiate fairly or make a sweetheart deal for one of its biggest donors?
- **Institutional influence.** Although not tied directly to a particular institution, school-specific collectives may craft deals to lure athletes toward that institution (without running afoul of the NCAA's bylaws).
- **Athletes' Autonomy.** Athletes in a collective may lose their ability to choose those deals they prefer because the collective may have a conflict or its own agenda.
- **Profits Split.** Most collectives take a piece of every deal they acquire for their athletes and may even have the right to receive a portion of the athlete's profits after the athlete has graduated. Do athletes really want to give up this piece when the profits are based off their name, their image, or their likeness? Is it fair to the athletes that, in some cases, the collective has a right to these profits even after they've exhausted their college eligibility?

Whether or not an athlete ultimately decides to join a collective, each NIL deal needs to be scrutinized and negotiated fairly. The average college athlete ranges from 17 – 23 years old and a large majority have little-to-no business acumen. Too often, these deals can promise what may seem to be life-changing money to an athlete and his or her family. This naturally puts pressure on them to rush through the deal, accept what is offered, and sign on the dotted line without even considering (or seeking advice on) the legal implications. Attorneys can assist athletes who need to understand these implications and the market forces involved to achieve a more beneficial deal.

After you're hired...

We, as attorneys, may be asked to walk an athlete through the applicable laws and regulations. Know which state's laws could affect your client's rights and reach out to attorneys in those other states. Legal Netlink Alliance is a great resource in this regard! This is a new, novel and quickly changing area of law. Staying abreast of these developments is critical as the key requirements could change tomorrow.

You may be asked to draft, review, or negotiate these NIL deals. First, determine if the deal is compliant with the following:

1 all applicable states' right of publicity and NIL laws

2 NCAA bylaws

3 the applicable athletic conference's NIL regulations

4 the athlete's institution's NIL policy.

This means, at a minimum, the deal: was not facilitated by any coach, staff member, or booster; and, doesn't include any provision tying compensation to performance or conditioning payment upon enrollment in a particular institution. Any deal contingent on winning championships or terminated (and possibly subject to a refund of the contract fee) upon the athlete's transfer to another institution is not appropriate!

Then, utilize your best contract construction and negotiation skills. Are you working for a brand, a collective, or on behalf of the athlete? As always, think about which provisions are more important to your client. This article is focused on assisting athletes, so the following are some items to look for on their behalf:

- **Term.** Is the term appropriate? Should it last only until the athlete's eligibility is exhausted? Most would say yes. Even if an athlete wants to carry a brand deal with them to the professional leagues, a new deal can always be negotiated. Beware: several NIL deals have come to light recently where companies and/or collectives have obtained the right to receive a portion of the athlete's profits far beyond the end of their collegiate eligibility.
- **Exclusivity.** Consider whether an athlete may want the freedom to enter multiple NIL deals, for different brands, different products, and in different industries.
- **Payment Structure.** Is the athlete getting a one-time payment or a percentage of the royalties? Are payments to be made after each social media post or on a regular schedule (say weekly or monthly)? Make sure these provisions are clear, reasonable, and fair.

(Continued on back page.)

REPRESENTATION & WARRANTY INSURANCE

Representation & Warranty Insurance

It May Enhance Acquisition Transactions

BY PRAY WALKER ASSOCIATES | *Representaion & Waranty Insurance*

PRAY WALKER

ATTORNEYS & COUNSELORS AT LAW

Once reserved for only very large transactions, recent changes in the insurance markets have made representation and warranty insurance policies (RWI) more available for merger and acquisition transactions involving smaller dollar amounts.

In most acquisitions, the seller and its owners are required to make substantial representations and warranties about the business they are selling and buyers rely upon those representations in deciding to complete the transaction. Sellers typically indemnify the buyer for losses incurred because of a breach of those representations, creating possible personal liability for a period of time after closing. Buyers face the risk that the sellers, even if personally liable, no longer have assets available to pay for the loss incurred from a breach. Further complicating the issue are transactions in which some of the seller's ownership group remain as co-owners of the surviving business, i.e. as a partner of the buyer or as a key employee, making recourse by the buyer more complicated.

