



POSITION STATEMENT

CRITICISM OF APRIL 29 NCAA BOARD OF GOVERNORS' GUIDELINES FOR FUTURE NCAA AND FEDERAL NIL LEGISLATION

May 11, 2020

On April 29, 2020, the NCAA issued a [press release](#) announcing its Board of Governors' (BOG) action responding to the comprehensive [April 17 NCAA Federal and State Legislation Working Group Final Report](#) regarding college athletes commercializing the use of their own names, images, and likenesses (NILs). While the Board of Governors expressed general support for rules changes that would allow college athletes to receive compensation previously not permitted under the NCAA's amateur status rules, they proposed no legislative changes. Rather, their comments were offered as guidelines for future legislation to be developed by the three NCAA competition divisions. Notably, the BOG also called for federal legislation that would give the NCAA a blanket antitrust exemption for all NIL rules it adopts. The NCAA rules would also preempt state NIL legislation passed, pending or planned in 37 states to date.

After reading the Working Group's final report, The Drake Group offers the following six critical observations about the future NCAA and federal NIL legislation:

Observation #1. Congress, rather than the NCAA, should adopt legislation establishing a college athlete's independent right to monetize his or her own NILs, enter into athlete group licensing arrangements, and engage in employment outside the educational institution.

The word amateurism derives from the Latin word "amator" which means lover. In common English, an amateur is someone who engages in activity for pleasure or love rather than for extrinsic reward or money. Ergo, Division I college basketball and football players remain amateurs so long as they do not receive pay for their participation. Under this line of reasoning, a Division I college basketball or football player should be able to receive pay for endorsing a local car dealership because the underlying performance is for executing the endorsement, not for playing basketball or football. Thus, NIL payments do not violate the core meaning of amateurism. Similarly, if a college athlete starts his or her own summer sports camp business,

the earnings from the conduct of the sport skill education business is separate from playing a sport for a university team. Nevertheless, such NIL payments and self-employment are prohibited under the current NCAA rules.

In our view, as long as playing a college sport remains an extracurricular activity conducted by a tax-exempt educational institution, rather than a standalone for-profit activity such as a professional sports team, the only restrictive compensation rules that should be promulgated by the NCAA are those that prohibit professional athlete employment, limit athletic scholarships to educational costs and prohibit cash or other benefits provided by boosters or others for work not actually performed or at rates beyond fair market value. Nor should the NCAA or any governing organization restrict the time the athlete may spend on outside employment other than prohibiting the missing of classes, exams, or other academic responsibilities for such purpose. In addition to establishing college athletes' NIL and employment rights outside the institution applicable to all college athletes no matter their competitive division, federal legislation should also stipulate the right of the educational institution to monetize its extracurricular programs, including the right to use athlete NILs in the promotion of athletic events.

Observation #2. Congress should not grant the NCAA any unconditional antitrust exemption to enable its control of college athlete NIL or outside employment. Rather, Congress should establish an independent College Athlete NIL Commission to set and enforce appropriate standards for NIL payments to college athletes. Congress should confer on the Commission a limited and conditional antitrust exemption to do so.

The Drake Group categorically rejects the conclusion of the NCAA's Working Group that it would be "appropriate and advisable" for Congress to bestow an unlimited and unconditional antitrust exemption on the NCAA. The NCAA Working Group cites several reasons for its conclusion, including that "aggrieved parties" have frequently used the antitrust laws "as a tool to attempt to change or undermine the Association's rules." Another lament expressed is that the NCAA has had to devote scarce time and resources to fending off challenges to its amateurism rules, even though that time and those resources could have been better spent pursuing the Association's goals. Finally, the NCAA Working Group selectively cites a case about transfer rules that the Seventh Circuit held did not violate the antitrust laws.

Ironically, instead of showing why the NCAA merits an antitrust exemption, the stated reasons in the NCAA Working Group report demonstrate why Congress should not grant the Association a blanket reprieve from the antitrust laws. First, antitrust challenges have forced the NCAA to change its rules in positive ways that have benefitted athletes (e.g. permitting scholarships in amounts up to the cost of attendance).

