

REGULATORS AND BUSINESSES ARE RACING TO FILL THE COLLEGIATE NIL VOID

After years of court challenges and shifting public perceptions, 2021 promises to be a year of fundamental change for collegiate name, image and likeness (NIL) rights.

As states continue to implement legislation and the NCAA formulates its own rules for managing NIL rights, multiple bills have been introduced in Congress which would enable student-athletes to exploit their NIL rights. With a potentially lucrative new marketing channel, businesses have already prepared to take advantage.

STATES STRIKE FIRST

In 2019, California changed the game when it enacted its Fair Pay to Play Act allowing student-athletes to enter into contracts to exploit their NIL rights without forfeiting their eligibility. Since then, Florida, Colorado, Nebraska and New Jersey have enacted similar legislation and more than 30 additional states have introduced legislation to do the same.

The legislation in these states prohibits colleges and universities in the state from:

- >> Upholding rules and limitations (e.g., by the NCAA) that would prevent student-athletes from participating in intercollegiate athletics because they received compensation for the use of their NIL rights;

THE BOTTOM LINE

As the NCAA and states continue to assert their own jurisdiction over the exploitation of NIL rights by collegiate athletes, three starkly different visions of appropriate federal regulation are making their way through Congress. Amidst this uncertainty, businesses in the sports marketing field are pushing forward to develop business models to take advantage of this new market.

There are significant risks in moving too quickly ahead of a regulatory framework that has yet to be defined. However, for businesses that are flexible and agile enough to adapt to competing regulatory schemes in real time, the long term rewards could be substantial.

- >> Directly compensating student athletes for their NIL rights; and
- >> Preventing student athletes from seeking professional representation in connection with NIL-related matters.

Yet each state also has its own focus. Florida, for example, prohibits athletes from engaging with individuals and companies who are affiliated with the school. New Jersey, on the other hand, is concerned with athletes partnering with companies in specific industries: adult entertainment, alcohol, tobacco, prescription drugs, controlled substances, weapons and casinos.

THE NCAA RESPONDS

Sensing a drastically different playing field than in past disputes over student-athlete pay, the National Collegiate Athletic Association (NCAA) announced recommendations in April 2020 for approving a framework enabling student-athletes to exploit their NIL rights.

Each NCAA division was tasked with developing rules for implementation of NIL rights. The Division I, II and III Councils each developed proposals that would allow student-athletes to:

- >> Promote private lessons and business activities and operate their own camps and clinics;

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- >> Profit from endorsing products through commercials and other ventures; and
- >> Be compensated for autograph sessions, among other activities.

Chief among the concerns at each division level were limiting the influence of boosters, developing an adequate compliance framework and prohibiting the use of school marks. The NCAA has also expressed concern about the patchwork of inconsistent state legislation preventing it from enacting a uniform set of rules for each school, going so far as to urge Congress to quickly enact uniform federal legislation that would preempt state NIL laws.

CONGRESS (MAYBE) STEPS IN

Federal law makers have responded to state and NCAA requests for intervention with no less than three proposed NIL bills:

- 1) **The Fairness in Collegiate Athletics Act** would supersede state legislation while permitting the NCAA to define the scope of permitted NIL rights and providing the anti-trust and other litigation protections that the NCAA has sought.
- 2) **The College Athlete Bill of Rights** would provide the most sweeping protections for student-athletes, including broad NIL rights, lifetime scholarships for student-athletes and representation by student-athletes on an oversight panel governing the baseline rules that govern college sports.

- 3) **The Student Athlete Level Playing Field Act** would enable student-athletes to exercise NIL rights and hire agents to assist them, while establishing prohibited categories such as alcohol, tobacco, controlled substances, adult entertainment and gambling, as well as establishing a commission appointed by congressional leaders and comprised of coaches, athletic directors, college athletes, NCAA officials and sports marketing professionals to improve NIL rules and create a dispute resolution mechanism for schools and student-athletes.

While none of these bills are likely to become law before the January 2021 inauguration, quick action will be needed by federal legislators to avoid an impending clash of state and NCAA rules in the summer of 2021.

EARLY MOVERS SEEK TO GAIN AN EDGE

As states, the NCAA and Congress jockey for a role in the changing NIL landscape, while businesses in this space are already moving to take advantage of the opportunities that an open NIL market can offer. Businesses such as Altius Sports Partners are offering advisory services and platforms such as Opendorse are providing readiness programs to assist schools and student-athletes in preparing for these changes. Other businesses, such as INFLCR and Cameo, are offering free versions of their NIL services that can be

switched over to paying versions once regulations are finalized.

The challenge for all of these businesses is that the regulatory environment remains unsettled. Moving too fast in one direction or another may result in wasted resources and a business model that conflicts with regulatory and compliance guidelines. It is expected that most businesses will focus on preparing each of the stakeholders in the NIL ecosystem (schools, student-athletes, sponsors and marketers) to respond quickly once regulations and guidelines are finalized.

FOR MORE INFORMATION

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