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**Highway to NIL Podcast: NCAA President Proposes Radical Changes to NIL Rules****Host: Cal Stein****Guests: Michael Lowe and Chris Brolley****Recorded 12/05/23****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, 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.

Today, we come to you with something of an emergency podcast, because there was a major development in NIL regulation earlier today, and we are coming to you on Tuesday, December 5th. Today, NCAA President, Charlie Baker, has sent a letter to all NCAA member schools proposing some rule changes, and they're not just little rule changes, they are major rule changes. The letter President Baker sent is a bit informal, but the ideas he proposes in that letter are very real. The proposed rules are significant, they would have significant impacts on college sports and college athletes, and as you might imagine, NIL is at the center of all of it.

So we're going to get to the proposed rule changes soon, but first we're going to do what we always do and start with some introductions here. 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 an 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 compliance questions. I'm here today with two *Highway to NIL* veterans, my partner, Mike Lowe, and my associate, Chris Brolley.

Mike, do you want to introduce yourself?

**Michael Lowe:**

Sure, Cal. My practice includes internal investigative work, which is predicated upon my experience for nearly 25 years as a federal prosecutor in Philadelphia and Los Angeles. I also practice in the health sciences space where I represent companies in products liability litigation., I have extensive experience in the False Claims Act, and I've been working with you in the NIL space as well.

**Cal Stein:**

Thanks a lot, Mike. Chris, you're another highway to NIL veteran, but why don't you introduce yourself once more?

**Chris Brolley:**

Like you said, my name is Chris Brolley, I'm a litigation associate at the firm. As part of my practice, 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 all NIL activities.

**Cal Stein:**

Great. Well, thank you both for being here today on short notice to record this emergency podcast, and let's get into a little bit of background just to set the table before we start talking about our thoughts. As I said, today is Tuesday, December 5th, and NCAA President, Charlie Baker, sent a letter to all NCAA member institutions, and the letter begins candidly with what I would call is a series of platitudes. He talks about the review that he has been doing of the current state of college athletics. He opines about the financial growth he has seen, and that which he expects, and then he provides a list of benefits of college athletics to the schools and to the athletes.

All of that is interesting, all of it is true. But after getting that out of the way, he gets into the meat of the letter and the reason that he was writing, and I'm going to give a couple of quotes here because I think it summarizes the purpose of this letter quite well. First, President Baker says, "However, the growing financial gap between the highest resourced colleges and universities and other schools and Division I has created a new series of challenges. The challenges are competitive as well as financial and are complicated further by the intersection of name, image, and likeness opportunities for student athletes and the arrival of the transfer portal."

It goes on, "Therefore, it is time for us, the NCAA, to offer our own forward-looking framework. To deliver on this framework, we need to make several fundamental changes," and then he offers, again, somewhat informally, three fundamental changes that he is proposing, and I'm going to quote all three of them and then we'll talk about them.

First, President Baker says, "We should make it possible for all Division I colleges and universities to offer student athletes any level of enhanced educational benefits they deem appropriate." Second, "Rules should change for any Division I school at their choice to enter into name, image, and likeness licensing opportunities with their student athletes." And third, "A subdivision comprised of institutions with the highest resources to invest in their student athletes should be required to do two things. First, within the framework of Title IX, invest at least \$30,000 per year into an enhanced educational trust fund for at least half of the institution's eligible student athletes. And second, commit to work with NCAA staff and their peer institutions in this subdivision to create rules that may differ from the rules in place for the rest of Division I. Those rules could include a wide range of policies, such as scholarship commitment and roster size, recruitment, transfers."

So there is a lot to cover there, and those changes certainly would be fundamental to the NCAA model that we have all come to know and love. So let's take them one by one, and I want to start with the first fundamental change that President Baker is raising, this is making it possible for all Division I colleges and universities to offer student athletes any level of enhanced educational benefits they deem appropriate. Charlie Baker does not define what he means by enhanced educational benefits, but nonetheless, Mike, what do you make of this fundamental change?

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**Michael Lowe:**

Cal, this is potentially a game changer here, and it's a dramatic change, but as you pointed out, it only applies to Division I schools. That being said, as I read this, schools that it applies to would now be allowed to offer things to their undergraduate students like graduate school tuition. Think about this, a school that's got a medical school or a law school could potentially offer to all of their athletes the ability to get free tuition at those graduate schools, because if you say any enhanced benefits that they deem appropriate, that doesn't seem to impose any restrictions. Now, obviously there could be restrictions that are imposed as they really flesh out this guidance theory here, but under its plain language, there's really nothing a school couldn't offer, whether we're talking about tutoring, computers, work study, it's all on the table right now.