RWI is an insurance policy that provides coverage for indemnification claims arising out of a breach of the seller's representations and warranties in the transaction agreements. Buyers and sellers may choose to obtain RWI to enhance the transaction by providing an alternative funding source, other than the seller's assets, as the buyer's primary method of recovery for such losses. Policies can be purchased by either the buyer (a "buy-side policy") or seller (a "sell-side policy") but most frequently, the buyer is the party that seeks the coverage.

RWI generally covers most of a seller's representations and warranties with a few exclusions which are set by the RWI provider. Common exclusions include matters that were known by the buyer's deal team (the insurance is intended to cover a loss from unknown matters), pension underfunding, uninsurable fines and penalties, breaches of covenants in the agreement, and purchase price adjustments. Exclusions may also be based upon matters that surface during due diligence.

RWI will be subject to a "retention" which serves as the deductible under the policy. The retention sets the amount of the loss that must be incurred prior to the insurance company paying a claim. The retention is set based upon the value of the transaction and, in some cases, the amount of the retention may decrease over time, such as after the expiration of the survival period of the representations under the agreement. Frequently, the seller will be responsible for some portion of the retention amount.

Policies contain a period of time after closing during which claims may be made. The policy period for general representations may extend for three years post-closing and a longer period, such as six years, for more fundamental representations. This is frequently longer than the survival of the representations under the acquisition agreement and in these cases the retention amount under the policy may decrease.

The amount of RWI coverage purchased also varies but generally would range from 10% to 20% of the transaction value. For example, in a $25 million transaction, buyer and seller might obtain insurance coverage of $5 million.

Policy premium amounts will vary and are negotiable. In general terms, premiums range between 2% and 4% of the coverage amount. The party bearing the cost of the premiums is, of course, also negotiable. An underwriting fee will also be required.

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Some of the benefits to the seller for obtaining RWI include:

- Providing a source to pay for a major portion (sometimes virtually all) of the indemnity obligation of the sellers, especially where sellers are individuals or family
- Allows more of the sale price to be distributed immediately by avoidance or minimization of an escrow or "hold back"
- If some of the seller's ownership group is less involved or passive in nature, insurance provides a source of payment
- Possible resolution of difficult representation and warranty issues by providing a funding source.

Buyers frequently benefit from obtaining RWI because these policies:

- Provide protection beyond seller's indemnity obligations and the credit risk associated with sellers who would not be able to fund payment of a liability from a breach;
- Policy period can be for a longer period of time than the survival period of the representations;

Where buyer is competing in an auction or against other bidders, insurance may add perceived value to buyer's offer or bid; and

Helps to protect an on-going business relationship by allowing buyer recourse to insurance rather than seeking recovery from sellers.

According to Harry Wallace, Senior Vice President – Mergers & Acquisitions at Marsh, "more underwriters are competing for fewer deals. As a result, pricing, coverage and appetites have reacted in a way that makes these products more accessible and affordable to buyers than ever before."

While insurance carriers had previously focused on larger deals (above $50 million), the market seems to have matured with transactions in the $10 to $20 million range now being insured by RWI.

In our experience, buyers and sellers should consider RWI at the earliest stage of the transaction. As the market has made this insurance more available for smaller transactions, both parties should consider whether they would benefit from such a policy and how to share the cost and benefit that is available.

For additional information about RWI and its use in merger and acquisition transactions, contact any of our acquisition transaction team on page 5.

PRAY WALKER
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MEMBER REQUEST

Dear LNA Members:

LNA is committed to improving the coverage that our organization provides to each member and its clients. To that end, we regularly seek out qualified full service law firms to join our ranks. We are requesting your help. Listed below are target cities to extend LNA coverage:

1. Montgomery, AL	**9. Columbia, SC**
2. Birmingham, AL	**10. Charleston, SC**
3. Little Rock, AR	**11. Salt Lake City, UT**
4. Augusta, ME	**12. Burlington, VT**
5. Portland, ME	**13. Montpelier, VT**
6. Helena, MT	**14. Richmond, VA**
7. Bismarck, ND	**15. Seattle, WA**
8. Fargo, ND	**16. Charleston, WV**

What can you do? Please circulate the list above within your firm and ask to whom they would refer a transactional and/or litigation matter in these cities. Following-up with your colleagues a couple of weeks after circulation is critical to a successful effort! Please forward their responses to Marge Enders Bacon, our LNA Administrator, at us-administrator@legalnetlink.net, who will review the submissions to see if any are candidates for membership.

