



## POSITION STATEMENT

# Compensation of College Athletes Including Revenues Earned from Commercial Use of Their Names, Images and Likenesses and Outside Employment<sup>1</sup>

### EXECUTIVE SUMMARY

Throughout 2019 and continuing into 2020, state and federal legislative bills were filed regarding the rights of college athletes to commercially exploit their own names, images, and likenesses. The various bills had different provisions, but all of them directly challenge National Collegiate Athletic Association (NCAA) amateur status rules. During this period, the NCAA appointed a special committee to reexamine its rules regarding this issue. The Committee, with the approval of the NCAA Board of Governors, issued preliminary guidelines with numerous guardrails and instructed each of the three NCAA Divisions to propose rules based on the guidelines. Additionally, the media reported the strongly expressed opinions of various NCAA, conference, and institutional athletics administrators, who maintained that allowing athletes to exploit their own NILs could not be accommodated without causing profound negative changes in college sports. The Drake Group disagrees with these contentions. We believe that national collegiate athletics governance organization control of athlete outside employment is overly restrictive. We also believe that commercial exploitation of athlete NILs by universities in conjunction with college athletic events can and should coexist with athletes' rights to employment outside the institution. Those athletes' rights include the right to independently

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<sup>1</sup> Note that this 2020 revision proposes a more administratively efficient selective challenge system for enforcing rates commensurate with services rendered and the going rate, transparency of outside employment agreements via a searchable database summarizing significant contract provisions and more clear separation of athlete and institution NIL rights during the championship season. Preferred citation: Andrew Zimbalist, Donna Lopiano, Fritz Polite, Brian Porto, Janet Blade, Gerald Gurney, B. David Ridpath, Allen Sack, Julie Sommer and Mary Willingham. (2020) *The Drake Group Position Statement: Compensation of College Athletes Including Revenues Earned from Commercial Use of Their Names, Images and Likenesses and Outside Employment*. (March 24, 2015, Revised February 12, 2016, December 2, 2017, December 27, 2017, September 27, 2019, October 14, 2019, November 4, 2019, February 26, 2020 and August 8, 2020). 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/>

**commercially exploit their own NILs, before and during the period of their collegiate eligibility, without being disqualified from collegiate competition.**

**This position paper proposes new rules that should and could govern previously impermissible outside employment and NIL licensing. With respect to NILs, we propose that an independent NIL Commission be responsible for setting standards and for overseeing a national NIL Eligibility Center responsible for implementing the standards. We recommend that all college-athlete-outside-employment and NIL licensing agreements be reported to the athlete's institution and to the national NIL Eligibility Center. We also recommend that athletes be permitted to employ agents to negotiate arrangements for employment and licensing. More particularly, all non-de minimis agreements would be registered with the NIL Eligibility Center and the athletes' respective institutions, and would be consistent with the standards set by the independent NIL Commission. Moreover, the institution or its representatives of athletics interests cannot directly or indirectly initiate such arrangements. We recognize that prohibiting the institution, sponsors, alumni, and boosters from initiating such arrangements represents a compliance challenge. However, we believe that the systems proposed -- reporting requirements coupled with other standards -- are sufficient controls as contrasted to current prohibitions on athlete employment. These prohibitions precipitate under-the-table transactions that are rules' violations. Further, we believe that reporting requirements would reveal the improper practices of individual alumni or boosters. Ultimately, rules' violations are always possible, but we believe these fears do not justify the current one-sided revenue advantages of the institution.**

## **1. Introduction**

The Drake Group's original position statement on the compensation of college athletes for commercial use of their names, images, and likenesses ("NILs") was issued in 2015 and updated in 2016, 2017, 2019 and 2020. Throughout 2019 and continuing into 2020, state and federal legislative bills were filed regarding the rights of college athletes to commercially exploit their own names, images, and likenesses.<sup>2</sup> These bills have different provisions, but all of the bills conflicted with National Collegiate Athletic Association (NCAA) amateur status rules. During this period, the NCAA also appointed a special committee to reexamine its rules regarding this issue. Additionally, the media reported strongly expressed opinions of various NCAA, conference, and institutional athletics administrators, who maintained that allowing athletes to exploit their own NILs could not be accommodated without causing profound negative changes to college sports. The Drake Group disagrees with these contentions; our core position has not changed from our initial 2015 publication. We believe that national-collegiate-athletics-governance-organization control of athlete outside employment is overly restrictive. University commercial

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<sup>2</sup> As of February 20, 2020, only California SB. 206 has been signed into law (passing its Assembly by a 73-0 vote and its Senate by a 39-0). Bills have been filed in 2020 legislative sessions in 19 states (Alabama, Arizona, Florida, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia and Washington) and legislators in seven other states (Colorado, Connecticut, Georgia, Kentucky, Maryland, Nebraska and Nevada) have announced their intent to file NIL bills.

exploitation of athlete NILs in conjunction with college athletic events can and should coexist with athletes' rights to independently commercially exploit their own NILs prior to and during their period of eligibility for college athletic participation without disqualifying them from college competition. This updated position statement offers recommendations on the administrative rules and procedures that should be implemented to realize this compromise.

