

March 9, 2020

VIA EMAIL

Val Ackerman & Gene Smith [Chairs]  
Jill Bodensteiner, Shawn Helibron & Rick George [Committee Co-Chairs]  
NCAA Division I Name, Image and Likeness Legislative Solutions Group  
P.O. Box 6222  
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Dear Ms. Ackerman, Ms. Bodensteiner, Mr. Smith, Mr. Helibron and Mr. George:

Thank you for the opportunity to provide feedback to the NCAA Division I Name, Image and Likeness Legislative Solutions Group regarding the student-athlete name, image and likeness (NIL) issue. 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 comment, we created a working group comprised of selected member athletics directors as well as other senior athletics staff. During the past several months, the working group members as well as LEAD1's Board of Directors carefully considered and deliberated this important topic.

With respect to a potential NIL model, we recommend five main points, including: (1) a low regulation model; (2) third party governance; (3) guardrails addressing fair market value, potential abuses and channel conflicts; (4) a group licensing structure administered by such third party; and (5) academic requirements to participate in such group licensing activities. Some of these recommendations can be implemented by potential NCAA rule changes, however, the majority of them should be codified by federal preemptive legislation.

## **I. Low Regulation Model**

We recommend a low regulation NIL model as any complicated regulatory structure would seem punitive to student-athletes and be criticized by the general public. This is a positive, sea change moment for college athletics, so the deregulation of NIL should reflect this new paradigm and not deliver excessive limitations, which would be easily dismissed. If a low regulation model proved to be problematic and rampant abuses resulted, adjustments to the model could be made in the future. Practically, it would be difficult to pass a regulation heavy model when approximately 30 states are in the process of passing low regulation models.

## **II. Third Party Administration**

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 risk and difficulties on athletic departments such as monitoring third-party vendors, representatives of athletics interests and others.

Because of the consequences of such a change, both anticipated and unintended, we recommend the exploration of a third party administrator (TPA) to manage the process. The TPA, like an independent clearinghouse, could be operated by professional managers and controlled by student-athletes, independent of the NCAA, conferences and institutions. The TPA could have the exclusive right to administer all student-athlete NIL participation (e.g., initiate, negotiate, and approve all bonafide, legitimate and non de minimus NIL deals), develop standardized contracts for NIL categories, ensure compliance with the guardrails outlined in Section III (discussed herein), assist student-athletes with their taxes and financial management, and police agent involvement, which we believe should be more flexible for student-athletes. The TPA would be charged with ensuring compliance with all regulatory

requirements and could receive a market-based transactional fee for any NIL deal to cover possible operating expenses. Further, any startup costs could be advanced by the NCAA, conferences, institutions, third party funders or any combination thereof.

### **III. Guardrails**

Any guardrails with respect to such an NIL model should focus on ensuring fair market value, eliminating recruiting and transfer inducements and avoiding potential channel conflicts. First, it should be the TPA's role to affirm fair market value for all non de minimus NIL deals (to this end, student-athletes should also be required to disclose all de minimus NIL deals to the TPA). The market value of each deal would vary based upon the geographical market and cultural differences of each institution. Moreover, while certain market values are more definable than others (i.e., social media influencers), ranges of market value could also be established in other markets based upon particular student-athlete services provided to third party vendors. Second, 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. Third, with respect to potential channel conflicts, student-athletes' individual rights agreements could potentially conflict with their institution's preexisting agreements. Thus, it would be critical that any NCAA legislation address such potential channel conflicts (for example, as incorporated in the California state legislation). In this regard, some of our athletics directors believe that key athletic categories (i.e., apparel, isotonic beverage, nutrition and media rights) should be circumscribed in such legislation, otherwise, a broad list of protected categories would unfairly limit student-athletes' opportunities.

To further address potential abuses and help protect competitive equity (by mitigating the disparity between schools that have more lucrative NIL markets than others), some of our athletics directors have expressed interest in a macro cap, such as capping the amount of compensation that a student-athlete may receive in any given year. While this concept has been discussed, there has been no consensus on this principle, however, concerns have been expressed with respect to negative perceptions to such a cap.

### **IV. Group Licensing**

In addition, similar to the model used by the major professional sports unions, our athletics directors support third party administration of a group licensing program for student-athletes. The TPA should act as the bargaining unit for student-athletes with potential businesses, negotiate and collaborate with each institution in this process. Participation in the group licensing program would not be required and a student-athlete could choose to "opt out" of certain categories.

### **V. Student-Athlete Academic Requirements**

Although the concept of "tethered to education" is fundamental to the NCAA's legal arguments in supporting its principle of "amateurism," no state bill has incorporated such a standard. Thus, it would be unreasonable to require academic eligibility for student-athletes to receive NIL compensation, however, to be eligible to participate in group licensing opportunities, we believe that student athletes should be required to be academically eligible based upon their institution's educational standards. In addition, the TPA may need to develop transitional language with respect to student-athletes who are no longer eligible at an institution for academic or any other reason, but are still contracted to an NIL agreement. In this situation, while the TPA would need to coordinate with each institution regarding eligibility, compliance, etc., the institution would still not be involved in any negotiating process with potential third party businesses.

## VI. Conclusion

Notwithstanding the expected abuses that may occur under any potential NIL model, we believe a student-athlete centric TPA model, as discussed above, could provide a mechanism to consistently support student-athletes (as opposed to a patchwork of support by individual institutions) and would be viewed positively from a public opinion and political perspective. In addition, at our upcoming annual spring meeting on Tuesday, April 14<sup>th</sup> at the Live! By Loews hotel in Arlington, TX, we have planned a time period for further discussing this issue. In this regard, we thank our co-chairs and their committee members for their effort on this issue, and, again, thank you for the opportunity to provide comment to the NCAA Division I Name, Image and Likeness Legislative Solutions Group.

Sincerely,

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