

IS CHANGE FINALLY BRUIN' OR IS IT A TROJAN HORSE? NCAA TAKES ACTION ON NAME, IMAGE AND LIKENESS RIGHTS

In a process that began with lawsuits led by current and former players, including former UCLA forward Ed O'Bannon, the National Collegiate Athletic Association (NCAA) announced on April 29 its recommendations for approving a framework which allows college athletes to earn money from the use of their names, images and/or likenesses from third parties.

A STEP FORWARD?

This recent round of NCAA activity comes in response to the flurry of states seeking to pass their own versions of California's Fair Pay to Play Act, which was signed into law in September 2019. For more information on the Fair Pay to Play Act, see our [previous alert](#).

At face value, the NCAA recommendations reflect the principles articulated in the state legislation that has been introduced, but these are only recommendations, not final rules or even preliminary rules.

The following steps must still be taken in order for these NCAA recommendations to be enacted:

- 1) Each of the 3 NCAA divisions must draft their own name, image and likeness (NIL) legislative proposals;
- 2) The governing bodies for the divisions must revise the proposed legislation; and
- 3) The divisions must enact the legislative proposals in time for

THE BOTTOM LINE

The NCAA recommendations to permit student-athletes to earn compensation for the use of their name, image and likeness rights should be viewed as a tentative step forward in the long-running battle over student-athlete rights. Yet, a closer examination reveals significant restrictions and exclusions, along with a plea to Congress for antitrust exemption, which will be seen by many as several steps back.

A solution to this complex issue requires a careful balance between student empowerment and enforcement. The NCAA's most recent effort appears to be weighted too heavily on enforcement to satisfy many.

implementation in the 2021-22 academic year.

the final NCAA rules are expected to address.

A HOST OF CAVEATS

The majority of the comprehensive report that accompanied the NCAA recommendations focused on:

- 1) Limiting the scope of legitimate NIL rights;
- 2) Defending the NCAA's prior approach to NIL rights; and
- 3) Describing the numerous restrictions and areas of abuse that

The threshold restrictions on licensing of NIL rights include the following:

- >> Compensation should represent genuine payments for use of NIL rights (rather than payment for athletics participation or performance);
- >> Schools, conferences and the NCAA should play no role in arranging agreements or payments for NIL rights;

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- >> Schools, conferences and the NCAA cannot permit any use of their facilities, uniforms, trademarks or other intellectual property in connection with the exercise of any NIL rights;
 - >> Student-athletes cannot be compensated for use of their NIL rights where they have no legal right to demand such compensation; and
 - >> NIL rights and payments cannot be conditioned on enrollment or used as an inducement by a school or booster.
- Once the divisions formulate rules for these threshold restrictions, they will consider an additional layer of restrictions and exclusions, such as:
- >> Excluding alcohol, tobacco and sports gambling uses of NIL rights;
 - >> Excluding or limiting athletics shoe and apparel companies;
 - >> Restrictions on athletes prior to enrollment at an NCAA institution;
 - >> Implementing safeguards to prevent use of NIL rights from becoming an undue burden on student-athlete time;
 - >> Keeping boosters from circumventing NCAA rules; and
 - >> Creating a framework for regulating student-athlete interaction with agents, advisors and other professional services providers in connection with their NIL rights.

A PLEA FOR HELP

The NCAA coupled its recommendation regarding rulemaking around NIL rights with some legislative recommendations that are certain to result in significant opposition from advocates for student-athletes. The recommendations include asking for Congressional help in the following areas:

- >> Ensuring federal preemption over state name, image and likeness laws;
- >> Establishing state and federal antitrust exemptions for the NCAA;
- >> Safeguarding the non-employment status of student-athletes; and
- >> Maintaining the distinction between students-athletes and professional athletes.

The antitrust exemptions, in particular, are a hot button issue. Many critics already view the NCAA as an unregulated monopoly and favor tighter federal oversight rather than immunity from antitrust rules. Many believe this will only embolden the NCAA to issue more draconian rules in the future, which would protect powerful university and corporate interests while harming the interests of student athletes.

The most confounding aspect of the recommendations is how little detail is provided and how much latitude is implied in the guidelines for future rulemaking. It would be unrealistic

to expect all of these issues to be sorted at this stage, as this is a clear intermediary step. However, decades of scandals and battles with student-athletes have removed much of the goodwill that would enable the NCAA to make these recommendations and invite a healthy dialogue about them. As it currently stands, the NCAA is likely to receive mostly skepticism and scorn.

FOR MORE INFORMATION

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