

NCAA Board of Governors Federal and State Legislations Working Group Final Report and Recommendations April 17, 2020

Executive Summary

- State legislation can significantly limit the NCAA's ability to manage the issue of NIL commercialization
 - This poses a significant challenge to the NCAA's ability to manage affairs nationally
- Feedback from NCAA member universities and third parties convinced the working group that rules relating to NIL commercialization need to be modernized
- Current rules were drafted long before many of today's opportunities were available (i.e., social media and other digital distribution and monetization platforms)
- Consistent with the direction that student-athletes should be treated as every other student, unless a compelling reason exists, the working group concluded that divisional NIL rules should be modernized to account to new media and promotional landscape
- Recommendations to the Board:
 - Stress to divisions that any modernization of NIL bylaws must be accompanied by guardrails to ensure:
 - NIL compensation must represent payment for use of NIL, not simply a disguise for pay-for-play
 - Schools and conferences cannot play a role in NIL activities
 - Student-athletes are not compensated for NIL when they have no legal right to demand such compensation
 - Schools and boosters are not using NIL as a recruiting inducement
 - Role of third parties in NIL activities is regulated
 - Modernization of rules does not interfere with NCAA members' efforts of diversity, inclusion, or gender equity
 - Encourage divisions to permit student-athletes to be compensated for third party endorsements appropriate circumstances
 - Provided the use does not involve athletic participation, divisions should be encouraged to permit student-athletes to be compensated for use of their NIL in their own work product or business activity
 - Recommend a timeline for divisions to act so legislative proposals are fully drafted by Oct. 31, 2020, voted on by Jan. 31, 2021, and effective by the 2021–22 academic year
- The Board should also pursue preemption from state NIL laws from Congress

Section I – Background

Creation and Charge

- Board created this working group in part because proposed federal legislation on NIL threatened the tax exempt status of the NCAA

- Proposed state legislation threatened the NCAA’s ability to host fair national championships and would materially alter the principle of college athletics
- Members:
 - Val Ackerman, commissioner, Big East Conference (Division I) (co-chair)
 - Jill Bodensteiner, director of athletics, Saint Joseph’s University (Division I)
 - Bob Bowlsby, commissioner, Big 12 Conference (Division I)
 - Don Bruce, faculty athletics representative, University of Tennessee (Division I)
 - Rita Cheng, president, Northern Arizona University (Division I)
 - Mary Beth Cooper, president, Springfield College (Division III)
 - Lauren Cox, student-athlete, Baylor University (Division I)
 - John "Jack" DeGioia, president, Georgetown University (Division I)
 - Jackson Erdmann, student-athlete, Saint John’s University (Division III)
 - Rick George, director of athletics, University of Colorado (Division I)
 - Carolayne Henry, senior woman administrator, Mountain West Conference (Division I)
 - Glen Jones, president, Henderson State University (Division II)
 - Scott Larson, athletics compliance coordinator, Lubbock Christian University (Division II)
 - Brandon Lee, student-athlete, University of Missouri (Division I)
 - Jackie McWilliams, commissioner, Central Intercollegiate Athletic Association (Division II)
 - Jere Morehead, president, University of Georgia (Division I)
 - Darryl Sims, director of athletics, University of Wisconsin-Oshkosh (Division III)
 - Gene Smith, director of athletics, The Ohio State University (Division I) (co-chair)
 - Tim P. White, chancellor, California State University System (Divisions I and II)
 - Carla Williams, director of athletics, University of Virginia (Division I)
- Group was specifically directed to:
 - Consider whether the NCAA should modify rules and policies to allow NIL payments
 - Be mindful NIL payments are not compensation for athletic participation (i.e., not pay-for-play)
 - **“Paying students as employees for play is anathema to the NCAA mission focused on students competing against students and is not part of this discussion.”**
 - Assure any proposed solution keep student-athlete benefits tethered to educational expenses or incidental to participation
 - Examine whether modifying NIL payment allowance—beyond what the 9th Cir. required in O’Bannon and other rulings—would be achievable/enforceable without undermining the distinction between professional and collegiate sports
 - Preserve the ability to host fair national competitions and championships
- The working group shall produce Association-wide principles to provide each division guidance for a consistent approach to NIL legislation

