Highway to NIL — CSC Guidance Unveiled: NIL Enforcement and Implications for Collectives
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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. 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 Locke. Today, I'm joined by two colleagues, Mike Lowe and Brett Broczkowski, and we're going to be discussing the latest guidance published by the College Sports Commission on its website. Now, we have, of course, been waiting to hear something, anything, from the College Sports Commission or CSC, which is the newly formed entity that will have oversight and enforcement authority in the post-House settlement world.

Now, there has been a lot of discussion and guidance, including recently from the NCAA and the conferences in the form of a Q&A document about what the CSC will be doing and how it will be enforcing these new rules. But the information the CSC released on its website last week is the first time we are hearing directly from this newly formed body. So, it's worth taking notice about what they had to say. But before we do let's do our introductions. Mike, you want to introduce yourself?

Michael Lowe:

Thanks again, Cal and always happy to be part of the *Highway to NIL* podcast. My name is Mike Lowe. I'm a partner with Troutman Pepper Locke in both our Philadelphia and Los Angeles offices. My practice includes advising universities and a Division I conference in connection with NIL issues. So, thanks again for having me here.

Cal Stein:

Sure. Welcome back. And Brett.

Brett Broczkowski:

Thanks, Cal. As you said, I'm Brett Broczkowski. I'm an associate here in our litigation practice in the Philadelphia office. As part of my practice, I'm involved with counseling institutions on all things NIL. Thanks for having me.

Cal Stein:

Terrific. Okay. So, let's start with a little bit of an introduction and some background. So, as I think most listeners know, beginning June 2025, student-athletes became required to report any third-party NIL deals that were worth six hundred dollars or more and they report or are required to report these deals through the NIL Go portal, which is the platform that is maintained by the newly formed College Sports Commission.

Now, the College Sports Commission is the now designated NIL Enforcement Entity. Through its website, it is going to act as a clearinghouse of sorts for NIL deals that, again, are $600 or more. As it had promised, the College Sports Commission recently updated its website or really created its website because it is a new entity. The content on its website includes guidance on, among other things, the criteria against which student-athlete NIL deals that are reported through NIL Go will be evaluated.

Now, briefly, those criteria are, number one, the payer's association. Two, whether there is a valid business purpose. And three, the range of compensation to be paid. We are going to discuss each in turn, in terms of what the CSC said about each on its website. We're also going to talk about some of the other nuggets of interesting information that the CSC chose to include on its website when it was released last week.

But let's start with the first criteria that the CSC will use to evaluate reportable NIL deals and that is the payer association criteria. Brett, you want to walk us through that?

Brett Broczkowski:

Absolutely, Cal. So, the guidance indicates that the CSC will first evaluate whether there's any relationship between the payer and the student-athletes' institution of enrollment. So, there's three categories of entities that are considered associated entities for NIL purposes.

First is any entity that exists primarily for the purpose of, A, promoting or supporting a particular institution's intercollegiate athletics program or student-athletes, or B, for the purpose of creating or identifying NIL opportunities solely for a particular institution's student-athletes. The second type of entity is any entity that assists in the recruitment or retention of student-athletes or which is requested to do so by the athletic department staff. And third and finally, any entity that is owned, controlled, operated by, or affiliated with an associated entity other than a publicly traded corporation.

So interestingly, the CSC discusses the importance of institutional cooperation with inquiries into an entity's associated status, stating it's critical that schools provide the CSC with information about the entity involved in the deal when it's requested. This plea for cooperation makes sense, as some of the hallmarks of an associated entity might not be outwardly recognizable. For example, an outsider might not be able to discern whether an entity has been requested by the athletic department to assist with recruiting or retaining student-athletes, and this underscores the importance of that institutional cooperation.

Cal Stein:

Yes, I think you're right, Brett. And the institutional cooperation, as you referenced, is obviously going to be a major component of this. I don't want it to be lost in the shuffle that that really is imposing a new burden on the schools themselves. This CSC operation, and NIL Go, and its evaluation of these deals is not something that is going to be on autopilot, at least not yet because they are going to be coming to the schools for information about associated entities and associated individuals and there are obligations on the schools to maintain those lists and to provide them. So, that's a new obligation, a new responsibility that the schools are going to have to balance.

Okay, let's shift now and talk about that the second criteria, which is that of a valid business purpose. Mike, why don't you take us through this one, because there's a lot of information about what will and will not constitute a "valid business purpose," at least as far as the CSC is concerned.

