



## POSITION STATEMENT

### NCAA and NAIA Give It the “Old College Try” with NIL Proposals, but Do Not Go Far Enough<sup>1</sup>

November 25, 2020

On November 16, 2020, the National Collegiate Athletic Association (NCAA)<sup>2</sup> issued its proposed bylaws to be considered at its January 12-15, 2021 Convention.<sup>3</sup> Included therein are the long-awaited new bylaws that would allow NCAA athletes to be compensated for the commercial use of their own Names, Images and Likenesses (NILs), subject to certain restrictions. If adopted, effective August 1, 2021, these provisions would eliminate numerous previously prohibited compensation restrictions imposed by decades of onerous NCAA amateur status rules. On October 6, 2020, effective immediately, the National Association of Intercollegiate Athletics (NAIA)<sup>4</sup> adopted bylaw amendments<sup>5</sup> that broadly allowed its athletes to receive NIL compensation. This Drake Group (TDG) position statement provides a critique of these actions by the NCAA and NAIA.

#### 1. State and Federal Legislative Initiatives Acknowledge College Athletes Should Be Compensated for Their NILs

Ignited by the September 2019 legislation in California that permits college athletes compensation for use of their NILs, 38 states followed suit with their own versions of bills that

<sup>1</sup> Preferred citation: Ridpath, B.D., Gurney, G., Lever, K., Sommer, J., Lopiano, D., Gill, E., Idsvoog, K., Porto, B., Sack, A., Thatcher, S. and Zimbalist, A. (2020) The Drake Group Position Statement – *NCAA and NAIA Give It the “Old College Try” with NIL Proposal But Do Not Go Far Enough*. November 2020.

<sup>2</sup> Established in 1906, the NCAA is a governing body of 1,098 four-year higher education institutions, serving approximately 480,000 athletes and offering 90 national championships in 24 sports. It is the largest national athletic governing organization for four-year institutions of higher education.

<sup>3</sup> These publications may be retrieved at: Division I - <https://web3.ncaa.org/lsdbi/reports/getReport/90001>, Division II - <https://web3.ncaa.org/lsdbi/reports/getReport/90005>, and Division III - <https://web3.ncaa.org/lsdbi/reports/getReport/90006>

<sup>4</sup> Established in 1937, the NAIA is a governing body of 250 four-year higher education institutions, serving approximately 77,000 athletes and offering 27 national championships. Retrieved from: [https://www.naia.org/schools/files/2020-21\\_NAIA\\_Member\\_Institutions.pdf](https://www.naia.org/schools/files/2020-21_NAIA_Member_Institutions.pdf) It is the second largest national athletic governing organization for four-year institutions of higher education.

<sup>5</sup> NAIA Bylaws Amendments to Address NIL, Effective October 6, 2020. Retrieved from: [file:///C:/Users/DONNAL~1/AppData/Local/Temp/806259d9-4ef4-6636-7333-e5fc4367e2c5\\_file.pdf](file:///C:/Users/DONNAL~1/AppData/Local/Temp/806259d9-4ef4-6636-7333-e5fc4367e2c5_file.pdf)

permit NIL compensation to varying degrees. To date, five states (California, Colorado, Florida, Nebraska, and New Jersey) have adopted NIL laws, with Florida's legislation effective in July 2021, and Nebraska's law, while technically effective July 1, 2023, says that "each postsecondary institution [in Nebraska] shall determine a date on or before that date [July 1, 2023] to start implementing the law". The other states have effective dates years out. Recognizing the potential havoc that could be caused by these differing state laws, including that those states with the most progressive college athlete NIL rules would enjoy recruiting advantages, numerous bills have been proposed in Congress<sup>6</sup> that would preempt state laws and impose a common standard. Moreover, the Uniform Law Commission (ULC) has begun drafting a law that could be adopted by all states. The ULC drafting process usually takes years followed by each state having individually to adopt the law. In an attempt to gain a degree of control regarding new rights for athletes to monetize their own NILs, both the NCAA and NAIA are seeking to shed their antiquated amateur status restrictions while protecting institutional marks and sponsorships in order to persuade state and federal legislatures of their the ability to govern in this area.