Initial Meetings and Feedback

Feedback from NCAA Membership

- Working group asked NCAA members to address the following:
 - Challenges and opportunities posed by permitting student-athletes to be compensated for NIL
 - Potential models for permitting NIL compensation
 - Whether permitting NIL compensation might affect fair competition, and the possibility of mitigating such effects

- Whether it is possible to develop a measure of fair market value for student-athlete NIL
- What steps the membership might take to prevent student-athletes from prioritizing NIL compensation over academic success and team commitment
- Highlights from NCAA Membership Responses:
 - Support for rules modernization to accommodate contemporary NIL opportunities
 - NCAA rules need to be updated to address changes in technology (emergence of social media platforms and the marketing opportunities they provide) to give student-athletes the same opportunities as non-athletes
 - Some members believe rules should be made more clear and easier to follow through deregulation in certain areas
 - Modernization efforts should not be overly focused on opportunities for football and men's basketball players
 - If schools were prohibited from participating in arranging deals, gender equity concerns would be reduced
 - No desire for changes to NIL rules that would undermine the NCAA's model of amateur intercollegiate athletics
 - Members **overwhelmingly** indicated the NCAA should not make rules that would undermine/fundamentally change the model of college athletics
 - Concern over effects on the recruiting process
 - Modernizing NIL rules could exacerbate recruiting advantages already in place and cause students to put too much emphasis on potential NIL opportunities over academic/athletic opportunities
 - This concern should not preclude otherwise beneficial modernization
 - Concern over boosters
 - Concern that payments made by boosters would be nominally for legitimate used on NIL but primarily for athletic participation
 - Concern over lucrative potential deals from boosters used in recruiting
 - Some members suggested that student-athletes should be prohibited from commercializing their NIL during the playing season to limit booster activity
 - Suggestions that third party payments should be compared and limited to fair market value

Information from Other Sports Organizations

- Working group received information about athlete NIL licensing programs used in MLB, NFL, NBA, and the Olympics
- Focus of this was to determine if a group licensing program similar to those leagues would be a viable path
- Current group licensing structures that exist benefit from legal structures not available to the NCAA or its members → Player's Association to serve as a bargaining unit for the athletes, or for the Olympics, federal legislation conferring antitrust immunity related to sports marketing
- "[T]he absence of similar legal structures in intercollegiate athletics greatly complicates the NCAA's ability to pursue a group licensing approach similar to the models used in the professional context."

The Working Group's October 2019 Interim Report

- Payment to student-athletes for use of their NIL should not be for their athletic performance or participation, or serve as a recruiting inducement
- Regulation of NIL use should be transparent, narrowly tailored, and enforceable. Regulation should also facilitate fair competition among schools in a division, including integrity in recruiting
- Student-athletes should be able to use their NIL in a manner similar to non-athletes, unless there is a compelling reason to differentiate them
- Recommendations to the Board:
 - Authorize change in policy and bylaws to permit NIL benefits that consistent with NCAA values and principles, and consistent with legal precedent
 - Reject approaches that make student-athletes employees or use likeness as a substitution for compensation related to athletic participation and performance
 - Reaffirm the recruiting process. Changes to NIL rules should support the recruitment process and not lead to undue influence of a choice of college
 - Extend the timeframe of the working group to April 2020 to work with NCAA members on development and adoption of new NCAA legislation

The Board of Governors October 29 Statement on the Working Group's Continuing Deliberations

- The following principles and guidelines for the modernization of NIL rules were established by the Board of Governors:
 - Assure student-athletes are treated similarly to non-athletes unless a compelling reason exists to differentiate them
 - Maintain priorities of education and collegiate experience to provide opportunities for student-athlete success
 - Ensure rules are transparent, focused, and enforceable to facilitate fair and balanced competition
 - Make the distinction between collegiate and professional sports clear
 - Make it clear that compensation for athletic performance or participation is impermissible
 - **Reaffirm that student-athletes are students first and not employees of the university**
 - Enhance principles of diversity, inclusion, and gender equity
 - Protect the recruiting environment and prohibit inducements to attend, remain at, or transfer to a specific institution

Section II – The Legal Framework for Student-Athlete NIL Rights

- Recent discourse on the ability of student-athletes to commercialize their NIL focuses on NCAA rules—not legislation—are primarily responsible for the athletes' inability to do so
- Legal scholars and the working group stress that any rule changes must be cognizant of what student-athlete NIL rights do and do not cover
 - “[P]ermitting student-athletes to receive payments for NIL ‘licenses’ that are not **legally necessary** would be tantamount to permitting thinly veiled payments for nothing other than athletics participation.”