What's in it for you? You will help expand your service network by increasing our membership and, in turn, help your clients. LNA also provides an incentive for you: Up to two nights free lodging for one firm representative, at the conference host hotel or equivalent, at the next LNA domestic meeting!

The LNA Membership Committee will need your help throughout the process. Just provide us the name and contact information of the person at the prospective member firm we should contact, and a committee member will contact them in short order.

If you have any questions about this note, please contact me at **216.453.5906** or bfriesen@mggmlpa.com.

Sincerely,

Brendon P. Friesen
Mansour Gavin LPA
Cleveland, Ohio

BEWARE!

The Corporate Transparency Act is Upon Us

(Continued from page 1.)

requirements, as the overwhelming majority of small businesses will be required to report. Information that must be reported about each Reporting Company includes:

1. **Full legal name of the company**
2. **All trade names and "DBA's"**
3. **Street address of the principal place of business**
4. **EIN**

Information that must be reported about each Beneficial Owner and (when applicable) Company Applicant includes:

1. **Full legal name**
2. **Date of birth**
3. **Residential address (or, in some cases, the business address for a Company Applicant)**
4. **ID number from a nonexpired passport, driver's license, or state identification (and a copy of the passport/driver's license/state ID must also be provided)**

Beneficial Owners and Company Applicants will also have the opportunity to submit all of the above information once directly to FinCEN beginning on January 1, 2024. FinCEN will then issue the Beneficial Owner or Company Applicant a unique identification number called a "FinCEN Identifier." Each Beneficial Owner and Company Applicant can then submit his or her FinCEN Identifier to each applicable Reporting Company in lieu of submitting all of the above information to each company.

The use of FinCEN Identifiers should help streamline compliance and lessen the burden on Reporting Companies. It should be noted, however, that a Beneficial Owner or Company Applicant who receives a FinCEN Identifier is required to make updates to his or her information (such as due to a change of address or issuance of a new driver's license) with FinCEN within thirty days of each change.

The definition of who is a "Beneficial Owner" of a Reporting Company is nuanced and complex, and a full and detailed discussion is outside the scope of this Client Alert. Each Reporting Company must determine who its Beneficial Owners are on a case-by-case basis. Generally, a Beneficial Owner is any individual who, directly or indirectly:

1. **Owns 25% or more of the interests in the Reporting Company**
2. **Exercises "substantial control" over the Reporting Company (this includes managers of an LLC, senior officers, members of a board of directors, etc., whether or not such individuals are also owners).**

Again, however, the rules and regulations regarding who constitutes a Beneficial Owner are much more complicated and must be analyzed carefully.

There are strict reporting deadlines that each Reporting Company must comply with, as follows:

For Reporting Companies formed before January 1, 2024, each such existing Reporting Company must file its initial report with FinCEN within one (1) year – i.e., before January 1, 2025.

For Reporting Companies formed on or after January 1, 2024 but before January 1, 2025, each such new Reporting Company must file its initial report with FinCEN within ninety (90) days following the company's formation.

For Reporting Companies formed on or after January 1, 2025, each such new Reporting Company must file its initial report with FinCEN within thirty (30) days following the company's formation

For all Reporting Companies, if there is any change in the information previously reported by the Reporting Company, an updated report must be filed within thirty (30) days of the change. Changes that must be reported include changes to the Reporting Company's information (name, DBA's, address, etc.); changes of the identities of the Beneficial Owners (for example, due to ownership changes or appointment of new officers/directors/etc.); and changes to any of the information about a Beneficial Owner that was previously submitted (such as name changes, changes of residential address, driver's license, etc.). However, if a Reporting Company has utilized and submitted a FinCEN Identifier for a Beneficial Owner, it becomes the responsibility of the Beneficial Owner, rather than the Reporting Company, to timely provide FinCEN with updates to the Beneficial Owner's information.

