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Sports Law Today

Newsletter

ROPES & GRAY

Opening Kickoff

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As we start the new year, the sports industry continues to change in a number of exciting ways and the Ropes & Gray Sports Industry Initiative continues to expand! We've had the pleasure this past year of working with clients on a number of intellectual property, team purchase, regulatory and investigative engagements. We also enjoyed seeing many of you at our Rights of Publicity and Alumni Roundtables in New York and Boston, as well as at Ropes & Gray-sponsored events, such as the Final Four in Houston and the Sports Lawyers Association Annual Conference in Los Angeles.

I hope you enjoy this edition of our sports law newsletter. In this issue, our industry experts provide continued analysis of federal legislation regarding name, image and likeness rules in college sports. This newsletter also includes a commentary on the recent trends in sports betting advertisement and regulation, as well as the tax implications of sports team ownership. Please feel free to contact us with any questions. Wishing you all a healthy and happy new year!

Sincerely,
Chris

In this Issue

What Have Our Sports Lawyers Been Up To?

- On **May 11 – 13**, sponsored the Sports Lawyers Association Annual Conference in Los Angeles, California.
- On **August 30**, sponsored NABC Foundation Hall of Fame Induction Celebration.
- On **November 9**, hosted a Right of Publicity Roundtable in Boston.

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Sports Betting Regulations Are Off to the Races

An Overview of Recent Trends in Sports Betting Advertising Regulations

By: Andres Solis; Edited by: Lindsay Richardson

New legislation may restrict sportsbook advertising

Following the legalization of sports betting, advertising for sportsbooks surged with over $300 million spent on national television commercials in 2022 by sportsbook brands. Sports betting companies have also begun partnering with universities to promote online gambling on collegiate campuses.[i] Public concern for the potential dangers of gambling has also increased with the mounting presence of sportsbook advertising. As a result, lawmakers at both the federal and state levels continue to eye restrictions on gambling ads.

Federal Legislative Updates:

- **On February 9, 2023**, Congressman Paul D. Tonko (D-NY) introduced the Betting on Our Future Act in the House of Representatives, a bill to prohibit all electronic sports betting advertisements.[ii]

State Legislative Updates:

- **Massachusetts contemplates a two-fold effort to restrict sports betting advertising:** Currently, Massachusetts advertising regulations prohibit advertisements on college campuses and on television programming where 25% of viewers are under 21. State legislators have also introduced a bill aiming to prevent the use of deceptive or misleading terms—such as "risk-free" or "bonus promotions." The Committee on Consumer Protection and Professional Licensure is currently considering the proposed legislation. Recently, the Office of the Attorney General also submitted a letter to the Massachusetts Gaming Commission regarding proposed amendments to mobile sports wagering regulations. Among other things, the proposed language would ban certain promotional offers (e.g., referral bonuses) and prohibit operators from using extensive personal information. Attorney General Andrea Campbell noted that she would not hesitate to invoke consumer protection laws when necessary. The proposed legislation would impact companies such as DraftKings, headquartered in Massachusetts, which spent around $500 million in marketing in 2020.

- **New York likely to require warnings on sports betting advertisements:** In February of 2023, the New York State Assembly approved a bill requiring advertisements to include warnings about the potential "harmful and addictive" effects of gambling.[iii] The state Senate is currently considering the bill, and if approved, the law would go into effect within 60 days. Additionally, the New York State Gaming Commission recently adopted advertising rules, such as preventing deceptive advertisements, requiring additional disclosures, and limiting contracts with marketing affiliates[iv] where fees are tied to consumer bets.

- **Maine to impose strict sports betting advertising rules:** Maine gambling regulations are in flux as the state is set to launch its sports betting regime within the coming year. The Maine Gaming Control Unit has proposed stringent regulations that have received industry pushback, including prohibiting the use of celebrities and athletes in advertisements. The regulations would also ban all television ads that take place during live sporting events and live sports games. The American Gaming Commission has opposed the regulations, arguing that the laws undermine the promotion of legal sportsbooks.

- **The Coalition for Responsible Sports Betting Advertising established:** A coalition of major sports leagues, which includes the NFL, NHL, NBA, MLB, WNBA, NASCAR, and certain media outlets (*e.g.*, NBCUniversal, Fox) has formed to address the changing landscape of sports betting and gaming. As part of its mission statement, the coalition aims to ensure that sports betting advertisements do not mislead and promote excessive or irresponsible gambling. The core principles of the coalition also align with many sports league-specific policies, like the NBA's restriction of the use of the phrase "risk-free" in gambling ads and the NFL's cap on the number of sports betting advertisements per game.