Second, the NCAA would not have faced antitrust challenges if it possessed an appropriate governance structure and if it had modernized its relationship to athletes in a timely and efficient way instead of clinging tenaciously to the outdated rules of a bygone era. The NCAA has thus

created many of the same "aggrieved parties" against whom it has felt compelled to defend itself. Besides, what goals could the NCAA possibly devote its time and resources to that are more important than those that benefit college athletes?

Third, as the reference to transfer rules demonstrates, the NCAA does not seek a narrow antitrust exemption confined to issues that surround NILs. Instead, it appears to seek a broad-based dispensation from any type of antitrust liability, brought by any aggrieved parties. In light of the NCAA's history of championing the interests of institutions instead of those of athletes, Congress and the American public should rebuff its request for such sweeping immunity.

Because the NCAA has not been an "honest broker" with regard to athletes' rights generally and has failed to demonstrate the ability to promulgate rules that place the college student's academic success above the winning or monetary success of the institution's athletics program, it should not be trusted to fairly oversee the implementation of athlete NIL and employment rights. Further, athletes' rights to monetize their own NILs and be employed, except for employment as a professional athlete, resides outside the jurisdiction of the NCAA and its member institutions. Thus, we believe Congress should establish an independent self-supporting Commission to set and enforce standards for the payment of college athletes' NILs and give this agency a limited and conditional antitrust exemption to permit its work.¹

Observation #3. The NCAA's multiple positions on group licensing are both self-serving and misleading.

The NCAA first proposes that, "The divisions should continue to explore whether it is possible to support institutionally managed group licenses for athletically related activities." Drake maintains that neither the higher education institution nor the NCAA should play the role of business manager or business partner for athletes engaged in outside employment. We believe

¹ The responsibilities and functioning of such an NIL Commission are addressed in [The Drake Group Position Statement: Compensation of College Athletes Including Revenues Earned from Commercial Use of Their Names, Images and Likenesses and Outside Employment](#) and Jayma Meyer and Andrew Zimbalist, "A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges," *Journal of Sports and Entertainment Law*, Vol. 11, No. 2 (2020). We note and concur with the position of Meyer and Zimbalist that the only circumstance under which a national collegiate athletic governing association should be given a conditional and limited exemption is for the purpose of controlling costs on coaches' salaries and facilities and not to pay athletes a salary or control outside employment. These excessive salary and facility expenditures are caused by artificial factors, namely "(1) the lack of compensation paid to the athletes; (2) substantial tax privileges given to intercollegiate sports; (3) a lack of shareholder demand for dividend distributions or higher profits to bolster stock prices at the end of every quarter; (4) the university and statewide financial support given to athletic departments; and (5) the incentives of athletic directors who negotiate coaches' salaries and whose own worth rises with the salaries of their employees" at p. 316.

that this statement exposes the underlying intent of the NCAA and its members to permit institutional/athlete group licenses that create another revenue stream for institutions, conferences, or the NCAA -- an ill-disguised feint to resurrect the EA Sports NCAA College Football video game discontinued as a result of the O'Bannon lawsuit or, for example, allow institutions to sell replicas of the institution's team jerseys displaying the names of athletes or monetize college athletes' personal followers on their respective Facebook or other social media accounts. Drake maintains that as soon as the institution is a part of such institution/athlete group licensing agreements or the institution begins sharing its assets, three problematic outcomes occur. First, the institution engages in a business relationship with a student and most likely a third-party partner, such as a video game manufacturer, thereby undertaking a commercial activity unrelated to its educational mission and making any proceeds subject to federal unrelated business income tax (UBIT)). Second, the financial success of these endeavors will become part of the institution's recruiting pitch, thereby creating undue influence on the student's choice of college. Third, Title IX would require that the institution's action to generate such a promotional and monetary benefit equally benefit male and female athletes.

