



# The Drake Group

ACADEMIC INTEGRITY IN COLLEGIATE SPORT

## POSITION STATEMENT

### College Athletes Should Give U.S. Senate NIL Bill a Failing Grade: Criticism of the *Fairness in Collegiate Athletics Act*<sup>1</sup>

June 24, 2020

The Drake Group<sup>2</sup> shares four observations critical of the [\*Fairness in Collegiate Athletics Act\*](#) proposed by U.S. Senator Marco Rubio of Florida on June 18, 2020:

- The Act does not protect the employment rights of *all* college athletes in that it is limited to those participating in National Collegiate Athletic Association (NCAA) programs.
- While the Act permits college athletes to earn compensation from third parties for the use of their names, images, or likenesses (NILs), it gives the NCAA administrative control of such outside employment and allows it to restrict such employment for questionable purposes such as preserving “amateur status.” “Amateur status” is not defined and historically, the NCAA has used its changing definition to impose unfair employment restrictions on college athletes.
- The Act specifies that the Federal Trade Commission enforce the Act, treating violations as unfair or deceptive acts or practices, a role wholly unsuited for a federal agency without the necessary resources or experience.
- The Act fully exempts the NCAA and its member institutions from antitrust or other lawsuits brought by college athletes who believe NCAA NIL rules are unfair. This allows the NCAA and member schools to continue to exploit college athletes so they can earn billions in gate receipts, sponsorships and television revenues from the college athletic events.

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<sup>1</sup> Preferred citation: Donna Lopiano, Gerald Gurney, Emmett Gill, Karl Idsvoog, Brian Porto, David Ridpath, Allen Sack, Sandy Thatcher and Andrew Zimbalist (2020) The Drake Group Position Statement - College Athletes Should Give U.S. Senate NIL Bill A Failing Grade: Criticism of the *Fairness in Intercollegiate Athletics Act*. (June 24, 2020). Retrieve from <http://thedrakegroup.org>.

<sup>2</sup> The Drake Group is a national organization of faculty and others whose mission is to defend and achieve educational integrity and freedom in higher education by eliminating the corrosive aspects of commercialized college sports.

This bill does not protect college athletes' employment rights and should be given a failing grade. The Act gives the NCAA and their member institutions a blank check – protection from lawsuits and control of the definition of 'amateur status'– which would allow institutions to continue acting in their own financial interests at the expense of college athletes' financial interests. Historically, the NCAA has behaved more like a trade association protecting its members' rights to commercially exploit college athletic programs instead of governing college sports to protect the health and education opportunities of athletes. The NCAA should not be trusted to do what is best for college athletes. It has failed to enforce time limitations for practice and competition so athletes can meet their academic responsibilities. It does not police academic fraud as practiced by member schools to keep athletes eligible. It does not adequately protect the health and well-being of college athletes by mandating institutional payment of basic athletic injury insurance and medical expenses while they are enrolled or providing long-term protection from chronic athletic injuries or the effects of concussions and other forms of brain trauma. It does not even adopt rules that prohibit the abusive conduct of coaches or dangerous conditioning practices by coaches or training staff. The NCAA has not fulfilled its duty of care to college athletes. Congress should not believe it will change and certainly should not reward the NCAA for its governance failures as would be the case if the Rubio NIL bill was adopted.

The Drake Group does believe that a federal NIL bill is needed to prevent the chaos of 30 or 40 state bills, all with different NIL provisions. However, the federal bill needs to carefully separate and balance institutional and athletes' individual rights to use athletes' NILs.

Specifically, Congress should specify the higher education institutions' rights and responsibilities as follows:

- Institutions should not pay athletes for their NIL rights other than with educational coin and benefits related to athletic injury insurance and benefits. It is not in keeping with the tax-exempt purpose of the educational institution to operate a sports business that pays cash salaries to students who participate in athletics.
- The NCAA has every right to declare a student who signs a contract to play with a professional sports team or enters a contest for prize money to be ineligible for college sports.
- The institution has the right to televise or otherwise market its athletics events and to use these revenues to support the athletic program and provide scholarships that enable athletes to achieve their educational goals (scholarships must be tethered to educational costs)
- Institutions should be limited in the use of college athlete NILs to the televising and promotion of the extracurricular athletic events in which the athlete participates. Institutions have no right to use athlete NILs on jerseys, video games, or other products which have nothing to do with the purpose of the university and are subject to UBIT.

- The institution should be “calendar limited” with regard to the period in which they can use the athlete’s NIL to promote athletic events only – from the beginning of practice to the end of the NCAA championship – referred to as “championship season”

The rights of individual athletes outside their collegiate athletics involvement space should be specified as follows:

- At all times during the year, college athletes should be free to be employed by third parties outside the institution or exploit their NILs for endorsements, product sales, videos, etc. and should be allowed to be represented by certified agents without limitation other than (a) the athlete agreement cannot conflict with institutional sponsorship agreements during the athlete’s championship season, (b) employment/NIL compensation should be limited to fair market value for services rendered and (c) full disclosure and transparency of such employment and compensation agreements should be required.
- College athletes, including prospective athletes, should be allowed to use their athletic skills or notoriety in advertisements for commercial products or to start their own sports-related business, employment -activities currently prohibited by NCAA antiquated amateur status rules. The only amateur status rule the NCAA should be permitted to enforce is the prohibition against playing professional sports or engaging in athletic contests for cash remuneration during college enrollment.
- Students or employees of the institution should not have the right to use their institution’s name, brand or affiliation with the institution for their individual private commercial gain.
- Institutional employees or boosters should not be permitted to promise or provide outside employment as recruiting enticements which is the same rule that currently exists with regard to recruiting. The athlete or the athlete’s agent has to independently obtain outside employment.
- Given the priority purpose of earning a degree, athletes should not be permitted to miss classes, exams or other academic responsibilities for employment/endorsement related activities and should be prohibited from engaging in new outside employment if they become academically ineligible

Finally, Congress must recognize that the NCAA cannot be an honest broker because it is conflicted. It has demonstrated that protection of its member institution’ commercial and other interests comes first. Therefore, Congress must create an unbiased third party independent non-governmental agency to set policy that balances institutional rights and interests with athletes’ third-party employment rights and interests. Congress has done this before, when it established the U.S. Center for Safe Sport and the U.S. Anti-Doping Agency. It is this independent agency that should receive a very narrow and conditional antitrust exemption from Congress for the express purpose of allowing it to make policies and render decisions in this college athlete outside

employment space. The functions of this entity would be to: (1) adjudicate institutional/athlete NIL agreement disputes/conflicts, (2) consider challenges to the fair market value standard, (3) establish policies regarding fair market values for NIL work that minimize differences in market size/recruiting advantages of NCAA institutions, (4) set standards for college athlete agreements with agents and lawyers that specify acceptable ranges for hourly rates or percentage commissions; and (5) set other standards as needed to balance institutional and athlete interests. Such an agency can be fully self-supporting by generating revenue from taking a small percentage of the value of athlete NIL agreements it approves as well as from a modest levy on institution sponsorship agreements involving athlete NILs that it reviews, as an application fee for an approval process.