The Right of Publicity

- Commercial NIL rights are based on the legal doctrine of the right of publicity
 - This doctrine requires third parties to obtain permission from individuals before commercially using that person's NIL
- This right “does not extend to the use of an individual's NIL in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses”
- First Amendment of the U.S. Const. and the Copyright Act can preempt the right of publicity in certain circumstances

The Right of Publicity and Sports Broadcasting

- Broadcasting a sports contest and advertising or promoting those contests by using the participants' names and images does not violate the publicity rights of the participants
- Rebroadcasting clips does not violate publicity rights unless the clip is used in a way that promotes or implies endorsement of a product or service
- A person who owns the copyright to a photo of an athlete from a sports contest can sell that photo without violating publicity rights, since the copyright owner's rights under the Copyright Act would preempt publicity rights
- Because of this, any “NIL payments” in consideration of clips or photographs from games would be “little more than . . . *litera pay for play*”

The NCAA's Use of Student-Athlete NIL

- Historically, the NCAA has requested student-athletes to sign waivers granting permission for the use of their NIL to promote NCAA championships
- The NCAA has never required permission from student-athletes to use their NIL in order to license broadcasts of competitions
- The NCAA has never attempted to commercially use student-athlete NIL, and has no intention of doing so

The *Keller* and *O'Bannon* Cases

- *Keller* accused the NCAA of conspiring with EA and the College Licensing Company to make unlicensed use of student-athlete NIL in NCAA football and basketball video games
- *O'Bannon* accused the NCAA of using NIL waivers as perpetual licenses to exploit the NIL of former student-athletes in commercial products after they graduated
 - *O'Bannon* later included allegations NCAA amateurism rules unlawfully restrained current athletes from being paid for the commercial use of their NIL in broadcasts and video games
- Ninth Circuit ruled EA did not have First Amendment protection to use athletes' NIL in *Keller*
 - *Keller* established that video games cannot be produced without obtaining permission for the use of student-athletes' NIL
- Trial court in *O'Bannon* ruled that absent NCAA amateurism rules, student-athletes would receive payments from schools/third parties for use of their NIL in video games
 - Court also ruled that the legal landscape supported the claim that student-athletes could demand a share of live broadcasting revenues associated with their games, if NCAA amateurism rules allowed them to

- Ninth Circuit in *O'Bannon* solely looked at video game licenses and held that NCAA rules must “permit student-athletes to receive NIL licensing payments as long as those payments do not result in student-athletes receiving total financial aid that exceeds their cost of attendance”

Legal Framework for Student-Athlete NIL after *Keller* and *O'Bannon*

- *Keller*'s holding did not prohibit any activity the NCAA previously engaged in → NCAA never sold licensing of student-athlete NIL to EA and the holding was strictly limited to video games
- Later cases rejected the notion that broadcasts require licenses from participants

Section III – The NCAA's Current Rules Relating to Student-Athlete NIL

Prior to Enrollment

- Divisions I and III
 - Athletes may use their NIL to promote or endorse commercial products or services
 - Athletes may not receive any compensation for their promotion, other than reimbursement of expenses, if they were chosen based on participation in athletics
- Division II
 - Athletes may be compensated for commercial use of their NIL
 - Only restriction is that athletes cannot sign or receive benefits from an agent

After Enrollment

- Division I
 - DI student-athletes are not allowed to use NIL to promote or endorse products or services, even if the athlete is not compensated
 - This extends to athletes creating their own business
- Division II
 - DII athletes may not participate in promotional activities related to athletics where payment is based on participation in athletics
 - DII athletes may participate in and be compensated for promotional activities—modeling, promoting commercial products or services—as long as the activity is not related to athletics and not based on the athletes' participation in athletics
- Division III
 - DII athletes can use their NIL in modeling and promotional activities not related to athletics, and promote their own businesses, as long as the athletes' status as a student-athlete is not used in promotion
 - Payment cannot be based on athletics participation

Common Exceptions

- Exceptions cover school promotions, tax-exempt or charitable promotions, media activities, National Governing Body promotions, camp and congratulatory advertisements
 - Beyond reimbursement for expenses, student-athletes cannot be compensated
- Athletes can provide unsolicited opinions on commercial products or services, as long as they are not paid for doing so

