To: **Members of the Uniform Law Commission**

From: **Bubba Cunningham, Director of Athletics, University of North Carolina**
Paul Pogge, Associate Athletic Director, University of North Carolina

RE: **NIL Alternative Considerations**

We are grateful to the Uniform Law Commission for considering potential legislation to address issues arising from recent proposals on the subject of student-athletes' use of their names, images, and likenesses ("NIL") in commercial endeavors. We also appreciate the time, effort, and consideration that members of the NCAA Board of Governors Federal and State Legislation Working Group devoted in formulating their April 17, 2020 Final Report and Recommendations (the "Working Group Report"). Though we share some of the same values and areas of emphasis as outlined in the document, we have concerns about unintended consequences of the proposals which could have materially negative impacts on educational and athletic opportunities for student-athletes. Therefore, we believe legislation is warranted to address the situation. The purpose of this document is to identify elements of legislation for which we advocate, as well as some of the reasons why such legislation is necessary. This document is also intended to discuss the need for a federal commission to consider the Working Group Report's proposals and its consequences, together with related issues presently facing intercollegiate athletics.

I. Concerns with the Proposals in the Working Group Report

As discussed in their final product, the issue of NIL is a complicated one with intertwined factors of law, business, and operational elements of various segments of sport. Because of the potential to fundamentally alter the nature of intercollegiate athletics, changes to NIL rules must be thoroughly evaluated in light of the risks and unintended consequences they may precipitate.

We are concerned that many of these unintended consequences and potentially harmful outcomes are not addressed in the Working Group Report. Instead, the document encourages the development of abstract "guardrails" to mitigate extraordinary risks to a model which benefits hundreds of thousands of student-athletes each year. Of additional importance, the proposals in the Working Group Report seem to invite the continuation of significant and costly legal challenges. As one reporter recently wrote, the proposals "make it tougher for the NCAA to both gain Congressional assistance and defend itself in antitrust lawsuits, the latter of which holds truly remarkable irony: While it is increasing athlete compensation rights, the NCAA is making it more difficult to defend its overall amateurism model in a courtroom, multiple law experts say."[1] Other legal experts have stated the proposals create an "unworkable solution" and could

[1] Ross Dellenger, *Group Licensing Is The Key To The Return of NCAA Video Games – So What's the Holdup?,* SPORTS ILLUSTRATED (May 5, 2020), https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing.

serve as an "evolutionary step to an employment relationship between school and athletes, something the NCAA has avoided and feared for years."[2]

At the institutional level, we have begun discussing what the proposals in the Working Group Report would mean for our ability to support opportunities for student-athletes. The projections are alarming. We have already been told by several multimedia rights experts that the NIL activities proposed in the Working Group Report will likely only benefit a very small number of individuals, primarily in football and men's basketball, while the NIL rights of most other student-athletes will have little or no commercial value. These multimedia rights experts believe certain sponsors will shift some or all funds from department-wide agreements used to subsidize broad-based programming to a select few individuals. This will directly impact opportunities for men and women in Olympic sports.

We are also concerned about the harmful effects for college athletics which could stem from the proposals' allowance for increased agent involvement, greater opportunities for corruption in the recruiting environment, and a shift of attention towards commercial activities. Given the significant risks to opportunities for so many student-athletes, we believe we must first investigate and employ all viable legal strategies to protect and enhance the educational model. In the event that changes to NIL rules are a desired outcome among member institutions, we believe the focus of any such efforts should be on alternate concepts apart from those endorsed in the Working Group Report, including the pursuit of the legislative structure and elements set forth below.

II. Legislative Considerations under a Model of Cooperative Federalism

We believe a model of cooperative federalism would be beneficial in establishing a sound and sustainable legal framework for intercollegiate athletics. As a first step towards this arrangement, we support legislation to create a federal commission to regulate NIL activities. Such a concept is not unprecedented. Commissions have been fairly common throughout Congressional history and have involved a wide variety of matters, some of which included sports. Congresswoman Donna Shalala, a former university president, has also suggested the formation of a commission pertaining to certain elements of intercollegiate athletics.[3] We believe the concept of a commission would be particularly beneficial on the specific subjects of NIL and matters related to preservation of opportunities for student-athletes.

