



# The NCAA's New NIL Guidance: How the NCAA Has Loosened Restrictions on Collectives

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## INTRODUCTION

On October 26, 2022, the NCAA released regulatory guidance addressing permissible and impermissible involvements that NCAA member institutions (**Institutions**) can have with the NIL activities of *currently enrolled student athletes* under existing NCAA rules (the **New Guidance**).

Although the New Guidance's title specifically refers only to Institutional involvements in student athlete NIL activities, it also addresses permissible and impermissible involvements Institutions can have with NIL collectives (**Collectives**).

The NCAA's decision to address the interactions between Institutions and Collectives is significant considering the dichotomy between Institutional and public perceptions of the NIL environment in which Institutions and Collectives must co-exist and operate.

On the one hand, Institutions have approached the NIL Regulations through a justified fear of NCAA authority and, therefore, often put NIL firewalls in place between themselves and Collectives to help prevent conflicts of interest and rules violations, primarily due to the NCAA's classification of Collectives as Institutional boosters.

On the other hand, the public seems to perceive Collectives as simply legalized conduits through which Institutions can end-around NCAA rules and aggressively funnel pay-for-play money and other impermissible inducements to student athletes.

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This dichotomy makes the NCAA's regulation of NIL unenviable, challenging, and somewhat unfeasible, but it does not justify or excuse the NCAA's intermittent, haphazard, and often inconsistent regulatory approach to NIL.

Within this context, the New Guidance evidences a marked but modest positional change by the NCAA regarding Collectives, which seemingly has the NCAA beginning a brick-by-brick dismantling of the NIL firewalls separating Institutions and Collectives.

## SUMMARY OF NCAA NIL REGULATION

The New Guidance adds to the NCAA's three prior NIL missives regulating NIL (collectively, the **NIL Regulations**):

- First, the NCAA's July 1, 2021 adoption of its Interim Name, Image, and Likeness Policy (**NIL Policy**), which, for the first time, allowed NCAA student athletes to earn NIL compensation without jeopardizing their NCAA eligibilities;
- Second, the NCAA's November 2021 Question-and-Answer Guidance (**Q&A Guidance**), which, among other things, clarified that Institutions may not (1) use NIL transactions to compensate student athletes for athletics participation or achievement or as improper inducements, (2) dictate how student athletes use their NIL compensation, or (3) compensate student athletes for their NIL; and
- Third, the NCAA's May 2022 Guidance Regarding Third Party Involvement (**May 2022 Guidance**), which addressed Institutional involvement with prospective student athletes (*i.e.*, recruits) and NIL collectives.

The New Guidance does not create new rules. Instead, the New Guidance attempts to contextualize concepts under the NIL Policy and implement them, like the prior NIL Regulations, under an overarching premise that NIL activities are subject to the NCAA's long-standing prohibitions against pay-for-play and other impermissible inducements. Beyond that crystalline premise, however, the NCAA has been reticent to fully regulate NIL and, consequently, it has released its NIL Regulations intermittently and haphazardly, creating interpretive challenges and implementation headaches for those subject to the NIL Regulations.

## THE NCAA'S REGULATORY SUBSERVIENCE

The NCAA's reticence to regulate NIL fully is primarily due to the NCAA's not so secretive desire to rid itself of NIL regulatory oversight. As widely reported, in response to a substantial majority of states having passed their own differing NIL laws, the NCAA has expressly and aggressively lobbied Congress to pass a federal NIL law that uniformly legislates NIL across all 50 states. Indeed, the NIL Policy itself was entitled an "interim" policy for this very reason and will remain in effect until federal legislation is passed or the NCAA decides to pass new rules.

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The NCAA's waiting game for Congressional action appears misplaced considering Congress' own reticence to legislate NIL, as evidenced by the eight federal bills that have been introduced into the Senate and House since 2019 and failed to become law.