## **2. NCAA and NAIA NIL Recommendations Represent Real Progress for College Athletes' to Earn Compensation**

### **NCAA**

Although the NCAA NIL proposed bylaws still give too much control to the NCAA and to the member institutions, they represent the most athlete-centric proposals yet from a reluctant NCAA.<sup>7</sup> The proposed new rules mirror many points featured in the five state NIL laws that permit athletes for the first time to monetize their NILs to promote athletically and nonathletically related business activities, with some key exceptions. The proposed rules also capture some of the longstanding TDG positions on college athlete compensation generally and, more specifically, college athlete NIL compensation. A key exception is that the proposed rules provide that the member institutions may prevent athletes from engaging in NIL deals that conflict with any existing institutional sponsorship arrangements. This means, for example, that

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<sup>6</sup> See TDG position paper on The Student Athlete Level Playing Field Act. We also note that there is a possibility that a federal NIL solution will occur only if additional athletes' rights issues are included. Ten US senators have signed on to an Athletes' Bill of Rights Statement and promised legislation to advance a more expansive athlete protection bill by the end of the year. Given the lack of speed of Congressional action and the heretofore apparent unwillingness of Congress to trust the NCAA with even a limited antitrust exemption, many believe that a federal bill will not be passed by the July 1 Florida NIL implementation date. If that occurs, the NCAA has stated that it would seek an injunction to delay implementation of Florida and any other state's NIL laws.

<sup>7</sup> The conferences can offer amendments to the proposed rules until December 15. Accordingly, these proposed rules could be altered before they are voted on in January.

institutions with apparel deals could prevent their athletes from engaging in any apparel deals with either the institutions' sponsor or any other company that competes with the institution's sponsor. This exception goes beyond many of the state proposals, and TDG believes it is an unreasonable restraint on athletes' ability to monetize their own NILs.<sup>8</sup>

TDG is in substantial agreement with the following elements of the NCAA proposal:

- Allows college athletes to use their name, image and likeness to promote the sale of a commercial product or service including camps and clinics, private lessons (including playing lessons), their own products and services, and other commercial products or services.
- Allows college athletes to receive payment for their autographs and personal appearances.
- Allows college athletes to crowdfund for nonprofits or charitable organizations, catastrophic events and family hardships, as well as for educational expenses not covered by cost of attendance.
- Allows college athletes the opportunity to retain agents, with fees consistent with norms for the service provider's industry, for the purposes of receiving professional advice and marketing assistance regarding name, image, and likeness activities, as well as professional representation in contract negotiations related to name, image, and likeness activities other than for the purpose of pursuing employment or compensation as a professional athlete.
- Continues to prohibit athletes from receiving compensation for athletics performance or participation.
- Prohibits schools from arranging or securing endorsement opportunities for the athletes. This means schools are prohibited from being involved in the development, operation, or promotion of an athlete's business activity, unless the activity is developed as part of a student's coursework or academic program. It is important to note that TDG strongly supports academia being part of the solution with regard to educational programming on money management, investing, and entrepreneurship, to name a few important areas.
- Continues to prohibit a representative of athletics interests from providing college-athletes impermissible benefits or recruiting inducements; however, a representative of athletics interest can be involved in legitimate commercial opportunities that are approved by third-party administrators and in line with fair-market value.

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<sup>8</sup> The proposed rules also apply to prospective athletes, which many of the state efforts do not address.

- Requires new disclosure statements that detail third-party relationships and the nature of NIL activities.
- Permits athletes engaged in promotion of their NILs to mention their involvement in sports including the name of the school they attend and sport and team, but not use the school logo and/or marks.
- Prohibits institutions from purchasing the student-athlete's work product or service and prohibits the athlete from using institutional facilities or marks for his or her business activities.
- Prohibits college athletes from monetizing internet content created by institutions or third parties hired by the institution.
- Encourages institutions to provide NIL education including advice on brand enhancement, assistance in evaluating opportunities, disclosure requirements, and evaluation of professional service providers.
- The proposed rules do state that the institution shall not be involved in the development, operation, or promotion of an athlete's business activity and shall not purchase an athlete's product or service.

### **NAIA**

On October 6, 2020, the NAIA was the first national college sport governing organization to positively embrace state actions to guarantee college athlete NIL rights, passing a broad, permissive, and simple rule permitting college athletes to receive "compensation for use of name, image, or likeness to promote any commercial product or enterprise, or public or media appearance." It does not have the same restrictions on athletes as those in the NCAA proposed rules. In addition, it gives its Council of Presidents the authority and defines a process to allow it to "respond to external factors—such as changes in state or federal law rendering compliance with NAIA amateurism regulations impossible."<sup>9</sup> TDG applauds these actions.

### **3. NCAA and NAIA NIL Recommendations Causing Concern and Suggested Remedies**

#### **NCAA**

TDG is concerned with the following elements of the NCAA proposed rules for which it recommends remedies:

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<sup>9</sup> NAIA Bylaws Amendments, pp. 2-3.