Key Takeaways

- Without a cohesive national framework, advertising regulations will largely differ by jurisdiction, which could incentivize or disincentivize sports betting businesses in certain states.

- Federal, state, and local legislators are actively attempting to establish regulatory frameworks following the legalization of online sports gambling.

- New legislation focusing on growing public policy concerns regarding responsible gaming practices should actively be monitored as the legalization of sports betting in various jurisdictions continues.

Endnotes

[i] Anna Betts, Andrew Little, Elizabeth Sander, Alexandra Tremayne-Pengelly & Walt Bogdanich, *How Colleges and Sports-Betting Companies 'Caesarized' Campus Life*, New York Times (Nov. 21, 2022), https://www.nytimes.com/2022/11/20/business/caesars-sports-betting-universities-colleges.html?action=click&module=RelatedLinks&pgtype=Article.

[ii] H.R. 967, 118th Cong. (2023-2024).

[iii] N.Y. Legis. Assemb. A-01118. Reg. Sess. 2023-2024 (2023). https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A01118&term=2023&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Text=Y.

[iv] Meeting Agenda, New York State Gaming Commission (May 22, 2023), https://www.gaming.ny.gov/pdf/2023-05-22%20Public%20Meeting%20Book.pdf. An affiliate marketing partner is defined as an "entity or person who promotes, refers potential customers to, or conducts advertising, marketing or branding on behalf of, or to the benefit of, a casino sports wagering licensee or sports pool vendor pursuant to an agreement with such licensee or vendor." 9 NYCRR §5329.1.

A Possible Next Step for NIL Rules and Regulations

House of Representatives Propose "FAIR" Federal NIL Bill
By: George Abunaw; Edited by: Erica Han, Lindsay Richardson and Karleigh Wike

Nearly two years since the NCAA's interim Name, Image and Likeness ("NIL") Policy took effect on July 1, 2021, enabling student-athletes to profit from their NIL rights (also known as rights of publicity),[i] the House of Representatives is on the precipice of introducing its first NIL bill.[ii] A draft of this legislation titled the "Fairness, Accountability, and Integrity in Representation of College Sports Act" or the "FAIR College Sports Act" ("FAIR"), was recently proposed by Florida Representative Gus Bilirakis (R) and is currently being discussed by college administrators ahead of a likely introduction.[iii] Before getting too excited, though, we must remember that no NIL bill has made it out of committee and onto the floor. [iv]

FAIR aims to enable student-athletes to earn compensation and creates a congressionally appointed independent advisory committee that seeks to protect the interests of student-athletes. If enacted, FAIR will preempt all state NIL laws—meaning no state may establish or continue any laws or provisions that govern or regulate the commercial use of a student-athlete's NIL. Associations and conferences will also need to establish rules consistent with FAIR.

Currently, the House appears ready to endorse FAIR.[v] However, it is unclear whether it will pass a House vote because, as proposed, the current legislation fails to address some of the issues many prominent government officials are seeking from federal NIL legislation, including student-athlete protections from exploitation, employment status, and gender equity considerations. New NCAA President Charlie Baker has yet to comment on Rep. Bilirakis's bill, though he has previously spoken of the importance of Congress creating NIL guidelines that seek to protect student-athletes from exploitation within the NIL marketplace.[vi]

This article briefly summarizes FAIR and provides insight into how its introduction would fit within the new age of NIL.

What the Bill Covers

The main goal of FAIR is to create a uniform rule regarding how college athletes may profit from their name, image and likeness, and thereby reduce the inequities that are arising through state-by-state and school-by-school application of rules. FAIR will prevent colleges, universities, collegiate athletic associations, and collegiate athletic conferences from prohibiting student-athletes from (i) earning covered compensation commensurate with market value for the use of NIL while enrolled at an institution, and (ii) obtaining and retaining an athletic agent as defined under the Sports Agent Responsibility and Trust Act for any matter or activity related to such covered compensation.

Covered Compensation under FAIR

Covered compensation accounts for forms of payment such as cash, benefits, awards, and gifts in exchange for (a) promotional services by a student-athlete or (b) licensing or use of a student-athlete's NIL. However, covered compensation cannot exceed the market value for the use of NIL.