Perhaps the lack of federal action is one reason why the NCAA has used the NIL Regulations to implicitly prompt states to legislate NIL pending federal action. In a mostly overlooked yet profoundly important aspect of the NIL Regulations, the NCAA includes clauses that expressly concede the NIL Regulations' subservience to state laws and executive actions with the force of law in effect. These subservience clauses are the NCAA's implicit invitations to the states to pass laws overriding the NIL Regulations and, by doing so, possibly increasing the likelihood of Congressional action.

## THE NEW GUIDANCE – THE NCAA REGULATES FOUR CATEGORIES OF INSTITUTIONAL INVOLVEMENTS IN NIL ACTIVITIES

The New Guidance regulates four categories of Institutional involvements with NIL activities:

- Institutional education and monitoring.
- Institutional support for student athlete NIL activities.
- Institutional support for NIL entities, and NIL Collectives.
- Institutional involvement in negotiating for student athletes, revenue sharing with student athletes, and compensating student athletes.

As part of each regulatory category, the NCAA has continued its reticent and haphazard regulation of NIL by specifying non-exhaustive and incomplete examples of both permissible and impermissible types of Institutional involvements in NIL activities.

### Category 1 - Institutional Education and Monitoring

The New Guidance clarifies that Institutional based NIL educational and monitoring efforts are permissible in three important ways.

- First, Institutions can and, according to the NCAA's announcement of the New Guidance, should proactively educate recruits and enrolled student athletes on NIL related subjects including, among others, financial literacy, taxes, entrepreneurship, and social media use/practices.
- Second, Institutions can conduct NIL related educational sessions for Collectives and other Institutional boosters.
- Third, Institutions can require student athletes to report their NIL activities to their Institutions' athletics departments.

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The NCAA's sanctioning of Institutional based NIL education and monitoring efforts is consistent in principle with numerous state NIL laws, which typically (i) require Institutions to conduct financial literacy and life skills workshops for student athletes addressing topics including financial aid, debt management, budgeting, and time management skills and (ii) authorize Institutions to require student athletes to report their NIL activities to them. Accordingly, this aspect of the New Guidance does not break new ground.

Nevertheless, by clarifying that Institutions can educate Collectives, the NCAA has taken its first significant step to dismantle the first bricks of the NIL firewalls separating Institutions and Collectives, which, eventually, should benefit both Institutions and Collectives by helping to sharpen Institutional and Collective engagement and rapport, motivating Collectives' fund raising efforts, and improving Collectives' self-regulation skills.

The NCAA did not identify any impermissible activities that Institutions should avoid regarding NIL education and monitoring, but it reserved the ability to identify impermissible activities as additional circumstances may warrant.

## Category 2 - Institutional Support for NIL Activities

The New Guidance's most developed subject area addresses the extent to which Institutions can directly support student athlete and Collective NIL activities. The NCAA's newly sanctioned support levels seem more lenient and tolerant of Institutional support than many Institutions have interpreted the NIL Regulations to date.

The NCAA addressed Institutional support for NIL activities in three loosely defined sub-categories:

### **Interactions among Institutions, Student Athletes, and Collectives**

Although the New Guidance affirms that, contrary to widely held public perception, Institutions cannot (i) communicate with Collectives regarding student athletes' specific compensation requests or demands (for example, student athletes requesting specific amounts of NIL based money) or (ii) encourage Collectives to fulfill student athletes' specific requests, it nevertheless confirms that Institutions can meaningfully interact with student athletes and Collectives, including in the following ways:

- Institutions can engage Collectives to inform student athletes of NIL opportunities;
- Without further Institutional involvement, Institutions can engage Collectives to administer marketplaces that match student athletes with NIL opportunities;
- Without further Institutional involvement, Institutions can provide or transmit information to student athletes about NIL opportunities of which Institutions are aware;
- Institutions can provide student athletes' contact and other directory information to Collectives, including Collectives specifically seeking to engage those student athletes in NIL activities;

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- Institutions can introduce student athletes to Collective representatives; and
- Institutions can arrange space for student athletes and Collectives to meet on campus, including within Institutional facilities.