**Cal Stein:**

That was my takeaway too. To me, this seemed to get at what I would describe as some of the more draconian NCAA rules about what schools can and cannot provide to their student athletes. You mentioned graduate school tuition, which I admit is something I hadn't really thought of. My mind immediately went to what you just mentioned, providing books, providing laptop, computers, providing tutoring, all things that, under the current model, there would arguably be some impediments to doing, because you'd be offering them to student athletes, which is different than what you offer to non-athletes, which has always been the litmus test for what constitutes an improper benefit. That would kind of go away here, at least with respect to enhanced educational benefits, however that ends up being defined.

Mike, you also mentioned something interesting about the benefits being unlimited, and I agree, at least based on the proposal here, there doesn't seem to be any limit in this language. Now, you mentioned, and I agree, if this rule were to ultimately be adopted and enacted by the NCAA, it wouldn't surprise me at all if it came with at least some sort of quasi-objective component of appropriateness aimed at keeping schools from using things that could nominally be termed educational benefits as a mechanism for providing what would really be improper benefits. But it'll be interesting to see if that plays out, and if it does, how it plays out.

**Michael Lowe:**

And Cal, one other thing to keep in mind is if this is enacted, I think what it really means is that there's no longer a limit to the number of scholarships a D-I School can offer to their athletes. So theoretically, they could offer every single athlete at their school a scholarship, a full ride, if you will.

**Cal Stein:**

That's certainly something that bears mentioning, that is mentioned also in one of the latter changes that we'll talk about in a few minutes.

Okay. Let's flip now to the second fundamental change that President Baker proposes, and this is the one involving allowing Division I schools, again, at their choice, to actually directly enter into NIL opportunities and deals with their student athletes. This is, of course, a huge change, because currently one of what I would say are the few clear cut rules on NIL right now, coming from the NCAA, is the prohibition on schools actually paying NIL compensation to its own

student athletes. Chris, we've spent so much time talking about that on highway to NIL and when advising our clients, what do you make of this?

**Chris Brolley:**

I think the proposal as a whole, whether good or bad, is quite frankly revolutionary, and I think specifically to this point, as you mentioned, it's a stark departure from, not only the NCAA's interim policy that was enacted in 2021 and the subsequent guidance documents that we have reviewed at length, but it also goes against everything the NCAA has been preaching for the last several years.

Again, as you mentioned, we've advised schools countless times about the dangers of what we call bringing NIL in-house, or having schools even appearing to help coordinate NIL deals for student athletes. Essentially under this proposal, the NCAA is now allowing schools to directly pay student athletes. While we take that on its face, there are also some other implications, if we're reading some of the tea leaves, but what I read this as, the NCAA is indirectly saying that collectives are no more. It seems that the hope appears to be that with schools now directly paying the student athletes, collectives will no longer see a need to pay the student athletes, and donors will no longer give to these collectives. Instead, the donors are likely to give directly to the school and have that money go to whatever athlete or whatever sport they so choose.

Moreover, and I think emphasized in the letter by Charlie Baker, is that it would bring NIL compensation now within the requirements of Title IX, which I think is a very big issue for schools to recognize. It would provide more compensation for female student athletes because if schools were providing NIL compensation, they would then be subject to Title IX, and would be required to provide women with more of that NIL compensation.

**Cal Stein:**

Yeah, that's all very interesting, Chris. I had the same thought. And I like the way you put it; collectives are no more. If you'll recall back when we talked about some efforts by certain schools to bring NIL in-house and when the NCAA came in and said, "No, we're not really going to allow that," this would obviously flip that on its head. If you'll recall, we talked about Charlie Baker and his regime, might bringing NIL in-house actually be appealing to them? He's talked a lot about being fair and transparent and looking out for the student athletes themselves, and it doesn't strike me as an unreasonable position for him and the NCAA to say, "Look, we'd rather have the schools negotiating NIL deals and paying NIL money. We'd rather have them doing it than the collectives. We trust the schools more. This is the way we can go about protecting student athletes." We speculated at the time that that might be a sentiment that comes out later, and lo and behold, here we are.

The other interesting component of this comes from an enforcement perspective. Certainly the big risk here would, and has always been, at least as far as the NCAA is concerned, inducements. How will those be regulated if and when the schools are able to pay the players directly for NIL compensation? My belief is that this is just going to lead to even greater scrutiny of NIL arrangements, and actually it might make it easier for the NCAA to pursue enforcement actions.

You'll recall when we talked about the University of Miami investigation, one of the big issues was the NCAA does not have subpoena power, therefore it couldn't go after the booster, it couldn't go after the collective. It couldn't even get documents from them. Now, NCAA still doesn't have subpoena power over its own members, but it is a membership institution, so it does have some authority and some control and can pass bylaws requiring member institutions to comply. So it's possible that those investigations, if they're focused exclusively on schools who are paying the NIL money, might be more fruitful.