We also believe the NCAA is engaging in unnecessary fear mongering by positing that "permitting student-athletes to receive payments for NIL 'licenses' that are not legally necessary would be tantamount to permitting thinly veiled payments for nothing other than athletics participation." This position suggests that athletes' use of photos or videos of themselves playing sports, even if there is a right of publicity, is tantamount to pay for participation. We reject this incorrect NCAA amateur status interpretation that any portrayal of the college athlete related to athletic skill or notoriety is equal to employment as a professional athlete. Again, Drake strongly maintains that only a narrow definition of professional athlete – employment as a professional athlete in the same sport – is a valid athletics reason for the NCAA to deny eligibility for college athletics participation. All other forms of outside employment and NIL licensing activities should be fair game for athlete and nonathlete students.

The NCAA also takes the position that it should not permit colleges' athletes to enter into group licensing agreements with other athletes (such as agreements that may allow them to earn income from the video game market) for another two or three years because of so-called "legal impediments." The implication of this position appears to be the belief that such agreements would create "employment unions" of athletes that might be precluded by state laws. Further, by continuing the figment of the NCAA amateur status model, this practice would reveal that these college athletes are really professional athletes. Again - balderdash. College athletes working together on a business opportunity that involves their avatars playing sports does not make these college athletes professional athletes. The only circumstance that would make these athletes professional is if they were paid by the institution to play their sport.

Observation #4. The NCAA’s professed NIL concerns related to gender equity are not believable.

The NCAA stated that it would immediately engage Congress to uphold “the NCAA’s values, including diversity, inclusion, and gender equity” and suggested that:

“The working group appreciates that the market response to new opportunities permitted by these proposed rules changes may not be made available in a gender-equal manner. Because schools and conferences may be prohibited from having any direct or indirect involvement in these new opportunities, they will not be able to correct or offset this problem directly, by leveling any imbalance created by the market’s offerings.” (NCAA Working Group Report, p. 24)

This is exactly the reason why the NCAA should stay out of the outside employment and NIL space. It has no responsibility for gender equity in the open marketplace. Its gender equity concern is within the boundaries of the intercollegiate athletic programs it governs because of the Title IX gender equity mandate that applies to all educational institutions that receive federal funds.

Further, the NCAA does not need the help of Congress to require that its own members comply with the athletics provisions of Title IX. The NCAA could easily establish, as an ongoing condition of NCAA membership, that all institutions must demonstrate compliance with this law, which the NCAA has declined to do. In fact, the NCAA inexplicably eliminated its Division I peer-review certification program in 2011 and ignored recommendations of its own Gender Equity Task Force to restore it. A main section of the certification program was an examination of whether the institution was conducting a gender equitable athletic program. Based on publicly available 2017-18 Equity in Athletics Disclosure Act participation data, 83 percent of all NCAA member institutions (N=1210) did not meet the Title IX Prong One participation standard (athletic participation proportional to male and female undergraduate student enrollment).² See Table 1 on the next page which summarizes the results of this study. We know of no NCAA committee or working group created to address Title IX noncompliance among NCAA member institutions.

² Donna Lopiano (January 8, 2020) *2017-18 NCAA Member Institutions: Title IX Athletics Participation Compliance with Prong One Proportionality Test*. Sports Management Resources. Retrieve at: <https://www.thedrakegroup.org/positions-issues/issues/gender-equity/>

Table 1: Percent of NCAA Schools in Which Female Athletes are Underrepresented Compared to the Proportion of Female Undergraduate Students, 2017-18³

NCAA Division	# of Reporting Institutions	Percent of Institutions with Female Athletes Underrepresented
Division I - Without Football	97	52%
Division I – Football Bowl Subdivision	126	59%
Division I – Football Champions Subdivision	123	89%
Division I – All Institutions	346	67%
Division II – With Football	165	93%
Division II – Without Football	242	89%
Division II - All Institutions	407	91%
Division III – With Football	242	94%
Division III – Without Football	215	85%
Division III – All Institutions	457	89%
All NCAA Institutions – All Divisions	1210	83%

Thus, it seems disingenuous at best for the NCAA to plead any concern for gender equity.

