
**HIGHWAY TO NIL PODCAST - S02E05: NEW NCAA NIL GUIDANCE MEMORANDUM
RECORDED 06/28/23**

Cal Stein:

Hello and welcome back to *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, especially those that participate in division one athletics. In this podcast series, we dive deep into the current NIL rules impacting colleges and universities and their compliance departments. Today we are here with another emergency podcast of sorts, as just yesterday Sports Illustrated reported on a new guidance memorandum that was issued by the NCAA about certain NIL activities, and we've been waiting for some time now for NIL guidance. So now that we have it, we wanted to bring it to you and our thoughts as quickly as possible, especially because this is the first known guidance to come from the NCAA during new president Charlie Baker's tenure. Baker, of course, being someone we discussed at length during our last episode.

But before we get to the new guidance, let's quickly do some introductions. My name is Cal Stein. I'm a litigation partner at Troutman Pepper. And as part of my practice, I do represent colleges and universities in internal investigations and other enforcement actions and lawsuits. And I also advise educational institutions on a number of topics, including most recently NIL. I am here today with two of my colleagues, Chris Brolley and Brett Broczkowski. I will let them both introduce themselves. Chris, why don't you go first?

Chris Brolley:

Thanks. It's good to be back. And like you said, my name is Chris Brolley. I'm a litigation associate in our firm's Philadelphia office. I also focus my practice on counseling and advising higher education institutions on compliance strategies relating to name, image and likeness.

Brett Broczkowski:

Hi, thanks guys. I'm Brett Broczkowski, also a litigation associate working out of the Philadelphia office. I, like Chris, also focus part of my practice on advising institutions of higher education on all things NIL.

Cal Stein:

Thanks Chris. Thanks Brett. Let's get right in and start our discussion here because I know we're all really eager to get into the details of the new NCAA NIL guidance memo, but let me set the stage a little first, the memo takes the form of six questions and then six answers. The questions focus on specific NIL activities and much like the guidance the NCAA issued back in October of last year, the NCAA answers the questions it poses directly indicating explicitly what NIL activities are, and as is particularly the case here, are not permitted. Interestingly and notably, as we will discuss throughout the podcast today, this memo comes after some very interesting changes to state laws across the country had been enacted or proposed. Our NIL team at Troutman Pepper, of course, carefully tracks all state NIL laws in our state law tracker.

So these were developments we were watching carefully. Whether there's any connection between those laws. And the new guidance is known of course only to the NCAA, but I think we'll do a fair bit of

dot connecting on that topic here today. So without further ado, let's go through each of the six questions and answers and talk about what the NCAA said, why we think they said it, and what this may mean for college sports.

And let's start with the first question. Question one, after reiterating that an institution may not compensate a student athlete for use of their NIL, which is something we've known for some time, the NCAA posed the question of whether an entity that is closely associated with the institution may do so. The NCAA then answered that question with a resounding no. The NCAA made clear that any entity that is so closely aligned with an institution so as to be viewed as an extension of the university is subject to the same NIL scrutiny as the institution. And this guidance applies regardless of the entity status, even if it's a separate 501(c)(3) entity. Now Chris, this guidance seems particularly relevant in light of the recent passage of one state law, does it not?

Chris Brolley:

I think it's extremely relevant and likely not coincidental. As you mentioned, Texas recently passed an amendment to its NIL law in part permitting 501(c)(3)'s to compensate student athletes for the use of their NIL. Specifically under this new Texas law, Texas A&M, which as we've discussed at length in previous episodes, played a large part orchestrating this lost passage is effectively using its athletics department's fundraising arm, known as 12th Man + Fund, to compensate student athletes for the use of their NIL. Again, not coincidental, this law goes into effect in a few days, actually on July 1st, 2023, so it actually remains to be seen how the NCAA's recent memo impacts the school's decision to use its fundraising arm to solicit NIL contributions.

Brett Broczkowski:

Yeah, I agree, Chris, and in fact, this is an issue that you've both discussed before on *Highway To NIL*, that of schools trying to bring NIL in-house, including by using existing university fundraising arms as a collective or NIL entity. You've previously commented that the NCAA had not taken a firm position on this, but that would seem to have changed now with this guidance. The other thing I found interesting and what I think institutions may find frustrating is the manner in which the NCAA describes these closely associated entities. Unlike other areas of this policy. As we'll see later in this podcast, the NCAA does not draw a clear bright line. Instead, it leaves plenty of wiggle room on the question of which entities may deem closely aligned with the institution and those it may not. So it will be interesting to observe whether institutions will try to find ways of maintaining an appearance of arms length dealing between it and its fundraising arm as a way of circumventing the prohibition.