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[2] *Id. See also Alston v. NCAA (In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig.)*, 958 F.3d 1239, 1265 (9th Cir. 2020) (rejecting plaintiffs' argument that by endorsing NIL payments, the NCAA flipped its position that "limits on cash payments untethered to education are critical to preserving the distinction between college and professional sports." Although the NCAA has proposed loosening NIL restrictions, the argument was categorized as "premature" because the NCAA has yet to adopt NIL legislation).

[3] Brian Murphy, *Can Congress Remake College Athletics? Shalala Proposes 2-Year Commission on NCAA*, MCCLATCHY (December 19, 2019), https://www.mcclatchydc.com/news/politics-government/article238480913.html; *see also* Congressional Advisory Commission on Intercollegiate Athletics Act of 2019, H.R. 5528, 116th Cong. (introduced by Rep. Donna Shalala, Dec. 19, 2019) (proposing to give the Commission broad authority over issues relating to the relationship between institutions and intercollegiate athletic programs).

This commission would be comprised of individuals appointed by Congress and could be specifically charged with studying and approving boundaries and regulations related to NIL activities. This option seems much more reasonable and realistic than the pursuit of an antitrust exemption. If conceived correctly, such a commission could be a very effective means of both protecting opportunities for student-athletes and empowering their group licensing pursuits.

Further, such a commission could help halt the acceleration towards a framework of disparate state laws on NIL principles. Under a patchwork structure of state laws, differing boundaries for commercial activities involving individual student-athletes would make it impractical to expect any semblance of competitive balance between competing institutions from different jurisdictions. On a uniform basis, however, state laws could be helpful in supplementing federal legislation. The Uniform Law Commission provides a very useful means of accomplishing this objective.

This moment presents an outstanding opportunity to develop cooperative legislation which can help protect and enhance opportunities for men and women in college athletics.

III. Focus on Academics and Status as Students

Whether at the state or federal level, we believe it is important for legislation in this area to contemplate certain specific elements. First, any legislation in this area should focus on fostering an environment in which student-athletes remain engaged in meaningful educational opportunities. Thus, we fully support the Board of Governors' October 2019 directive to "Maintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success."[4] NIL activities must not distract from this primary reason schools provide opportunities to men and women through athletic scholarships in the first place.

Consistent with an emphasis on student-athletes' academic pursuits, one of the main objectives of the NCAA's time management rules which took effect in 2017 was to alleviate demands on student-athletes so they could allocate more time to their studies. Even if NIL activities don't materialize to a significant degree for many student-athletes, the allure of commercial activity alone is likely to be a distraction from scholastic endeavors.

Furthermore, student-athletes' relationships vis-à-vis their institutions must remain that of students, not employees, and the benefits provided to them from institutions must be tethered to education. Thus, we agree with the Board of Governors' principle to "Reaffirm that student-athletes are students first and not employees of the university."[5] Recognizing student-athletes as employees of their respective institutions would necessitate further analysis of tax obligations in various jurisdictions, applicability of hiring and firing actions, and other employment law considerations. At the most fundamental level, though, such a reclassification threatens to materially alter the nature and meaning of student-athletes' affiliation with colleges and universities. The relationship between an employer and employee will always be different than the relationship between a student and his or her school. We commend the Board of Governors

[4] *NCAA Board of Governors Federal and State Legislation Working Group Final Report and Recommendations* 8 (2020) [hereinafter *Working Group Report*].
[5] *Id.*

and Working Group Report for acknowledging this fact, and we support legislation that recognizes this principle.