The Drake Group notes that the updated recommendations contained herein reflect a level of procedural detail not usually included in Drake position statements. This level of detail is intended to demonstrate that these or other similarly structured national intercollegiate-sport-governance-association policies and administrative procedures can produce results that (1) protect the rights and contractual obligations of both the institution and the participating college athlete with regard to use of athlete and institutional NILs and (2) remove unfair restrictions on commercial revenues that may be derived from college athlete employment outside the educational institution. The Drake Group also believes that opening up these outside athlete employment and NIL opportunities will diffuse the current public pressure calling for institutions to pay and treat athletes like professional athletes, which would run counter to allowable practices of tax-exempt educational institutions and recent court decisions. Drake argues that higher education institutions should direct their resources to providing education and health and injury protections that create a safe educational environment for extracurricular athletics programs. At the same time, college athletes should not be unduly prohibited from maximizing their revenue potential unrelated to their higher education and college athletics participation obligations.

We emphasize that all existing NCAA or other collegiate-athletics-governance-organization rules prohibiting boosters, alumni, and other representatives of athletics' interests from paying athletes, promising to pay them as recruiting inducements, or providing extra benefits to athletes once they enroll remain in place in our proposal. We also note that the use of the term "recruiting" applies to recruiting of high school prospects and any two-year or four-year college transfer athletes with collegiate athletics eligibility remaining.

Finally, this position paper addresses new rules that should govern previously impermissible outside employment and NIL licensing. With respect to NILs, we propose that an independent NIL Commission be responsible for setting standards and overseeing a national NIL Eligibility Center. The Center would implement the standards.<sup>3</sup> We recommend that all non-de minimis outside employment agreements and agreements regarding NIL payments to athletes be reported to the athlete's institution and to the NIL Eligibility Center. We recommend that athletes be permitted to employ agents to negotiate arrangements for employment and NIL licensing. More particularly, all non-de minimis NIL agreements must be registered with the NIL Eligibility Center and the athletes' respective institutions and be consistent with the standards

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<sup>3</sup> The NIL Eligibility Center would be the administrative arm of the NIL Commission, similar to the currently existing NCAA Academic Eligibility Center that determines whether prospective athletes' high school academic transcripts meet NCAA freshmen eligibility standards. Like the NCAA Academic Eligibility Center, the NIL Eligibility Center would be self-supporting based on application fees that represent a de minimis percentage of the institutional and athlete agreements being reviewed.

set by the independent national NIL Commission. The NIL Eligibility Center would also be responsible for maintaining a publicly accessible and searchable database of such agreements (with appropriate information redacted). Moreover, the institution or its representatives of athletics interests cannot directly or indirectly initiate such arrangements, as currently specified by NCAA rules. We recognize that prohibiting the institution, sponsors, alumni, and boosters from initiating such arrangements represents a compliance challenge. For example, it would be permissible for college athletes or their agents to initiate and solicit endorsement or licensing agreements from current institutional sponsors and alumnus/booster business owners as long as these entities did not directly or indirectly initiate such opportunities. However, we believe that the systems proposed -- reporting and transparency requirements coupled with requirements that compensation be for services actually rendered at the going rate and other standards -- are sufficient controls, in contrast with current prohibitions on athlete employment. These prohibitions precipitate under-the-table transactions that are rules violations. Reporting requirements would reveal the improper or suspicious employment practices of individual alumni or boosters. Ultimately, rules violations are always possible, but we believe these fears do not justify the current one-sided revenue advantages of the institution.

## **2. Review of Basic Principles Guiding College Athlete Compensation**

The Drake Group believes that all institutions of higher education should operate athletic programs according to financial, ethical, and other principles appropriate for tax-exempt educational organizations. Regarding college students, institutions of higher education should seek to (1) promulgate policies regarding the conduct of students or programs that maximize student pursuit of educational goals in an environment that protects their health, safety, and general welfare; (2) protect the rights of students to accept and retain education-related inducements to enroll or maintain enrollment, such as athletic or other forms of scholarships or grants-in-aid; (3) recognize students' legal rights to the use of their own names, images, and likenesses by themselves, their educational institutions, or other third parties or groups; and (4) allow students to engage independently in employment or endorsement/licensing activities outside the institution.

Intercollegiate athletic programs must operate within this context, adopting policies and rules that balance the rights and interests of students who participate in athletics with the rights and interests of institutions that offer these extracurricular opportunities. The Drake Group has already issued a separate paper on college athlete compensation<sup>4</sup> that fully explains the following summary of predicates for determining a fair balance of interests:

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<sup>4</sup> Donna Lopiano, Gerald Gurney, Fritz Polite, B. David Ridpath, Allen Sack, Sandy Thatcher, and Andrew Zimbalist, (2019) *The Drake Group Position Statement: A Critical Analysis of Proposed Models of College Athlete Compensation*. (February 27, 2019; revised March 2, 2019) Retrieve at: <https://www.thedrakegroup.org/2019/10/16/critical-analysis-of-proposed-models-of-college-athlete-compensation/>

**a. Primacy of Academic and Athlete Health and Protection Policies.** In light of public pressure to produce winning teams, educational institutions and their national sport governance organizations have the highest obligations to promulgate policies that permit students to fully engage in and complete the academic requirements for an undergraduate degree<sup>5</sup> and to protect them from physical and psychological harm.<sup>6</sup> The Drake Group believes that national-sport-governing-organizations and their member institutions lack policies that protect college athletes from educational fraud, ensure the integrity of the educational degrees they are awarded, and insulate athletes from the professional misconduct of coaches and other personnel. Similarly, athlete protection policies related to the provision of sufficient athletic injury related insurance, payment of athletics related medical expenses, and assurance of qualified medical oversight are insufficient or non-existent. These issues are not the subject of this document, which focuses instead on athlete employment outside the higher education institution. However, we strongly believe that these issues and others deserve the attention of Congress once it resolves the current NIL crisis. We therefore urge consideration of the bipartisan Congressional Advisory Commission on Intercollegiate Athletics Act of 2019 (H.R. 5528) as an initial mechanism to comprehensively examine the relationship between higher education and intercollegiate athletics.

