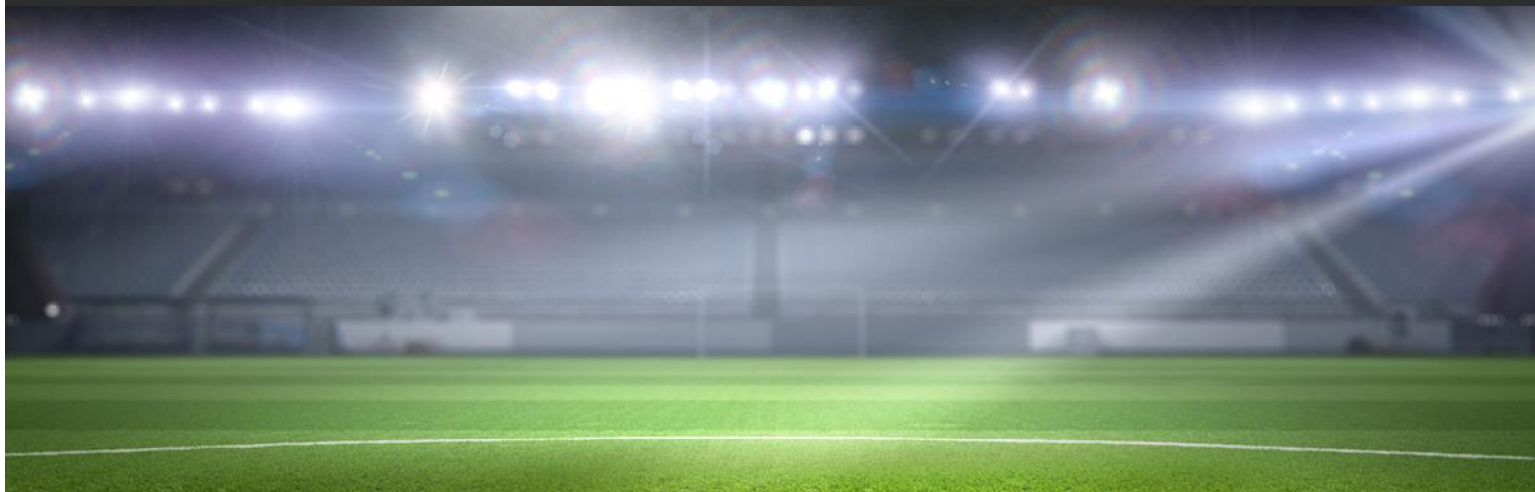


Alert | Sports Law



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Game-Changer: NCAA Revises Rules Governing Student-Athletes' Name, Image, and Likeness Rights

On June 30, 2021, The National Collegiate Athletic Association (NCAA) Board of Directors approved a dramatic, albeit interim, **revision** to the NCAA's long-standing policy against student-athletes earning compensation. Effective July 1, 2021, student-athletes may receive compensation for the use of their name, image, and likeness (NIL), subject to compliance with applicable state law and other requirements (e.g., schools cannot compensate student-athletes for performance or recruitment – so-called “pay-for-play”). While this revision is being presented as “temporary,” it may have been the NCAA's only viable remaining option while it waits for Congress to establish a nationwide NIL framework. Although significant details remain uncertain, the potential impacts on college athletics are game-changing.

This departure from the NCAA's prior position regarding “amateurism” was issued in response to (i) the June 21, 2021, 9-0 Supreme Court ruling in *NCAA vs. Alston et al.* (594 U.S. __,) which essentially held that the NCAA's rules limiting the education-related benefits that schools may make available to student-athletes are anti-competitive horizontal restraints of trade; and (ii) the enactment of NIL laws in several states (e.g., Alabama, Florida, Georgia, Mississippi, New Mexico, and Ohio) that are scheduled to go into effect July 1, 2021, and that are in direct conflict with the NCAA's previous policy. In addition to these states, as many as 15 others have enacted or are in the process of enacting NIL legislation. Differences among states with respect to NIL may materially impact recruiting and a student-athlete's choice of college.

In an attempt to strike a balance between the NCAA's desire to preserve amateurism and the realities of the modern marketplace (i.e., (i) that college athletics is big business and (ii) that athletes are also potential influencers who should be able to monetize their brand without fear of compromising their eligibility), the NCAA has approved policy changes that pave the way for student-athletes to earn compensation while maintaining their amateur status. Previously, the NCAA permitted student-athletes to receive only limited consideration from their schools in the form of scholarships, meals, and reasonable expense allowances for travel, equipment, and health care, but until this revision, student-athletes were not allowed to receive consideration, meals, travel, or other items of value from third parties, agents, and/or representatives. While the extent of the consideration remains to be seen, there are opportunities for student-athletes to earn significant amounts for autographs, endorsements, personal appearances, paid social media, etc.

Framework

During their June 30, 2021, meeting, the NCAA Board of Governors adopted the following rudimentary framework:

1. Student-athletes will be able to earn compensation from the use of their NIL rights, provided that if such student-athlete is in a state that has enacted NIL legislation, the arrangement must comply with applicable state law.
2. Schools and conferences may not compensate student-athletes for performance ("pay-for-play" is still prohibited).
3. Student-athletes may engage the services of a professional (e.g., lawyer, agent, etc.) to assist in the monetization of their NIL.
4. Schools (and conferences) are tasked with determining whether the compensation complies with applicable state law and/or other applicable school or conference requirements.
5. Students-athletes will have to report their NIL compensation to their respective schools and conferences.

Open Questions

While this development may well lead to a surge in NIL deals for student-athletes, open questions remain, including:

1. What forms of consideration are permissible, apart from monetary consideration (cash)? In-kind consideration (e.g., a vehicle for tweeting about a car dealership) or other forms of consideration (e.g., equity in a joint venture, cryptocurrency)?
2. How will the member schools and conferences distinguish between acceptable endorsement deals and impermissible "pay-for-play" arrangements? Will there be a review board, or audit rights, or certification requirements?
3. What will the actual reporting requirements be? Will there be limits or other caps on the consideration that may be earned? How will these rules be enforced (e.g., loss of scholarship, fines, vacating wins)?

4. How will schools and conferences located in states that have not enacted NIL laws adapt? Will they default to the most permissive requirements in order to entice student-athletes?
5. How will this impact recruiting? Given the uncertainty and desire to maintain a competitive balance, will the federal government establish a national regime?

The immense appeal of sports, the broad reach of television and social media, and the rise of influencer culture and blockchain monetization (e.g., NFTs) are all factors that contribute to the enormous potential for student-athletes to monetize their NIL rights.

This potential coupled with the evolving legal and business landscape, the current state-by-state approach, and the significant open questions listed above regarding permissibility, reporting, and enforcement make it critical for student-athletes to be well-informed as they license their NIL rights. Further, companies looking to license student-athletes' NIL rights will, by and large, be sophisticated.

Given these factors, a knowledgeable advisor can be an invaluable resource to help parties: research, clarify, and comply with applicable legal requirements; understand the marketplace and their relative value within it; negotiate, structure, and draft NIL deals to maximize and protect that value; evaluate the various forms of consideration and risks presented by these deals; and assist in the enforcement of the deals once they have been papered, including with litigation, if necessary.

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