Conversely, payment or provision of the following is excluded from the definition of covered compensation:

- Tuition, room, board, books, fees, etc., paid or provided by an institution up to the full cost of attendance
- Federal Pell Grants
- Health insurance and the cost of health care
- Career counseling and job placement services; and
- Payment of hourly wages and benefits for work actually performed (and not for participating in intercollegiate athletics) at a rate commensurate with the prevailing rate in the locality of an institution for similar work

Independent Advisory Committee (USIAC) under FAIR

FAIR also would establish the United States Intercollegiate Athletics Committee ("USIAC"), an independent, nonprofit organization separate from the United States government. This organization would serve as the federal regulatory body for all matters surrounding student-athlete NIL. Agents wishing to represent student-athletes must register with the USIAC, as well as remain compliant with relevant state authorities regarding NIL agreements in their state of representation. All boosters, collectives and third-party licensees are similarly required to register with the USIAC under FAIR.

FAIR requires student-athletes to disclose to the USIAC when they (i) sign a representation agreement with a covered agent, (ii) sign a NIL agreement with a third party, (iii) or receive covered compensation relating to a NIL agreement.

These reports will help the USIAC create a public database that will be made available no less than quarterly. The public database plans to advertise information such as the total number of student-athletes who have entered into NIL agreements and are eligible to earn covered compensation from related third-party license agreements. The public database will also include a host of further data and information that the USIAC considers helpful to student athletes in evaluating covered agents and NIL agreements.

Additionally, under FAIR, the Inspector General of the Department of Commerce shall conduct oversight of the USIAC. Further enforcement is also provided by the Federal Trade Commission, State Attorneys General, and other authorized state officials. This enforcement regime

would seemingly replace the NCAA as the main source of enforcement for NIL-related matters, though the NCAA would still control oversight on any athlete misconduct outside the scope of NIL.

Key Takeaways

While there have been many pushes for NIL legislation and regulation over the last few years, there have been challenges, including opposition within Congress. Certain sources in the House of Representatives believe any federal bill that addresses protections related to health and medical benefits or the status of athletes as employees is an inappropriate use of federal power. According to a letter from Texas Representative August Pfluger (R) that has circulated among NCAA officials and members of Congress, many Democrats are likely to oppose FAIR due to its jurisdictional challenges.[vii]

Though FAIR represents a milestone in the future of NIL-centered bills introduced in the House of Representatives, its lack of specificity on key matters surrounding NIL, such as gender equity in sports, the employment status of student-athletes, and health care, may hamper the bill's chances of getting enacted. Until federal legislation is enacted, compliance, competition and confusion will be a challenge for colleges and universities.

Endnotes

[i] *NCAA NIL Interim Policy: A Win for Student-Athletes, but Challenges Remain Ahead*, Ropes & Gray LLP (July 2, 2021), https://www.ropesgray.com/en/newsroom/alerts/2021/July/NCAA-NIL-Interim-Policy-A-Win-for-Student-Athletes-but-Challenges-Remain-Ahead.

[ii] Fairness, Accountability, and Integrity In Representation of College Sports Act, H.R._, 118th Cong. (2023), https://bilirakis.house.gov/sites/evo-subsites/bilirakis.house.gov/files/evo-media-document/fair-college-sports-act_1.pdf.

[iii] Karen Weaver, *NCAA May Get Most Everything It Wants from Proposed House NIL Bill*, Forbes (May 28, 2023), https://www.forbes.com/sites/karenweaver/2023/05/28/ncaa-may-get-everything-it-wants-from-proposed-house-nil-bill/?sh=5e2ccc973387.

[iv] Nicole Auerbach, *The NCAA's Hopes to Control NIL Laws Hinge on Congress. Will It Get What It Wants?*, The Athletic (Jun 2, 2023), https://theathletic.com/4566889/2023/06/02/ncaa-nil-rules-laws-congress-bills/.

[v] Dennis Dodd, *House Subcommittee Considering Federal Regulatory Body to Oversee NIL Rights for College Athletes*, CBS Sports (May 23, 2023), https://www.cbssports.com/college-football/news/house-subcommittee-considering-federal-regulatory-body-to-oversee-nil-rights-for-college-athletes/.

[vi] Jonathan D. Wohlwend, *Congressional Hearing on College Name, Image. And Likeness*, The National Law Review (April 3, 2023), https://www.natlawreview.com/article/congressional-hearing-college-name-image-and-likeness.