- For DI athletes, if a student became involved in modeling or other non-athletics related promotions prior to enrollment and not because of their athletic ability, they may continue to participate but no reference can be made to the athletes participation in athletics and they cannot endorse a commercial product

Waivers

- Waiver requests regarding student-athlete use of their NIL to promote businesses or products have generally been approved, provided the following conditions were met
 - The student-athlete was using their NIL to promote their own business
 - The student-athlete became involved in the business for reasons unrelated to athletics, and the vocation was not athletically related
 - The student-athlete's institution did not have any involvement with promotional activities related to the business, unless it was part of a class project or program and that benefit is extended to all participating students in the class or program
 - No reference was made to involvement in intercollegiate athletics
 - The student-athlete was compensated at a rate commensurate with their skills and experience related to the vocation, and compensation was not based in any way on their athletics ability

Section IV – The Growth in Opportunities for College Students to Make Commercial Use of Their NIL Rights

- Given the evolution of social media advertising, the NCAA rules created in the past were inconsistent with the NCAA's goal of treating student-athletes like non-athletes—who were able to commercialize their NIL on social media

Social Media “Influencer” Marketing Opportunities

- This is one of the important new commercialization opportunities for college students
- Influencer Marketing → modeling and using or promoting a product in social media posts in exchange for money or some other thing of value
- Brands spend and estimated \$5 to \$10 billion a year on influencer marketing
- Brands have extended social media marketing to college students who are “micro-influences” who provide more genuine and honest interaction than celebrities

Digital Content Creation and Distribution

- Content like podcasts, vidoes, and live streams have increased in popularity and accessibility for people to create using their phones
- Rules should be modernized so student-athletes can take advantage of theses opportunities

Section V – Additional Recommendations on Association-Wide Principles and Regulatory Framework

- Even if promotional activity is associated with a student-athletes athletic ability in some way, that would not amount to pay for play so long as the school does not provide or arrange for the compensation

Why Significant Modernization is Appropriate

Current Rules Could Prevent Student-Athletes from Pursuing Opportunities Available to College Students Generally

- Current rules tend to prohibit student-athletes from participating in activities described in Section IV
- The rules should be reworked to directly address modern NIL environments
- These rules should allow student-athletes to pursue the same promotional opportunities as non-athletes
- Student-athletes should not be treated differently unless a compelling reason exists

The Historic Distinction Between Permitted and Prohibited Promotional Activities Should be Re-examined in Light of Modern Commercialization Opportunities

- Modernization of rules should consider how traditional activities are addressed (television commercials, autograph signings, etc.)
- With appropriate restrictions, divisions could allow student-athletes to be compensated for the use of their NIL in television endorsements or for signing autographs

Concerns About Abuse of NIL Commercialization are Better Addressed Through Proper Regulation than Prohibition

- working group believe it is better to regulate certain areas of NIL rather than prohibit entire categories of NIL
- NCAA members should be prohibited from providing NIL compensation to student-athletes or arranging for compensation provided by a third party “unless such compensation is part of a total financial aid package that does not exceed the cost of attendance”
- Some have recommended boosters should continue to be treated as part of the universities, effectively banning boosters from participating in NIL
 - Working group suggests this issue should be left to the divisions, and the NCAA should not make a broad rule governing all three divisions

Necessary Regulation of Newly Permitted NIL Activities

- **Regulations must be adopted that are designed to endure permitted NIL activity does not undermine America’s unique educational model of athletic competition between students rather than professionals**
- Guardrails should be adopted by the divisions to ensure the following:
 - Student-athletes should be encouraged to keep academic commitments and not let NIL activities distract with academic progress
 - Compensation should represent genuine payments for use of NIL, not payment for athletic participation or performance
 - Outside providing financial aid up to the cost of attendance, schools, conferences, and the NCAA should play no role in arranging NIL activity or payments
 - NIL activity cannot be contingent on a prospective athlete’s enrollment at a particular school
 - Use of agents, advisors, and professional services by student-athletes in connection with NIL must be regulated
 - NIL activities cannot interfere with efforts of diversity, inclusion, or gender equity
- Divisions must implement guardrails that will prevent NIL opportunities from distorting the recruiting process

Specific Recommendations

- Board of Governors should allow divisions to create the final form of their respective rules given the different needs of each division
- Board of Governors should urge divisions to closely monitor the effects of new NIL activity and be proactive in addressing abuses