Even though Institutions cannot communicate with Collectives about or encourage Collectives to fulfill specific student athlete demands or requests, the newly sanctioned levels of permissible interactions between Institutions and Collectives are significant for two main reasons. First, the permissible level of interaction is more lenient than prior NIL Regulations indicated, whether due to their silence on the issue or, as was the Q&A Guidance's case, refusal to answer specifically whether Institutions are permitted to arrange NIL opportunities for student athletes. Second, the newly sanctioned levels of permissible interactions are further examples of the NCAA's brick-by-brick dismantling of the NIL firewalls separating Institutions and Collectives, which suggests that Institutions can have greater comfort in proactively interacting with student athletes and Collectives about NIL opportunities.

## **Institutional Promotion**

The New Guidance clarifies the extents to which Institutions can promote student athlete NIL activities, and the key to Institutional promotional involvement is, as is often the case, rooted in financial considerations.

The New Guidance permits the following Institutional promotional efforts:

- Institutions can promote student athlete NIL activities if no monetary value applies to the promotion or the Institutions incur no cost for the promotion, such as retweeting or liking a social media post.
- Institutions can provide stock, stored photo/video, graphics to both student athletes and Collectives.
- Institutions can promote NIL activities on Institutional platforms if student athletes or NIL Collectives pay "going rates" for advertisements on those platforms. For example, Collectives can pay to advertise themselves on video boards during football games, which place them in positions pivotal to solicit funds directly from tens of thousands of potential donors.
- Institutions can purchase items relating to student athletes' NIL deals if the items are *de minimis* in value and Institutions pay the same rate for the items as the general public would pay.

The NCAA limited certain Institutional promotional activities where the activities seemingly have indirect financial benefits to student athletes (i.e., student athletes do not have to pay for the benefits). Unless the benefits derived are generally available to all students and not just student athletes, Institutions cannot:

- Proactively assist in developing, creating, executing, or implementing student athlete NIL activities, including developing product or promotional materials or ensuring student athlete performance of contractual NIL activities.

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- Provide non-educational services to support NIL activities, such as graphics design services, tax preparation services, or contract review services.
- Provide equipment access to support NIL activities, including, specifically, cameras, graphics software, or computers.

The three key criteria to permissible Institutional promotional activities include whether the promotional benefits (i) are available to all students and not strictly student athletes, (ii) have a direct or indirect financial value to student athletes or financial cost to Institutions, and (iii) are made available on commercially arm's length bases.

## **Institutional "On Call" Involvement**

Institutions cannot allow student athletes to participate in NIL activities while they are "on call." In other words, Institutions cannot allow student athletes to promote NIL activities while they are participating in required athletic related activities, specifically including practices, pregame activities, postgame activities, on-court celebrations, or news/press conferences. Accordingly, as long as student athletes are "off duty" from an Institutional standpoint at the time, they can, from an NCAA standpoint, generally devote however much time they want to NIL activities, and, subject to the New Guidance's limitations, Institutions can assist and support those activities.

## Category 3 - Institutional Support for NIL Collectives

The New Guidance clarifies certain permissible and impermissible types of support Institutions can provide to Collectives.

The following are impermissible types of support:

- Institutions cannot financially subscribe to Collective efforts.
- Institutions cannot donate cash to Collectives, regardless of whether the Institutions earmark the funds for specific sports or student athletes. Although this prohibition does not expressly extend to, for example, Institutional coaches, the NCAA's announcement of the New Guidance states unequivocally that coaches "cannot donate cash directly to" Collectives.
- Institutions cannot provide assets, such as game tickets or stadium suite access, to donors as incentives for them to donate funds to Collectives.
- Collectives cannot employ staff members of Institutions' athletic departments, including coaches.

Although the New Guidance does not specifically address the reasons for these prohibitions, they appear to be rooted in anti-commingling and anti-conflict of interest reasons.

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Notwithstanding the NCAA's prohibited types of Institutional support for Collectives, the NCAA continued to dismantle the NIL firewalls separating Institutions and Collectives by permitting the following levels of support:

- Institutional coaches and other staff members can assist Collectives with fundraising, including by appearing at Collective fundraisers or donating autographed items to Collectives.
- Institutions can request that donors provide funds to Collectives, if the Institutions do not direct that the funds be used for specific sports or specific student athletes.
- Institutions can provide donor information to Collectives.
- Institutions can facilitate meetings between donors and Collectives.
- Institutions can provide assets to Collectives (for example, game tickets or stadium suite access) if the assets are available to, and on the same terms as, other Institutional sponsors.