[vii] Steve Berkowitz, *NIL Bill Expected in House Would Provide Legal Help Sought by NCAA, Letter Says*, USA Today (May 23, 2023), https://www.usatoday.com/story/sports/college/2023/05/23/college-sports-nil-bill-big-changes-expected/70246101007/.

Sports Team Ownership, Amortization, and Depreciation

By: Joshua Thomas; Edited by: Leo Arnaboldi and Chidi Oteh

In July 2023, Josh Harris, the co-founder of Apollo Global Management, led a group of investors in a roughly $6 billion purchase of the NFL's Washington Commanders, one of the highest valuations ever put on an NFL franchise. As of August 2023, Forbes estimates that the Washington Commanders have annual operating income (net of expenses) of $87 million.[i] The purchase price was thus 69 times the annual earnings, a P/E ratio more in line with a profitable high-tech growth company than a mature business. What drives this stratospheric valuation? The prestige of NFL ownership is certainly a major driver, but the tax benefits of acquiring a sports franchise should also be considered. These tax benefits can materially affect the purchase price and value of the investment. Specifically, the tax rules that impact sports franchises will create an up-front benefit to the Harris group by spinning off millions of dollars of tax deductions, which, as discussed below, may allow the Harris group to offset income from other investments, as well as the income from the Commanders.

Current tax law sets forth complex rules that allow a buyer of a business to depreciate or amortize the assets of the business over set periods of time, generating tax deductions to reduce taxable income of the business. These deductions are meant to reflect the loss in asset value that occurs over time due to the usage, aging or obsolescence of the assets. If a sports franchise is structured as a "flow-through" structure (i.e., as a partnership or S corporation for U.S. federal income tax purposes), these deductions can flow up to the tax returns of individual owners—such as Harris—and offset their income from other sources.

The amount and timing of these deductions depends on how the purchase price is allocated. When a buyer purchases a sports franchise, the purchase price is allocated between the tangible assets of the franchise (equipment, balls, uniforms, back-office computers, training facilities, etc.) and the intangible assets of the franchise (player contract rights and franchise rights, such as TV revenues) with a heavy weighting towards intangible assets. As will be shown, this can generate significant tax value for investors, specifically when amounts are allocated to player contract rights.[ii] For example, in Bud Selig's purchase of the Seattle Pilots in 1970 for $10.8 million, $10.2 million (roughly 94%) of the purchase price was allocated to the purchase of player contract rights, which was upheld in court—despite the players being paid a total of $607,400 under the contracts each year.[iii]

Current tax law allows the amortization of any amount allocated to player contract rights over 15 years on a "straight line" basis (i.e., deductions are available in equal shares over 15 years).[iv] This process is generally referred to

as the "Roster Depreciation Allowance," or RDA, and plays a material part in the economics of investments in sports franchises. For example, assume that (i) the Washington Commanders franchise is owned equally by four persons in a flow-through structure, (ii) 94% of the $6 billion purchase price is allocated to player contract rights (as was upheld for the Seattle Pilots), and (iii) the franchise receives $200 million in revenue annually after paying expenses (but before taxes). The following result would occur:

1. The franchise would report a $176 million loss each year ($200 million – RDA, which is $376 million [i.e., 94% of $6 billion, divided by 15]), and would allocate a loss of $44 million to each owner for the taxable year (25% of the $176 million loss).

2. Each owner may be able to use the $44 million loss to offset their income from other sources.[v]

Because of the RDA, the franchise would be operating at a loss for tax purposes, despite being profitable in real economic terms. In addition, the franchise would be able to claim the actual compensation paid to players under each contract (which is separate from the player contract rights) as a deduction against current income, providing a double benefit to franchises and their owners.

As noted above, RDA deductions are meant to reflect declines in the value of player contract rights. Thus, if an investor sells a franchise at a gain, and RDA deductions exceed the actual "loss" that they are meant to reflect, the excess RDA deductions will be subject to "recapture" rules that will treat the amount of excess RDA deductions as ordinary income upon the sale.[vi] This is not necessarily a negative outcome, as it would have the effect of an interest-free loan to the franchise owner from the government in the amount of the excess RDA deductions. However, potential investors should be aware of the potential for portions of sale proceeds on exit to be treated as ordinary income as a result of RDA deductions.