Michael Lowe:

Yes, Cal. You're absolutely right about that. And I think this is where a lot of the fighting is going to be down the road. But in terms of guidance, right now the CSC's saying that in evaluating valid business purpose, they're going to look to whether or not the deal, and this is their language, "demonstrates a legitimate commercial rationale." So, what does that mean? "Demonstrates a legitimate commercial rationale."

Well, there are two parts to that inquiry. First is whether or not the student-athlete's NIL is being used to promote a good or service that's offered to the public for profit. So, you think about that, right? They're going to look to see what is the NIL being used for. Is it being used essentially to sell something? Second, part of the analysis is whether the entity complies with industry standard NIL practices. What does that mean? What are industry-standard NIL practices?

To me, it's pretty interesting that we're at the dawn of this new system. So, I think it remains to be seen what becomes accepted as the industry standard NIL practices. I think there's some room for people to take a position on that one way or the other. But in its guidance, the CSC is basically really focusing on that first factor, whether the good or service being promoted is for something that's offered to the public for profit. The way I read this is that essentially without saying so, the guidance from the CSC is really looking to take aim at collectives and booster organizations because it actually indicates that when an entity exists primarily for the purpose of providing NIL payments or benefits, which is essentially what a collective does, then the CSC will not find the NIL agreements with those entities meeting the valid business purpose test.

So, I think that's true even where the collective or booster organization contracts with the student-athlete to appear at an event that's open to the public because the guidance gives an example. It gives an example of a student-athlete is being paid to appear at a golf tournament. Now, because the valid business purpose of the paying entity is primarily to provide NIL payments to the student-athlete, the CSC would find that deal to fail the valid business purpose test. Okay, how about exceptions? Well, there is one exception to that rule that's listed in the guidance. A deal might satisfy the valid business purpose test, even if the payment is made by a booster or collective, so long as, "there is documentation establishing that the source of those

specific funds were the entities with a valid business purpose that receive the benefit of the student's NIL."

In other words, it would allow collectors or boosters to act as the, I guess we can call it the de facto marketing agencies, so that they could be a bridge, really, between the student-athletes and the entities that really do have a valid business purpose.

Cal Stein:

Yes. I mean, this was fascinating. This discussion was fascinating. Dare I say, a little bit surprising. The CSC's focus on, I'll call it the "commercial rationale" for these NIL deals that you just talked about, Mike. To me, this sounds a lot like the discussion of "true NIL" that went back and forth in the House settlement hearings before it was ultimately approved by Judge Wilkins. So, wherever the settlement kind of landed after all that back and forth, after all of Judge Wilkins' comments and the parties going back to their corners to ultimately alter, and amend, and negotiate this component, it seems as though, at least to me, the CSC is returning and reverting to that "true NIL" component. I agree with you, Mike, this is where the fighting is going to be. There is already litigation on this.

So, let's talk a little bit more about the impact of this particular guidance on collectives. And you hit on it quite a bit, Mike. The CSC, in its website, it doesn't use the term collective. That doesn't appear in the guidance, but very clearly, as Mike noted, the guidance is aimed at collectives and at boosters. The collective association certainly anticipates that this guidance is going to impact the operations of collectives.

In a statement that was issued the very same day that the guidance was published on the CSC website, the association expressed its position that the CSC's guidance regarding a deal's valid business purpose is "deeply dismissive" of collective organizations. Now look, as Mike said, based on all of this guidance, it seems unlikely that the CSC would approve a deal that is strictly between a collective and a student-athlete, i.e. one that does not involve funds sourced from a third-party business, i.e. the exact type of deals that collectives have been entering into with student-athletes since the outset of NIL.

We may begin to see collectives shift their function if, in fact, this rule holds and survives what are extremely likely to be many legal challenges. But we might see collectives shift their function from being entities that just collect and then provide NIL funds directly to student-athletes, to entities that act as that de facto marketing agency that Mike mentioned, kind of a go-between for student-athletes and businesses looking to invest their dollars into an athlete's NIL. In that sense, these collectives may become sort of mini-clearing houses themselves.

Now, if this shift does materialize, who knows what it'll mean, but it could mean fewer institutions turning to third-party alternatives in an effort to assist their student-athletes in finding NIL opportunities because their collectives are going to serve that function.

Okay, let's now talk about the third criteria of evaluation, the range of compensation. Brett, what did the CSC tell us about that?