Observation #5. The idea that Congress might prohibit athletes to sign with sneaker and apparel companies, thereby protecting the commercial sponsorship interests of its member institutions, reveals the NCAA's current status as a trade association whose commercial interests outweigh the educational and health and safety interests, and the economic freedoms, of college athletes.

It is justifiable for Congress to specify that athletes’ NIL agreements cannot conflict with existing institutional commercial agreements involving the NILs of athletes participating during their respective sport seasons, consistent with the institution’s right to operate extracurricular programs. This limited restriction should not preclude athletes from exploiting NIL and employment opportunities in a free and open marketplace during all other times, including prior to higher education enrollment. For the NCAA or its tax-exempt member institutions to declare that they should have the right to rope off an entire commercial area to assist in monetizing its athletic programs over the rights of college athletes to do so is the height of hypocrisy.

Observation #6. The NCAA must fully prioritize its basic governance responsibilities over its members' commercial interests and must facilitate outside employment opportunities for college athletes instead of obstructing them.

The primary roles of a national collegiate athletic governance organization are advancing fair athletic competition among its members, ensuring that participation in athletics does not interfere with college athletes’ pursuit of a bona fide educational degree, and promulgating rules and policies that protect the health and safety of participants. The NCAA has been an abject

³ Id.

failure at the latter two, denying that it has any role in the determination of academic fraud or athlete health and protection. Both Congress and the general public are well aware that too many athletes in high-profile college football and basketball programs already are cheated out of a legitimate learning experience. They may be admitted without adequate academic achievement or ability and hustled into phantom courses and majors. The NCAA does nothing to police academic fraud, maintaining this to be an institutional responsibility. In addition, the NCAA invents and implements academic metrics that deceive the public into believing that athlete graduation rates far exceed those of the non-athlete student body⁴ when, in fact, the dismal federal graduation rates of NCAA basketball and football athletes, especially black athletes, reveal the extent of their educational exploitation.⁵ It is also disingenuous at best for the NCAA to publicly represent that education comes first when it has a loophole-filled and relatively unenforced 20-hours-per-week limit on athletics-related activities. NCAA and athletic conference research shows that most athletes are required to spend well in excess of forty hours weekly preparing for and engaging in sport competition.⁶ Neither does the NCAA require, as a condition of institutional membership, that higher education institutions comply with sports medicine best practices or that coaches comply with a code of professional conduct that forbids abusive treatment of their athletes.⁷ We believe it is well past time for the NCAA to fully meet these basic governance responsibilities.

⁴ See Gerald Gurney, Donna Lopiano, Eric Snyder, Mary Willingham, Brian Porto, B. David Ridpath, Allen Sack, and Andrew Zimbalist. (2015-Revised 2017, 2019) The Drake Group Position Statement: Why the NCAA Academic Progress Rate (APR) and Graduation Success Rate (GSR) Should Be Abandoned and Replaced with More Effective Academic Metrics. Retrieve at: <https://www.thedrakegroup.org/2015/06/07/why-the-ncaa-academic-progress-rate-apr-and-the-graduation-success-rate-gsr-should-be-abandoned-and-replaced-with-more-effective-academic-metrics/>

⁵ Harper, S. R. (2018). Black male student-athletes and racial inequities in NCAA Division I college sports: 2018 edition. Los Angeles: University of Southern California, Race and Equity Center. Retrieve at: <https://race.usc.edu/wp-content/uploads/2018/08/2018-Sports-Report.pdf>

⁶ Penn Schoen Berland & PAC 12 Conference. Student-Athlete Time Demands. (Apr. 2015) Retrieve at: <https://sports.cbsimg.net/images/Pac-12-Student-Athlete-Time-Demands-Obtained-by-CBS-Sports.pdf> [<https://perma.cc/NSG3-GWKA>].

⁷ Donna Lopiano, Janet Blade, Gerald Gurney, Sheila Hudson, Brian Porto, Allen Sack, David Ridpath and Andrew Zimbalist (2019) The Drake Group Position Statement: College Athlete Health and Protection from Physical and Psychological Harm. (October 1, 2019). Retrieve at: [<http://thedrakegroup.org>]