In addition to the significant deductions that can be generated from player contract rights and other intangible assets, a sports franchise will be entitled to ordinary course depreciation like every business. In recent years, tangible assets purchased by a business have been entitled to an immediate, 100% deduction. A $1 billion stadium would give a franchise a $1 billion deduction in the year of construction, for example, as a result of 2017 tax legislation. However, this benefit is phased out by 20% per year starting in 2023, until there is no immediate deduction in 2027.[vii] Thus, the enhanced tax benefit associated with capital investments and tangible assets will slowly be reduced, with an incentive for investments to be made sooner rather than later to maximize potential benefits from depreciation. Note that any such depreciation would be subject to the same "recapture" rules described above.

There are many additional tax considerations implicated in the ownership of a sports franchise, but none carry as much weight with investors as amortization and depreciation deductions, including the RDA. While the investment by the Harris group may make headlines, private investors have become heavily interested in potential franchise investments, including in emerging leagues and minor league franchises. When considering such investments, managers of private capital should consider the tax benefits of the investment in their economic models and should obtain the advice of counsel to fully maximize the opportunities to realize those benefits.

Endnotes

[i] https://www.forbes.com/teams/washington-commanders/?sh=14f0a75b6eec.

[ii] Note that player contracts are viewed as separate from player contract rights. A player contract sets forth how much a player will be paid and what their services will be. Player contract rights represent the ability to enforce the contracts (e.g., to field an entire team) and the duty of the players to abide by the terms of the contracts. Player contract rights are viewed as the major source of value in a franchise, as the right to cause a superstar quarterback or infielder to play creates demand for tickets and merchandise, and increases the value of TV rights packages.

[iii] *Selig v. U.S.*, 740 F.2d 572 (7th Cir. 1984); Stephen R. Keeney, *The Roster Depreciation Allowance: How Major League Baseball Teams Turn Profits Into Losses*, 45 The Baseball Research Journal 88 (Spring 2016).

[iv] Section 197 of the Internal Revenue Code of 1986, as amended (the "Code"). Note that *Selig*, supra note 3, and other leading cases in this area, including *Laird v. U.S.*, 556 F.2d 1224 (5th Cir. 1977), deal with the ability to deduct the value of player contract rights over their useful life under Section 167(a) of the Code. However, Section 197 was subsequently added to the Code, which allowed for specified intangible assets to be amortized—and contained an explicit statement that acquisitions of sports franchises and related rights were not included in the types of assets which could be amortized; however, this statement was removed in 2004, and ever since, the intangible assets of sports franchises have been amortizable under Section 197. An in-depth discussion of this history can be found in Robert Holo and Jonathan Talansky, *Taxing the Business of Sports*, 9 Florida Tax Review 162.

[v] This loss may be subject to the passive loss rules described in Section 469 of the Code; however, a discussion of those rules is beyond the scope of this article.

[vi] As an example, assume that a franchise was purchased for $1,000, with RDA deductions of $20 taken each year for 10 years. At the start of year 11, the tax basis (i.e., the value indicated by the cumulative tax deductions) would be $800. If the franchise were then sold for $1,100 (a $300 gain), the first $200 of gain attributable to RDA deductions would be ordinary income, and the remaining $100 of gain would be capital gain.

[vii] Section 168 of the Code.

NIL Update: NCAA President Charlie Baker's "Forward-Looking Framework" and Proposed Changes to NCAA's NIL Policy

By: Chris Conniff, Dennis Coleman, Erica Han, Chidi Oteh, Tatum Wheeler, Esteban De La Torre, Parv Gondalia.

Overview

On December 5, 2023, NCAA President Charlie Baker sent a letter (the "Letter") to NCAA Division I school members detailing several proposed changes to the NCAA's Name, Image and Likeness ("NIL") policy.[i] These changes permit Division I schools to participate directly in NIL deals with their student-athletes in ways that were previously impermissible. Described as a "forward-looking framework,"[ii] the three main changes to existing NCAA policies outlined in the Letter are:

1. Division I schools will be able to offer student-athletes "enhanced educational benefits" that the schools "deem appropriate";
2. Division I schools will be able to enter into NIL licensing opportunities with their student-athletes; and
3. A subdivision of Division I schools with "the highest resources to invest in their student-athletes" must do the following: (a) within the framework of Title IX, invest at least $30,000 per year into an enhanced educational trust fund for at least half of the institution's eligible student-athletes; and (b) commit to working with peer institutions within the subdivision to create rules that may differ from the rules in place for the rest of Division I schools (including in the areas of scholarship commitment, roster size, recruitment, transfers, and NIL).