- The proposed rules do not specify that NIL compensation to athletes be at a value commensurate with the going rate for similar services. While there are challenges with determining fair market value, there are baseline data that can be applied, and fair market value will become clearer as the NIL process progresses over a two- to three-year period;
- While TDG agrees with the proposed rule that bans athlete NIL agreements with commercial products or services that conflict with NCAA legislation such as sports wagering and banned substances, other proposed rules permit an institution to include additional bans to advance its values. TDG is concerned that without further specification, the ban on sponsors with values contrary to the institutions could be too controlling.
- The proposed rules would permit the institution to prohibit its athletes from engaging in endorsement activities with entire product categories in order to protect its own sponsorship agreements. Specifically, the rules state that institutions would be able to prohibit their athletes from being involved in NIL activities that conflict with existing institutional sponsorship arrangements. Thus, a school may be able to prohibit athletes from doing deals with its existing sponsors or any of the existing sponsors' competitors. TDG believes that this rule is much too restrictive and believes that the institution should be limited **only** to prohibiting athletes from wearing marks, logos, and other insignia of their sponsors during official practices, competitions, and university events. Also, the proposed rules state that an athlete's NIL cannot be used by an athletics equipment company to publicize the use by the institution's athletics program. This too severely limits the scope of the athletes' potential sponsors. The TDG believes that athletes should be permitted to enter into sponsorships with the institution's sponsors or with their competitors, only subject to the limitations noted above.
- There are two amendments requiring advanced disclosure of NIL agreements; the first does not specify the entity to which disclosure must be made, and the second specifies disclosure to an independent third-party administrator reporting to the NCAA, which would play an oversight role.<sup>10</sup> The proposed bylaws do not specify whether the third party or the NCAA will determine approval of the activity, compliance with the rules, and/or possible malfeasance. TDG believes that the NCAA, its member institutions, and conferences should have *no role* in approval of athlete NIL agreements, other than educating athletes of potential noncompliance with NCAA or legal standards. However, the NCAA should continue to enforce the improper involvement of boosters in the recruitment or support of college athletes. TDG believes that establishment of fair NIL compensation and employment criteria, including any fair-market value standard and

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<sup>10</sup> At this point, it is not clear if any ultimate oversight or approval is via the NCAA or the independent third-party administrator.

standards and certification programs for agents, should be within the purview of a permanent and independent NIL Commission<sup>11</sup> with a narrow antitrust exemption that will permit it to set such standards. The Federal Trade Commission should consider any appeals of such NIL Commission decisions. The FTC would have sole jurisdiction to deal with investigation and adjudication of all allegations of impropriety on the part of athletes, sponsors, or agents, because it has full powers of discovery. Not only has the NCAA demonstrated its inability to enforce its own rules<sup>12</sup>, it has failed to accept responsibility for protecting athletes from institutional academic fraud, failed to provide adequate medical and insurance protection related to athletic injuries, and failed to protect athletes from coach and abuse from other athletes that violate basic standards of care. Neither the institutions that take advantage of athlete NILs (the NCAA, conferences, and institutions that have free use for their extracurricular activities) nor athletes advantaged by no standards should have a role in determining compensation restrictions.

- The proposed rules prohibit professional service providers (e.g., agents) from promoting athletes' athletics abilities for future professional sports opportunities. The proposed rules only permit the professional service providers to provide advice regarding NIL activities, representation in contract negotiations related to those activities, and marketing of those activities. TDG believes that athletes should always have the freedom to secure the services of an agent or advisor to evaluate future employment opportunities. Only at the point that that athlete accepts pay for playing professional sports or participating in athletic events for prize money should collegiate sport ineligibility be triggered. Hiring an agent should not be the determinative factor.
- The proposed rules are silent regarding explicitly prohibiting group licensing contracts among an institution, a third party and athletes in which the third party separately pays licensing fees to both the institution and athlete for use of their marks or in which the third party pays the institution, which then pays the athletes. The Drake Group believes the institution, conference, or NCAA may not initiate or enter into a business relationship with college athletes such as in a group licensing agreement (e.g., video games)<sup>13</sup> during the athletes' enrollment. However, TDG believes that a third party (e.g., video game manufacturers) should be able to initiate and enter into a licensing agreement with the institution and separately with the athlete; but only if there are requirements that specify

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<sup>11</sup> For a full description of the composition and functions of such an independent NIL commission, see TDG position statement on this topic. Retrieve at: <https://www.thedrakegroup.org/2019/10/14/compensation-of-college-athletes-including-revenues-earned-from-commercial-use-of-their-names-images-and-likenesses-and-outside-employment/>