The willful failure by a Reporting Company, its senior officers, and/or a Beneficial Owner

BENEFICIAL OWNERS DESCRIPTION

Under the proposed rule, a beneficial owner would include any individual who (1) exercises substantial control over a reporting company, or (2) owns or controls at least 25 percent of the ownership interests of a reporting company.

The proposed regulation defines the terms "substantial control" and "ownership interest" and sets forth standards for determining whether an individual owns or controls 25 percent of the ownership interests of a reporting company. In keeping with the CTA, the proposed rule exempts five types of individuals from the definition of "beneficial owner."

In defining the contours of who has "substantial control," the proposed rule sets forth a range of activities that could constitute "substantial control" of a company. This list would capture anyone who is able to make significant decisions on behalf of the entity. FinCEN's approach is designed to close loopholes that would allow corporate structuring that obscures owners or decision-makers. This is crucial to unmasking shell companies.

to comply with the CTA's requirements and timely provide accurate information to FinCEN can result in both civil penalties (fine of $500 per day that a violation continues, up to a maximum of $10,000) and criminal prosecution (fine of up to $10,000 and/or imprisonment of up to 2 years).

It is therefore very important that all small businesses take these reporting requirements seriously and ensure that they are and remain in compliance.

This Client Alert contains only a basic overview of the CTA and its reporting requirements. More detailed information on the CTA and compliance can be found at the following links:

1. FinCEN's general webpage for the CTA – **https://www.fincen.gov/boi/small-business-resources**
2. FinCEN's Small Entity Compliance Guide – **https://www.fincen.gov/sites/default/files/shared/BOI_Small_Compliance_Guide_FINAL_Sept_508C.pdf**
3. FAQ prepared by FinCEN – **https://www.fincen.gov/boi-faqs**

For clients of the firm that are or own/manage small businesses, upon specific request by those clients, Carruthers & Roth may be able to assist in determining whether any exceptions to the CTA reporting requirements apply, and if necessary, who those companies' Beneficial Owners are. However, please note that our firm will not be in a position to undertake the actual preparation and filing of FinCEN reports on behalf of clients.

Brandon Jones focuses his practice on helping individuals and business owners in a number of capacities. In addition to his trust and estates work, a significant portion of Brandon's practice also consists of assisting small business owners and entrepreneurs with all aspects of ownership and operation, including business formation, management, contract drafting and negotiation, business succession planning, and mergers and acquisitions. If you have any questions about these topics or other business law matters, please feel free to contact Brandon (336-478-1160, bkj@crlaw.com) or another member of Carruthers & Roth's Business team.

Legal Netlink Alliance

Legal Netlink Alliance (LNA) is a global association of small and medium-sized, independent law firms that offers members and their clients access to top-notch legal representation around the world. What makes LNA unique is the valued professional relationships and camaraderie that our members forge with one another. Many lifelong relationships started at LNA quarterly member meetings, which bring legal professionals from all over the world together to learn from each other.

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While most client matters are handled between members, LNA members are free to refer matters to any law firm, whether or not a member of the organization.

GENERATIVE AI

Five Steps for Performing Due Diligence on **An Acquisition Target's Use of Generative AI**

By David A. Johnson, Jr., Arbonberg Goldgein

Generative Artificial Intelligence (Generative AI), such as ChatGPT and similar predictive text artificial intelligence models, is currently a hot topic. Businesses are looking for ways to implement it into their systems, while lawyers are cautious of the risks involved. No matter your view on it, Generative AI is becoming mainstream and buyers of businesses need to take steps as part of their due diligence to understand and manage the risks associated with this new technology. The goal of this article is to provide a starting point for a buyer's due diligence efforts related to Generative AI, to help buyers better allocate that risk between buyer and the target or adjust purchase price as appropriate.

- **Identifying the risks of Generative AI.** The first step in any due diligence inquiry is understanding the potential risks. A buyer cannot protect itself if it does not have a sufficient understanding of potential risks. The risks associated with Generative AI are still unfolding, but any potential buyers should at least be concerned with the following:
    - **Intellectual property ownership rights.** The ownership rights of the product of Generative AI is still unclear. Generative AI is ultimately a derivative product. The use of the product created by a Generative AI service creates questions of whether the original author's intellectual property rights have been violated. Further, the Generative AI service may reproduce similar, if not identical, results to multiple users, which can create a legal quagmire.
    - **Disclosure of confidential information/loss of information rights.** Information disclosed to Generative AI services may jeopardize the confidentiality of the information disclosed, which may cause business risk and ultimately affect the value of the target.