Cal Stein:

I agree with all that's been said. We've speculated a little bit that the NCAA would provide guidance like this, particularly with respect to existing fundraising arms of universities. This seems to be the guidance we all were expecting, but I do wonder if this is the last we will hear about this. We've wondered out loud whether there could be some real benefits to schools being permitted to bring NIL in-house at least a little bit. This would seem to go in the other direction, but perhaps to be revisited another day.

Okay, let's go to question two in this new guidance. The next question that the NCAA posed was whether boosters or collectives were permitted to have contact with prospective student athletes or PSAs as they're referred to, and whether those discussions can discuss potential NIL activities. And again, the NCAA responded explicitly in the negative. It reiterated that neither a booster nor a collective

may engage in any sort of recruiting activities, including recruiting conversations. In other words, the NCAA made clear that boosters and collectives may not encourage a prospective student athlete to attend a particular institution. Now, to me, there's absolutely nothing surprising about this answer. The NCAA has long been focused on preventing schools from using NIL opportunities to induce student athletes to enroll there. And this total prohibition, seems to me, to be in line with that. What do you think, Chris?

Chris Brolley:

Yeah, I'm actually quite confused as to why this is even added to the Q&A. I think this may be something that we're going to talk about when we go to question three, four, or five. This is longstanding been a prohibition ever since the October 2022 guidance document. I would even say that it's been a prohibition since the start of NIL in 2021. Boosters, collectives may not have contact with prospective student athletes and engage in recruiting activities. This, like you said, is nothing new. I think it also follows comments that we have seen coming from the NCAA's Enforcement Division regarding the potential punishment of collectors and boosters and not just institutions.

Brett Broczkowski:

And the one thing I'll note that I found interesting about this prohibition is that it's worded in a way that covers all prospective student athletes and that includes both high school athletes who have not yet matriculated to any higher education institution, but it also includes athletes who are already in college but considering transferring to another institution. I also share in the sentiment that this is not at all surprising. We've speculated on the podcast that NIL enforcement would focus on the transfer portal, but it does very much confirm some of the things we've thought and said about NCAA enforcement priorities.

Cal Stein:

Alright well let's move on then to question three where the NCAA posed a question of whether it would be permissible for institutions to provide benefits to boosters in return for the booster donating funds to a collective. Again, we've got an explicit and categorical answer from the NCAA saying institutions may not do this, in particular, institutions may not provide any assets, the NCAA said, be it tickets, suites to a game club seating, things like that to any donors to incentivize that donor to provide funds to an NIL entity. And once again, this is not all that surprising to me. However, and interestingly I think, this guidance also seems to pertain to the recently passed Texas NIL amendment. Chris, do you want to explain that?

Chris Brolley:

Yeah, we're again, going back to Texas. To me this is in direct response to the Texas law and possibly in response to the University of Texas where it's official fundraising arm, the Longhorn Foundation, has established a point system for priority tickets to donors based on how much they contribute to the Texas One Fund collective. And as you've said, this is a big no-no, it's a prohibition. The NCAA's latest guidance, the memo that just came out, essentially conflicts with Texas carve out along with other states that have followed suit.

Brett Broczkowski:

Yeah, I agree with you Chris, and again, what strikes me about this guidance in particular, this provision is how absolute it is. There is no wiggle room here. The Texas carve out had language involving de minimis passing of value. There's no room for that here. It would seem that rather than try to examine these cases on a case-by-case basis, or interpret intent on a case-by-case basis, the NCAA is at least looking to create some bright line rules.

Cal Stein:

Yeah, that's a good point, Brett. I can't help but think a little bit about somewhat Charlie Baker's comments about transparency and consistency across NIL activities that we discussed on our last podcast. One way to accomplish transparency and consistency is through these types of bright line rules. It isn't the only way to do it, but it is arguably one way. So I found that very interesting. Okay, let's move along to the fourth question. That question involved whether an individual may condition payment of NIL compensation on a student athlete's attendance at a particular school. Here we go again, the answer to me, very obvious, the NCAA clarified to the extent there needed to be any clarification, that an individual may not place such conditions on NIL compensation. Again, this is a position the NCAA has taken since the outset of NIL, and this really coincides directly with the NCAA's prohibition against use of NIL compensation as an inducement to enroll or otherwise remain at an institution. I don't think there's much more to say about this one. Chris, what have you got?

Chris Brolley:

Again, I'm surprised it even needs to be clarified. As we've discussed ad nauseum conditioning a student athlete's NIL money on attendance at a particular school has always been the clearest example of an inducement and has been addressed in almost every guidance document since NIL's inception, 2021. I do however, wonder if the NCAA may be giving its member institutions and boosters and collectives one final warning before it decides to hand down some punishments.