**b. Provision of Compensation from the Institution to Students Participating in Curricular and Extracurricular Offerings.** The institution should not pay students for participating in curricular or extracurricular activities, except for providing scholarships in which all compensation and benefits are tethered to educational expenses. Athletics scholarships should be continued through graduation, conditioned only on (a) academic performance; (b) compliance with rules of conduct applicable to all students; and (c) enrollment in the academic subject or participation in the activity for which the scholarship was awarded. Renewal should not be conditioned on (a) sport performance, which practice should be considered athletics employment; (b) nonparticipation resulting from an injury; or (c) noncompliance with rules of conduct that do not apply to all students or that violate freedom of speech. With regard to athletics, notably, only 29 of the 1,114 athletic programs sponsored by NCAA member institutions in 2017-18 generated sufficient revenues to fully defray program expenses on an operating basis (i.e., without considering most capital costs and certain indirect expenses).<sup>7</sup> At the vast majority of institutions, mandatory student athletics fees, institutional general funds

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<sup>5</sup> See Gerald Gurney, Donna Lopiano, Brian Porto, B. David Ridpath, Allen Sack, Mary Willingham, and Andrew Zimbalist. (2015) *The Drake Group Calls Upon the NCAA, Its Member Institutions and Higher Education Regional Accreditation Agencies to Fulfill Athlete Academic Protection Responsibilities*. (April 16, 2015). Retrieve at: <https://www.thedrakegroup.org/2015/06/02/academic-protection-responsibilities/> and Gerald Gurney, Donna Lopiano, Allen Sack, Mary Willingham, Brian Porto, B. David Ridpath and Andrew Zimbalist. (2014) *The Drake Group Position Statement: Guidelines for Academic Integrity in Athletics*. (October 28, 2014) Retrieve at: <https://www.thedrakegroup.org/2015/10/06/guidelines-for-academic-integrity-in-athletics/>

<sup>6</sup> Donna Lopiano, Janet Blade, Gerald Gurney, Sheila Hudson, Brian Porto, Allen Sack, B. 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: <https://www.thedrakegroup.org/2019/10/01/college-athlete-health-and-protection-from-physical-and-psychological-harm/>

<sup>7</sup> NCAA Research (2019) *14-Year Trends in Division I Athletics Finances*. Retrieve at: [http://www.ncaa.org/sites/default/files/2019RES\\_D1-RevExp\\_Report\\_Final\\_20191107.pdf](http://www.ncaa.org/sites/default/files/2019RES_D1-RevExp_Report_Final_20191107.pdf)

(e.g., tuition, etc.) and outside donations to athletics, which sometimes come at the expense of donations to the general fund, heavily subsidize athletic programs. It is non-sensical to suggest that a tax-exempt higher education institution be permitted to operate a professional sports business and that all students attending those institutions, many of whom are leaving college burdened with extraordinary student loan debt, should pay professional athlete laborers salaries and bonuses, in part, via student fees and tuition dollars. Similarly, suggesting that contributions to athletics never compete with donations to support academically-related programs is dubious.

**c. Use of Revenues Generated by Extracurricular Activities.** Extracurricular activities generally, and intercollegiate athletic programs particularly, are important contributors to student development. If revenues are directly generated from the staging of such activities, the revenues should be used to support that extracurricular activity, including educational scholarships,<sup>8</sup> and the provision of adequate athletic injury insurance, medical expenses, and other health and safety protections. Institutions should use any other excess revenues over expenditures to support themselves generally, consistent with their tax-exempt missions.

**d. Ineligibility of Professional Athletes for College Sport.** It is reasonable for college athletes to be prohibited from professional athletic employment while enrolled in college. Time demands and physical demands of college sports participation, professional sports participation, and full-time student status and degree requirements would challenge the primacy of education. College athletes now train year-round, and many attend classes in the summer to keep on track with academic requirements. Besides, the additional training, competition, and time demands of professional sports would likely heighten the college athlete's risk for overuse injuries, injuries that result from fatigue, and injuries that result from increased exposure to physical contact (e.g., repetitive hits to the head, contact with playing surfaces or boundaries, etc.).