The Letter outlines several benefits that the NCAA believes will result from these changes, including allowing highly resourced educational institutions an opportunity to operate within a set of rules that more accurately and equitably reflects their scale and operating model.

The NCAA has become more permissive of opportunities for student-athletes following the Supreme Court's unanimous May 2021 ruling in *NCAA v. Alston*,[iii] which held that the NCAA had violated antitrust law by limiting education-related compensation to student-athletes. The NCAA then introduced a groundbreaking interim NIL policy in July 2021[iv] that, for the first time, allowed student-athletes to be compensated by third parties for NIL opportunities. The NCAA released additional guidance in October 2022,[v] which provided more clarity[vi] on permissible NIL activities. Under the prior NCAA guidance, schools were restricted from taking an active role in "representing, sourcing, securing, negotiating, or proactively assisting a student-athlete's involvement with NIL entities" and "developing, creating, executing, or implementing a student-athlete's NIL activity."[vii] The Letter's proposed framework would now allow all Division I schools to enter into NIL opportunities directly with their student-athletes, and the tone of the proposed changes suggests any restrictions on schools' involvement with third-party NIL deals will be eliminated.

Impact on Current NIL Legislation and Litigation against the NCAA

The Letter briefly addresses the current headwinds of federal NIL legislative efforts and litigation against the NCAA. President Baker describes that "the courts and other public entities continue to debate reform measures that in many cases would seriously damage parts or all of college athletics." President Baker previously has welcomed federal legislation[viii] and several federal legislative bills have been presented post-*Alston*. On December 6, 2023, U.S. Senators Chris Murphy (D-CT), Bernie Sanders (I-VT), and Elizabeth Warren (D-MA) re-introduced a federal NIL bill that affirms college athletes are employees who are entitled to labor and collective bargaining rights, with U.S. Representative Jamaal Bowman (D-N.Y.) introducing companion legislation in the U.S. House of Representatives.[ix]

The proposed changes in the Letter could be viewed as a risk mitigating response to ongoing litigation concerning NIL rights and the NCAA's regulation of college athletics. The NCAA has been hit with an onslaught of class action lawsuits from current and former NCAA athletes who have sought cash payments, lost earnings, and status as employees.[x]

As the NCAA continues to fight such litigation, the proposed changes in the Letter may be an effort to push back against some of the headwinds threatening the existence of the NCAA's amateurism model for college athletics and the benefits that the NCAA believes this model provides to many student-athletes. The focus of the Letter's proposed changes on the "highest resourced" Division I schools appears to be an acknowledgment that the college athletics experience (and associated economics) can vary greatly between those within and outside the group of wealthiest institutions.

Key Takeaways

It remains to be seen whether the NCAA will move forward with rule changes based on these proposals. However, the Letter's proposals could have a major impact in the following areas:

- **Intellectual Property and Licensing Rights.** Allowing schools to enter into NIL deals directly with student-athletes, combined with the ability of NCAA athletes to enter the Transfer Portal and transfer more freely, may create licensing complexity. Notably, an NIL deal with an NCAA athlete that transfers from one institution to another may create additional exposure for ambush marketing claims and require termination and exclusivity provisions more akin to professional athlete deals.

- **School Compliance.** The proposal briefly provides that the $30,000 per year for half of eligible student-athletes in an "enhanced educational trust fund" would be within Title IX, suggesting that male and female athletes would be compensated in equal proportion, likely based on participation. Additionally, universities would have to provide equal opportunity to NIL deals directly with their athletes. This may pose challenges to Title IX compliance to ensure that male and female athletes are receiving equal opportunities, particularly if booster collectives remain outside of the scope of the school's own NIL deals. Additionally, 31 states[xi] have passed NIL legislation that may impact the NIL opportunities offered among universities and within conferences.

The Letter does not address certain key issues, including employment status for student-athletes, visibility between institutions (including those within the "subdivision") through a national database of NIL deals, or how media rights and revenue would factor into the proposal, if at all. Such issues remain to be solved, and the Letter invites feedback from Division I Committee Members.