IV. Group Licensing

We support legislation to empower group licensing by sport if the membership wishes for NIL activities to become a part of college athletics. Though dismissed in the Working Group Report for various reasons, group licensing can provide economic benefits to a wide range of student-athletes. Much of the resistance to the concept has been predicated on concerns about unionization or changing the employment status of student-athletes. However, "many sports law experts agree that a union isn't necessary to have group licensing."[6] The LPGA's arrangement, for example, demonstrates how these activities do not require unionization by the participants: "It is a membership organization that enters into group licensing and sponsorship deals, yet every golfer is an independent contractor, not an employee."[7]

Group licensing activities would not require any additional time commitments from student-athletes. Furthermore, there has already been a proven market for video games, trading cards, jerseys, and other products which could be sold under a group licensing structure. The sources of revenue associated with these sales would be new to college athletics; thus, it would not jeopardize funding from existing corporate sponsorships currently used to support opportunities in Olympic sports. Sales of video games, for example, would not create a risk to revenue currently generated through department-wide sponsorships with local business entities. Under this arrangement, the scholastic opportunities afforded by intercollegiate athletics would be safeguarded, while student-athletes could also reap the monetary benefits associated with market demand for their sports.

Proposed legislation should contemplate an entity independent of the NCAA that could oversee NIL activities and potentially pursue group licensing opportunities on behalf of the participants in each sport. Such legislation should also accommodate a voluntary grant of NIL rights, perhaps through modifications to the NCAA Division I Student-Athlete Statement, as a means of enabling such collective commercial activity. While such agreements would be "collectively bargained" with third party commercial entities on behalf of the student-athletes, legislation should be established such that this activity can take place within a structure that does not permit unionization or collective bargaining between student-athletes and schools.

1. Shared Benefits for More Student-Athletes

Legislation that facilitates the aggregate nature of group licensing activities would mitigate many of the risks associated with the concepts suggested by the Working Group Report. With regards to proposed individual NIL activities, the Working Group Report correctly notes, as an example, that "one result . . . is the possibility that students will place undue emphasis on potential NIL opportunities when selecting their schools, to the potential detriment of their academic and athletic careers, and to the potential detriment of fair competition between NCAA members."[8]

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[6] Dellenger, *supra* note 1.
[7] *Id.*
[8] Working Group Report, *supra* note 4, at 21.

Additionally, as the Working Group Report states, "Student-athletes may also be exploited by bad actors making false promises of NIL opportunities should they select a particular school, only to have those opportunities fail to materialize after enrollment."[9]

Rather than inviting risks of this nature, we recommend legislation that would consider the widespread benefits group licensing could confer upon an even greater number of student-athletes, some of whom may not have the financial resources enjoyed by others. While individual NIL activities would focus on the most high profile student-athletes and probably yield very different monetary results for certain members of their respective teams, group licensing would leverage the collective appeal of each particular sport and allow many to share in the financial rewards. This would enable more student-athletes, a number of whom come from underprivileged backgrounds, to profit financially from NIL activities associated with their participation in college athletics. Instead of individual NIL endeavors, we believe this would best accomplish the objective of enhancing the collegiate experience for as many student-athletes as possible.

2. Preservation of Opportunities

As is reflected in some sentiments of the Working Group Report, we believe the preservation and enhancement of educational opportunities for many student-athletes is of paramount importance. The challenges of our time necessitate educated, well-rounded leaders. Over the last century, college sports have proven to be one of the most effective means of producing such capable men and women through the opportunities afforded by athletic scholarships. To wit, over 460,000 student-athletes participate in intercollegiate athletics each year.[10] Many of these student-athletes come from challenged socioeconomic backgrounds and, without the opportunities provided by athletic scholarships, may not be able to attend college at all. We believe it is essential to preserve these opportunities so we may empower future male and female leaders from a wide variety of backgrounds.