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ARBONBERG GOLDGEIN

    - **Improper reliance upon Generative AI.** Generative AI can be a great efficiency resource, but Generative AI is not perfect and is known to create inaccurate results. Failure to provide proper oversight, overuse and excess reliance can be an indication of a larger business issue. A good example of this comes from the legal industry, where a lawyer was sanctioned by a court for relying on Generative AI for his legal research. This lawyer filed legal precedent with the court without taking the time to verify its accuracy, which unfortunately for him was all fabricated by the Generative AI service and did not actually exist.
    - **Non-Compliance with privacy and other governing laws.** There has been an overwhelming trend towards increasing privacy rights, both in the U.S. and abroad. This trend will continue, and, much like with confidential information, the disclosure of private information may be deemed improper under those law. This is particularly true if the target operates in an industry where sensitive information is given heightened protections under law (for example, health care, accounting, and insurance). If the use of Generative AI results in an improper disclosure, the target may be in violation of these privacy laws and can create substantial consequences.
    - **Contractual rights.** The use of Generative AI by the target needs to be evaluated to determine whether the contractual rights violate the terms of a target's commercial contracts, such as confidentiality provisions, which creates legal risk for the breach of those agreements.
    - **Business risk of non-use.** As the marketplace increasingly adopts Generative AI, a target's failure to do so can put that business at a competitive disadvantage that may affect the purchase price or desirability to acquire the target.

There may be other business and legal risks involved, and those should be determined and considered as part of a buyer's due diligence.

- **Create an Inventory of the Target's Use of Generative AI.** Once a buyer has an idea of the potential risks, it should create an inventory of the target's use of Generative AI. This list should include, at a minimum:
    - **The generative AI resources being used**
    - **The manner in which those resources are being used**
    - **The categories of information disclosed in the use of Generative AI**

A common hurdle to proper diligence is a reluctance from the target's management

to provide this type of detailed operational information. Obviously, a fulsome analysis requires the deepest level of inquiry. But in practice, a target's reluctance to respond is paired with the buyer's push to close forcing the deal to close on imperfect information. This translates to gaps in information and additional risk to the buyer. To manage this risk, the target's industry and the manner of potential use should be considered when determining the scope of a buyer's inquiry.