**Chris Brolley:**

I agree, and I think one thing to add, and you touched on it a little bit ago, but the problem with NIL isn't the student athletes being compensated for their name, image, or likeness. I think the biggest issue the last year or so, and we've seen it with NCAA guidance documents, are the presence of these collectives, the loudest boosters, the loudest collectives, are essentially causing the most problems. We've talked about it at length, what would happen if the NCAA allowed schools to start paying their players? And I think one of the implications is that collectives are going to go away, and I think the NCAA would much prefer that over having them to be able to pay players as much as they want and cause all this commotion. So I think NCAA is protecting itself more than it's protecting the players.

**Cal Stein:**

Yeah, it certainly seems that if the NCAA had the choice of giving the collectives all of the power or none of the power, seems as though they would opt for the latter. Okay, let's talk about the third fundamental change, and this is the one where there would be a subdivision comprised of the institutions with the highest resources, and they'd be required to do the two things that I mentioned earlier within the framework of Title IX, invest at least \$30,000 per year into an enhanced educational trust fund. But also, what I think is even more interesting, is committing to working with the NCAA staff and the other institutions in the subdivision to basically create a whole new set of rules regarding scholarships, roster size, recruitments, transfers, NIL. In many ways, I found this to be the most interesting proposal. Mike, what did you make of it?

**Michael Lowe:**

I agree with you, Cal, this is really interesting, and it raises a lot of questions, obviously. As you pointed out at the beginning, this is a pretty vague document that was sent out, but the one question is, which schools are going to be in it? This is a subdivision of the highest resource schools, but highest resource schools isn't defined. Then the question becomes, does a particular school want to be in this special subdivision? And I think the answer is that schools will want to be in this, because you touched on this at the last point you made, which was the schools in the subdivision will have the ability to be part of the rulemaking process, which is pretty huge, because when you think about the ability of D-I schools to now pay students, enter into NIL deals, award scholarships all the way through grad school, it raises a lot of questions about inducement, because if you are a school and you can now enter into an NIL deal with a student, isn't that an inducement? So don't you want to be part of the rulemaking to determine how this is looked at and what's permitted? So I think if you're a school with a big athletics program, you want to be in this subdivision.

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**Cal Stein:**

Yeah, that's a really interesting point. Who's going to be in it? And I guess the corollary of that is, who's going to get left out? I could certainly imagine a scenario where there are schools that want to be in this subdivision, and maybe they don't fit the criteria, maybe they're not voted in. What if you go in and you don't carry your water? Could you be then demoted out of it? So many interesting questions.

What I found really fascinating about this is it sounds a lot like something that I've speculated might be coming for big time college football, which is I've often speculated, at some point, are the big time, and I mean the real big time programs, all going to get together and just say, "You know what? We don't need the NCAA anymore. We're going to form our own college football league with our own rules and our own everything," and that to me always seemed a little bit realistic and far-fetched at the same time because it's obviously something that the schools would be interested in, but would need major resources to do. And I also wondered, is the NCAA going to be okay with it? Well, maybe they are. This sounds an awful lot like creating a semi-pro league for some of the highest resourced schools, whatever that ends up meaning.

Okay. Those were the three fundamental rule changes that Charlie Baker proposes in this letter. I want to spend the last moments we have focusing on the last part of the letter, which is where he talks about what he perceives to be the benefits of the new framework that would be established by these rule changes, and Charlie Baker actually goes forward and lists 10 benefits that he says would come from this framework. Now, we're not going to go through all of them. Instead, we're going to focus on a couple common themes that we kept seeing throughout.

And the first theme that I want to focus on is this acknowledgement and recognition finally from the NCAA that there is, not only a difference, but perhaps a major difference, between big schools and big brands and small schools and small brands. Basically acknowledging that the NCAA one-size-fits-all rule may not really apply. Chris, what did you make of this?

**Chris Brolley:**

I think, like you said, it's about time. There's always been an issue when it comes to NIL. We see top tier schools, traditionally those in the Power Five, that have access to more donors or money, it's just a fact of life, and that typically widens the gap between the haves and the have-nots. So the smaller schools with less resources are left struggling or trying to find creative ways to compete with the bigger schools, which has been nearly impossible. So it's refreshing for President Charlie Baker to recognize the difference between the big schools, the big brands, and the small schools and the small brands, and I think this makes sense to recognize the disparity between the two and do something about it.

