

COLLEGIATE SPORTS / HIGHER EDUCATION INFORMATION MEMO

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NCAA Issues Additional Guidance On NIL – What Does It Mean For Your Institution?

The NCAA recently issued additional guidance to all member institutions concerning name, image and likeness (NIL) activity through separate communications from the NCAA Division I Council Working Group on NIL and the Vice President of Enforcement. This guidance primarily addresses NIL issues in the recruiting and transfer environments, including the role of NIL entities (e.g., collectives). The NCAA is clarifying and reinforcing its expectation that institutional employees, athletics representatives of the institution (i.e., boosters) and other third parties may not inject NIL into recruiting, particularly as it concerns offering and/or providing NIL deals to athletes in exchange for their enrollment at particular institutions. Schools could be subject to significant penalties if their employees and/or athletics representatives violate these rules.

While some individuals have publicly voiced skepticism of the NCAA's ability to curtail NIL-related violations, this recent guidance, coupled with the NCAA enforcement staff's increased attention to NIL issues, makes clear that the NCAA will pursue investigations of schools whose staff members and/or athletics representatives use NIL opportunities in recruiting.

NIL Collectives and Other Entities Likely to be Considered Boosters Under Bylaw 13.02.15

Bylaw 13.02.15 governs whether an individual and/or entity in the NIL space qualifies as a booster and the NCAA is free to incorporate a wide range of facts and circumstances into its evaluation of booster status.¹ NIL entities that member institutions would not have traditionally viewed as boosters under Bylaw 13.02.15 may be identified as such by the NCAA. This is important because the NCAA can only penalize schools for the actions of their employees and/or athletics representatives. The NCAA's recent guidance regarding NIL entities triggering booster status suggests greater exposure to NIL-related violations for member institutions going forward.

NIL Deals Under Scrutiny

The NIL deals are also garnering significant attention from the NCAA. For example, agreements that restrict when, where or how the athlete must render their services can trigger questions regarding enrollment requirements. Some deals contain equivocal language on the nature of the *quid pro quo* or specify large sums of compensation paid to the athlete compared to the services they are rendering, both of which could implicate Bylaw 12.4.1.² Other important considerations in NIL-related investigations will likely include (i) the timing, nature and frequency of communication between the institutional

¹ **Representative of Athletics Interests.** A "representative of the institution's athletics interests" is an individual, independent agency, corporate entity or other organization who is known (or who should have been known) by a member of the institution's executive or athletics administration to: (a) have participated in or to be a member of an agency or organization promoting the institution's intercollegiate athletics program; (b) have made financial contributions to the athletics department or to an athletics booster organization of that institution; (c) be assisting or to have been requested (by the athletics department staff) to assist in the recruitment of prospective student-athletes; (d) be assisting or to have assisted in providing benefits to enrolled student-athletes or their family members; or (e) have been involved in otherwise promoting the institution's athletics program.

² **Criteria Governing Compensation to Student-Athletes.** Compensation may be paid to a student-athlete: (a) only for work actually performed; and (b) at a rate commensurate with the going rate in that locality for similar services.

employee(s), athlete and NIL entity/athletics representative during the athlete's recruitment/transfer; (ii) the timing with which the athlete's NIL deal was negotiated and executed (i.e., whether it pre-dated the athlete's enrollment at the institution); and (iii) the applicable state NIL law(s).

Institution's Responsibility to Monitor

The NCAA expects all member institutions to monitor their student-athletes' and athletics representatives' NIL activities for compliance with the NIL interim policy and all applicable NCAA rules and guidance. This has placed institutions in difficult and unfamiliar positions when evaluating the permissibility of their athletes' NIL deals, while also respecting the athletes' rights to earn NIL income and observing other governing authorities (e.g., state law). At a minimum, institutions should consider increasing education and monitoring of their employees with respect to interacting with persons and/or organizations operating in the NIL space.

Misconceptions about NCAA Infractions Process

Widespread public commentary and dissemination of inaccurate information regarding the NCAA infractions process, including on the likelihood of the NCAA proving NIL-related violations, has only compounded matters. NCAA investigations are not traditional legal proceedings. If pertinent information is developed during an investigation and that information is obtained pursuant to NCAA bylaws and operating procedures, the NCAA may use it to support an allegation that a violation occurred. In the NIL space specifically, the NCAA is not limited to considering only the terms contained within the four corners of an agreement. The NCAA may cite media reports, social media activity, hearsay statements and circumstantial evidence, as well as make inferences and credibility determinations about gaps in the factual record, when alleging a violation.³ In short, the NCAA has more ability to pursue NIL-related investigations than many in the industry realize.

We are continuing to monitor developments in this important area of intercollegiate athletics and expect that additional guidance (and NIL-related investigations) will be forthcoming. We hope this information will be useful in administering NIL programs and awareness on your campuses. If you have questions regarding NIL or other areas of NCAA compliance, please contact any attorney in Bond's [collegiate sports practice](#).

³ A finding of a violation must meet the standard detailed in Bylaw 19.7.8.3 – **Basis of Decision**, which states: "The hearing panel shall base its decision on information presented to it that it determines to be credible, persuasive and of a kind on which reasonably prudent persons rely in the conduct of serious affairs. The information upon which the panel bases its decision may be information that directly or circumstantially supports the alleged violation."

