



The NCAA's New Guidance Regarding NIL Collectives — Will the Guidance Shut Down NIL Collectives or Affect Their Abilities to Pay College Athletes?

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Background of the NCAA and NIL Policy

Effective July 1, 2021, the National Collegiate Athletic Association (“NCAA”) adopted an Interim Name, Image, and Likeness Policy (“Interim NIL Policy”) for currently enrolled college athletes, their families, and NCAA member institutions. The Interim NIL Policy suspended NCAA name, image, and likeness (“NIL”) rules for all incoming and currently enrolled college athletes in all collegiate sports. Outgoing NCAA President Mark Emmert heralded the Interim NIL Policy’s adoption by stating:

"This is an important day for college athletes since they all are now able to take advantage of name, image and likeness opportunities.... With the variety of state laws adopted across the country, we will continue to work with Congress to develop a solution that will provide clarity on a national level. The current environment — both legal and legislative — prevents us from providing a more permanent solution and the level of detail student-athletes deserve."

The Interim NIL Policy provided the following guidance principles:

- Individuals can engage in NIL activities consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.

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- College athletes who attend a school in a state without an NIL law can engage in NIL activity without violating NCAA rules.
- Individuals can use professional service providers for NIL activities, including sports agents and attorneys.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

While permitting college athletes to accept NIL compensation, the Interim NIL Policy preserved the NCAA's prohibitions against "pay-for-play" and boosters offering improper inducements for recruits to attend a particular school.

The Interim NIL Policy's Long Term Viability

The NCAA has said its Interim NIL Policy will remain in place until Congress enacts federal NIL legislation or the NCAA adopts new rules. However, as Mark Emmert indicated when the NCAA adopted the Interim NIL Policy, the current environment – both legal and legislative – seems ill-equipped to foster a more permanent solution.

On the federal front, Congressional members have introduced at least eight acts relating to college athletes and NIL, but none of those acts has become law; and, despite the NCAA's lobbying efforts and the efforts of other high ranking collegiate officials (including SEC Commissioner Greg Sankey and PAC-12 Commissioner George Kliavkoff), Congress has not publicly shown any significant appetite to legislate NIL.

Similarly, the NCAA has been reluctant to adopt new NIL rules. The NCAA's reluctance appears primarily due to the following:

- The constantly evolving state law treatment of NIL (example — Alabama passed an NIL law but, following the NCAA's adoption of the Interim NIL Policy, Alabama signaled its willingness to repeal its NIL law due to it being more restrictive than the Interim NIL Policy, and then officially repealed the law – all in less than one year);
- The U.S. Supreme Court's June 2021 decision in *NCAA v. Alston et al.*, which, upon antitrust grounds, unanimously upheld the U.S. Court of Appeals for the Ninth Circuit's ruling striking down NCAA caps on college athlete academic benefits;
- The NCAA's January 20, 2022 vote to streamline its constitution, which will reduce the NCAA's responsibility and overhaul rules at all levels of college sports.

The Interim NIL Policy and its Birth of NIL Collectives

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Following the NCAA's adoption of the Interim NIL Policy a mere 10 months ago, so-called NIL collectives have meteorically begun emerging. In less than one year, NIL collectives have fundamentally reshaped college athletics by becoming a critical component of athletic success using novel techniques to compensate college athletes for their NIL. College athletes at some schools benefit from a single NIL collective, while others have the luxury of multiple NIL collectives at their disposal.

NIL Collectives are Revenue Generators for College Athletes

The term “collective,” which generally means a cooperative enterprise, has no particular legal significance. NIL collectives are simply business entities that supporters of a school's athletic teams (not the schools themselves) form under state laws to generate and pool revenue, which the collectives use to fund NIL opportunities for college athletes at particular schools who opt-in and avail themselves of the collective's help and efforts to monetize their NIL.

Some NIL collectives use a subscription-based model, by which subscribing fans pay the collective monthly or annual subscription fees in exchange for access to, interaction with, or memorabilia from their favorite school's athletes. Often, subscriptions are tiered, with higher-paying subscribers receiving more access, interaction, or memorabilia than lower-paying subscribers. Other NIL collectives rely more heavily upon sponsorships and donations for revenue.

For-Profit NIL Collectives and Non-Profit NIL Collectives

NIL collectives can be for-profit or non-profit entities. Some non-profit NIL collectives have obtained 501(c)(3) status under the Internal Revenue Code, which makes the collective tax-exempt and potentially allows the collective's benefactors to receive tax deductions for their payments to the collective. Entities described in Section 501(c)(3) are commonly referred to as charitable organizations, and, to be tax-exempt under Section 501(c)(3), an entity must be organized and operated exclusively for exempt purposes set forth in Section 501(c)(3) and none of its earnings may inure to any private shareholder or individual. The predominant model for tax-exempt collectives involves having a college athlete pick a favored charity for which to provide services in exchange for payment from the NIL collective for the athlete's services.

