
Highway to NIL Podcast: NCAA Division I Council Approves New NIL Disclosure and Transparency Rules**Host: Cal Stein****Guests: Michael Lowe and Chris Brolley****Recorded 1/11/24****Cal Stein:**

Hello and welcome back for a special, and again, one might say emergency episode of *Highway to NIL*, the podcast series that discusses legal developments in the name, image, and likeness for NIL space. NIL, of course, affects colleges and universities all over the country, particularly those in division one 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'm a litigation partner at Troutman Pepper. I come to you today with two of my colleagues to discuss some breaking news out of the NCAA related to NIL. On Wednesday, January 10th, the division one council met and discussed the topic of NIL, but they didn't just discuss it. They adopted one proposal and they introduced another proposal. And we're going to talk about those individually because they have the potential to drastically change the current NIL landscape. This is an important step in that ever-developing landscape, and we at Highway to NIL are here to talk about it. But before we do, we're going to start with introductions. I've got with me here today Mike Lowe and Chris Brolley, who everybody should know. Mike, do you want to introduce yourself?

Michael Lowe:

Thanks, Cal. I'm a former federal prosecutor for 25 years. I was with the US Attorney's office in Los Angeles for about 13 and in Philadelphia for about 12. My practice here at Troutman Pepper focuses on white-collar, government investigations, False Claims Act, products, liability for medical device and pharmaceutical companies, as well as NIL.

Cal Stein:

Thanks, Mike. Chris?

Chris Brolley:

Thanks, Cal. I'm a litigation associate in the Philadelphia office, and my practice primarily focuses on products liability, defense, and investigations. And like both you and Mike, I advise colleges and universities on NIL, particularly regarding compliance with state laws, NCAA bylaws, and other NCAA policies regarding NIL activities.

Cal Stein:

Well, I have a feeling all three of us are going to be doing a little bit more of that in the coming months now that things are starting to change as rapidly and drastically as they are.

All right, let's start by talking about what specifically the division one council did. And they did two things. First, they adopted a proposal that addresses student athlete protections related to NIL, and that proposal is going to become effective August 1st of this year. The second thing the council did was they introduced another proposal pertaining to school involvement and recruiting in NIL activities. That one hasn't yet been adopted, but as we'll talk about, it could be soon. So let's take those one at a time, and let's start with the proposal that was actually adopted related to student athletes and their NIL.

And this idea of protecting student athletes, this has been a big theme that we have heard from new NCAA President Charlie Baker time and again. He's talked a lot about wanting to protect student athletes, so it's not entirely surprising to me that the division one council actually adopted this proposal. And the way they did it, and the way they announced it, is in four elements, so I think it makes sense for us to follow those four elements in talking about them.

The first element is the concept of voluntary registration. The NCAA is going to establish a voluntary registration process for NIL service providers. Those are people like agents, financial advisors, the folks who are providing specific services to NCAA student athletes in connection with their NIL and the money they are now earning from their NIL deals. And this is going to serve as a central source for providers interested in working with student athletes. And this, at least to me, seems to be an effort to enhance the quality and the experience of the people who are working closely with student athletes, which goes of course directly to what President Baker has said about protecting student athletes in contracting for the use of their NIL. Guys, what do you think about this?

Michael Lowe:

Well, Cal, one thing that jumps out to me is that this is a way for student athletes to literally be able to find people that can help them in the NIL space, because right now, there's a dominance by certain major players. And think about this. You're a student athlete, you go to a school, and you want to get involved in NIL, you're hoping to make some money off of your name, image or likeness. How do you go about finding the right people to represent you to facilitate those deals? And I think that's been one of the challenges for student athletes. And so what I think is going on here is that this is a way to let all student athletes have a one-stop shop at least, where they can get some background information, get some names, some contacts, and start doing their own diligence.

Chris Brolley:

I think the buzzword here, and I think we'll talk about this throughout as we discuss the proposal, is transparency. Charlie Baker has mentioned the need for transparency for the student athletes, for the schools, for the families, and I think at least this proposal will allow them, the student athletes, to make more informed decisions with the agents or the financial advisors they decide to sign with. I think the goal is also to weed out some of the predatory actors that we've heard about, that are essentially preying on unsuspecting student athletes. I think what I'm most interested to see is how the voluntary registration process will be finalized or implemented by the NCAA. NCAA states in the proposal that it will be monitored by a to-be-determined committee to ensure that it meets the needs of student athletes. Who will this committee be comprised of? We don't know. We have little to no facts right now, but I think that'll be interesting to see who that committee is comprised of.

Cal Stein:

Yeah, ultimately anytime you start monitoring something, that certainly suggests an oversight role on the part of the NCAA, which suggests the development of some sort of minimum criteria for these service providers, which is going to create all sorts of potential headaches and compliance obligations.