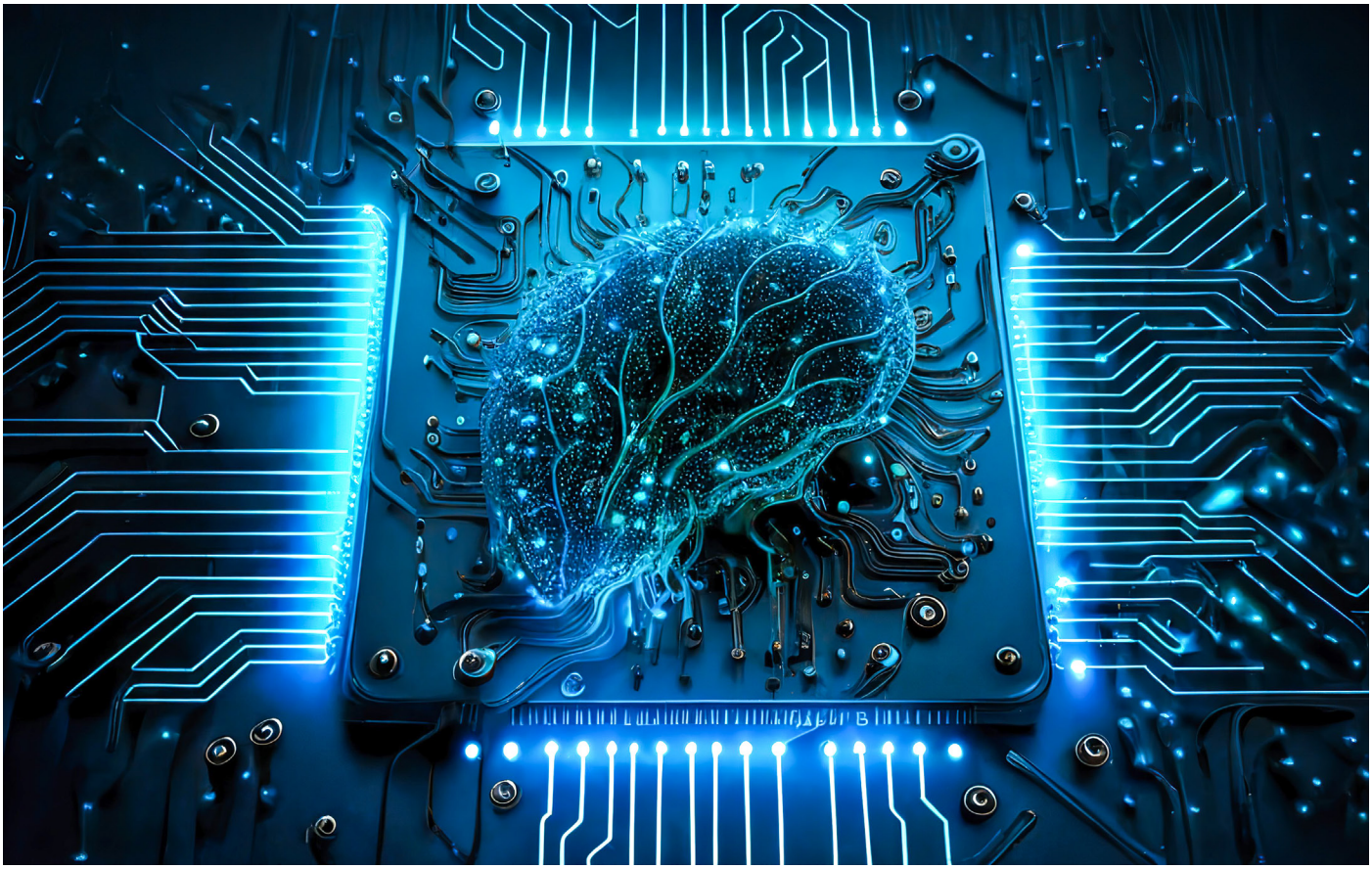
- **Review Employee Policy governing Generative AI use.** While businesses and lawyers are still grappling with how to respond to the changing environment, a common response has been the adoption of an employee policy governing the use of Generative AI. A review of the target's Generative AI policy can provide a buyer with an early level of comfort, as a well-crafted, bespoke policy demonstrates a concerted effort by the target's management to manage this risk. Likewise, however, a lack of a policy could be an indication that no thought has been given by management to managing the risk associated with Generative AI.

The target's policy should be viewed to verify that the use of Generative AI complies with laws and utilizes it in a manner that is appropriate for the target's industry. Much like any other employment policy, though, implementation is only half the battle. To properly assess risk, a buyer will also need to compare the policy with actual company practice. With a proper inventory, this practical risk can be assessed quickly.

- **Review Terms of Service for the Generative AI Services Used.** Each Generative AI service has its own terms of service, and it is imperative that the terms of service are being followed. If not, the continued use of the Generative AI service could be in jeopardy and the ownership of any content generated by the Generative AI service, to the extent any exist, may not be transferred to the target.

- **Review laws and Agreements governing information disclosed to Generative AI Services.** A buyer needs to know what rules govern a target's use to understand the risk related to it. Those rules can be created by law, regulation or agreement. This is obvious to experienced buyers, but not necessarily as it relates to Generative AI. Buyers should look to the industry of the target for privacy rules that may be impacted, as well as general privacy rules. Private agreements should also be reviewed. While this concern would certainly be part of a buyer's general commercial contract diligence, the Generative AI component can easily be overlooked without special care – particularly if the reviewer does not have the benefit of the Generative AI inventory referenced above.

While these steps provide general guidance for performing due diligence on an acquisition target, increased care and additional steps may be considered necessary, particularly for those targets operating in regulated industries.



