

To: Uniform Law Commission: Drafting Committee on College Athlete Name, Image and Likeness Issues Act.

From: Dawn Buth, National Collegiate Athletics Association, Office of Government Relations.

Date: January 18, 2020.

Re: Draft College Athlete Name, Image and Likeness Issues Act – Comments.

The NCAA thanks the drafting committee for its thoughtful and deliberate work in considering the issue of student-athlete name, image and likeness and we appreciate the opportunity to serve as an observer for the committee's efforts. This memo provides comments and feedback in response to the College Athlete Name, Image and Likeness Issues Act discussion draft circulated during the committee's December 2020 meeting.

The NCAA membership believes that uniform, national legislation must be in place to provide student-athletes fair competition, protect the collegiate athletics model and ensure opportunities for future student-athletes. The NCAA is committed to allowing name, image and likeness opportunities for student-athletes consistent with the college athlete model and - as many of you are aware - in October 2019, the NCAA Board of Governors directed the Association's three divisions to modernize its rules. Since this time, the Divisions I, II and III memberships have developed the attached legislative proposals which have been informed by the extensive review of, feedback from and engagement with its nearly 1,100 member schools.

The NCAA strongly recommends that any model state legislation be consistent with the Association's proposed rules and existing bylaws which have developed and voted on by its member institutions. While the draft NIL proposal developed by the ULC is largely consistent with proposals developed by the NCAA membership, this memo outlines areas where there are opportunities for additional alignment. The NCAA Divisions I, II and III memberships have temporarily delayed NIL votes expected to occur this month due to external judicial and political factors, however this memo reflects input consistent with the membership's proposals at the time of this communication. If subsequent legislation being considered or voted on by the membership is substantially different that noted in this memo, our staff will follow-up with an addendum which will include these updates.

On behalf of the NCAA and its member schools, we thank the committee for its consideration of the Association's feedback on this important matter.

SECTION 2. Definitions.

Overall: Any law pertaining to student-athlete name, image, and likeness should not confer any greater right of publicity than otherwise provided under a state’s right of publicity law. Definitions pertaining to name, image, and likeness including (16) “NIL” or “Name, Image, and Likeness” and (11) - “Game-Related NIL Use” in this draft extend far beyond rights of publicity including but not limited to intrusion upon federal copyright law that governs broadcast, photography and other media. Additionally, wherever the word “inducement” is used, one has to be careful to differentiate between those that are permissible under NCAA bylaws (e.g., scholarships) and those that influence a prospect or recruit through some form of currency. Additional comments are included below:

- (4) **“Booster”**: We believe the definition in this draft is too broad for enforcement.
- (5) **“Championship Season”**: This provision may be intended to mirror marketing restrictions implemented by the U.S. Olympic and Paralympic Committee for its athletes, but it does not seem appropriate for the purposes of college athletes as it is written. The NCAA NIL proposal does not distinguish between in and out of season.
- (6) **“College Athlete”**: In its December meeting, we understand the Commission discussed narrowing this definition. We recommend incorporating the NCAA’s definition of student-athlete found in bylaw 12.02.14: “A student-athlete is a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.6. A student is not deemed a student-athlete solely on the basis of prior high school athletics participation.”
- (13) **“Independent Contractor”**: The reference to shoe and apparel companies may not be appropriate, since those contracts may contain service provisions.

SECTION 4. Limits and Restrictions on NIL Activity.

- (a) **“Fair Market Value”**. We understand some members of the Commission suggested the draft legislation require a cap on earnings rather than providing the right to fair market value. We strongly recommend that the Commission avoid restricting NIL compensation through a cap as a cap would present questions of arbitrariness and unreasonableness. A cap also could trigger questions of control such as by an employer. The NCAA is also considering the use of an independent third-party administrator to address integrity concerns and other issues related to fair market value raised in the December meeting. Therefore, we would like to ensure the legislation does not preclude the NCAA from adopting additional rules – such as disclosure or registration requirements – that assist the Association and its member institutions in ensuring fair play, promoting integrity and strengthening accountability.

SECTION 5. Limits and Restrictions on NIL Activity.

- (c) **Eligibility**. NCAA proposals do not require student-athletes to be eligible in order to be compensated for the use of their NIL.
- (g) and (h) **Conflicts and Restrictions** – The proposed NCAA legislation includes both provisions noted in clause (g) and none of the provisions noted in clause (h); the Association’s proposals prohibit student-athletes from engaging in NIL activities involving a commercial product or service that

conflicts with NCAA legislation AND it allows institutions to prohibit a student-athlete's involvement in NIL activities that conflict with existing institutional sponsorship arrangements. Therefore, at this time, we support retaining both provisions in clause (g) and removing clause (h) entirely.

SECTION 6. Institutional Involvement; Restricted Activity; Permitted Activity.

- **(a)(2) *Institutional Assistance.*** The NCAA proposal has an exception to this provision if the assistance would also be available to any regular student, such as advice obtained through a class in the course offerings.
- **(b)(4) *Use of Institutional Facilities.*** This provision is more restrictive than current NCAA legislation and we do not support it at this time.

SECTION 8. Third-Party Professionals; Duties; Registration Requirements.

- **(c) “*Advice Regarding Professional Sports Opportunities*”:** In its December meeting, the Commission discussed amending this provision to allow third-party professionals to provide advice regarding professional sports. This is inconsistent with existing or proposed NCAA legislation and we support keeping this definition as is. The NCAA believes there is an important distinction between an agent who is advancing a person’s professional sports career, such as negotiating terms of a contract to play sports, versus the services associated with securing compensation for the use of name, image and likeness.

SECTION 15. Group Licensing.

- **(a).** This section seems as though it would benefit from additional development as, for example, athletes could grant rights directly to a third-party seeking multiple student rights of publicity. In any event, Non-Game NIL Use should not be a defined term. A person has a compensable right of publicity or one does not. Game or Non-Game should not modify the rights a person would otherwise have and should not interfere with federal copyright jurisdiction.

SECTION 16. Scope of Act.

- **(a) *Application.*** The exclusion here seems at odds with the notion that any person with future college eligibility may engage in NIL activity.
- **(b) *Employment Status.*** We suggest this provision state more clearly that the law does not confer employment status to student-athletes.