Okay. Let's shift to the second element of this adopted proposal, which is about disclosure requirements. And essentially, what this proposal that has been adopted requires or will require is for student-athletes to disclose to their schools' certain information related to NIL agreements that are in excess of \$600. It's not a very high number, so that seems to me there's going to be quite a few of these disclosures taking place. The type of information that's going to need to be disclosed are things like the contact information for the involved parties, and importantly, the terms of NIL arrangements: the services being rendered, the length of the agreement, the compensation, the payment structure, all of that stuff. This information is then going to be de-identified and then provided to the NCAA at least two times per year. And the NCAA is going to use that to develop an aggregate database. And again, Chris, I think this goes directly to the point you were just talking about, which is transparency. This is another shot at transparency by a Charlie Baker-led NCAA, don't you think?

Chris Brolley:

I'd agree. And also, I know we all would agree that transparency is a positive, but I'll take a look at this the other way. We've heard so much throughout the last couple of years since NIL has been implemented, the discrepancy between the star athletes and the athletes that are lower on the totem pole. However, with this transparency, now everyone can have access to what the star quarterback is making versus what, no offense to my offense alignment, but what they're making. And I think could lead to some or possibly some resentment in the locker room. So I think that could maybe be a little bit of a downfall of the transparency, requiring these contracts to be made public.

Cal Stein:

And I think this is going to be a little bit of a double-edged sword for schools. They're going to have more information now about what these student athletes are doing and what they're getting in NIL, but I think with that knowledge is going to come some obligation to act if something looks amiss. And Mike, I want to ask you about this from your time as a federal prosecutor. Another thing that looks interesting to me here is all of a sudden, the NCAA is going to have a ton more data and a ton more information about these NIL deals. And I know from my time defending cases against federal prosecutors who have all sorts of data like that, they love to use analytics to find outliers and find things to investigate. Do you think that could happen here?

Michael Lowe:

I do, Cal. I think that's a great point. What are the actual reasons that the NCAA wants to have this policy in place? And the ostensible reasons they give are for student athletes to "better understand trends in NIL agreements," and also to allow the NCAA national office and the member schools to make informed decisions about NIL policies. So I think what's really going

on here is the NCAA wants to know what's going on in the NIL marketplace, so to speak, so that they can formulate policies around that. And once they start formulating policies, you are going to have policy violations, you're going to have investigations, you're going to have disciplinary actions. So I think all of this is going to lead towards some type of enforcement actions.

Cal Stein:

That was my thought exactly as well. The other point I'll note here is as we know and have discussed on this podcast, there are many state laws out there already that require this type of disclosure. Not necessarily in the same manner and certainly not with this NCAA aggregate database. However, this appears to me to be another shot at making things a little bit more uniform across the board, which is something else we know Charlie Baker has been focused on.

All right, let's turn to the third element, which is standardized contracts. And in many ways, this is the most immediate and tangible change. What this element of the policy says is that the NCAA is going to work with schools to provide student athletes with education on contractual obligations. But more importantly, they're going to work to develop a template contract, a template NIL contract with recommended terms. Again, this seems to me to be another step towards standardization and transparency, but I'm interested in seeing what these recommended terms might be, because that's going to have a big impact, don't you think?

Chris Brolley:

Yeah, Cal, I'd agree. I think the devil's in the details. What does the NCAA require in the schools to include or what are the schools going to be including in these contracts? On paper, it seems like a really good idea to have a uniform set of contracts, but that takes away a little bit of agency from the players being able to put things in a contract that they'd want if they're signing NIL deals. So I think that this will be interesting to see, and up in the air as to whether it's a positive or a negative.

Michael Lowe:

I would add to that. I think the real danger comes if the NCAA tries to go from recommended contract terms to required contract terms, because not only are you then potentially interfering with the athletes' abilities to contract, I think it raises a host of antitrust issues, which the NCAA is already dealing with, potentially like a tortious interference with contract. So that is a wait and see kind of a thing where we won't know how this is going to shake out. But I do think from the perspective of it being well-intentioned, there are a lot of student athletes that don't have the name cachet or the resources to really have good representation. And so providing a baseline of recommended terms and helping the athletes understand what this is all about and what they should be looking for I think is a positive, and I definitely think it's consistent with President Baker's goals.

Cal Stein:

I agree across the board. Okay. The fourth element is one that I'll just run through quickly because I don't think it requires much attention. The fourth element was this comprehensive NIL education plan. Nothing really new here. The NCAA has long been touting NIL educational benefits, and what this proposal says is that the NCAA is going to develop a comprehensive

plan to provide ongoing education and resources to student athletes, but also other "key stakeholders." We don't really know who that is. I guess we will see.