Cal Stein:

Yeah, that's an interesting point. What could possibly have happened behind the scenes to make the NCAA feel that it had to clarify this position? I really wonder about that. And you might be onto something, time will of course, tell. Okay, let's flip to question five now. In question five, after reiterating the clear prohibition on compensating a student athlete for participating in or promoting a competition, which again, we saw in that October 2022 guidance, the NCAA posed the question of whether an event sponsor of a tournament or something, for example, could pay a collective, which in turn would then compensate the student athlete. And this is a more interesting question, but again, the answer from the NCAA is a clear no. Student athletes cannot be paid directly or indirectly for participating in or promoting any athletic competition. So the NCAA made it clear that event operators, event sponsors, and even opponents can't get around that rule by paying an NIL entity for the participation and then having the money flow down to the student athletes from there. Brett, what struck you about this?

Brett Broczkowski:

I think this is much of a reiteration that institutions may not directly or indirectly, as this hypothetical paints, provide compensation or a share of revenue to student athletes for their participation in athletic competition. The NCAA also pointed out that athletic department staff may not serve as a

representative for student athletes for NIL deals. And this is something that was included in the NCAA October 2022 guidance, which included specific examples for institutions of the NIL do's and don'ts.

Cal Stein:

Yeah, it's a good point and a good reminder. I think that all of these things that cannot be accomplished directly, sure starting to look like the NCAA is not going to look too kindly or with much patience on efforts by institutions or boosters or collective or really anyone to circumvent those direct prohibitions by having more indirect relationships. Okay, let's flip now to the sixth and final question, which actually I think is the most important one. In this last question, the NCAA took dead aim at some recent state laws, which we've addressed and alluded to so far in this podcast. And the NCAA very candidly noted that some current and proposed state laws appear to now prohibit the NCAA from enforcing its rules. The question asked the NCAA what it would do when an institution in one of those states violates NCAA rules.

And again, I think the answer is what you would expect, but it is very important and very interesting. The NCAA reiterated that its rules, the NCAA rules, are adopted by all the member schools and fairness requires equal enforcement across all institutions and all states. Thus, the NCAA stated, all schools by virtue of their voluntary membership in the NCAA are still required to comply with all NCAA guidance regardless of whether their particular state law permits them to do something otherwise or prohibits or impedes the NCAA from enforcing its own rules. And the NCAA encouraged disgruntled institutions to seek change via the NCAA's governance process, I think taking a jab, perhaps not so subtly at those that it believes may have gone through the state legislature process instead. Let's spend a little bit of time on this. Chris, what do you make of this final proclamation?

Chris Brolley:

This, to me, is actually the main reason why the NCAA put out this memo, in my opinion. So hear me out. The NCAA is essentially daring its member institutions to violate its rules or give up their, as they emphasize, voluntary membership. However, and I think this is obvious, state laws hold more weight than a private association's rules that conflict with that state's law. This memo's also, I think, in direct response to state laws that have been proposed or passed, as we have discussed and seen recently with Texas, Arkansas, Oklahoma, and Missouri, that in some form or fashion prohibit the NCAA from interfering with state law. Now, if an institution calls the NCAA's bluff, I think will likely see scores of litigation. Andrew Brant, a professor at Villanova Law and Executive Director of the Moorad Center for Sports Law, made a really interesting point on Twitter, I think. He said players and professional leagues are bound by collective bargaining agreements, which trumps state laws, and he points out gambling, which is illegal for players under the CBA, but legal in many states.

However, college athletes are not employees, have no union, no collective bargaining agreement, and are not legally bound through labor laws, meaning that state laws have more weight for them. So I think it remains to be seen how the NCAA goes forward, and it'd be really interesting to see what they actually do. Will they punish their member institutions? We don't know yet, but either they punish them and risk litigation or they do nothing and look weaker than ever and largely irrelevant.

Brett Broczkowski:

Chris, you make a really interesting point. I think we also have to look at this in light of the comments made by NCAA President Charlie Baker. He's focused on ensuring consistency, transparency, and

enhancing fairness across the NIL landscape. And if he's really committed to that, and we have no reason to think he isn't, the NCAA has no choice but to commit to enforcing its roles regardless of what state laws say.

Cal Stein:

Yeah, this is all something we've talked about a lot here at *Highway To NIL*. We've openly wondered what would happen if or when a state law contradicted an NCAA rule or at least impeded NCAA enforcement of its rules. Well, we seem to have our answer, at least in theory, how it plays out in practice remains to be seen. And with that, we're going to bring our discussion here today to a conclusion. I really want to thank you Chris and you Brett, for joining me on this podcast. I also want to thank everyone for listening.

If you have any thoughts or comments about this series or about this episode, I invite you to contact any of us directly. I also invite everyone to check out Troutman Pepper's State NIL Legislation tracker, that webpage, which we update any time there is a change to state NIL laws can be accessed through the *Highway to NIL* webpage, or you can always use a simple Google search. We are very proud that our tracker is one of the first, if not the first result when you Google state NIL laws. 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.