June 30, 2020

Bob Bowlsby & Grace Calhoun [Co-Chairs]
NCAA Division I Legislative Solutions Group
Indianapolis, IN 46206
P.O. Box 6222

Dear Mr. Bowlsby & Ms. Calhoun:

Thank you for the opportunity to provide feedback to the NCAA Division I Legislative Solutions Group regarding the student-athlete name, image and likeness (NIL) issue. As you know, LEAD1 is the association that represents the athletic directors of the 130 member universities of the NCAA Division I Football Bowl Subdivision (FBS). To best provide feedback, in addition to surveying our members, LEAD1's Board of Directors and NIL Working Group, comprised of selected member athletics directors and other senior athletics staff, carefully considered and deliberated this important topic.

Executive Summary:

With respect to a potential NIL model, we recommend eight main points, including that: (1) NCAA legislation should defer to state and national high school associations for pre-enrollment rules; (2) a third party administrator (TPA) should monitor agent involvement; (3) the TPA should affirm fair market value for all NIL deals; (4) a sophisticated registrar, through the TPA, should regulate all booster involvement; (5) institutions should have the discretion to limit NIL activities based on the values of their institution; (6) institutions should play a limited role in the NIL model; (7) student-athlete autograph sales should not be overregulated; and (8) a TPA should be established to manage the NIL process.

I. Pre-Enrollment

With respect to whether NIL legislation applicable to enrolled students should apply to individuals prior to collegiate enrollment, we recommend that NCAA legislation should defer to state and national high school associations for pre-enrollment rules. In this regard, many state and national high school associations already have existing rules related to student-athlete promotions and endorsements. As an NIL model progresses, however, a TPA, as described below, could be used to align pre-and post-enrollment NIL rules.

In addition, as we mentioned in our previous comment, assuming that some categories of key athletic categories are protected (i.e., apparel, isotonic beverage, nutrition and media rights), one of our concerns with respect to agreements signed by prospective student-athletes in these categories (prior to collegiate enrollment) is whether such protected categories may limit potential enrollment options for student-athletes at the collegiate level. For instance, a student-athlete who signs a Nike deal in high school may only consider Nike schools to keep his or her existing Nike agreement. Our working group is therefore divided on whether NCAA legislation should be established that would require all prospective student-athletes to terminate their high school contracts before enrolling in college. We suggest, however, that student-athletes could be allowed to keep their high school agreements while enrolled in college as long as institutional marks and logos are not used in such agreements. A student-athlete, for example, who chooses to attend an Under Armour institution could still be allowed to have a Nike contract while enrolled in college as long as the student-athlete did not use Nike marks while participating in institutional activities). Otherwise, overregulating in this area could spark increased litigation.

II. Professional Services

While we are concerned that the blurring of the lines could occur between professional representation (e.g., agents) for professional athletics opportunities and agent representation for NIL opportunities, agent involvement related to NIL activities should not be overregulated as it would be very hard to enforce restrictions limited to only NIL marketing. We recommend, however, that the TPA could monitor agent involvement by creating a vetting process for agents (such as performing preliminary background checks and flagging bad actors) and agents could pay a small fee to the TPA to be eligible to register with the TPA. In this regard, student-athletes could pick their own agents as long as the agent were vetted by the TPA (for clarity purposes, the TPA would not serve as an agent for student-athletes with respect to providing counsel or advice on NIL deals). In addition, the TPA could ensure that all benefits provided by agents to student-athletes, in conjunction with NIL activities, meet a fair market value standard. If an agent, for example, paid for a student-athlete's expenses to film a commercial in Paris, the context of the entire deal, including travel and hotel arrangements, would need to meet a fair market value standard.

III. Disclosure

Student-athletes should be required to disclose all de minimus and non de minimus NIL deals to the TPA (note that contrary to our previous comment, we recommend that all deals (including all de minimus deals) should be disclosed to the TPA so that the registrar within the TPA (as described below) could build intelligence in monitoring all NIL deals over time). The TPA should be able to track if Starbucks, for example, secured de minimus (i.e., $250) endorsement deals with thousands of student-athletes in various Starbucks locations across the country. As mentioned, the TPA should also provide transparency through real-time public reporting of all NIL deals (like a registrar) to help ensure that all student-athlete NIL deals meet a fair market value standard. In this vein, such a registrar would become more sophisticated over time and therefore be able to flag NIL deals outside any realm of "normalcy."

With regard to the NCAA's proposed "Activity Disclosure Form," the disclosure form would be better served as a database within the TPA where all data would be located in a centralized place and any updates to the form could be made directly. We have additional concerns including whether student-athletes would feel adequately educated to sign the form, whether the form would need to be updated every time there is new NIL activity and the possible legal ramifications with respect to head coaches' signing the form (in addition, many head coaches may not be willing to sign the form without knowing all the details of various NIL activities). In this regard, we would appreciate greater clarity from the NCAA with regard to the specific role and potential liabilities of coaches in approving student-athlete NIL activities.

