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**HIGHWAY TO “NIL” EPISODE 1: NCAA GUIDANCE ON NAME / IMAGE / LIKENESS (NIL)  
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**Cal Stein (00:07):**

Hello, and thank you for joining us on this brand new podcast mini-series that will discuss a very new legal development affecting colleges and universities, particularly those in Division One athletics, but also in all other divisions. Of course, I am talking about name, image and likeness rights of student athletes, or NIL as they are often called.

My name is Cal Stein and I am a litigation partner at Troutman Pepper. This podcast series, which we have titled Highway to NIL, will delve deep into the current NIL rules impacting colleges and universities and their compliance departments. We will begin with three episodes. The first of which will outline current NCAA guidance. The second of which will discuss the myriad state laws. And the third of which will analyze enforcement trends, including taking a look into the future of NIL enforcement and compliance.

Today's episode, the first in our series, is going to begin at the source, the NCAA. My colleague Chris Brolley and I are going to walk through the rules, guidance and guidelines, formal and informal, that have so far been forthcoming from the NCAA related to NIL. But before I go any further, I think some introductions are in order. As I mentioned, my name is Cal Stein and I am a litigation partner at Troutman Pepper. As part of my practice, I have represented colleges and universities for years, including an internal investigations and state and federal enforcement actions and lawsuits. I also advise educational institutions on any number of topics, including recently name, image and likeness questions.

Joining me is my colleague, Chris Brolley. I will let Chris introduce himself, but he and I have been working together to advise schools on NIL issues and have gotten to know each other very well. Chris, as a former collegiate athlete yourself, I know these issues are near and dear to your heart. Why don't you introduce yourself?

**Christopher Brolley (02:01):**

Thanks Cal. As you said, my name is Chris Brolley. I'm a litigation associate in the Philadelphia office with Troutman Pepper and I've also been advising educational institutions and all things NIL. But I think before we go much further into the NIL space, I think it's important to discuss the history of NIL. And that begins with a discussion of the O'Bannon case and the Supreme Court decision in NCAA v. Alston.

If we go back 2009, Ed O'Bannon, a UCLA championship winning player, sued the NCAA, EA Sports and the Collegiate Licensing Company for using his name, image and likeness in a basketball game, where he argued that the NCAA's compensation rules were a violation of antitrust laws. And in 2014, a federal court ruled that the NCAA's model of amateurism, i.e., not paying athletes violated antitrust laws.

Fast forwarding to 2021, the United States Supreme Court in the aforementioned NCAA v. Alston case upheld a district court ruling that the NCAA's rules limiting education-related compensation violated those same antitrust laws. The Supreme Court stated, and I'll quote, "That the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for colleges raised serious questions under the antitrust laws." And under pressure from state legislatures, the NCAA finally allowed its student athletes to benefit from the NIL.

**Cal Stein (03:16):**

Thanks, Chris. I think the historical context of how this area of the law and intercollegiate athletics has developed is really important to our discussion today. So with that, let's do as I said we would and start with the source, the NCAA. What has the NCAA had to say about NIL since the Supreme Court decision you just mentioned? Actually, not all that much, to be honest, but the NCAA has released two formal guidance documents. The first being its interim policy on NIL. And the second being its interim guidance on third party involvement in NIL. We will discuss each individually, starting with the interim policy. That policy went into effect on July 1, 2020. And it will remain in effect until "such time that either federal legislation or new NCAA rules are adopted." So that policy is in fact, the law of the land, at least insofar as the NCAA is concerned.

The purpose of the policy was to protect and enhance student-athlete wellbeing and maintain national standards for recruiting. The NCAA specifically noted that those goals are consistent with its foundational prohibitions on both pay-for-play and impermissible recruiting inducements. We will come back to those dual prohibitions time and again in this podcast. Not only in discussing the NCAA guidance, but also in discussing state laws and especially enforcement. That the NCAA specifically called these prohibitions out in the interim policy is significant. And it underscores how essential the NCAA continues to view those concepts as related to collegiate athletics.

So, now let's talk about the primary rule that the NCAA set forth in this interim policy. Structurally the rule the NCAA announced is framed as a series of exceptions to the historical prohibition that NCAA bylaws have imposed on pay-for-play and improper recruiting inducements. There's that language again. Through the interim policy, the NCAA makes clear that its traditional rules set forth in the bylaws remain in effect, subject to a series of exceptions.

