



## POSITION STATEMENT

### *Collegiate Athlete Compensation Rights Act* Misses Mark on What is Needed to Protect the Independent Publicity Rights of College Athletes <sup>1</sup>

December 21, 2020

The Drake Group<sup>2</sup> reviewed the [\*Collegiate Athlete Compensation Rights Act\*](#) introduced by U.S. Senator Roger Wicker (R)-Mississippi on December 10, 2020. The stated purpose of Senator Wicker's bill is to protect the rights of college athletes, to provide for transparency and accountability with respect to college athlete name, image, and likeness (NIL) agreements, and to establish an independent entity for intercollegiate athletics, and for other purposes. While the bill advances many of these goals, it has many flaws which should be remedied.

**Provisions that Benefit College Athletes.** The Drake Group commends the following elements of the *College Athletes Compensation Rights Act* that advance substantial protections of college athlete NIL rights:

- **Right to Commercially Market Their Own NILs** clearly specifies the right of college athletes to earn compensation from marketing their publicity rights at fair market value (FMV) while they are enrolled in colleges and universities and to retain certified agents to help them do so.
- **Protection from Breach of Agreement Upon Cessation of Participation** allows athletes to rescind NIL agreements with remaining terms of more than one year if they cease intercollegiate athletic participation.
- **Provision of Independent Educational Resources** mandates the operation of an independent entity to provide NIL educational resources.

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<sup>1</sup> Preferred citation: Ridpath, B.D., Zimbalist, A., Lopiano, D., Gurney, G., Gill, E., Idsvoog, K., Lever, K., Porto, B., Sack, A. and Thatcher, S. (2020) The Drake Group Position Statement - *Collegiate Athlete Compensation Rights Act* Misses Mark on What is Needed to Protect the Independent Publicity Rights of College Athletes. December 21, 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.

- **Prohibits Education Institutions or Athletic Associations from Imposing NIL Restrictions** prevents institutions or athletic governance organizations from imposing rules that unduly restrict college athlete NIL activities.
- **Protects the University-Student Relationship** prohibits the institution from paying athletes or their families for publicity rights and specifies that college athletes cannot be considered to be employees.
- **Protects Athletic Scholarships** prohibits revocation of athletics financial aid for reasons related to the college athlete entering into NIL agreements or retaining an agent.
- **Prohibits NIL Agreements as Booster Inducements** continuing the NCAA’s current strong prohibition against extra benefits as recruiting inducements.
- **Provides for an Independent Third-Party Oversight** including comprehensive details about how a private, independent self-regulatory, nonprofit corporation (Independent Third Party) will carry out the provisions of the bill and develop standards to “maintain fairness and integrity” and regulate agents. Particularly noteworthy is the Commission’s obligation to deal with athlete complaints.
- **Provides for an Athlete Health and Safety Committee** that is responsible for establishing standards for athlete safety and the prevention of athlete abuse.

**Provisions That Require Further Clarification.** The following provisions of the Act require further examination for clarification or to correct important omissions:

- **Compensation from Conferences and Governing Associations.** Although the bill prohibits institutions from directly or indirectly providing NIL compensation to an athlete, it does not address conferences and associations providing NIL compensation, which should also be prohibited.
- **Immediate Access in Addition to Annual Reports.** Although the Act specifies that the third-party entity must publish annual reports that are publicly available, including information that is specific to individual NILs in addition to aggregated data, we believe that NIL information should be publicly available immediately.
- **Independence of the Athlete Health and Safety Committee.** This committee should be fully independent and consist of sports medicine, mental health, and other experts appointed by professional associations with no current affiliation with colleges and universities.
- **Penalties for Act Violations Should Be Specified.** The Act allows the NCAA and conferences to pass rules consistent with proposals in the bill and declare the athlete

ineligible for violations. The Act also allows the oversight NIL Commission to penalize institutions, including by withholding revenue distributions, that are in violation of the Act. Penalties need to be specifically spelled out.

- **Publicity Rights and NIL Contracts Should Be Governed by Existing Law.** The Act should specify that publicity rights should be governed by common law and athletes' NIL agreements should be governed by existing contract law rather than adding more legal layers as this Act proposes.
- **Disclosure of NIL Agreements by the Athlete's Agent.** Although the Act recognizes the responsibility of the athlete's agent to disclose NIL agreements to the third-party administrator, such disclosure should occur prior to payment of the agent for services and the reporting responsibility should revert to the athlete if no agent is involved.

