
***Highway to NIL* Podcast – S01 Ep04, NCAA Issues New Clarifications to Its Interim NIL Policy**
Recorded October 2022

Cal Stein:

Hello, and welcome back for a brand new episode of *Highway to NIL*, the podcast series that discusses legal developments in the name, image and likeness, or NIL space. NIL, of course, affects colleges and universities all over the country, particularly those in Division I athletics. And in this podcast series, we delve deep into the current NIL rules impacting colleges and universities and their compliance departments. My name is Cal Stein and I am a litigation partner at Troutman Pepper. I come to you today, with two of my colleagues to discuss some critical new guidance recently released by the NCAA Division I Board of Directors that concerns institutional involvement in the NIL activity of their enrolled student athletes. There are many reasons why this new guidance is so important and we are going to get to all of them here today.

But before we do, I do think some introductions are in order. As I mentioned, my name is Cal Stein and I'm a litigation partner at Troutman Pepper. As part of my practice, I represent colleges and universities, including in internal investigations and state and federal enforcement actions and lawsuits. I also advise educational institutions on any number of topics, including most recently name, image, and likeness questions. Joining me today, are two colleagues. The first, Chris Brolley, is known to *Highway to NIL* listeners from prior episodes. Chris, why don't you go ahead and introduce yourself.

Christopher Brolley:

Thanks, Cal. As you said, my name is Chris Brolley and I'm a health sciences litigation associate in Troutman Peppers, Philadelphia office. Along with my work doing products liability defense, I've been advising educational institutions as it relates to NIL for the better part of a year now. And like you said, I'd like to welcome a new addition to our team, Mia Marko.

Mia Marko:

Thanks, Cal and Chris. My name is Mia Marko and I am an associate in the Philadelphia office in the firm's business litigation group. A large part of my practice is in the higher education space and involves providing litigation, counseling and investigative services to colleges and universities. And more recently, it has involved advising colleges and universities on these NIL issues we are discussing today.

Cal Stein:

Great. Welcome Mia, and welcome back, Chris. So, we've got a lot to cover today and I want to get right into the guidance, which of course is effective immediately. And I should probably stop myself right here because I have already a couple of times used the word new, to describe this guidance. And while I do believe that the guidance is new, the NCAA Division I board of directors actually characterizes it slightly differently. They call it a clarification of the existing

NCAA legislation and interim policies on NIL, and whether or not it really is a clarification or if it's new, is not material.

What is important though is that in this guidance, the NCAA is signaling that it's confirmatory. It's more confirming than anything else. It's confirming the existing policies and the existing interim guidance that it has set out in their prior guidance documents. And by issuing this clarification, the NCAA seems to want institutions and their compliance departments to know what its views are on the existing policies and what those policies do and do not permit. The NCAA references in this new clarifying guidance, as we will call it, all of the key principles and concepts that have characterized its NIL policies to date, things like fairness, integrity, avoidance of pay for play.

This is why we believe a clarifying guidance is focused on the NIL activity of enrolled students. That area is murkier under the existing NCAA policies, thus leading the NCAA to issue this clarification. This context is important and it's important to understand it as we go through the clarifying guidance, especially because it is framed as a set of examples of institutional conduct that is permitted or is not permitted. Though the NCAA does not provide an exhaustive list in this clarifying guidance, it is clear that the conduct must be viewed within the context of its overall NIL policies. So, with that context in place, let's get into the clarifying guidance, which begins by referencing several NCAA bylaws, specifically section 11.1.3, which prohibits athletic department staff members from representing student athletes in marketing their athletic ability or reputation. Section 12.1.2, which prohibits student athletes from using their athletic skills for pay.