But I want to jump to the second proposal, the one that was introduced though not yet adopted, because I think this one is really interesting. It is about school involvement in NIL and the proposal claims, at least, that its aim is to "stabilize current challenges with NIL activities." The division one council said this proposal could be adopted as early as April, which is not that far away, but they are going to consider membership feedback in the interim period, so what gets adopted may end up looking different. Nonetheless, the components of this proposal are really interesting, and I want to take those one at a time as well.

Let's start with the overarching component, which is school support of NIL activities. And if adopted, this proposal would remove some of the restrictions on the level of support provided by schools to enrolled student athletes as they pursue NIL opportunities. And this goes way back to the October 2022 guidance on school support for student athletes. Now, even under this proposal, if it gets adopted, schools will still not be permitted to directly compensate their own student athletes for the use of their NIL, but schools would have the enhanced ability to facilitate NIL deals. This is similar to what the NCAA said in October of 2022, but here's the big thing.

An entity that is associated with or closely aligned with the school would be subject to the same rules as the school itself under this policy when it comes to NIL, and they also may not directly compensate a student athlete. This is, I think, a codification of some of the things we saw from a few months ago when schools were trying to use existing fundraising arms to be ostensibly collectives. There's a lot to unpack here, and what we know about this proposal is not entirely clear, but what do you guys think? What were your big takeaways from this?

Chris Brolley:

I think what struck me here is that this proposal differs from the proposal that Charlie Baker introduced back in December of 2023. If our listeners will recall, we actually recorded another emergency podcast basically on a lot of these issues, specifically relating to the direct payment by schools to their student athletes. The proposal, as you noted, still prohibits schools from directly paying the student athletes, but now explicitly allows schools to help facilitate deals, which we have, again, talked at length in previous episodes that relate to the October 2022 guidelines. Those guidelines implicitly allow this type of school involvement when it provided examples of permissible and impermissible activities, but now it appears it is explicitly allowing the facilitation of schools to help its student athletes sign and engage NIL entities.

Michael Lowe:

I think really what President Baker proposed was more of a ripping the Band-Aid off approach to this, which personally I liked. It's just acknowledging the reality that student athletes, especially of the higher caliber, are really in demand and that schools make money off them. Why not let the schools just pay them? I also think that would address many of the antitrust concerns that have been raised in various lawsuits. I think this proposal, which falls far short of what President Baker has suggested, is just basically a baby step. It may take multiple baby steps, but I think ultimately, however long it takes, we're going to get to the point where student athletes are permitted to be paid for their NIL. I just don't think that the NCAA is ready for it yet.

Chris Brolley:

Cal, in terms of enforcement or punishment, you noted, and the NCAA notes, that an entity that is associated with or closely aligned with the school would be subject to the same rules as a school itself when it comes to NIL. I understand the punishing of the schools, which I think the NCAA is maintaining its position that student athletes would not be punished for any NIL violations, but rather it would be the school. But how are we defining closely aligned with the school? And what types of punishments or what type of enforcement mechanism can the NCAA use against these entities that are closely aligned with the school but are not the schools? That's my question, and raised some red flags when I was reading this, but that's where I netted out on, at least the enforcement or punishment to an entity that is closely aligned with the school.

Cal Stein:

Yeah, fair question. We don't know. We don't know who is going to be considered closely aligned with the school and who won't, but what even the NCAA could do is absolutely an open question. We know the NCAA, and we've talked about it here, they're not a government agency. They don't have subpoena power. They can make referrals to agencies that do. However, at the end of the day, they seem to be limited to enforcement action against its member institutions. Now, could theoretically the NCAA get at one of those closely aligned entities through the member institution? Could they force the member institution to cease the relationship with that type of closely aligned entity? Seems possible. But until these issues play out, we really won't know. But I agree, it's something worth watching.

Okay. Let's talk now about the second component of this proposal that was introduced, and that is school support of NIL entities. The proposal would eliminate regulations governing communications between schools and NIL entities, namely collectives, regarding student athletes that are enrolled at the schools. It would continue to prohibit schools from directly or indirectly providing financial support to collectives, but it would nonetheless open up the lines of communication between them and start to blur some of those lines that we've talked about on this podcast that schools need to maintain. What do you guys think about that?

Michael Lowe:

Well, I think it's, again, a recognition of the realities. When you're dealing with these collectives, what's better to have? An inability to communicate and sort of an operation in forced ignorance? Or do you want to be able to communicate so that you're ensuring that whatever rules are in place can be followed by all the actors in the NIL space? I think that's where this is coming from.