Most notably, for institutions in states that have NIL legislation or executive action with the force of law, if a student athlete or an NCAA institution engages an NIL activity that is protected by that state legislation or order, then the student athlete's eligibility will not be impacted by NCAA bylaws. The NCAA is saying that if the state has a law that permits NIL and that state law trumps NCAA bylaw prohibitions of it, but what about institutions and states without NIL legislation? There, the NCAA interim policy simply says that student athletes eligibility will not be impacted. So, what does it all mean? At bottom, the interim policy permits student athletes to engage in NIL activities and to receive NIL payments, so long as they are not prohibited by state law. So, that is all great. But you may be asking, what did the NCAA interim policy say about enforcement?

What is the NCAA going to do to monitor compliance with these state laws? The answer may surprise you. It's nothing. The interim policy is clear that the NCAA will not monitor for compliance with state laws, but of course, it also says that the NCAA will continue normal regulatory operations. It's not exactly clear what the NCAA means by that. On the one hand, it sounds like the NCAA is largely going to rely on states to monitor compliance with their own laws. But on the other hand, the NCAA is clearly retaining some of its authority in the event it learns of a violation.

More on this in a moment and then later in our episode about enforcement activities. But Chris, before we switch to talk about the other formal NCAA document, I want to pivot from analyzing the interim policy like a lawyer would, and instead provide the listeners with some key takeaways that they should have from the interim policy. So, from a practical perspective, what is one thing schools in particular should take away from the interim policy?

**Christopher Brolley (07:42):**

I think what's important about the interim policy is that the main takeaway is now that there's a clear line of demarcation of responsibilities between the NCAA and member institutions. So for

example, schools must report potential violations of NCAA legislation, pay-for-play or inducement. The ultimate responsibility is on the school to determine certifying the eligibility of that student athlete. And I think something that's very important, what you just touched on, is that the NCAA's national office will not monitor for violations of, or assess compliance with state law or institutional NIL policies. That creates something of a monitoring gap, and as a result an individual school should consider the extent to which it wants to be proactive in protecting itself and/or mitigating enforcement risk by monitoring for this compliance itself.

**Cal Stein (08:29):**

And the other practical takeaway for me has to do with what you were just talking about, which is enforcement, which I mentioned briefly earlier. Based on the interim policy, it seems that if the NCAA becomes aware of a potential violation that is related to pay-for-play or inducement, they will likely act according to current legislation and their enforcement policies. But how the NCAA might become aware of such a violation if it's not actively monitoring compliance with state laws, is another question altogether. And one that I suspect is going to develop over time. Although there have not been any formal enforcement actions as of yet, there have been some rumblings of some. It's extremely likely that there will be soon, either by the NCAA, by state enforcement agencies, perhaps even a state attorney general or some combination thereof.

And as I noted, we're going to discuss this in greater detail in episode three of this podcast series. So with that, let's talk about the second formal NCAA guidance document. Chris, will you take us through the subsequent guidance on third party involvement in NIL?

**Christopher Brolley (09:37):**

I think this is interesting as well, given the rise of boosters and collectives that we've seen in the last couple months. Because of the rise of the third parties in the NIL space, the NCAA, in May of this year, released new guidance regarding third party involvement in NIL activities. This guidance focuses specifically on NCAA legislation, as it applies to interim NIL policies and boosters, which includes, as I mentioned, NIL collectives or third party entities consisting of individuals who work to funnel NIL opportunities as student athletes. Collectives and boosters are being used interchangeably these days, but they're essentially the same thing. What this new guidance does, is it clarifies that boosters and NIL collectives are still prohibited from engaging recruiting activities on behalf of a school and are also prohibited from providing benefits to prospective student athletes.

The new guidance effectively puts NIL collectives on notice that they may be classified as boosters and subject to NCAA's rules against improper recruiting, inducements and pay-for-play. The new guidance reinforces the fact that boosters cannot take part in any recruiting activities on behalf of the school and that boosters cannot provide benefits to prospective student athletes and institutional staff members cannot be "involved directly or indirectly with the provision of benefits to prospective student athletes." What this new guidance does, it discusses specifically prospective student athletes and current student athletes and offers guidance to both of those classifications of student athletes. So Cal, if you want to take a shot at explaining the prospective student athletes portion.

**Cal Stein (11:04):**

First and foremost, this guidance document makes clear that recruiting conversations between boosters and prospective athletes are prohibited. Boosters may not communicate with a prospective athlete, his or her family, or really anyone else affiliated with the prospective student

athlete for a recruiting purpose, or to encourage the prospective student athlete's enrollment at a particular institution. This prohibition is also extended to institutional coaches and staff who may not communicate directly or indirectly with a prospective student athlete on behalf of a booster.