Section 12.5.1.1, which prohibits institutions from compensating student athletes in exchange for using their NIL and section 16.2.3, which prohibits generally institutional staff from providing student athletes with special arrangements or benefits. Though it also does reference section 16.3, which provides a limited exception. The references to these bylaws are important because they make clear they are still applicable, especially for institutions in states without state NIL legislation. But after this discussion of the bylaws, the new clarifying guidance gets into the meat of what the NCAA is providing to institutions here, which it breaks down into four sections of what amounts to four lists of dos and don'ts. The first section is titled Institutional Education and Monitoring. This provides a list of educational sessions related to NIL that are permissible for an institution to provide. This includes topics like financial literacy, taxes, collectives, sessions for boosters and the like.

We're not going to spend a lot of time on this section today because as one would expect, the guidance permits institutions to offer all of these educational sessions. The second section is titled Institutional Support for Student-Athlete NIL Activity. This is in many ways the most critical section as it addresses how an institution may and may not support its own athletes NIL activities. This goes directly to the heart of the institution student relationship, so we are going to spend a lot of time on this section. The third section is titled Institutional Support for NIL Entity or Collective. This is also very important because it addresses permissible and impermissible institutional conduct in dealing with NIL entities and collectives. These, of course, are mostly new entities and new relationships born out of the recent NIL policies. So, this is some of the first and most important guidance we have on how institutions should and can deal with those entities.

The final section is titled Negotiation Revenue Sharing and Compensating. This section only provides impermissible activities and illustrates the strong NCAA policy against institutions and

athletic departments financially tying themselves to and benefiting from student athlete NIL activities. So now that we know the structure of the clarifying guidance, let's get into the specific sections I just mentioned. As I said, we are largely going to skip the Educational and Monitoring section and get right to the examples of the dos and don'ts the NCAA provides, starting with Institutional Support for Student-Athlete NIL Activity. In this section, we see two major categories of conduct. The first is institutional facilitation of NIL opportunities for its student athletes, and the second is institutional assistance to its student athletes for their NIL activities. Let's start with institutional facilitation. We're going to go through the specific examples of permissible and impermissible conduct in a moment, but I do want to start our discussion here by focusing on what we have identified as the key concept that comes out of the examples the NCAA provided.

And that concept is that the level of involvement of the institution in the NIL activity is the most important factor to determining whether it will be permissible or not. In reviewing this guidance, I think the best way to think about and interpret the examples that the NCAA provides is that activities by an institution that constitute true facilitation of NIL for its students is permitted. But where institutions will run into trouble, is when they go beyond facilitation and get more involved in a role akin to something like representation. Now, Chris, we talked about this concept of facilitation versus representation when this guidance came out. Can you take us through the examples the NCAA provides, which led us to this conclusion?

Christopher Brolley:

We did discuss this, and I'd like to touch on something that you mentioned earlier in this conversation, that the NCAA is putting out clarifying guidance. So, this is essentially the first time that we're getting concrete examples of what the NCAA will be looking for. And so, some examples of permissible activity by the institution include, as you said, a true facilitation and exchange of information. So, informing a student athlete of NIL opportunities, providing information to student athletes about opportunities that the institution has become aware of. So merely transmitting information without further involvement in the specific NIL opportunity, which I think is key.

Another example is providing contact information and other directory information to NIL entity or collective seeking to engage the student athlete. Or introducing a student athlete to representative of an NIL entity or collective and arranging space for NIL entity or collective and student athlete to meet on campus or the institution's facilities, for example, classroom or an office. Again, key is that the institution goes no further than arranging the space. And finally, administering a marketplace that matches student athletes with NIL opportunities again without institutional involvement. For example, an online marketplace that connects the student athletes with local, national, and global businesses interested in partnering on NIL opportunities, as long as the institution is not involved in the negotiations.