Athletes need a Coach, continued

(Continued from page 3.)

•**Sharing Profits.** Is the athlete required to share a portion of the athlete's generated NIL profits with another party (for instance, the collective or the institution)?

•**Athlete's Obligations.** What are the obligations of the athlete under the deal? Will they require too much of the athlete's time or compromise his/her ability to fulfill the other duties required for school, sport, and a "normal" life? What happens if the athlete gets injured?

•**Athletic Performance Requirements.** If payment is contingent on athletic performance requirements, the deal is not going to be compliant with applicable laws/regulations. Remove these provisions.

•**Termination Clause.** Is there a fair termination clause? Does the athlete have an out when: payments aren't made as required; the other party tries to unilaterally amend the deal; or, the parties do not agree as to the exact obligations of each?

•**Boilerplate provisions.** These provisions are often afterthoughts, but frequently come back to harm a party when it matters most. Which jurisdiction governs the agreement? Some states have NIL and right of publicity laws which are more advantageous than other states. Certain states may have requirements that limit the athlete. Is your client agreeing to alternative dispute resolution or litigation in the case of a conflict, where, and at whose cost?

For now, several traps await the unwary athlete in an NIL deal. A market savvy party may not hesitate to take advantage of a young athlete. Many of these athletes will never have a professional career. So, done correctly, NIL can supplement their livelihood while in college and bridge the gap to their future career. Presently, only the most gifted athletes are benefiting. Even so, NIL is here to stay. As more and more athletes participate, developments in the law are inevitable. Skilled attorneys have a role in this process.

What does the Future Hold?

On January 10, 2024, the NCAA Division I Council unanimously adopted a proposal that would implement student-athlete protections effective as of August 1, 2024. These new rules will include the following:

1. establishing a voluntary registration process for NIL service providers (agents, financial advisors, etc.) that would provide a centralized source of information for student-athletes;

2. all student-athletes will be required to disclose information (such as parties involved, term length, compensation structure, etc.) related to any NIL deal exceeding $600 in value to their schools no later than 30 after the deal has been executed, which data will, in turn, be deidentified and provided to the NCAA to develop a database to track NIL trends;

3. the NCAA will assist schools in establishing template contracts and recommended contract terms for their student-athletes' knowledge and use; and

4. the NCAA will develop a comprehensive plan to provide ongoing education and resources to assist the student-athletes.

A major question right now is what amount of involvement the schools will be allowed to have their student-athletes. Two sets of proposals are being discussed. On December 5, 2023, NCAA president, Charlie Baker, proposed a rule change to all Division I member schools that, if adopted, would allow schools to enter into NIL deals directly with their athletes. In January 2024, the NCAA Division I Council also introduced proposals that would allow schools to identify and facilitate NIL deals between their student-athletes and third parties. These proposals that could be adopted as early as April 2024 would not, however, allow schools to directly compensate or make NIL deals with their student-athletes. There is no clear indication of which proposal the NCAA will adopt or if it will reject both. Either way, if a new rule regarding school involvement is implemented, the NIL landscape could change dramatically.

Finally, a major shift could occur to the entire landscape of college athletics. Within the NCAA President's December 2023 proposals was a new rule that, if adopted, would establish a new Division I subdivision to create its own set of rules for roster size, recruiting, and transfers, among others. If schools voluntarily join this subdivision, they will be required to deposit at least $30,000 each year into an educational trust fund for at least half of its athletes. Distributions from the trust fund would be subject to Title IX. The NCAA is determined to stay involved in the NIL discussion and to maintain governance over college football. This proposal may be driven by the "Power 5" schools indicating a desire to become self-governed. Hoping to appease this movement, it is likely the NCAA will adopt these rule changes.

It is also likely that there will be federal law governing NIL akin to that of copyrights and trademarks. Bills filed over the past few years have attempted to standardize the patchwork of laws defining the NIL landscape, including: the College Athlete Economic Freedom Act; the Protecting Athletes, Schools, and Sports Act; and, the Student Athlete Level Playing Field Act. There is also an open draft proposal for the College Athletes Protection and Compensation Act. The success of these proposals remains uncertain although every indication points to the eventual adoption of a uniform federal NIL Act.

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