None of this is all that groundbreaking, but the guidance continues and addresses some specifics regarding NIL agreements. That an NIL agreement between a prospective student athlete and a booster cannot be guaranteed or promised contingent on enrollment or continued enrollment at a particular school. Specifically, the guidance states, "NIL agreements must be based on an independent case by case analysis of the value each athlete brings to an NIL agreement as opposed to providing compensation or incentives for enrollment decisions, athletic performance, achievement, or membership on a team." Of course, prospective student athletes are only half of the equation and you mentioned the other half, Chris. Do you want to talk about what this guidance says about current student athletes?

**Christopher Brolley (12:37):**

Current student athletes are basically subjected to the same regulations that prospective student athletes are. The NIL agreement between student athlete and a booster "may not be guaranteed or promise contingent on initial or continuing enrollment at a particular institution." It's the same for prospective student athletes as it would be for current student athletes. Whereas NIL agreements also must be based on independent case by case analysis of the value each athlete brings to an NIL agreement. Almost identical.

**Cal Stein (13:03):**

Those are the two formal guidance documents that the NCAA has released on NIL to date. But we want to address one more NCAA-type issue in today's episode, if only because it is something that schools have asked us about more than once already. And that is how to consider and analyze NIL deals for international students. Now, this is not directly addressed in either of the two guidance documents we just mentioned, but it is an NCAA issue. And it is one that schools are clearly concerned about. And for good reason. Approximately 12% of collegiate athletes in the U.S. are from a foreign country. That's over 3,000 athletes in Division One alone. By not addressing this issue directly in any of its guidance, the NCAA seems content to defer this issue to the immigration rules that are already in place.

The majority of the foreign athletes that I just mentioned are in school in the United States pursuant to an F1 visa. F1 visas prohibit students from working off campus except in rare, authorized exceptions. And even on campus work is limited to 20 hours per week or full time during the summer and break. So, on its face these F1 visas present some real challenges to both schools and student athletes in this new NIL era. Chris, can you talk about some of the strategies we have seen and talked about for schools to address this issue?

**Christopher Brolley (14:39):**

Some schools are choosing to take a more cautious approach, to NIL opportunities for international students, with some choosing to go so far as to advise international students that they are best served to avoid these NIL opportunities. Because if a school finds out that one of their international student athletes has been making money off NIL, under certain circumstances the school may be legally obligated to terminate their visa, and of course they wouldn't want that to happen. So, some international student athletes on F1 visas have been finding creative workarounds to this issue, essentially signing or performing their NIL deals out of country. For example, if a student athlete gets a NIL deal in, let's say Hungary, does the work in that country,

and is paid outside of the United States, then that probably wouldn't be an issue. Again, there's not much guidance on this and it's usually deferred to the institutions. Another example is if a student athlete signs a passive NIL deal, this may be okay if they sign the document in their home country. For example, some Canadian athletes have traveled back to Canada, post on their social media as to not violate U.S. visa laws. So, it's an interesting area, but not one that has been addressed by the NCAA guidelines.

**Cal Stein (15:46):**

This is a very real risk for schools and a very real risk for a large number of collegiate athletes. For one, businesses may not want to take risks with international students, as you mentioned, Chris, for fear of a reputational hit, if there is a violation that is found to have occurred.

One example, there has already been one story involving a Division One basketball player from Ireland. He signed an NIL deal with a company in the United Kingdom, and there's absolutely nothing wrong with that, but some have questioned, pretty loudly, whether it's a violation because he is posting on social media in the United States. And while there hasn't been any final decision on that, the mere fact that it is being discussed as a potential violation, certainly raises the risk profile, particularly for other businesses that may be contemplating entering into NIL deals with other international students. This is certainly a topic that will continue to develop and one that we will be monitoring as it goes forward.

And with that, I think we are out of time for today's episode. Chris and I want to thank you for joining us on this podcast and I also want to thank everyone for listening. I hope you'll join us for our next regularly scheduled installment, in which we'll be discussing state legislation related to NIL. If you have any thoughts or any comments about this series, I invite you to contact me directly at [callan.stein@troutman.com](mailto:callan.stein@troutman.com) or Chris directly at [christopher.brolley@troutman.com](mailto:christopher.brolley@troutman.com). You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.

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