### **3. Prohibition of “Professional Athletes” to Replace Antiquated Concept of “Amateur Status”**

**a. Why Amateur Status Rules Don't Work.** Historically, athletic governance organizations have used “amateur status” rules as a requirement for collegiate sport eligibility. These rules classify business activities with any relationship to athletic ability or notoriety as the equivalent of playing professional sports, declaring that any athlete who participates in such activities is ineligible for college athletics. The rules are based on the belief that almost any effort to monetize an individual's athletic skill or notoriety should be considered employment as a professional athlete. These rules prohibit, for example, retaining a sports agent to negotiate a

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<sup>8</sup> The Drake Group supports priority use of intercollegiate athletics revenues for athletic scholarships that provide educational opportunities, academic support programs conducted by academic authorities, which are available to all students, and the establishment of academic trust funds to provide financial support for the completion of undergraduate or graduate degree programs. The Drake Group does not support the concept of “lifetime scholarships” to currently eligible college athletes, which send the inappropriate message that these athletes do not have to be diligent students now because they can always return to college on full scholarship later to complete the degree. The Drake Group does support the establishment of trust funds to which any former athlete may apply and receive a completion of degree grant based on need or deserving circumstances.

professional contract even if the athlete decides not to execute the contract. They also prohibit athletes from starting their own summer sports camps for youth and advertising their status as college athletes, even without identifying their respective higher education institutions. And the rules prohibit athletes from using their notoriety or athletics' ability to endorse sports or other products. Some of these amateur status rules have changed over time or have been waived in response to public objection or institutional desires to be able to recruit athletes who have been compensated for their athletic performances. Such recruits include Olympic athletes who have received bonus monies from their countries for winning medals and tennis players who have accepted prize money. Thus, amateur status has been subject to a moving definition. These amateur status rules were discarded long ago in Olympic and open amateur sports programs with no harm to the commercial operation of the United States Olympic Committee or to our national sport governing bodies.

**b. Use a Narrow Definition of "Professional Athlete" as the Disqualifier for Collegiate Athletics Eligibility.** A simple, clear definition of "professional athlete" is offered as the standard to preclude college athletics eligibility. Thus, the Drake Group believes that any law that gives college athletes the right to pursue employment or monetize their own NILs from third parties outside the institution should also prohibit the institution from disqualifying them for doing so. Institutions should not be able to disqualify athletes from collegiate athletics because the athletes have earned compensation based on their athletic skill or notoriety, unless the compensation was earned for professional athletics participation.

NCAA rules restrict students to four years of collegiate eligibility within five years of enrollment. The enrollment period starts during the year following the graduation date of the athlete's high school class, and the rule charges the student with one year of used eligibility for any year of participation in organized sport competition. Accordingly, The Drake Group believes that the professional-athlete-disqualification-standard should only apply during collegiate enrollment for the educational, time and health considerations discussed in Section 2.d on the previous page. Allowing an athlete to test professional-sport aspirations in that five- year period after high school graduation and to decide that an education combined with collegiate-athletics participation is a preferred route, may produce a more educationally committed student and athletic programs less prone to academic fraud.

**c. Definition of "Professional Athlete."** The Drake Group maintains that any one of the following policies and practices during collegiate enrollment should be used to designate a student as a professional athlete employee who is ineligible for collegiate sport:

- (1) Receives compensation to play a sport that exceeds actual and necessary expenses to participate in practice or competition;
- (2) Receives, directly or indirectly, a salary, reimbursement of expenses, or any other form of financial assistance from a professional sports organization as payment for sport participation;

- (3) Competes on any professional athletics team;
- (4) Competes in an athletics competition or exhibition for pay or receives remuneration in excess of actual and necessary expenses to participate in such activity; or
- (5) Receives a college athletics grant-in-aid guarantee (1) for a period less than five years or until graduation, whichever occurs first, (2) which, although conditioned on continued participation in athletics, can be withdrawn for reasons of physical injury, unsatisfactory athletic performance, or improper pressure to withdraw from the team, (3) includes compensation untethered to educational expenses, such compensation that exceeds the institution's financial aid office's calculation of "cost of attendance."

With regard to (5) above, The Drake Group contends that one-year scholarship agreements should be considered tantamount to employee-at-will agreements. We note that NCAA athletic scholarships were initiated as four-year commitments, but were reduced in the 1970's to increase coach control of team composition. The significance of mandating scholarship awards for "five years or until graduation, whichever comes first," cannot be understated. First, this policy ties athlete compensation to the institution's commitment to provide the athlete with a chance to earn an undergraduate degree. Second, it would reduce the power imbalance that currently deters athletes from reporting coach misconduct or gender equity concerns by minimizing fears associated with loss of scholarship support as a form of retaliation.

Under the above definition, a college athlete could participate in a professional draft combine or enter into a professional draft at any time and not lose eligibility for participation or athletics-related financial aid. To remain eligible, the athlete would have to forego signing a professional sport employment contract and receiving remuneration for such employment in excess of reimbursement for actual expenses.<sup>9</sup> Further, a college athlete, like a nonathlete student, could pay for the services of a qualified lawyer or sports agent at any time to obtain professional advice or negotiate a professional contract, and would retain collegiate eligibility as long as the athlete did not execute the agreement and become a professional athlete.

#### **4. College Athlete Rights Related to Use of Name, Image, and Likeness (NIL)**

The Drake Group believes that the following policies protect the rights of college athletes to engage in outside employment (including monetizing their own names, images, and likenesses related to their recognized athletic skills and notoriety) while imposing reasonable rules designed to ensure the primacy of academic responsibilities and prevent violation of athletics recruiting rules or rules prohibiting the provision of extra benefits.

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<sup>9</sup> The Drake Group believes it would be a simple matter and a fair rule to require any college athlete who participates in a professional draft to declare his/her intent to remain eligible for collegiate athletics within 30 days or other reasonable deadline following the completion of the professional draft. This arrangement would allow the institution to exercise its scholarship renewal obligations or recruit to replace a departing athlete.