Brett Broczkowski:

Thanks, Cal. Yes, so the guidance states that finally the CSC will evaluate each NIL deal for whether it fits within a range of compensation or ROC. So, the guidance describes the ROC analysis as a valuation process aimed at determining whether the NIL compensation provided for in a given deal is commensurate with that paid to similarly situated individuals with comparable NIL value. Importantly, the fact section of the website indicates that this value will be measured against individuals who are not current or prospective student-athletes at the institution where the deal submitting student-athlete is enrolled. This analysis is said to take into account multiple factors including the performance obligations under the deal, the student-athlete's athletic performance, their social media reach, and the local market.

Now, importantly, the CSC stated that will not be calculating the fair market value of NIL deals when it conducts this analysis, though the present guidance is not clear on the precise differences between a fair market value calculation and the range of compensation calculation.

Cal Stein:

Yes, we'll talk about that a little bit more in a few minutes, but before we close the discussion of these three criteria, I just want to recap some impacts, some impacts that this guidance could have. I think number one is a pretty obvious one, that associated entities, associated individuals, they are going to receive the most scrutiny. This includes collectives, and this, again, foists an obligation on the institutions to provide information about those entities and individuals.

Number two impact. I think we are likely to see a decline in NIL deals between collectives and student-athletes for the reasons that Mike mentioned, absent some sort of litigation, win, or change in the rules. Third impact. Along those lines, I think we're likely to see a shift in the use of collectives towards more of a pass-through between student-athletes and the entities that have the valid business purpose, which is now going to be required by the CSC. And then fourth, the range of compensation process remains kind of a black box. It's really unclear what is going into that, but I think we will see some additional guidance there or certainly some trends coming out of the CSC as they start issuing decisions on that criteria.

Okay, let's go now quickly through some of those other nuggets that I mentioned from the CSC's website guidance. And I want to do this a little bit as like a little lightning round with you, Mike and you, Brett. I'm going to raise something that I flagged as I thought important and get your reactions on it. The first one, I want to talk about the section of the website called Deal Review and Outcomes. In this section, the CSC indicates that when it is evaluating an NIL deal based on the criteria we just talked about, there are three outcomes. It can be one cleared, two not cleared, or three flagged for additional information.

Now, that's what we always knew. Then when they talk about a deal not being cleared, the CSC lists three options for what a student-athlete can do when a deal is not cleared. Number one: they can revise the deal and resubmit it. Number two: they can cancel the deal. Or number three: they can appeal the determination to neutral arbitration. Again, all of this was expected, but in the website, the CSC actually includes a fourth option for student-athletes that they don't

really want to highlight, but it says, “If the student-athlete continues with the deal as submitted, they may face enforcement consequences which could include the loss of eligibility.”

Now, this language really jumped out at me because this is the first time in all of the NIL rules and all of the NIL guidance that enforcement action is being overtly threatened against student-athletes. Until now, all of the NIL enforcement action has been directed to the schools. So, Mike, what do you think about this? Do you think there's going to be enforcement action against student-athletes and do you think they're going to lose eligibility?

Michael Lowe:

Well, I think at some point there's going to be an enforcement action brought against the student-athlete. I think when that happens is really going to be the situation where the student-athlete just digs in his or her heels and says, “No. This is a deal that I'm willing to fight for.” And that's the question is, does the student-athlete just cave, right? Renegotiate a deal because the CSC is basically telling them they don't like it. Or does the student-athlete say, "I'm willing to risk litigation on this. I'm willing to risk an enforcement action.” I think it's bound to happen at some point because the dollars at a certain point are just going to be too attractive that the student-athlete’s willing to risk that loss of eligibility. And maybe it's sort of midseason deal, end of the season, maybe their last year of eligibility, and they're willing to take the chance on it, and maybe even hope that by the time the enforcement action plays out, they're already done with their season.

So, I don't know how this is going to look because we're in a brand-new world here. But I could certainly speculate that somebody at some point is going to be willing to roll the dice on this.

Cal Stein:

Yes. I agree. And if a student-athlete does lose eligibility, that feels like another lawsuit to me. So, to be determined. Okay. Next nugget. In the question and answer section on student-athlete NIL deals, there was a question. What type of NIL deals must be reported to NIL Go? And the CSC's answer to that is, well, of course, third-party deals that equal or exceed $600, that we know. But then it says, “If a student-athlete enters into multiple deals with the same payer or payers with common ownership, they are required to enter those deals if the aggregate value meets or exceeds $600.” Brett, what do you think about this? This is the first explicit mention of aggregating these deals, perhaps that was implicit before. Do you think this is a big deal?