Cal Stein:

Thanks, Chris. Let's pivot now to the second category in this section that I mentioned, which is Institutional Assistance to Student Athletes to Support their NIL Activities. And again, I want to start with the same key concept, the level of the assistance being provided matters. Like with institutional facilitation, the level of assistance seems to be the pivot point as to what is permissible and what is not permissible. In doing so, the NCAA seems to be trying to draw

lines, at least in part, to prevent institutions from giving student athletes special treatment, *i.e.*, being treated more favorably than other students or the public at large. Or trying to prevent them from providing student athletes with special benefits, benefits that non-athletes students don't get. Again, this is the conclusion we reached by looking at the examples the NCAA provided, both of the permissible conduct and the impermissible conduct. Mia, I want to start with the permissible conduct examples. Can you take us through those?

Mia Marko:

As you mentioned, the new NCAA guidance provides us with examples of permissible institutional assistance provided to student athletes. To be considered permissible, we've broken this down into two categories. One is the assistance must be *de minimus* in terms of the cost to the institution, or two, it must be equivalent to that which the institution provides to the general public. So, for the first type of permissible assistance or *de minimus* assistance, the new guidance provides us with some examples. One is that the institution may provide stock, stored photos, videos, or other graphics to a student athlete or an NIL collective. For example, the institution can provide a student athlete with a copy of their headshot or can provide a stock image of the school's logo. This type of assistance is *de minimus*, because institutions already own these photos or videos and can provide them at little to no cost to the student athlete.

Another example is that the institution may promote a student athlete's NIL activity such as retweeting or liking a student's social media post. Again, this is considered *de minimus* provided there is no value or cost to the institution associated with the social media activity. For the second type of permissible assistance, which we think about in terms of fair market value, the new guidance also provides us with some examples. One is that the institution may promote a student athlete's NIL activity on a paid platform, so long as the student athlete or the NIL collective pay fair market value for the services. For example, an institution may promote a product the student athlete is endorsing on a scoreboard during a game, but only if that student athlete pays the fair market value. The restriction appears intended to prevent institutions from inducing student athletes by offering steep advertising discounts, not dictated by the market.

And finally, a third example is that the institution may purchase items related to the student athletes, NIL deal like athletic apparel or other types of goods or products, so long as they are purchased at the same rate as the general public. For example, if the student athlete has a deal with a clothing company, the school can purchase gear from that clothing company as long as it purchases it at the fair market value and not more. Again, the emphasis is on the fair market value of the goods to avoid any appearance of improper inducement or pay for play by the institution.

Cal Stein:

Thanks, Mia. The conduct that the NCAA is deeming permissible in this new clarifying guidance really does seem to line up with the concept I mentioned earlier about the level of assistance mattering. The impermissible examples the NCAA provides does as well, at least in my view. Chris, can you take us through those?

Christopher Brolley:

Yeah, and I think the important thing to look at for these examples that the NCAA has provided is whether the benefit is also available to the non-student athlete. So, some examples that the NCAA has provided in this clarified guidance include proactively assisting, developing, or creating a student athlete's NIL activity. For example, developing a product, developing promotional materials, or ensuring the student athlete performs or contractual duties unless the same benefit is available to the institution's students, and that's key. Another example that they provided is providing services to support NIL activity. So, tax preparation or contract review unless the same benefit is available to the institution students and also providing access to equipment to support NIL activity, cameras, or computers, unless the same benefit is available to the institution's students. The NCAA's language regarding impermissible involvement by the institution focuses primarily on preferential treatment for certain services, not otherwise available to a non-student athlete.

Cal Stein:

Thanks, Chris, and thanks, Mia. Let's shift now to the other big section of the guidance, the one that focuses on institutional support, not for the students, but for the NIL entities and the collectives. As I said earlier, this guidance is really particularly important because the entities and collectives are new, so an institution's relationship with them are new. Indeed, these relationships have generated a lot of the questions, A lot of the NIL compliance questions that we have been fielding from educational institutions to date. In a word, the NCAA guidance here seems to be all about the money, which really isn't all that surprising. This section though, it covers different conduct and relationships, does follow a similar pattern to the one we just discussed that governs institutional support for its athletes.