- a. **Employment Unrelated to Athletic Ability, Reputation, or NIL.** College athletes should be treated like other students with regard to their independent efforts to engage in non-school employment unrelated to athletic ability or reputation in their sport and not involving the employer's use of the athlete's NIL. Current NCAA rules (12.4.1) that require compensation received to be "only for work actually performed" and "at a rate commensurate with the going rate" for similar services are appropriate. The institution should be permitted to require that the athlete report such employment when receiving above de minimis remuneration<sup>10</sup> and attest in a statement that neither the institution nor an institutional representative was involved in obtaining such employment, and compensation is commensurate with services actually rendered and the going rate.
- b. **College Athlete Employment Related to Athletic Ability, Reputation, or NIL.** College athletes should be permitted to obtain employment and accept remuneration for the commercial use of their own NILs in advertisements, appearances, or speaking engagements, and for endorsement of commercial products at any time during the year except during their championship seasons. During championship seasons they are limited to performing agreements with third parties that do not conflict with institutional sponsorship agreements. Such employment rights should be limited by the following policies:
- (1) Generally, compensation shall be for work actually performed and at rates commensurate with the going rate or fair market value, except for employment as a professional athlete (see Section 3 above). An athlete's NIL work may rely on the athlete's sport notoriety (e.g., for services as a coach, a fee-for-lesson sport instructor, a sport camp counselor in any sport, or a model, such as for athletics apparel or equipment in any sport). An athlete's NIL work could also pertain to endorsements, product licensing, personal appearances, books, movies, television or radio shows, autographs, etc., and endorsement of commercial products or services or ownership of a sports business, etc. Restrictions such as rates commensurate with the going rate or fair market value should apply at the local level but may be inappropriate for NIL deals that are national in scope where the free market may be a more appropriate standard.
  - (2) Employment or work based on the use of the athlete's NIL shall not include implied endorsement, mention, or acknowledgement of affiliation with the institution of higher education or the institution's athletics or team marks, colors, brands, taglines, intellectual property or other mechanisms of association with the

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<sup>10</sup> For example, the proposed NIL Commission might establish a definition de minimis remuneration as \$1,000 per year.

institution where the student participates as a college athlete or of that team's athletic conference or national governing organization.<sup>11</sup>

- (3) College athletes, like nonathlete students, should be permitted to pay for the services of a lawyer or certified sports agent at any time to market the athlete for employment, prospective employment as a professional athlete or endorsement agreements at any time. Agreements with regard to professional athlete employment must not be executed while the athlete is eligible for college sports. Such agents should not be allowed to represent the athlete or otherwise participate in college athletics recruiting or scholarship processes because these activities do not constitute employment. An agent should not be permitted to promote, advance or negotiate any NIL agreement related to a college athlete's attendance at a particular institution, including compensation for the direct or indirect use of the institution's name, brand, or marks.
- (4) The athletes and his or her agent shall independently obtain such employment. Such employment shall not be arranged, directly or indirectly, by the institution's employees, donors, athletic program sponsors, advertisers, or other representatives of its athletics interests. This restriction shall not preclude a college athlete or the athlete's agent from independently soliciting work from any company that also supports the institution or any company owned by alumni, donors, boosters, etc., or from applying for positions advertised by those entities.
- (5) Current NCAA recruiting rules that prohibit the institution or its representatives of athletics interest from offering employment incentives or any extra benefit beyond an athletic scholarship shall remain in force.
- (6) Employment obligations shall not result in the athlete missing classes, final examinations, or other required academic commitments.
- (7) Athlete employment by any third party outside the institution shall not conflict with athletes' assignment of their own NIL rights to the institution during the championship season.
- (8) Third party employers, endorsements, employment activities, advertising and promotional activities must meet certain character and integrity standards (e.g., no association with gambling, alcohol, tobacco, performance enhancing drugs, etc.) as established by the NIL Commission.
- (9) Athletes not meeting athletics academic eligibility requirements (i.e., good academic standing, normal progress toward the degree, full-time enrollment, etc.)

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<sup>11</sup> The Drake Group believes that the proposed NIL Commission should address an appropriate manner in which college athletes would be permitted to identify their status as a student at their respective University without the context of such identification implying commercial use of the institution's marks.

shall not be permitted to renew or enter into any new outside employment agreement until they become eligible again.

- (10) Athlete-group-licensing agreements (multiple athletes and not involving the institution) shall conform to these policies. No rules shall prevent athletes from entering into group-licensing agreements with other athletes.
- (11) College athletes should not be denied access to any employment market by virtue of any unreasonable college-transfer regulation. College athletes, like nonathlete students, should be permitted to transfer to another institution without the permission of their current institution and without penalty (i.e., one year of residency required prior to eligibility to compete at the new institution)<sup>12</sup> However, on the occasion of a second or subsequent transfer, The Drake Group does not support any rule requiring the permission of the releasing institution, but does support a one-year residency requirement as a condition for athletics eligibility. The bases for this view are that transfer students: (1) require a longer time to graduate than other students; (2) have a lower probability of earning a degree and (3) when they are athletes, are more likely to transfer for athletics reasons than academic reasons.<sup>13</sup>

## 5. Institutional Rights Related to Use of Name, Image, and Likeness (NIL) of College Athletes

The Drake Group believes that the following policies would properly balance the rights of the institution to commercially exploit intercollegiate athletic events, including use of college athlete NILs, with the rights of college athletes to commercially exploit their own names, images, and likenesses and be employed by third parties outside the institution.