**Cal Stein:**

It sure does make a lot of sense. The NCAA forever, really, has operated with a single set of rules that apply to all its members regardless of the major differences in size and resources and geography and all that stuff. I think what we have here is a classic case of the straw that broke the camel's back. In recent years, and with NIL, those differences have just increased and the gap between the haves and the have-nots has become even more apparent, leading the NCAA to realize that the current system really isn't sustainable. This is also, I think, a recognition of

something that many people have wondered with the consolidation of conferences, which is, look, are some schools going to be left out in the cold, either because they don't have the resources to compete with the others in their conferences, or because they have higher academic standards? Or things like that.

I, for one, thought that the result of that would be schools discontinuing sports altogether, like football, because they're either unwilling or unable to do what they need to do to compete against some of the bigger resourced brands. This would seem to throw a lifeline to some of those schools, to allow them to continue playing sports, but under a different set of rules, because now we've got different rules that apply to different types of schools.

The second theme, an important one as well, that we've seen in the letter from Charlie Baker, is the need for flexibility, not only by the NCAA, although certainly by the NCAA, but by schools as well. Flexibility, not something we typically associate with the NCAA, but that's what I see in this letter at least. Mike, what do you say?

**Michael Lowe:**

Yeah, Cal, I agree with you. I think one of the things that they're trying to do here is give schools the ability to offer more to students, and recognizing that there are schools that are the big schools, that have the great programs, that are going to get the top athletes, and they're going to be able to offer more. But there are other schools, particularly D-I schools that have a great academic reputation, and by allowing those schools to offer an unlimited amount of educational benefits, there are athletes that are going to find that very appealing, and it's going to let those schools, I think, compete for certain athletes who maybe don't expect to go pro, but are good enough to play D-I, and want the valuable college degree and maybe even a grad school degree that can be thrown their way.

So I think it gives those schools the ability to engage in that kind of recruiting, and also it allows them to have sort of a play it by ear mentality where they can see how things work, offer some benefits, see how it works for their school, for their students, for their athletic programs, and then change, offer more if they think that's needed, offer less if they think that's needed.

I also want to point out that there are some uniformity provisions that are important to bring out, which we haven't talked about, and one of them is the memo says that it wants all D-I schools to guarantee scholarships to their student athletes even if the student athletes don't play in their chosen sport. So think about that. You offer a scholarship to an athlete and, for whatever reason, he or she doesn't play, now they got to honor that scholarship. Similarly, all the D-I schools are going to have to provide up to 10 years of ongoing tuition assistance to their scholarship athletes until they complete their degree. So if an athlete doesn't get that degree in the three or four years that they're at the school, but they want to get it later, the schools have to give them that assistance to get that degree.

The last thing I think that is recognized here is that Congress is going to look at this. Everyone knows Congress has been contemplating legislation in the NIL space, and the NCAA is acknowledging that, and I think part of the goal here is to come up with a framework that shows that the NCAA is doing a lot to help student athletes maximize their value and earn money from their participation in these sports, and so it'll let the NCAA and the member schools go into negotiations with Congress from a position of having already made dramatic changes.

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**Cal Stein:**

Some really, really good points there, Mike, and I'm really glad you mentioned the uniform rules that are inherent in this memo. Guaranteeing scholarships, guaranteeing tuition assistance, those are things we can all agree on. Those are things we can all agree are probably long overdue. I'm also really glad you mentioned Congress, because I saw that in there as well, and who knows when, and I do think it's a when, not an if, it's a when Congress is ultimately going to get around to passing this legislation. But I wondered if that wasn't a little bit of a hedge by President Baker in putting this memo out there because he can say all he wants and propose these new fundamental rule changes, but actually getting them enacted, actually getting them written down and applied to the member institutions, is going to be something else altogether.

It would not surprise me at all, we've talked in the past about how vocal Charlie Baker has been about using the political process, the political process that he was once a part of, but using the political process to get uniform rules, might this be a way of nudging Congress in the direction that he wants? As you mentioned, Mike, I think that's a really good observation.

And with that, we're out of time. We're going to end our discussion here today. I'm certain we're going to revisit this as we hear more and more comes out about this, but this is a major development. It not only shows where Charlie Baker is and where the NCAA is in terms of NIL regulation and where they want it to go, but I think it's an indication of the way some schools are thinking, because we know Charlie Baker, the politician that he is, has been doing his road show, speaking with athletic directors, and I, for one, am absolutely confident that these proposed changes reflect the feedback that he has been receiving.

So with that, we'll bring the discussion today to a close. Mike and Chris, I really want to thank you guys for joining me on the podcast on such short notice. I want to thank everybody for listening. If anyone has any thoughts or comments or questions about this series, or about this episode, please feel free to contact any of us through the Troutman Pepper website. I also invite everyone, as I always do, to check out our NIL State Legislation Tracker. That webpage, we update it all the time, anytime there's a change in NIL state laws, and it can be accessed through the *Highway to NIL* webpage, or we're very proud that if you do a Google search, we're one of, if not the first result. 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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