By that I mean, once again, in drawing lines between what it deems permissible and what it deems impermissible, the level of involvement by the institution seems to really matter or put in different terms since we're following the money here. The permissible impermissible line seems to be turning very frequently on whether the institution is merely facilitating support for NIL entities and collectives, which may be okay, or whether the institution is contributing to them itself, which may not be okay. So, let's first talk about facilitation of contributions to NIL entities and collectives, which this new clarifying guidance says is largely permissible. Mia, talk to us a bit about the examples the NCAA gives here and what institutions can glean from them.

Mia Marko:

As you mentioned, the new guidance provides us with examples of how institutional staff may support NIL entities and collectives in certain ways. For example, one way that they may do so is that a staff member may assist an NIL collective in raising money for an NIL entity. The guidance tells us that this can be done by staff members appearing of fundraisers or by donating an autographed item to a fundraiser. Another way that institutional staff may support NIL entities and collectives is that they are permitted to request that a donor provides funds to NIL entity generally, but the staff may not direct funds to be used for a specific sport or for a specific student athlete. And finally, institutional staff may support NIL entities and collectives by providing donor information to an NIL entity or collective, or by facilitating meetings between donors and NIL entities and collectives. As you can see, these three examples fit within the framework of supporting or facilitating support for NIL entities and collectives without

crossing into impermissible inducement or pay for play, because they require a little to no cost or expense to the institution.

Cal Stein:

Thanks, Mia. Those are really helpful and good examples I think, of the facilitation side of things, facilitating contributions rather than making them yourself. Now, let's do the flip side, Chris. What about the examples the NCAA provides of impermissible activities that largely focus on institutions themselves making contributions to NIL entities and collectives either directly or indirectly?

Christopher Brolley:

The NCAA has made a couple bullet points for impermissible activities. So, for instance, institutions cannot make direct contributions, donate cash, or have staff members employed by the NIL entity or collective. These institutions as the NCAA says, also cannot make indirect contributions, for example, provide things of value to others, usually institutional donors, to incentivize them to donate to the NIL entity and or collective. However, the NCAA, under its permissible list allows institutions to provide non-cash assets to the NIL entity or collective, so long as they're available to and on the same terms as other sponsors. So, for example, tickets or suite.

Cal Stein:

I think this is a great example of how both sides, again, the permissible conduct and the impermissible conduct support this notion that involvement and the level of involvement matters. Okay, those two sections, at least in our view, are the two most important sections of this new clarifying guidance. But that doesn't mean the others aren't. And I do want to briefly touch upon the fourth and final section, which addresses negotiations, revenue sharing, and compensation. The most important thing in this section, again, in our opinion, is that the NCAA has only provided examples of impermissible activities. To me, that speaks volumes. This section identifies the following examples of conduct that are impermissible, athletic department staff or third parties acting on behalf of athletic departments representing student athletes and NIL deals, institutions contracting with student athletes to sell products related to their NIL deals. Conferences and student athletes sharing broadcasting and NIL revenue. Institutional staff members providing NIL deals to student athletes through side businesses they own.

Institution coaches, compensating student athletes to promote the coaches' camps and student athletes receiving compensation for promoting athletic events in which they participate. All of these things are impermissible according to the new clarifying guidance. So, what's the common thread connecting all of these impermissible activities? Well, all of the scenarios, the NCAA identifies as impermissible, would financially tie together an institution or one of its staff members and a student athlete. The NCAA seems concerned that such relationships could present problems. And so, appears to be sending a message that these relationships will be deemed impermissible. In this sense, I found it meaningful that the NCAA does not identify a single revenue or compensation sharing type relationship that it believes would be permissible. Institutions and compliance departments should really take note of these relationships and pay extra attention to them going forward.

So, with that, we are approaching the end of this podcast. The clarifying guidance is very substantive, as you have heard with lots of information. Rather than recap it, what I want to do is I want to go around the horn here and have each of the people on the panel offer some key takeaways that we think institutions or athletic departments or compliance personnel should have after reading the new clarifying guidance and listening to this podcast. So, Chris, why don't you start us off? What is a key takeaway or two from your perspective?