**a. Legal Limits on the Institution’s Right to Use Athlete NILs.** The higher education institution conducting an athletics program does not require the permission of athletes for certain limited use of their NIL related to such participation. State laws dictate whether an institution conducting an athletics program must obtain the permission of or payment for the

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<sup>12</sup> Thirty-nine percent of all undergraduates who initially enroll in a four-year institution transfer at least once. National Student Clearinghouse Research Center. 2018, National, Postsecondary, Signature Report, Transfers. Retrieve at: <https://nscresearchcenter.org/signaturereport15/>

<sup>13</sup> See summary of NCAA Research on Student-Athlete Transfers at <http://www.ncaa.org/about/resources/research-student-athlete-transfers>. Regarding impact of transfer on time of graduation and attrition, note that issues related to non-transferable credits increase as the student advances to upper level courses within specialized degree programs and that most institutions require transfers to meet a ‘minimum credits in residence’ requirement as a condition for graduation. Data from a 2017 GAO report show that students lost an estimated 43 percent of college credits when they transferred, or an estimated 13 credits, on average. The average credits lost during transfer is equivalent to about four courses, which is almost one semester of full-time enrollment. United States Government Accountability Office. (2017) Higher Education: Students Need More Information to Help Reduce Challenges in Transferring College Credits. (GAO-17-574) Retrieve at: <https://www.gao.gov/products/gao-17-574>

use of its athletes' NILs. There is no federal uniform law regarding rights of publicity. And, there is no Supreme Court decision governing privacy, publicity, or copyright protections of college athletes. Many states have legislation providing institutions the right to broadcast live games without obtaining athletes' permission to use their NILs. Even absent state law, courts may consider live broadcasts to be noncommercial events that involve a matter of public interest. On the other hand, generally, commercial speech or events, like video games, require permission from or payment to athletes for the use of their NILs.<sup>14</sup>

**b. Reasonable Policies Regarding Institutional Use of College Athlete NILs.** The limited use of athlete NILs by the institution should include the following policies:

- (1) The institution may use athlete NILs for audio or videocast or otherwise recorded for live or delayed electronic distribution or photographed for print or digital publication during the championship season (from the beginning of practice through the end of the championship)<sup>15</sup> for athletic events in which the athlete participates.
- (2) The institution may use athlete NILs for advertising or promoting championship season athletic events in which the athlete participates.<sup>16</sup>
- (3) The institution may use athlete NILs for publication and sale of event programs sold in conjunction with or during the course of championship-season athletic events in which the athlete participates.
- (4) The institution may use athlete NILs for perpetual print and electronic publication rights for the athlete's historical performance and participation statistics and

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<sup>14</sup> See e.g., *Keller v. Elec. Arts*, 724 F.3d. 1268, 1271 (9th Cir. 2013). While the law in this area, especially with respect to live broadcasts, is somewhat unsettled we support the proposition that institutions do not need to receive permission from athletes to use their NILs in live, in-game broadcasts (or support thereof), but must with respect to all non-game events like videogames.

<sup>15</sup> Hereafter referred to as the "championship season." The Drake Group notes that its selection of "during the championship season" for limiting the institution's sponsorship agreements is based on a simple to administer line in the sand to prevent conflict between an athlete's NIL agreement and the institution's sponsorship agreements, which includes athlete NILs, allowing a balance of interests. At all times other than the championship season, the athlete's interest in monetizing NILs takes precedence over institutional agreements. We envision the athlete being able to exploit any sponsorship category in which the institution does not have an agreement during the championship season. We also recognize several issues that the proposed NIL Commission will need to address. For instance, assume the institution has a NIKE exclusive shoe agreement and an athlete on that team, recognizing no conflict with the shoe agreement, enters into an outside agreement with NIKE thereby being able to earn compensation during the championship season. What about other athletes on the team who are Adidas athletes whose agreements would be in conflict and who could not exploit the shoe category in the championship season? Would this arrangement give the school any type of recruiting advantage or allow NIKE-signed players unfair advantage? Another area might be athletes monetizing their Facebook pages that are filled with photographs of the athlete in institution-branded gear. Questions related to fair use and desired use would need to be addressed.

<sup>16</sup> Institutions must be cognizant of their Title IX obligation to promote men's and women's events equally. Failure to do so will have a significant effect on female athlete visibility and ability to monetize their NILs.

photographs of prior champions or championship teams. The institution may not commercially exploit such rights in settings other than athletic-event programs. However, such historical licenses should not extend to commercial documentary products that exist separate from the current athletic event. The inclusion of such data on the institution's official athletics internet site, which may be supported by sponsorship revenues, shall not be considered prohibited commercial exploitation.