The IRS's granting of 501(c)(3) tax-exempt status to NIL collectives is, at present, more of a ministerial action than a substantive approval of any collective's charitable purposes. Therefore, an issue exists whether any collective's tax-exempt status will be sustainable enough to survive an IRS audit in the final analysis. The ultimate substantive question for the IRS will be whether an NIL collective (1) exists simply to support athletes at a specific school or (2) validly uses college athletes as independent contractors to successfully further the collective's charitable purposes. At present, the IRS has not taken a position regarding whether NIL collectives will be able to maintain their tax-exempt status, and the IRS may take years, if ever, to rule upon the issue.

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The NCAA and NIL Collectives

During the NIL era's infancy, the NCAA has not penalized any school or college athlete relating to issues involving an NIL collective. Moreover, based upon the Supreme Court's weakening of the NCAA due to the Alston decision, the NCAA's current state of flux and related staff reductions, and the NCAA's apparent reluctance to invite and defend additional antitrust lawsuits, schools and NIL collectives are grappling with whether, and to what extent, the NCAA has the resources or appetite to police NIL collectives.

As a result of this grappling, the most significant NCAA action regarding NIL collectives occurred in February of this year, when the NCAA's Division I Board of Directors requested the NCAA's Division I Council to review NIL's impact upon college athletes, including school choice, transfer opportunities, academics, and mental health, while highlighting existing NCAA rules that prohibit direct booster involvement.

In response to the NCAA's Division I Board of Director's request, on May 9, 2022, the NCAA's Division I Council Working Group (comprised of athletic directors and conference commissioners) on NIL released a document entitled Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement ("NIL Collective Guidance"), which addresses the emergence and impact of NIL collectives in collegiate sports and attempts to install some ill-defined guardrails for those involved with the collectives. In an ironic twist, the NCAA did not even use the term "collective" in the NIL Collective Guidance and, instead, referred to collectives as "third party entities" that "promote or support a specific institution."

The NIL Collective Guidance's Overarching Principles

Under the NIL Collective Guidance's overarching principles, the NCAA has (1) recognized that "many student-athletes are benefitting positively from NIL opportunities consistent with the Interim NIL Policy," (2) recognized that the 10 month anniversary of the NCAA's adoption of the Interim NIL Policy was "an appropriate time to review the emerging NIL environment and whether NIL activities are impacting school choice and transfer, particularly relating to the involvement of individuals and entities that promote or support a specific institution," (3) sought "to reinforce key principles of fairness and integrity across the NCAA and maintain rules prohibiting improper recruiting inducements and pay-for-play," and (4) attempted to clarify how current NCAA legislation applies to the NIL environment and NIL collectives.

The NIL Collective Guidance's Starting Point – the Booster

The NIL Collective Guidance's starting point is the NCAA's definition of a "booster" (more formally known in NCAA parlance as a "representative of athletics interests").

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NCAA legislation defines a “booster,” in part, as an individual, independent agency, corporate entity, or other organization who is known (or who should have been known) by a member of the institution’s executive or athletics administration to (1) have participated in, or to be a member of, an agency or organization promoting the institution’s intercollegiate athletics program or (2) assist or to have assisted in providing benefits to enrolled student-athletes or their family members.

With the definition of “booster” as its guide, the NCAA chided NIL collectives, by speculatively assessing, without citing a single shred of evidence, that, “[i]t appears that the overall mission of many, if not all, of the [NIL collectives] is to promote and support a specific NCAA member institution by making available NIL opportunities to [recruits] and [currently enrolled college athletes] of a particular institution” Further, based upon its speculative assessment of NIL collectives, the NCAA concluded that NIL collectives “trigger” its definition of a booster.”

Based upon its clumsy, speculative, and evidentiary challenged conclusion that NIL collectives “trigger” NCAA rules regarding “boosters,” the NCAA summarily clarified that (1) its existing rules relating to booster involvement in recruiting activities apply to the Interim NIL Policy and (2) the Interim NIL Policy did not change the existing NCAA prohibitions relating to “pay-for-play.”

The NIL Collective Guidance Addresses Three Main Concepts

Conditioned upon the NCAA’s express disclaimer that its NIL Collective Guidance is subject to state NIL laws or executive actions with the force of law in effect, the NIL Collective Guidance addresses three broad subject matters. First, it offers guidance relating to recruits. Second, it offers guidance relating to currently enrolled college athletes. Third, it offers reminders about current applicable NCAA Division I legislation.