Consistent with this position, we support the Working Group Report's recommendation to the Board of Governors that "Modernization of NIL rules (should) not interfere with NCAA members' efforts in the areas of diversity, inclusion, or gender equity."[11] College athletics has witnessed considerable progress in opportunities for women since the passage of Title IX. Any legislation should support and encourage, not undermine, this progress.

3. Avoidance of Risks Posed by Sports Agents and Other Professional Service Providers

Group licensing would preserve the educational incentives and team dynamics of college athletics against the self-interested influences of sports agents and other professional representatives. Without the need for individual representation, student-athletes could also avoid the extraordinary risks of financial harm and legal challenges posed by some members of the agent community who have preyed on athletes in the past. Agents are paid a percentage of what their clients make, so if given the opportunity, they will have every economic incentive to pursue

[9] *Id*.
[10] *NCAA Student-Athletes*, NCAA, http://www.ncaa.org/student-athletes.
[11] Working Group Report, *supra* note 4, at 26.

further disruptions which will provide themselves with greater financial benefits. This threat, coupled with agents' historical propensity to "hold out" players and use other similar negotiation tactics at the professional level to acquire more money, jeopardizes revenue used to support opportunities for other student-athletes. In addition, distancing intercollegiate athletics from sports agents would also help mitigate the risk of agents attempting to exert control over the recruiting process, pressuring coaches to increase the perceived marketability of their clients, and otherwise disrupting team chemistry.

As an aside, we fully support the development of greater means of collaboration with professional leagues to generate more detailed and accurate feedback for those elite athletes considering transitioning to pro sports. Though some mistakenly believe agents help facilitate this flow of information now, teams are actually very reluctant to share their most thorough insights on player evaluations so they do not reveal which players they intend to pursue. Therefore, agents should not be viewed as a reliable source of this information. We do believe, however, that compiling and anonymizing detailed feedback from professional teams would empower more informed choices by student-athletes considering entering the drafts in their respective sports. While eliminating the risk of particular teams disclosing their priorities in upcoming drafts, this anonymized and aggregated feedback would also provide student-athletes with a reliable, unbiased source of information rather than having to rely on speculative media reports, "mock drafts" on the internet, and agents who have financial interests in players earning income as soon as possible.

4. *Avoidance of Heightened Risks to the Collegiate Recruiting Process*

Legislation should also consider how group licensing can protect recruiting from unintended interference. The recruiting process is a central element which differentiates college athletics from other levels of sport in America and around the world. As opposed to professional drafts, under the current educational model, young men and women are given the freedom to select from various institutions offering academic and athletic opportunities. Most student-athletes choose their respective colleges or universities based on academic qualifications, competitive opportunities, campus life, geographical location, and other traditional factors. This is an exciting choice for these young men and women as they begin the next phase of their lives.

There have been many historical examples of malfeasance and illicit conduct in the recruiting process, however. According to the NCAA, "the most common infractions between 1953-2014 were recruiting inducements (57 percent), impermissible benefits (54 percent), and other recruiting violations (48 percent), according to the study of 554 major infractions cases . . . ."[12] A number of boosters have demonstrated their willingness to attempt to lure top prospects in hopes of securing competitive advantages for their teams. The Working Group Report proposals would provide countless avenues to facilitate such undesirable conduct. Group licensing, however, would confer economic benefits on all participants from a certain sport and, by doing

[12] NCAA, *Inside the Infractions Process*, https://ncaaorg.s3.amazonaws.com/infractions/level3/INF_Level3SecondaryViolations.pdf.

so on a collective basis, would avoid risks associated with new ways to funnel money to individual student-athletes.

V. Expansion of Choices

Some elite athletes wish to pursue professional opportunities as soon as possible. We believe these young men and women should have paths available to do so. Therefore, any new legislation should preserve and expand avenues to compete outside college athletics. We fully support the recent willingness by the NBA, NBPA, and G League to offer generous salaries for top high school basketball players wishing to earn compensation for their play immediately instead of attending college. Some have suggested other options which would yield expanded access to professional opportunities in football as well.[13] We encourage further exploration of such concepts.