- (5) The institution is prohibited from commercial exploitation of current student NILs for non-extracurricular program activities such as entering into licensing agreements using current student NILs for video games, licensed apparel, licensed products, etc.<sup>17</sup>
- (6) The institution may engage in commercial exploitation of the exclusive right to provide official team athletics apparel or equipment to its athletics' teams and to put the name of the athlete on official team uniforms. However, if the institution licenses its own NIL to a third party to sell its institutionally branded products, it cannot grant the use the athlete's NIL to such third parties. The athlete must wear official team apparel, as specified by the institution, but retains the right to utilize their own "personal performance gear" (not apparel) in practice and competition. In that case, the athlete must cover the brand of any conflicting institutional sponsor during participation in such championship season athletic events.<sup>18</sup> The athlete's obligation to wear official team apparel shall extend throughout the academic year for official team practices, exhibitions, non-championship season contests, and appearances at official university events in which all attending players must wear such apparel.
- (7) The national-collegiate-athletic-governance organizations and their member institutions and conferences may jointly agree to license their championship season

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<sup>17</sup> The proposed NIL Commission should provide clear guidance regarding the propriety of third party negotiated institution/conference/athlete group licensing agreements for currently enrolled and no-longer-enrolled athletes. Commission guidance should prohibit higher education institutions from entering into a business relationship with its students or former students for products or services not related to its tax-exempt purpose. For example, an institution enters into an agreement with a video game company to use its marks; the video game company enters into a separate agreement with current athletes, thereby allowing athletes to appear in a video game wearing the institution's uniform. This type of group licensing agreement would circumvent (a) the prohibition of athletes being allowed to use the NILs of their institutions for outside compensation and (b) the prohibition of institutions paying college athletes for use of their NILs other than the provision of athletic scholarships tethered to educational expenses. The Commission would also have to consider the Title IX implications of the institution knowingly entering into an agreement with a third party that would benefit the members of a male team without affording corresponding benefits to an equal proportion of female athletes. The Drake Group opposes higher education institutions entering a business relationship with the athlete when the business is subject to UBIT or sharing institutional revenues derived from athletics in any manner other than an athletic scholarship supporting the institution's purpose of students earning accredited degrees.

<sup>18</sup> This policy example is intended to be consistent with Olympic policies that recognize the importance of the athlete being able to control his or her own sports performance related equipment and other gear. This is another area in which the NIL Commission would develop policy.

collective intellectual property (including college athlete NIL and national governing organization/institution/conference name, marks, logos, etc.) to third parties conditioned on such agreements excluding royalty or other payments to athletes.

- (8) The institution (conference or national governing organization) may not enter into a group licensing agreement with the individual college athlete during the athlete's enrollment. Neither may the institution pay proceeds from any sponsorship agreement to college athletes other than using athletics income to support athletic scholarships tethered to educational expenses. All proceeds from the institution's permissible commercial exploitation of athlete NILs related to the athletes' participation shall be used to support the athletic program or the other academic or extracurricular programs of the institution consistent with its tax-exempt status.
- (9) Following an athlete's completion of collegiate athletics eligibility, the institution may negotiate group licensing agreements related to sale of products subject to the provisions of the federal unrelated business income tax (UBIT). Any effort to commercially exploit former students' NILs requires the institution (or third party) to obtain consent from each former student for each specific use, which may include payment of licensing fees or royalties to the former students or a charitable donation of such income back to the institution or other non-profit entity.

## **6. An Independent Commission and Administrative Center to Set Standards and Adjudicate Conflicts and Complaints**

During the college athlete's enrollment, coordination will be necessary to prevent conflicts between institutional and college athlete NIL agreements with third parties. The Drake Group proposes the establishment of an independent NIL Commission to oversee the operation of a NIL Eligibility Center for this purpose because of the following:

- the rights of college athletes to outside employment are not within the purview of a collegiate athletics governance organization;
- such national athletics governing organizations consists of higher education institution members that have a conflict of interest with regard to resolution of competing institution/athlete interests;
- college athletes are not employees, no labor union exists to represent their interests; and
- even though a college athlete organization exists, the organization would have a conflict of interest concerning resolution of competing institution/athlete issues.

**a. National College Athlete NIL Commission and NIL Eligibility Center.** Congress should establish a federally chartered independent 501-c-3 organization<sup>19</sup>, the College Athlete NIL Commission (NIL Commission), which shall also house the NIL Eligibility Center. The Center shall

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<sup>19</sup> Congress successfully established the United States Olympic Committee, a federally chartered independent 501-c-3 self-supporting organization in 1978 via passage of the Ted Stevens Olympic and Amateur Sports Act to oversee the U.S. Olympic, Paralympic and open amateur sport system.

be limited to performing administrative functions. The NIL Commission and NIL Eligibility Center should be financially self-supporting.

**b. Functions of the NIL Commission.** Congress should grant the NIL Commission a limited antitrust exemption and enforcement powers to perform the following functions:

- (1) **Set Standards and Adjudicate Challenges.** The Commission shall set standards and resolve challenges to such standards. It shall ensure that institutional sponsorship and other third-party agreements related to use of college athlete NILs and outside employment during an athlete's period of enrollment meet established policies, as detailed in Sections 4 and 5 above;
- (2) **Caps on Employment/NIL Compensation.** The Commission shall not impose caps on athlete compensation related to national agreements with third party employers, including internet/social media sponsorship agreements, sale of NIL items on the internet, or college athlete(s)' sport related self-employment (local or otherwise) without third party investors (e.g., camps, clinics, lessons, etc.). Because college athletes may be signing multiyear local endorsement or employment agreements and because large market institutions may enjoy recruiting advantages over small market institutions (not yet proven), the Commission shall initially establish caps on total annual local employment earnings from third party employers. These caps shall apply to appearance-related services (autograph signing, lessons, speaking engagements, etc.). They shall also apply to advertising/endorsement local employment by businesses within a specified radius from the university or where the target market for the employer's product is within a specified radius of the athlete's institution.<sup>20</sup> The Commission shall reevaluate the local cap system following a review of actual agreements and compensation during the initial 18 months of implementation,<sup>21</sup>
- (3) **Complaints Related to the Conduct of Agents and Third-Party Employers.** The Commission shall receive, monitor, and adjudicate complaints concerning agents, attorneys, and third-party employers related to compliance with Commission

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<sup>20</sup> For example, the amount of the annual cap could be tied to the average of the median income in all markets of NCAA member institutions or all markets with the institution's competitive division. Instead of allowing athletic conferences to set their own compensation caps or limit median income computations to the markets of their members, The Drake Group believes an "honest broker," such as the proposed NIL Commission, should set national standards to prevent any conflicts of interest.