**Major Flaws with the Proposed Legislation.** The Drake Group believes that the following elements of the Act should be reconsidered and revised:

- **Unnecessary Delay of College Athlete Outside Employment.** The Act states that a college athlete must complete and pass 12% of college credits *prior* to having the ability to earn NIL compensation, essentially restricting NIL rights to athletes who are academically successful. The Drake Group believes that there should be no restrictions of college athletes NIL employment that occurs outside the institution at any time. As long as such NIL employment is not an inducement to enroll, a student's employment rights should be unfettered. Thus, the bill's jurisdiction should begin when the student becomes a college athlete either through actual enrollment or execution of a commitment to attend an institution to participate in athletics, whichever occurs first.
- **Educational Materials.** Although the Act requires the independent regulatory agency to provide educational materials about the Act and NIL agreements, we believe the Act should also require the institution to provide educational resources unrelated to the contents of the Act (finance, budget management, entrepreneurship, etc.).
- **Excessive Protection of Institutional Sponsorships.** The Act prohibits third parties from entering into any agreement that conflicts with the institution's contracts, such as sponsorships and apparel agreements, unless the institution agrees, or if the contract "unduly restricts" the athlete. This provision is too restrictive and vague. The conflict protection should only apply to the athlete's participation in official team contests or events during which the athlete is required to honor institutional apparel or similar sponsorship agreements. Otherwise, college athletes should not be prohibited from engaging with third parties in any product category other than those related to gambling, adult entertainment, or those reasonably determined to be inconsistent with the values of the school. Such value category prohibitions should be determined by the independent college athlete regulatory entity rather than the institution.

- **Limit to Institutional Control of Athlete Time Spent on NIL Obligations.** The bill would permit schools to impose “reasonable” limits on the amount of time an athlete spends on NIL deals with no definition of “reasonable.” The Drake Group believes the institution should only have the right to preclude a college athlete from missing mandatory class attendance or examination responsibilities as long as the athlete is academically eligible to compete.
- **Excessive Antitrust Immunity for the NCAA.** The bill’s proposed antitrust exemption for the NCAA is too broad. Any antitrust exemption should be strictly limited to rules necessary for compliance with provisions of the proposed Act and conditioned on the institution complying with limits on excessive spending and the provision of college athlete health and safety protections.
- **Preemption of State Laws.** The Act as written would preempt all existing state laws regarding compensation, publicity rights, employment status, or eligibility for competition, including any NIL regulations. Such preemption is excessively broad. Any federal law should be narrowly limited to NILs, including state competition laws and publicity rights so far as they relate to NILs.
- **A Truly Independent Commission.** The Drake Group agrees that an independent third-party entity is necessary. However, members of the entity should not represent schools and conferences because such ties compromise independence. “Independence” must be specifically defined. The Drake Group recommends that the NIL Commission consist of nine members, each of whom shall serve five-year staggered terms. Three members should be economists with experience and expertise in setting prices based on marketplace benchmarks and should be appointed by the American Economics Association. Three members should have experience and expertise in employment and sports law; at least two of them should also have been college athletes, and should be appointed by the national Sports Lawyers Association. Three other members should have experience and expertise in intercollegiate athletics management or higher education administration, and at least two of them should be former college athletes. The American Council on Education should appoint these members. 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.
- **Separation of Powers between the FTC and the Independent Commission.** Either the independent commission should be given subpoena power to allow complete

investigations with appeals handled by the FTC or the FTC should be used for investigations, given that this agency already possesses this power and expertise regarding unfair and deceptive acts and practices. Investigation, adjudication and appeal processes should be separated.

**An Improved Federal Legislative Solution.** The Drake Group further believes that federal NIL legislation should be imbedded in a more comprehensive bill that conditions receipt of Higher Education Act funding on higher education institutions providing students participating in intercollegiate athletic programs with sufficient health and medical protection, improved educational benefits that lead to better graduation rates, greater freedom of college athletes to attend institutions of their choice, and a stronger athlete voice in the governance organizations that control their athletics experience. Existing restrictions of time spent on athletics-related activities are woefully inadequate and must be reexamined. Greater transparency and annual public reporting of compensation of athletics personnel, as well as detailed information on sources of revenues and expenditures should be required. The Drake Group urges the Senate leaders of the *College Athletes Compensation Rights Act* to join forces with Senate proponents of the [College Athlete Bill of Rights](#) to accomplish such broader purposes.