These permissible support activities are, perhaps, the NCAA's most meaningful bricks removed from the NIL firewalls separating Institutions and Collectives. Nevertheless, for some Institutions that had taken an aggressive approach to supporting NIL entities, the New Guidance may require them to soften their aggressiveness. As Lynda Tealer, chair of the NCAA's NIL Working Group and Executive Associate Athletics Director for Administration at the University of Florida, commented in the NCAA's announcement of the New Guidance, "[T]he new guidance may require institutions and key stakeholders to modify practices, and some disentanglement may be necessary."

## Category 4 - Institutional Involvement in Negotiating for Student Athletes, Revenue Sharing with Student Athletes, and Compensating Student Athletes

The New Guidance clarifies that Institutions generally cannot negotiate for student athletes, share revenue with student athletes, or compensate student athletes.

In contrast to the category addressing institutional education and monitoring, which only addressed permissible activities, this category addresses only impermissible activities, including specifically prohibiting the following activities:

- Athletics department staff members cannot represent student athletes for NIL deals, including securing and negotiating on behalf of student athletes.
- Companies owned by athletics department staff members cannot represent student athletes for NIL deals, including securing and negotiating on behalf of student athletes.
- Institutions cannot enter into contracts with student athletes for sales of products relating to their NIL.
- Institutional staff members who own businesses separate from their Institutions cannot provide NIL deals to student athletes.

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- Institutional coaches cannot compensate student athletes to promote their athletic camps.
- Conferences and student athletes cannot share revenue, including broadcast or NIL revenue.
- Student athletes cannot receive compensation for directly or indirectly promoting an athletics competition in which they participate.

Notwithstanding the NCAA's partial dismantling of the NIL firewalls separating Institutions and Collectives, the New Guidance affirms Institutional concerns that some portion of the NIL firewalls remain.

## A NEW ALLEGATION AND CONCLUSION STANDARD FOR NCAA ENFORCEMENT ACTIONS

The New Guidance ushers in a new and unexpected standard by which the NCAA will prosecute and adjudicate alleged violations of the NIL Regulations. Based upon the new standard's more stringent and punitive approach to alleged violations than existed previously, the NCAA has taken a material regulatory step overriding its prior NIL Regulations and contradicting its otherwise reticent approach to regulating NIL.

For NIL related violations that occurred before the New Guidance, the NCAA had directed its enforcement staff to review facts of individual cases but pursue only those individual cases that were clearly contrary to the NIL Policy, including the most severe violations of Institutional involvement or pay-for-play. This standard was generally viewed as being largely toothless.

The new allegation and conclusion standard is far more aggressive and states that, when available information *indicates* impermissible conduct has occurred, the NCAA enforcement staff and Committee on Infractions will presume violations have occurred, unless Institutions clearly demonstrate that the conduct in question was in line with the NIL Policy and existing NCAA rules. No longer toothless, the new standard inverts due process standards and places the burden of proof on the accused Institutions rather than forcing the NCAA to prove its own cases, which cannot be a welcome development to Institutions, student athletes, or Collectives; however, considering that the NCAA reiterated its prior position that its NIL Regulations are not intended to question the eligibility of student athletes, the only logical conclusion is that the NCAA's new allegation and conclusion standard is aimed primarily at the Institutions themselves.

## CONCLUSION

Having not yet concluded its second year of existence, the NIL era of college sports remains in its infancy; however, the New Guidance confirms the NCAA's apparent struggle to authoritatively and consistently govern NIL's evolution and growth and, in most respects, continues the NCAA's reticent, intermittent, and haphazard approach to regulating NIL. Accordingly, Institutions and Collectives should take a cautious, deliberate, and thoughtful approach to implementing new NIL policies and procedures based upon the New Guidance.