Ultimately, we believe choices for young men and women will make the educational model even more appealing. Over the years, many talented basketball players from foreign countries have elected to participate in intercollegiate athletics in the United States rather than pursuing professional opportunities abroad. Top high school athletes in baseball, hockey, soccer, golf, and tennis all currently have alternatives, yet many freely choose to participate in college athletics anyway. We have no reason to doubt that young men and women will continue to be attracted to the incredible value of a college degree and the exciting experiences associated with participation in college sports, provided the opportunities exist.

For those who do not wish to participate in intercollegiate athletics, however, we encourage the establishment of more choices for top prospects rather than attempting to reshape the educational model in ways that incorporate many aspects of the professional model. If they do not wish to do so, young men and women should not be forced to participate in the educational model that allocates revenues in a manner that creates opportunities for hundreds of thousands of student-athletes each year. We recommend legislation that facilitates the development of more options for elite athletes and would welcome dialogue with other stakeholders to contribute to the development of such alternatives.

VI. Other Considerations

One of the often-cited criticisms of the financial model of intercollegiate athletics involves the extraordinary salaries paid to some employees. We agree that the escalation in compensation is not helpful in our efforts to safeguard and enhance educational and athletic opportunities across a broad-based programming of sports. As a singular institution, however, it is difficult to invoke change in this area. Additionally, past litigation has addressed coordinated attempts to cap compensation.[14] Moreover, college athletic departments are just one participant in the labor

[13] Nick Schwartz, *Jim Harbaugh Explains His Sensible Idea to Change NFL Draft Eligibility Rules to Benefit Players*, USA TODAY (May 12, 2020), https://ftw.usatoday.com/2020/05/jim-harbaugh-nfl-draft-eligibility-idea.
[14] Just over 20 years ago, Division I basketball coaches filed a class action lawsuit alleging the NCAA violated Section 1 of the Sherman Antitrust Act by restricting annual compensation to $16,000. *See Law v. NCAA*, 134 F.3d 1010, 1012 (10th Cir. 1998). The district court granted summary judgment in favor of the plaintiffs, finding that the NCAA violated Section 1. *See id.* at 1015. The district court "permanently enjoined the NCAA from enforcing or

market for coaches and sports executives, as financial packages at the professional level have contributed to the rise in market rates as well. We welcome conversations to inform legislation about how compensation can align with other relevant financial factors within a sustainable fiscal framework. Ideally, such a structure would promote the enhancement of experiences for current student-athletes and, potentially, empower the creation of new opportunities for even more future student-athletes.

The conversation about NIL is a complicated, multi-faceted one which transcends traditional concepts of athletic competition. It involves considerations of educational opportunities for individuals from a variety of socioeconomic backgrounds, equity under Title IX, and the essence of the athletic environment in which young men and women will participate and develop. Despite pressure exerted by effective dates of various state laws, we should not rush to formulate a new model without full consideration of all potential outcomes and unintended consequences.

Once again, we thank all those involved in the ongoing NIL conversations for their thoughts and input on these important matters, as well as how legislation can address them. We hope the alternatives above will receive fair consideration in the course of future dialogue, and we look forward to contributing to solutions which safeguard and enhance educational opportunities for student-athletes for years to come.

attempting to enforce any restricted-earnings coach salary limitations . . . ." *Id.* Upon de novo review, the 10th Circuit applied the Rule of Reason to evaluate whether the NCAA unreasonably restrained trade. *See id.* at 1016-18. The plaintiffs successfully presented sufficient anticompetitive effects by showing "that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces." *Id.* at 1020. The NCAA failed to show that the procompetitive effects of the horizontal agreement, including retention of entry-level positions, cost reduction, and maintaining competitiveness, outweighed the anticompetitive effects. *See id.* at 1021-24. Summary judgment was affirmed, "barring the NCAA from reenacting compensation limits." *Id.* at 1024.