<sup>21</sup> Following such review, if such local caps are continued to be imposed on college athletes, similar caps on outside local compensation should be imposed on college coaches. Both coaches and athletes are in high recruiting demand by institutions of higher education. One can argue that the size of the institution's market as it affects outside third-party employment opportunities might influence a coach's employment decisions just as it might influence a college athlete's attendance decision. The Drake Group believes that athletes, already experiencing more limits to outside employment created by prohibitions of non-conflict with institutional sponsorship agreements and scholarships tethered to educational expenses, should not be the lone victims of a double standard regarding any adverse effects of a cap on local third-party earnings.

standards under the terms of previously approved employment or NIL agreements during a college athlete's enrollment. The desired end will be to report violations to the national-college-sport-governing-organization enforcement authority and/or to withhold approval of an agent or third-party employer for future college athlete agreements. Adjudication shall be based on consideration of formal written records in an administrative proceeding;

- (4) **National-College-Sport-Governing-Organization Rules Related to Athlete Outside Employment and Commercialization of College Athlete NILs.** The Commission shall approve revisions to national college sport governing organization legislation related to college athlete outside employment and commercialization of NILs. Further, any entity (conferences, NCAA) should also receive a limited antitrust exemption for the express purpose of restricting eligibility for athletic participation consistent with the federal law and findings and conclusions of the NIL Commission;
- (5) **Registration of Sports Agents.** The Commission shall establish standards for the registration and approval of sports agents to represent college athletes who seek employment or NIL endorsement opportunities;
- (6) **Agent and Attorney Compensation.** The Commission shall set standards for college athlete agreements with agents and lawyers that specify acceptable ranges for hourly rates or percentage commissions;
- (7) **Appeal of NIL Agreement Disapprovals.** The Commission shall resolve any college athlete's or institution's appeal of a NIL Eligibility Commission decision not to approve an athlete's or institution's NIL agreement based on failure to meet established standards.
- (8) **Educational and Instructional Materials.** The Commission shall develop educational and instructional materials related to applicable standards, procedures for receiving approval for athlete outside employment/NIL agreements and institutional agreements that include use of athlete NILs. Forms for submission of the proposed agreements to the NIL Eligibility Center for review and approval shall contain a section that requires both parties (the athlete and the institution) to attest that neither one knows that such employment has been arranged, directly or indirectly, by the institution's employees, donors, athletic program sponsors or advertisers or other representatives of its athletics interests.
- (9) **Oversight of NIL Eligibility Center.** Develop all policies and procedures for and oversee the operation of the NIL Eligibility Center .

**c. Composition of NIL Commission.** The NIL Commission shall consist of nine members, each of whom shall serve a five-year term. Three members shall be economists with experience and expertise in setting prices based on marketplace benchmarks and shall be appointed by the

American Economics Association. Initially, one shall be appointed for a term of five years, one for a term of four years and one for a term of three years. Three members shall have experience and expertise in employment and sports law; at least two of them shall also have been college athletes, and shall be appointed by the national Sports Lawyers Association. Initially, one shall be appointed for a term of five years, one for a term of four years and one for a term of three years. Three other members shall have experience and expertise in intercollegiate athletics management or higher education administration, and at least two of them shall have also been college athletes. The American Council on Education shall appoint these members. Initially, one shall be appointed for a term of five years, one for a term of four years and one for a term of three years. The term “independent” shall mean at least two years removed from employment by any member institution of a national college sport governing organization member institution, the national-college-sport-governing-organization, the organization itself, one of its member athletic conferences, or the appointing organization, and a promise not to be employed by such entities for five years following service on the Commission.

**d. NIL Eligibility Center.** Operating as the administrative arm of the NIL Commission, the NIL Eligibility Center shall be established to review and approve all non-de minimis athlete endorsement and NIL agreements for compliance with the policies and standards set by the Commission. The NIL Eligibility Center shall perform all Commission-assigned administrative functions including maintenance of a publicly available searchable database containing approved agreements with proprietary content redacted according to policies established by the NIL Commission.

**e. Funding of NIL Commission and NIL Eligibility Center Operations.** The operating budgets of the Commission and the NIL Eligibility Center shall be funded from a small percentage charge against media rights revenues of national collegiate championships, national collegiate sports governance organization fees, and a small percentage charge on the value of each endorsement or NIL agreement, or similar assessments. The percentage shall be established by the NIL Commission, with each year’s operating assessment based on projected service volume and annually adjusted based on an independent audit of the cost of actual services rendered. Annual compensation of commission members should be established by Congress based on compensation consistent with that provided for federal commission members.

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