Christopher Brolley:

Thanks, Cal. I think regarding enforcement, the guidance focuses on the institution and not the student athletes. We've discussed this in one of our previous episodes, but this new clarifying guidance confirms what the NCAA has already said. Any enforcement will be focused on the schools, not the student athletes, and I think that's worth repeating. Any enforcement will be focused on the schools and not the student athletes. However, these clarifying guidelines along with the guidelines introduced since the NCAA enacted its NIL laws in 2021, are essentially meaningless without any enforcement, and we have yet to see any enforcement from the NCAA or state regulators.

Cal Stein:

Thanks, Chris. Mia, how about you? What's the takeaway or two from your perspective?

Mia Marko:

Piggybacking off of Chris's enforcement takeaway, I think one thing that struck me about this new guidance is that we're finally seeing the NCAA moving away from the theoretical and into the more concrete. We now have helpful guidance on specific activities that institutions can and cannot do. But this may indicate that enforcement is ramping up, particularly because the new guidance is effective immediately, and it even addresses violations that occurred prior to the publication date of the guidance. Although the NCAA explained that enforcement of these older violations would be for the most severe pay for play examples. In fact, according to posts on various job application websites, about a month ago, the NCAA posted a job for an NIL rule violation investigator. So, this leads us to believe that institutions should be prepared to see enforcement actions in the future.

Cal Stein:

You guys are both quite right. We haven't had enforcement yet, but we know it's coming. And this type of clarifying guidance signals or at least suggests to me that it may be coming sooner than we think. And my key takeaways focus on that as well. We really don't know what enforcement is going to look like just yet, because there hasn't been, and we don't know what types of violations the NCAA is going to focus on. And more importantly, we don't really know how it is going to go about proving the element of an inducement. My hypothesis has long been that the NCAA is going to try to prove inducements the way other law enforcement and regulators have tried to do so in other areas of the law that forbid inducements. Where they have succeeded is mainly by relying on circumstantial evidence, circumstances that seem suspicious and suggest an inducement even if there is no direct evidence of one.

My big takeaway from this clarifying guidance is that it supports that hypothesis. Some of the examples it provides embrace concepts that have long been used by regulators and prosecutors in those other areas as circumstantial evidence of an inducement. For example, in this guidance, the NCAA permits institutions to promote a student athlete's NIL activity, but only if the athlete or the entity pays the quote going rate. This concept is lifted almost identically from a federal statute that prohibits payments to induce doctors and other medical professionals called the Anti-Kickback Statute. There, payments that are made must be 'fair market' value just as the payments the NCAA deems permissible here must be the 'going rate.' Those are equivalents. There are many more examples and we are going to be back with more content that focuses on this aspect of NIL enforcement. So, keep an eye out for that.

The other key takeaway I have is one I just alluded to a moment ago, which is that enforcement is coming. You heard it from Chris, you heard it from Mia. We don't know when, but this type of guidance where the NCAA is finally giving concrete examples of permissible and impermissible conduct and being clear that it is not an exhaustive list of those things, appears to me to be a clear precursor to investigations and enforcement action. Institutions should take note, athletic departments should take note and compliance professionals should take note. Enforcement is coming and all should be sure to have their house in order before it does. There are concrete steps that schools can and should take right now before an investigation is opened to mitigate their risk.

And with that, we now are out of time here today, so I want to bring this discussion to a conclusion. I really want to thank Chris and Mia for joining me on this podcast. I also want to thank everyone for listening. If you have any thoughts or any comments about this series or about this episode, I invite you to contact me directly at callen.stein@troutman.com. And you can also reach Chris at christopher.brolley@troutman.com and Mia at mia.marko@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.

Copyright, Troutman Pepper Hamilton Sanders LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman Pepper does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper. If you have any questions, please contact us at troutman.com.