Recommended Areas in which Rules Related to NIL Should be Modernized

- Category One: Compensation for Third-Party Endorsements
 - Divisions could permit student-athletes to receive compensation for NIL use, including activity that may be related in some way to athletics
 - Divisions should prohibit schools or conferences from making these payments or having any involvement in NIL activity
 - Prohibitions should include:
 - Prohibition on institutions arranging, identifying, facilitating, or having any other kind of participation in endorsement deals
 - Prohibition on institutions permitting student-athletes use of institution's intellectual property in endorsements
- Category Two: Compensation for Student-Athlete Work Product or Business Activities
 - Student-athletes should be permitted to receive compensation for:
 - Social media content creation and distribution
 - Promotion of student-athlete businesses
 - Personal promotional activities
 - Schools and conferences should be prohibited from paying student-athletes for these activities, arranging or having any involvement in these activities, or permitting their intellectual property to be used in these activities
- There are no recommendations for group licenses for use in video games because of legal hurdles that stand in the way

Recommended Areas of Regulation of Newly Permitted NIL Activities

- Recommendations above are contingent on divisions creating rules to prevent new NIL activity from undermining the integrity of the collegiate model and the recruiting process
- The following issues should be considered:
 - Whether certain categories of promotional activities should be precluded because they are inconsistent with NCAA membership's values
 - Whether certain categories of third-party businesses should be precluded from NIL activities or have limited participation, due to history of encouraging or facilitating recruiting infractions
 - What adjustments should be made to NCAA rules regarding promotional and other commercial activity by athletes prior to enrollment, including disclosure and enforcement measures
 - How to best implement safeguards to ensure NIL activity does not impose undue burdens on student-athletes
 - How to best implement safeguards to ensure NIL activity is not used as an inducement by boosters
 - Creating a framework to permit student-athletes to engage and consult with professional service providers consistent with existing federal and state laws

- Create resources on campus to educate student-athletes about NIL activities and in a manner consistent with gender equity

Section VI – Presidential Subcommittee on Congressional Action

Background

- Antitrust issues could pose a significant issue to proposed modernization of NIL rules
- Purpose of this subcommittee was to “provide input to the Board of Governors and the NCAA president on potential assistance that the Association should seek from Congress to support any efforts to modernize the rules in NCAA sports”
- Members
 - Rita Cheng, president, Northern Arizona University (Division I)
 - Mary Beth Cooper, president, Springfield College (Division III)
 - John "Jack" DeGioia, president, Georgetown University (Division I) (chair)
 - Michael Drake, president, The Ohio State University (Division I)
 - Glen Jones, former vice chair, NCAA Board of Governors (Division II)
 - Denis McDonough, The Markle Foundation
 - Jere Morehead, president, University of Georgia (Division I)
 - Tim P. White, chancellor, California State University System (Divisions I and II)
- Evolving legal landscapes surround NIL threaten to undermine the NCAA’s collegiate model and limit its ability to meet the needs of student-athletes moving forward
- The NCAA is the most appropriate and experience entity to over college athletics given the uniqueness of the collegiate model, the member-driven nature, daily connection to student-athletes, breadth and scope of administrative operations, willingness to respond to growing needs of student-athletes, and long track record of providing remarkable opportunities for student-athletes to gain access to higher education

Recommendations

- Board of Governors should support the ongoing modernization effort of NCAA rules regarding student-athlete well-being, experience, health and safety, and academic success
- Board of Governors should immediately engage Congress to accomplish the following:
 - **Ensure federal preemption over state NIL laws**
 - **Establish NCAA antitrust immunity**
 - **Safeguard non-employment status of student-athletes**
 - **Maintain distinction between student-athletes and professional athletes**
 - Uphold the NCAA’s valued including diversity, inclusion, and gender equity

Why Congressional Action is Desirable

- Impediments posed by state NIL laws
 - State laws would erode the NCAA’s ability to further maintain the collegiate model
 - Some laws would threaten to transform student-athletes into employees
 - State laws, rather than a federal law, creates the possibility that NCAA members in different states will be governed by different NIL rules
- Impediments posed by continuing antitrust litigation

- Antitrust has “frequently been used by aggrieved parties as a tool to attempt to change or undermine the [NCAA’s] rules”
- Committee is concerned antitrust challenges will continue and interfere with the NCAA’s ability to effectively regulate college athletics
- The NCAA should seek federal antitrust exemption to avoid future challenges