President Baker has indicated more changes are on the way as this is just a "starting point" for a more proactive approach by the NCAA.[xii] Schools, athletes, coaches, and brands interested in NIL deals will all surely continue to monitor the evolving NIL landscape and be watching closely to see what's ahead for the NCAA.

Endnotes

[i] Letter from Charlie Baker, NCAA President, to Division I Committee Members (Dec. 5, 2023, 8:46 AM EDT); *NCAA President Charlie Baker calls for new tier of Division I where schools can pay athletes*, ASSOCIATED PRESS, (Dec. 5, 2023), https://apnews.com/article/ncaa-baker-nil-c26542c528df277385fea7167026dbe6.

[ii] Letter from Charlie Baker, NCAA President, to Division I Committee Members (Dec. 5, 2023, 8:46 AM EDT).

[iii] *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

[iv] *NCAA NIL Interim Policy: A Win for Student-Athletes, but Challenges Remain Ahead*, Ropes & Gray LLP (July 2, 2021), https://www.ropesgray.com/en/newsroom/alerts/2021/July/NCAA-NIL-Interim-Policy-A-Win-for-Student-Athletes-but-Challenges-Remain-Ahead.

[v] *Navigating the NCAA's New Guidance On Student-Athlete NIL Compensation*, Ropes & Gray LLP (November 30, 2022), https://www.ropesgray.com/en/insights/alerts/2022/11/navigating-the-ncaas-new-guidance-on-student-athlete-nil-compensation.

[vi] *NCAA NIL Update: With a Semester of NIL Opportunities in the Books, Trends Emerge and Confusion Reigns,* Ropes & Gray LLP (March 1, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/march/ncaa-nil-update-with-a-semester-of-nil-opportunities-in-the-books-trends-emerge-and-confusion-reigns.

[vii] *NCAA NIL Update: With a Semester of NIL Opportunities in the Books, Trends Emerge and Confusion Reigns,* Ropes & Gray LLP (March 1, 2022), https://www.ropesgray.com/en/insights/alerts/2022/03/ncaa-nil-update-with-a-semester-of-nil-opportunities-in-the-books-trends-emerge-and-confusion-reigns.

[viii] Ralph D. Russo, *Charlie Baker says NCAA made a 'big mistake' by not setting up framework for NIL compensation*, Boston.com (June 9, 2023), https://www.boston.com/sports/college-sports/2023/06/09/charlie-baker-ncaa-big-mistake-not-setting-up-framework-nil-compensation/.

[ix] Daniel Murphy, *What to expect for NIL, Title IX with proposed NCAA rule changes*, ESPN, https://www.espn.com/college-sports/story/_/id/39056505/ncaa-rule-changes-nil-paying-athletes-title-ix-charlie-baker-faq/; Press Release, Chris Murphy, Senator, U.S. Senate, With Support From Major Labor Unions And Players Associations, Murphy, Sanders, Warren Reintroduce Legislation To Strengthen College Athletes' Collective Bargaining Rights (Dec. 6, 2023), https://www.murphy.senate.gov/newsroom/press-releases/with-support-from-major-labor-unions-and-players-associations-murphy-sanders-warren-reintroduce-legislation-to-strengthen-college-athletes-collective-bargaining-rights.

[x] The lawsuits include the following: *Ohio et al v. NCAA*, no. 1:23-cv-100, (N.D.W. Va. Dec. 7, 2023); *Carter et al v. NCAA et al*, no. 4:23-cv-6325, (N.D. Cal. Dec. 7, 2023); *Fontenot v. NCAA et al*, no. 1:23-cv-03076, (D. Colo. Nov. 20, 2023); *Hubbard et al v. NCAA et al*, no. 4:23-cv-01593, (N.D. Cal. Apr. 4, 2023); *In re College Athlete NIL Litigation*, no. 4:20-cv-3919, (N.D. Cal. June 15, 2020); and *Johnson v. NCAA*, no. 2:19-cv-05230, (E.D. Pa. Nov. 6, 2019).

[xi] *Tracker: Name, Image and Likeness Legislation by State*, *Business of College Sports*, https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ (last updated July 28, 2023).

[xii] Ralph D. Russo, *Proposal to create new tier for big-money college sports is just a start*, NCAA president says, Washington Post (Dec. 6, 2023), https://www.washingtonpost.com/sports/2023/12/06/ncaa-college-sports-new-tier/3cef40fc-9476-11ee-9d5c-d462c9032daa_story.html.