

ALERT

The Dawn of the NIL Era: The NCAA's Interim Policy and What it Means for Brands

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The National Collegiate Athletic Association (NCAA) is poised to adopt an interim policy this week that will transform the definition of amateurism in college sports and open significant new opportunities for promotion of products and services by allowing college athletes to profit from their name, image, and likeness (NIL). The new policy is a response to laws adopted in several states—with some scheduled to take effect on July 1—that would prohibit restrictions on the ability of student athletes to profit from their NIL.

What Will the Interim Policy Do?

The interim policy, which the NCAA's Division I Council voted to recommend on June 28, 2021, will alter how the NCAA enforces Bylaw 12, which relates to Amateurism and Athletics Eligibility:

- For student athletes enrolled at a college or university in a state that has adopted laws for NIL, the student athletes may engage in NIL activities that are "consistent with and protected by a valid and enforceable law of the state in which the institution at which such individual enrolls is located." Each college or university will be responsible for determining whether a student athlete's NIL activities are consistent with state law.
- For student athletes enrolled at a college or university in a state that has not adopted laws for NIL, the NCAA will forebear from enforcing Bylaw 12 to alter a student athlete's eligibility.

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Although student athletes will be permitted to use a professional services provider (agent, lawyer, etc.) for activities related to the use of NIL, other NCAA rules, including prohibitions on pay-for-play and improper recruiting inducement, will remain in effect.

Specifically, the draft policy prohibits:

- Compensating a student athlete—except for work performed;
- Conditioning NIL compensation on a student enrolling or remaining enrolled at a particular college or university;
- Conditioning NIL compensation on future athletic performance benchmarks; or
- Providing benefits to student athletes that are not available to the general student body.

When is the Interim Policy Effective?

If adopted, the interim policy will take effect July 1, 2021, and remain effective until either: (1) the Federal government adopts legislation addressing NIL; or (2) the NCAA adopts a permanent NIL policy.

Why is the NCAA Adopting an Interim NIL Policy Now?

The rules are the NCAA's temporary solution to what otherwise would have been a significant imbalance on the NIL front due to a wave of state level legislation coming into place next month. On July 1, laws will go into effect in Alabama, Florida, Georgia, Mississippi, New Mexico, and Texas that would have undercut the NCAA's prior rules by generally enabling college athletes to make money off their NIL. A number of other states are rushing to enact NIL legislation or policies or to expedite the effective date for previously adopted legislation. With no preemptive federal law in sight, the NCAA faces a choice: either adopt its own policy or allow a situation in which athletes in certain states could profit from their NIL while others could not.

While not directly related to NIL, the Supreme Court's decision last week in *NCAA v. Alston* also provides an impetus for NCAA action. There, the Court unanimously concluded that the NCAA's restrictions on colleges offering education-related benefits to athletes violate antitrust law. In a concurring opinion, Justice Brett Kavanaugh warned that "the NCAA's remaining compensation rules also raise serious questions under the antitrust laws." According to Justice Kavanaugh, "the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year." Although the interim NIL policy does not address the entirety of student athlete compensation, it could help stave off immediate challenges to the NCAA's amateurism policies.

What Does the Interim NIL Policy Mean for Brands?

The NCAA's interim NIL policy provides an immediate opportunity for brands to benefit from endorsements of, and relationships with, student athletes whose endorsements previously were off limits. That opportunity comes with both responsibility and risk.

On one hand, there most likely will be a race for brands to align themselves with the most premier student athletes. Companies will need to account both for the present value a collegiate athlete can provide as well as the potential value of developing a relationship now with athletes who could become the stars of the future. Because this market has been artificially limited until this point, the pent-up demand should generate significant activity in the coming weeks and months.

At the same time, companies and student athletes would be wise to tread carefully in this area. Unlike NIL relationships with professional athletes, which are largely unregulated, relationships with student athletes will be subject to myriad rules and regulations, including state (and possibly federal) laws and policies adopted by the NCAA, athletic conferences, and individual colleges and universities. If the draft NCAA policy is any indication, given the haste with which these policies are being adopted, there will be many unanswered questions and potential stumbling blocks for all parties. Compliance failures could have considerable consequences—a brand could not only mar its reputation but could also jeopardize an athlete's collegiate eligibility and professional prospects.

To minimize their risk and prepare for the inevitability of investigations into NIL relationships, companies that are interested in working with collegiate athletes should consider:

- Adopting internal policies to ensure that their NIL arrangements are consistent with applicable laws and regulations;
- Providing training to all employees, contractors, and other representatives who will be involved in the collegiate NIL process and obtaining acknowledgments from such employees and contractors (including disclosures of any schools at which those persons may be considered boosters, which may require additional precautions); and
- Maintaining detailed documentation of: (i) how they selected which athletes to pursue, (ii) all contacts with those athletes and their representatives, and (iii) any and all benefits conferred to such athletes and their representatives.

Wiley has extensive experience helping clients achieve their business objectives in complex regulatory environments. If you or your brand would like assistance with NIL compliance, please contact one of the attorneys listed on this alert.