

May 4, 2020

NCAA Moves Closer to “NIL” Policy for Student-Athletes

On April 29, 2020, the NCAA Board of Governors (the “Board”) announced its support for a proposal (the “Proposal”) that would allow student-athletes to financially benefit from the use of their names, images, and likenesses – sometimes known as the “right of publicity” – through engagements with sponsors otherwise unaffiliated with the student-athlete’s college or university.¹

The Proposal, which still needs approval from member institutions, would allow student-athletes to enter paid sponsorship and endorsement deals as soon as 2021.² The Proposal would not, however, allow a student-athlete’s use of their school’s trademarks or logos in connection with such sponsorships and endorsements. While the Board’s most recent announcement is a significant departure from past NCAA positions and public statements, it is less comprehensive than recently enacted legislation and a far cry from a revenue-sharing model that might imperil the *status quo* of collegiate athletics.

Background

Historically, the NCAA has prohibited student-athletes from profiting from their names, images, and likenesses, as part of its effort to preserve the amateurism of collegiate athletics. More particularly, the NCAA Bylaws, in Article 12 (Amateurism) Section 12.5 (Promotional Activities) Subsection 12.5.2 (Nonpermissible) Paragraph 12.5.2.1 (Advertisements and Promotions After Becoming a Student-Athlete) state that:

After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

- a. Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or
- b. Receives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.³

The NCAA has long fought to maintain this “no pay” position. For instance, in *O’Bannon v. National Collegiate Athletic Association*,⁴ the NCAA argued that amateurism is a fundamental aspect of collegiate athletics and that compensation of student-athletes would fundamentally undermine that amateurism.⁵ Similarly, NCAA President Mark Emmert initially responded to California’s 2019 passage of the “Fair Pay to Play Act,” (the “Act”) which would permit California student-athletes to earn money from endorsements, sponsorship deals, and related activities,⁶ by suggesting that the Act would lead to California schools being excluded from NCAA championships.⁷

As such, the Board’s announced support of this Proposal is a drastic departure from its previous position but also a reasonable response to the growing chorus of support for some compensation for student-athletes. It is also a pretty clear effort to preempt: (i) further litigation, (ii) California’s “Fair Pay to Play Act” and related legislation, and (iii) the existential threat posed to men’s college basketball as high school prospects choose the less restrictive and more lucrative G league over a season in college.⁸ Whatever the impetus, the consequences of this shift in approach will have a substantial impact on collegiate athletics and the compliance requirements of member institutions.

The Proposal

Generally speaking, the Proposal would (i) allow “compensation for third-party endorsements related to athletics, without school or conference involvement; [and] compensation for other student-athlete opportunities, such as social media, new businesses, and personal appearances, without institutional involvement or the use of trademarks/logos,”

while, (ii) prohibiting schools, conferences, or boosters (as a recruiting tool) from paying student-athletes for the use of their names, images, and likenesses.⁹

More particularly, the Board has instructed each NCAA division to provide initial legislative proposals concerning a student-athletes' right to benefit from their names, images, and likenesses by the end of August 2020, and to draft final legislation on the subject by October 2020. While the Board has not provided detailed guidance on the specifics of such legislation, they've relayed to the divisions that these changes must follow the following principles and guidelines:

- “Ensuring student-athletes are treated similarly to nonathlete students unless a compelling reason exists to differentiate.
- Maintaining the priorities of education and the collegiate experience to provide opportunities for student-athlete success.
- Ensuring rules are transparent, focused and enforceable, and facilitating fair and balanced competition.
- Making clear the distinction between collegiate and professional opportunities.
- Making clear that compensation for athletics performance or participation is impermissible.
- Reaffirming that student-athletes are students first and not employees of the university.
- Enhancing principles of diversity, inclusion and gender equity.
- Protecting the recruiting environment and prohibiting inducements to select, remain at or transfer to a specific institution.”¹⁰

Considerations

The Proposal appears to be more of a reaction to the inevitable than a true paradigm shift in the NCAA's thinking. Even while expressing support for the Proposal, the Board noted that the NCAA will continue to lobby Congress for national legislation that would preempt state laws (*i.e.*, Colorado,¹¹ and thirty-two (32) other states¹² that intend to follow California's example and have introduced or passed similar right of publicity bills).¹³

Moreover, the Board has insisted that (i) colleges and universities are not able to compensate student-athletes directly for the use of their rights of publicity, and (ii) student-athletes cannot use their school's trademarks or logos in connection with that use.

As the details are being considered – and in the absence of national legislation, a Supreme Court ruling, or final rules from the NCAA – colleges and universities should prepare for increased compliance requirements, develop reasonable policies and procedures for monitoring their student-athletes' adherence to these prohibitions, and be prepared for all possible scenarios.

1. *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (Apr. 29, 2020, 8:30 AM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.
2. *Id.*
3. NCAA 2019-2020 Division I Manual, Operating Bylaws art. 12.05.2.1 (Aug. 2019), <https://www.ncaapublications.com/p-4577-2019-2020-ncaa-division-i-manual-august-version-available-for-presell-now.aspx>.
4. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).
5. Joe Nocera, *O'Bannon Ruling Stands, but N.C.A.A.'s Status Quo May Yet Collapse*, The New York Times (Oct. 3, 2016), <https://www.nytimes.com/2016/10/04/sports/ncaa-obannon-case-ruling-supreme-court.html>.
6. *Gov. Newsom Signs SB 206, the 'Fair Pay to Play Act'*, Senator Nancy Skinner (Sept. 30, 2019), <https://sd09.senate.ca.gov/news/20190930-gov-newsom-signs-sb-206-%E2%80%98fair-pay-play-act%E2%80%99>.
7. Jeremy Bauer-Wolf, *One Step Closer to Pay for California College Athletes*, Inside Higher Ed (Sept. 11, 2019), <https://www.insidehighered.com/news/2019/09/11/california-passes-bill-allowing-athletes-be-paid-name-image-and-likeness>.
8. Jeff Borzello, *Five-star PG Daishen Nix decommits from UCLA to join G League*, ESPN (Apr. 28, 2020), https://www.espn.com/nba/story/_/id/29108600/five-star-pg-daishen-nix-decommits-ucla-join-g-league.
9. *Questions and Answers on Name, Image and Likeness*, NCAA (last updated Apr. 28, 2020), <http://www.ncaa.org/questions-and-answers-name-image-and-likeness>.
10. *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (April 29, 2020, 8:30 AM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.
11. Steve Berkowitz, *Colorado Governor Signs College Athlete Name, Image and Likeness Bill*, USA Today (Mar. 20, 2020, 4:29 PM), <https://www.usatoday.com/story/sports/college/2020/03/20/colorado-governor-signs-college-athlete-name-image-likeness-bill/2887481001/>.
12. Kendall Baker, *Colorado Joins California in Allowing College Athletes to Profit Off Name and Likeness*, AXIOS (Mar. 23 2020), <https://www.axios.com/colorado-college-athletes-name-image-likeness-profit-bd8e51ee-672e-4683-89de-610d2dd072c6.html>.
13. *Board of Governors Moves Toward Allowing Student-Athlete Compensation for Endorsements and Promotions*, NCAA (April 29, 2020, 8:30 AM), <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>.