Chris Brolley:

I agree, but I look at it a little bit more cynically. I think this goes back to putting pressure on the schools to make sure that they're abiding by the NCAA guidelines and NIL rules. We've seen in the past, the NCAA has explicitly stated how they've had trouble getting schools to self-report or make sure that the rules are being followed. So I think schools can no longer hide behind or blame a rogue collective or NIL entity for improperly engaging a student athlete with regards to NIL.

Cal Stein:

Yeah, it certainly removes a potential barrier to going after a school for something that a collective did. A school, at least under the current regime, is limited in the types of communications it can have with collectives regarding its own student athletes. If those are eliminated, there could be a lot more information flowing freely and a lot more argument or perhaps perception on the part of the NCAA that these schools know and intimately what these collectives are doing. And I do note that the justification that was given for this component is that the working group identified a need for schools and entities to be able to communicate to ensure NCAA rules are followed by both parties. That to me is really interesting. It looks like the NCAA is trying to get its hooks into collectives, which as we just discussed, they really don't have authority over right now.

Michael Lowe:

Yeah, Cal, and I would add to that, that if you're going to look at it from an enforcement perspective, what entity could the NCAA initiate enforcement action against here? It would be the school. If there's a violation, it's not going to be the collective. So in a sense, this is almost, to Chris's point, making the schools responsible for the conduct of the collectives and providing a mechanism for the NCAA to punish the schools when there's a violation.

Cal Stein:

I think that's right, and that has to be a potentially horrifying thought for schools and their compliance departments because, as we know, these collectives are certainly capable, shall we say, of creating some violations.

All right, let's talk now about the third component of this proposal that was introduced, and this is one that gets at an issue that we have talked about a lot on this podcast, that of timing. This proposal if adopted would prohibit NIL entities, the collectives, from engaging with student athletes or providing benefits to student athletes until that athlete signs a letter of intent, until the athlete participates in summer activities, practices with the team, enrolls in a school, or attends class. In short, what this proposal would do is limit all NIL activity until after a student athlete has chosen his or her school and enrolled in that school. And again, we've talked about this in the context of anti-inducement. The more these conversations and promises and deals are happening before a student athlete enrolls in a school, the more opportunity there is for an inducement. The more one could see, to dust off this old chestnut, a hallmark of an inducement. And it seems to me that the NCAA largely agrees with us and is now trying to eliminate that altogether. What do you guys think?

Chris Brolley:

I think that's a fair point, and I think as we've discussed on previous episodes regarding timing, I think the easiest way for the NCAA to make some sort of impact or make some noise is to specifically call out transfer students, student athletes. It's January 11th, 2024. The college football final just happened. The transfer portal window was open in December, it closed. It's about to open up again. This is a convenient time for the NCAA to come out and say, "Hey, we're looking at the timing of all these deals," and I think the most low-hanging fruit that we'll find is transfer students. It's the easiest way for schools to slip up and for the NCAA to make

their mark. I think it's interesting. It's definitely convenient timing as we look at transfer portal opening and closing at the conclusion of the college football season.

Michael Lowe:

To me, this is the most important part of the new proposal, and the most consequential. Because really, what I expect to see is that as these policies evolve, the parties that find themselves injured, so to speak, and complaining, are going to be the schools that lose out on an athlete that they were recruiting or that was at their school and transferred. And so who's likely to complain about some kind of a violation? It's going to be a school that basically finds out that its star athlete or its star recruit was improperly induced and paid or promised NIL money at a time when they weren't supposed to be. So the other potential violations and enforcement actions I don't think are going to rise to the same level of seriousness, so to speak, because you're going to have really aggrieved parties here that can bring these matters to the attention of the NCAA.

Cal Stein:

What an interesting point, and one that I think probably has a lot of truth to it. That'll really create some interesting dynamics when you've got one, for example, major state school football coach telling on another major state school football coach. I think you're probably right. It's only a matter of time before that happens. And Chris, to your point, I agree. I think the transfer portal is the low-hanging fruit here, and I'll note that in announcing this component, the division one council did specifically mention transfers. I don't think the timing or that reference to transfers is accidental.

Chris Brolley:

Cal, it's important to note as well, circling back to one of the beginning points that I made about Charlie Baker's original proposal from December of 2023, it appears that the division one board of directors will actually be meeting next week, January 15th, to discuss Charlie Baker's proposal from December 2023, so we may see some more movement in the coming weeks regarding those proposals.

Cal Stein:

Well, that happens. I'll see you two gentlemen right back here. And with that, we're going to be out of time here today. I want to bring the discussion to a conclusion. I want to thank you, Chris, and thank you Mike for joining me on this podcast. And I also, as always, want to thank everyone for listening. If you have any thoughts or any comments about this series or this episode, you can contact me directly at callan.stein@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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