Brett Broczkowski:

Yes. I think from the CSC perspective, aggregation is probably necessary to prevent student-athletes and payers from structuring multiple deals that fly just below the $600 radar. For student-athletes, I don't see this as a major issue, though it will certainly require some extra diligence and perhaps counseling. So, in addition to keeping track of multiple deals signed with the same payer, student athletes and their agents will need to be cognizant of payers with common ownership. These common ownership relations may not be immediately apparent to the student athlete or their agent. So, due diligence will be a must to avoid inadvertent failures to report deals that do aggregate to $600 or more.

Cal Stein:

Yes, I agree. I think this has headache written all over it. How are these student-athletes or how even are institutions really supposed to know if payers have common ownership? Interesting to see what happens with this one.

Okay, in the same section, there's another question. Will the system allow student-athletes to report deals under the $600 threshold? The CSC's answer is, “Yes, student-athletes can report third-party NIL deals valued under $600, the mandatory reporting only applies to deals of $600 or more in the aggregate.”

Now, Mike, I found this interesting for a couple of reasons mostly because until I saw this, I, like many people, I think, was kind of considering the $600 to be like a hard limit, i.e., that the standards we talked about, associated pay or valid business purpose, range of compensation, only applied to deals of $600 or more. This suggests the opposite, that the standards apply to all deals. It's not just the big ones. It's the small ones too, but the small ones just won't be reported. But what if the CSC becomes aware of a smaller deal under $600 that didn't need to be reported? Do you think it could still take action based on what it's saying here?

Michael Lowe:

That's a good question, Cal. But I think the bigger question is, would it take action on a deal that's less than $600? Why does it want these under $600 deals reported to them? So, I think it's unlikely that the CSC is really going to start getting into the weeds of any kind of enforcement actions on a deal that's less than $600. If you start with that premise, then the question becomes, well, then why do they want these lower-value deals recorded?

My personal opinion is that I think they want them to establish a range of compensation. So, I think they're trying to incentivize or at least invite low-value NIL deal reporting so that they can start using it if you want to be skeptical here of their motives to sort of depress the range of compensation values that they're willing to assign to particular deals. So, they get all these low-value deals reported and then they can sort of lower the range of compensation that they find for appropriate for larger deals. That's my skeptical take on it.

Cal Stein:

Yes, a really interesting take, though. Very interesting to see what they'll do with those. Okay, last nugget, and this is one that you mentioned before, Brett. In the same section, there was a question. It has been reported that NIL Go will determine, “fair market value” for each deal. Is that true? And unequivocally, the answer is no. NIL Go does not calculate fair market value, NIL Go’s range of compensation determines whether the subject deal submitted by the student-athlete does not exceed a reasonable range of compensation.

Brett, fair market value versus reasonable range of compensation. The College Sports Commission seems pretty adamant that it's not going to calculate fair market value but will determine range of compensation, so it certainly seems to think those are two different things. Practically speaking, do you see any difference between them?

Brett Broczkowski:

Yes, Cal. I think the CSC may be splitting a hair here, but doing so may be causing additional confusion. While the CSC may not be determining the worth of a particular deal down to the dollar, it will necessarily need to engage in some calculation to establish the fair range of compensation, only then can it decide whether the cash value of the NIL deal falls within that acceptable range. So, I think we can at least understand the CSC's hesitancy to assign concrete fair market value to each NIL deal given the wave of antitrust scrutiny in the space. But at the same time, I think we're all collectively scratching our heads to figure out what the true difference between fair market value and range of compensation really is. If we're confused, I have to believe that student-athletes and payers are likely confused as well.

Cal Stein:

Yes, I agree. I really wonder if the CSC's refusal to adopt the term fair market value is because of what you just said. They don't want to put a number on it. They want to have a range. I don't know. If you ask me, fair market value could be a range in and of itself. There's no requirement that fair market value be a single number at a single price, but perhaps that is the root of the hesitancy by the CSC. Perhaps it's something else. I think we will begin to see that soon.

Michael Lowe:

Cal, before you end, one thought there, and correct me if I'm wrong, but doesn't the House settlement actually use the term fair market value?

Cal Stein:

I believe it does.

Michael Lowe:

So, it's interesting that, unless my recollection is wrong, it would be really interesting that the CSC is sort of shying away from the term that's actually in the settlement agreement. But then I think Brett's analysis on that is spot on.

Cal Stein:

I agree. And we will see how the CSC ultimately makes those determinations again as these decisions start to come out. And with that, we are out of time here today. So, I want to bring this discussion to a conclusion. I want to thank you, Mike, and you, Brett, for joining 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 any of us directly. You can subscribe and listen to other Troutman Pepper Locke podcasts wherever you listen to your podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.