IV. Boosters

By ensuring fair market value, this could help mitigate concerns that an NIL model would lead to potential abuses where student-athletes receive NIL payments, which, in reality, are recruiting and transfer inducements. To this end, NCAA legislation should not distinguish between different types of boosters when evaluating participation in NIL activities. A sophisticated registrar (as mentioned above), however, could regulate all booster involvement by performing preliminary background checks and flagging certain deals (if needed). With regard to the potential role of boosters in pre-enrollment activities (for example, a booster could have a relationship with a potential corporate partner for a student-athlete) we again, recommend that the NCAA defer to state and national high school associations for pre-enrollment booster activities.

V. Conflicts

As stated in our previous comment, we recommend that NCAA legislation address potential channel conflicts that may occur between student-athlete NIL deals and institutional preexisting contracts. In addition, as aforementioned, key athletic categories should be circumscribed in such legislation, otherwise, a broad list of protected categories would unfairly limit student-athletes' opportunities. Relatedly, institutions should have the discretion to limit NIL activities based on their own values, however, these limitations should be minimal, otherwise, there will be the possibility of increased litigation.

A few other points worth mentioning from a recent survey of our members on this issue. First, the majority of our members oppose institutional multimedia rights (MMR) holders entering into NIL deals with that institution's student-athletes. Second, the majority of our members oppose student-athletes entering into NIL deals with sponsors that conflict with institutional *exclusive* partners. And third, even though our members are divided on this issue, our working group is of the position that student-athletes should be permitted to enter into NIL deals with any corporate partner not narrowly excluded for institutions, otherwise, again, there will be increased litigation and criticism from the general public. For clarity purposes, institutionally protected sponsor categories (e.g., apparel) must be extremely limited so as not to unfairly restrict endorsement category opportunities for student-athletes.

VI. Institutional Involvement

Per our previous comment, we have concerns with respect to any model that would involve institutions negotiating with companies on behalf of student-athletes due to Title IX compliance, conflicts of interest, potential divergence of interests with student-athletes (i.e., providing opportunities for some student-athletes, but not others) and abuses. Further, there would be additional risks and difficulties on athletic departments such as monitoring third-party vendors, representatives of athletics interests and others.

While we approve institutions providing general educational programming for student-athletes on NIL and associated regulations, we are more concerned with possible institutional involvement regarding compliance and the evaluation of NIL opportunities. In this vein, institutions should individually decide the level of educational programming they provide for student-athletes and there should not be NCAA legislation that mandates educational programming (we recommend, however, that the NCAA create generic educational programming for all student-athletes).

VII. Student-Athlete Business Activities and Commercial Endorsements

With respect to student-athlete autograph sales, we recommend a low regulation model (i.e., cash transactions should be allowed and there should be no time, place and manner restrictions), however, all autograph vendors (e.g., companies) and individuals who purchase autographs for non de minimus amounts (e.g., established by the TPA), should be required to register with the TPA to help ensure fair market value (note, however, that an individual who pays for an autograph for a de minimus amount, such as a booster who purchases an autographed football, would not be required to register with the TPA). In addition, while signing autographs, student-athletes should be permitted to wear any clothing and sign any item they want (note, however, that student-athletes should not be allowed to pose with certain apparel specifically for advertising purposes without rights to the marks). Moreover, student-athletes should be permitted to sell institutionally issued awards, apparel and equipment prior to exhausting eligibility (as long as they are not required to return such items).

VIII. Third-Party Administration

As we underscored in our previous proposal and have stated throughout this comment, we recommend a TPA to manage the NIL process. The TPA, like an independent clearinghouse, could be operated by professional managers and led by student-athletes (both current and former). In this regard, we recommend "Option Number Two – Additional Oversight," as referred to in the NCAA's NIL briefing document, where, as mentioned, the TPA could approve all NIL deals, register businesses, identify potential channel conflicts and collect and report all NIL activity. As alluded to above, we also recommend the additional function for the TPA of monitoring all agent, booster and other third-party involvement. Correspondingly, the TPA could create customized reports for the NCAA, conferences, institutions and even student-athletes to help all stakeholders fulfill their respective obligations. Further, the TPA could receive a market-based transactional fee for any NIL deal to cover possible operating expenses and any startup costs could be advanced by the NCAA, conferences, institutions, third party funders or any combination thereof.

With respect to the NCAA's suggested concept that administrative fees from the TPA could be used to create a development fund for social entrepreneurial endeavors developed by student-athletes, (e.g., grant program to encourage businesses that address social equity concerns), given our proposed student-athlete

centric model, we recommend that the student-athletes affiliated with the TPA make this determination based on the economics of the TPA. This could also be assessed once the TPA is further developed.

IX. Conclusion

Regardless of the expected abuses that may occur under any potential NIL model, we believe that a student-athlete based TPA model, as discussed above, could help college sports effectively monitor, investigate issues and ensure accountability. Moreover, as college sports moves ahead with a potential NIL model, it will be important to ensure that student-athletes receive the requisite education and guidance before signing potential NIL contracts. In addition, the college sports industry should be mindful that student-athletes will need to manage their time wisely when potentially adding NIL activities to their already busy schedules. We thank our co-chairs and committee members for their effort on this issue, and, again, thank you for the opportunity to provide comment to the NCAA Division I Legislative Solutions Group.

Sincerely,

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