Guidance Relating to Recruits

The NIL Collective Guidance provides the following six principles relating to recruits:

- Recruiting conversations between an individual booster or NIL collective that has triggered booster status and a recruit are not permissible.
- An individual booster or NIL collective that has triggered booster status may not communicate with a recruit, a recruit’s family, or others affiliated with the recruit for a recruiting purpose or to encourage the recruit’s enrollment at a particular institution.
- An NIL agreement between a recruit and an individual booster or NIL collective that has triggered booster status may not be guaranteed or promised contingent on initial or continuing enrollment at a particular institution.

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- Institutional coaches and staff may not organize, facilitate, or arrange a meeting between an individual booster or NIL collective that has triggered booster status and a recruit (e.g., provide the individual booster or NIL collective with a recruiting list or watch list, including the NCAA Transfer Portal).
- Institutional coaches and staff may not communicate directly or indirectly with a recruit on behalf of an individual booster or NIL collective that has triggered booster status.
- NIL agreements must be based on an independent, case-by-case analysis of the value that each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner), or membership on a team (e.g., being on roster).

Guidance Relating to Current Student-Athletes

The NIL Collective Guidance provides the following two principles relating to currently enrolled college athletes:

- An NIL agreement between a college athlete and an individual booster or NIL collective that has triggered booster status may not be guaranteed or promised contingent upon initial or continuing enrollment at a particular institution.
- NIL agreements must be based on an independent, case-by-case analysis of the value each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions (e.g., signing a letter of intent or transferring), athletic performance (e.g., points scored, minutes played, winning a contest), achievement (e.g., starting position, award winner), or membership on a team.

Existing NCAA Division I Legislation and NIL

The NIL Collective Guidance provides the following seven reminders relating to existing NCAA Division I legislation:

- Athletics department staff members are prohibited from representing a recruit or enrolled college athlete in marketing their athletics ability or reputation. See *NCAA Bylaw 11.1.3 – Representing Individuals in Marketing Athletics Ability/Reputation*.
- Before a recruit signs a National Letter of Intent or written offer or admission and/or financial aid or before the institution receives a financial deposit, an institution may comment publicly only to the extent of confirming its recruitment of the recruit. See *NCAA Bylaw 13.10 – Publicity*.
- Boosters may not engage in recruiting activities, including recruiting conversations, on behalf of a school. See *NCAA Bylaws 13.1.2.1 – Permissible Recruiters*.

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- Recruiting is defined as “any solicitation of a [recruit] or a [recruit’s] family members by an institutional staff member or by a booster for the purpose of securing the [recruit’s] enrollment and ultimate participation in the institution’s intercollegiate athletics program.” See *NCAA Bylaw 13.02.14 – Definition of Recruiting*.
- Boosters may not be involved in making arrangements for, or giving or offering to give any financial aid or other benefits to, a recruit. Receipt of a benefit by a recruit is no a violation if the same benefit is generally available to the institution’s prospective students. See *NCAA Bylaw 134.2.1 – Offers and Inducements*.
- Athletics participation for pay and payment based on performance or given on an incentive basis are prohibited. See *NCAA Bylaws 12.1.2, 12.1.2.1.4.1, and 12.1.2.1.5 – Athletics Eligibility*.
- Institutions are held responsible for any impermissible recruiting activities engaged in by a representative of athletics interest. See *NCAA Constitution 2.1.2 and 2.8.1 and NCAA Bylaw 13.01.2 – Institutional Responsibility*.

Retroactive Enforcement of NIL Guidelines

According to the NCAA’s press release regarding the NIL Collective Guidance, the guidance is effective immediately. For violations that occurred prior to May 9, 2022, the NCAA directed its enforcement staff to review the facts of individual cases but to pursue only those actions that clearly are contrary to the Interim NIL Policy, including the most severe violations of recruiting rules or payment for athletics performance. The NCAA reminded schools of their obligation to report any potential violations through the traditional self-reporting process.

Conclusion

The NIL Collective Guidance is the NCAA equivalent of administering first aid to a critically wounded individual until advanced medical care can treat the individual. In this scenario, the advanced medical care will be Congressional action, for which the NCAA has unsuccessfully lobbied for more than a year. Until Congress acts, the NCAA has essentially conceded that the current legal and legislative environments with respect to NIL have handcuffed the NCAA into non-action, state laws and executive actions with the force or effect of law can overrule the NIL Collective Guidance, and NIL collectives will continue to flourish and reshape college athletics.

Bill Lawrence is a partner in Burr & Forman’s Birmingham, Alabama office and leads the firm’s NIL Industry Sector Team. He has advised NCAA member institutions, college athletes, athletic agents, and NIL collectives regarding NIL matters. For more information regarding Bill’s experience, please see his main bio here and his sports law bio here.