<sup>12</sup> B. Porto, G. Gurney, D. Lopiano, B. D. Ridpath, A. Sack, M. Willingham, A. Zimbalist. (2015) The Drake Group Position Statement: Fixing the Dysfunctional NCAA Enforcement System. (April 7, 2015). Retrieve at: <http://thedrakegroup.org/>

<sup>13</sup> For example, a video game company separately contracts with athletes and institutions, respectively, to license their NILs for use in an NCAA Football electronic game. The institution and the athletes should be required to contribute their respective licensing revenues to the athlete medical trust.

that the revenues from such group licensing agreements are contributed by both parties to the establishment and maintenance of a National Collegiate Athlete Medical Trust. The purpose of the Trust should include assisting former college athletes with medical expenses related to long-term disability or coverage of medical expenses related to college athletic injuries, including the latent medical cost impact of brain trauma or other athletics injuries that do not manifest before the end of basic athletic injury insurance policy coverage.

### **NAIA**

TDG has concerns with the NAIA's new NIL rules to the extent they involve institution involvement with athletes with respect to NIL monetization.<sup>14</sup> Specifically, TDG believes the institution should not enter into an employer/employee or agent relationship with its athletes. While it is not clear what is permitted given the brevity of the rules, NAIA materials issued in conjunction with its October 6, 2020 report on NIL amendments state, "Some schools might have a better ability to engage local businesses in providing student-athlete endorsement opportunities, which could create a recruiting advantage for those schools. Endorsement opportunities would likely not necessarily be identical across sports, or even within a given team. Because this hasn't been done before in collegiate athletics, we don't know exactly how it may impact teams or schools, including financially."<sup>15</sup>

Further, the NAIA's legislative services provided the following scenario that it said would be acceptable:

*"Katie plays soccer at Big City College and has become the all-time leading scorer in school history. Big City College wants to sell soccer jerseys with Katie's name and number on the back in their school store. Can Big City College sell these jerseys and give Katie a cut of the proceeds?*

*Yes! Katie is profiting off her NIL and can receive compensation from her institution. There is nothing in the bylaw that would prohibit her school from being the source of the compensation."*

If the NAIA permits group licensing, payments from the institution, and efforts by the institutions to assist the athlete in obtaining compensation for their NILs, TDG has no objection to such athlete/institution/third-party agreements benefitting the institution or its athletic program or the ability of the institution to provide educational or health benefits to its athletes. But TDG draws a solid philosophical and possibly legal line, maintaining that the tax-exempt institution

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<sup>14</sup> NAIA Bylaws Amendments, p. 1.

<sup>15</sup> NAIA. Name, Image, and Likeness FAQs. (October 6, 2020). Retrieved from: [https://www.naia.org/name-image-likeness/NIL\\_FAQs\\_for ASA.pdf](https://www.naia.org/name-image-likeness/NIL_FAQs_for ASA.pdf)

must use its revenues for its stated educational purposes rather than to pay cash compensation untethered to educational purpose to players that participate in sports.

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**TDG acknowledges that the NCAA proposed rules and NAIA rules are an improvement over prior inaction. However, we believe that an improved federal legislative solution is a better approach as detailed in our [NIL paper](#).** Even with the difficulties of passing a federal bill, TDG further believes that such federal NIL legislation should be embedded in a more comprehensive bill that conditions receipt of Higher Education Act funding on higher education institutions that provide college athletes with sufficient health and medical protection, improved educational benefits that lead to better graduation rates, greater freedom of college athletes to attend institutions of their choice<sup>16</sup>, and a stronger athlete voice in the governance organizations that control their athletics experience.<sup>17</sup> Existing restrictions of time spent on athletics-related activities are woefully inadequate and must be reexamined. Greater transparency and annual public reporting of compensation of athletics personnel, along with detailed information on sources of revenues and expenditures, should also be required. TDG urges the House leaders of *The Student Athlete Level Playing Field Act* to join forces with Senate proponents of the [College Athlete Bill of Rights](#) to accomplish such broader purposes.

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<sup>16</sup> We note that proposed legislation to be considered at the 2021 NCAA Convention includes revision of its current transfer rule that would allow a one-time transfer with no penalty and no requirement to receive permission from the athlete's institution, other than the obligation to give notice of intent to transfer by a date certain.

<sup>17</sup> TDG strongly supports H.R. 5528, the [Congressional Advisory Commission on Intercollegiate Athletics Act](#) that is being proposed to address all of these issues that confront intercollegiate athletics today.