

NCAA Issues Guidance Pertaining to Institutional Involvement in NIL Space

By: Tate Thompson and Curry Sexton

When the National Collegiate Athletic Association (NCAA) implemented its Interim Name, Image, and Likeness (NIL) Policy, effective July 1, 2021, it did not detail whether and to what extent institutions could be involved in the NIL space. Naturally, the lack of guidance on this issue led to a great deal of confusion and uncertainty. Some states tried to eliminate the confusion and uncertainty by enacting legislation either permitting or prohibiting institutions and their employees from being involved in the NIL space, among other matters. Many other states did not enact any NIL legislation, causing further confusion and uncertainty.

Last week, the NCAA Division I Board of Directors sought to eliminate the confusion and uncertainty by approving clarifications to its Interim NIL Policy that specifically detail the extent to which an institution may be involved in NIL activities. The approved clarifications explain what the NCAA views as “Permissible” and “Impermissible” institutional involvement under the NCAA’s Interim Policy. Specifically, the clarifications provide guidance related to the following areas:

1. Institutional education and monitoring;
2. Institutional support for student-athlete NIL activities;
3. Institutional support for NIL entities (e.g., collectives); and
4. Institutional involvement in NIL negotiations, revenue sharing, and student-athlete compensation.

Education and Monitoring

The NCAA did not identify any impermissible institutional activities related to education and monitoring. Instead, the NCAA is taking the broad view that institutions should not be discouraged from offering their student-athletes all of the informational resources necessary to comply with applicable laws and policies and maximize their brands. Specifically, the NCAA announced that it is perfectly above-board for institutions to offer athletes educational sessions in financial literacy, taxes, entrepreneurship, and social media. This is essentially no different from any student seeking a business degree and aligns with the NCAA’s educational mission.

Similar educational instruction may be offered to NIL collectives, boosters, and even prospective student-athletes (PSAs). Already an essential recruiting tool, the NCAA has authorized institutions and coaches to highlight the school’s NIL infrastructure to recruits and their parents.

Institutional Support for Student-Athlete NIL Activity

The NCAA has adopted a stricter approach related to institutional involvement in the NIL activities of their student-athletes.

Permissible institutional activities under this category include the following, among others:

- Connecting NIL entities with student-athletes, including making introductions, providing on-campus space for meetings, etc.
- Connecting institutional donors/boosters with NIL entities, including providing assets (e.g., tickets

and suites at fair market value), requesting donor contributions to NIL entities, facilitating meetings, etc.

- Engaging NIL entities to administer a marketplace (e.g., Opendorse) that matches athletes with NIL opportunities without the institution's involvement.
- Providing stock photos/videos/graphics to a student-athlete or NIL entity.
- Promoting student-athletes NIL activities, provided there is no value or cost to the institution (e.g., retweeting or liking a social media post).
- Purchasing items related to an athlete's NIL deal that are de minimis in value and for the same rate available to the general public.
- Staff members assisting NIL entities in raising money (e.g., appearing at fundraisers, donating autographed items, etc.).

Impermissible institutional activities under this category include the following, among others:

- Communicating with NIL entities regarding specific student-athlete requests for compensation.
- Proactively assisting in the development/creation and execution or implementation of a student-athlete's NIL activity (e.g., developing product, developing promotional materials, ensuring student-athlete's performance of contractual NIL activities, etc.), unless the same benefit is generally available to the institution's students.
- Providing services (other than education) to support NIL activity (e.g., graphics designer, tax preparation, contract review, etc.) unless the same benefit is generally available to the institution's students.
- Providing access to equipment to support NIL activity (e.g., cameras, graphics software, computers, etc.) unless the same benefit is generally available to the institution's students.
- Subscribing to the entity/collective and donating cash to the entity/collective (regardless of whether funds are earmarked for a specific sport or athlete).
- Athletics department staff member being employed by NIL entity/collective.

The NCAA has effectively approved its institutions acting as conduits, or liaisons, between its student-athletes and the individuals/entities writing the checks. This is generally consistent with many state laws and the NCAA's prior guidance. Nevertheless, the list of permissible and impermissible activities provides much-needed clarity on where the NCAA stands and what its eventual non-interim NIL policy might look like. Also, many of the impermissible activities in this category may become permissible if "the same benefit is generally available to the institution's students." This caveat benefits student-athletes by recognizing their status as students—benefits available to the general student body are not denied to student-athletes.

Institutional Support for NIL Entities

The NCAA's limitations on institutional involvement with its student-athletes is similar to its limitations on institutional involvement with NIL entities.

Permissible institutional activities under this category include the following:

- Staff members may assist NIL entities in raising money (e.g., appearances at fundraisers, donating autographed items, etc.).
- Institutions may provide assets (e.g., tickets, suites) to NIL entities under sponsorship agreements, provided that access is available to other sponsors on the same terms.
- Institutions may request donors provide funds to NIL entities (without directing funds be used for a specific sport or student-athlete).
- Institutions may provide donor information or facilitate meetings between donors and NIL entities.

Impermissible institutional activities under this category include the following:

- Institutions may not subscribe to the NIL entity or donate cash to the entity (regardless of whether funds are earmarked for a specific sport or student-athlete).
- Institutions may not provide assets (e.g., tickets, suites) to a donor as an incentive for providing funds to the NIL entity.
- Athletics department staff members may not be employed by a NIL entity.

The NCAA's updated guidance makes it clear that institutions may be tangentially involved in the NIL process, but must maintain an arms-length distance from any NIL entities.

NIL Negotiations, Revenue Sharing, and Compensation

The NCAA has taken its firmest and most restrictive stance with respect to institutional involvement in the NIL deal-making process.

The following list of activities have been deemed impermissible:

- Athletics department staff members (or companies owned by staff members) cannot represent student-athletes in NIL deals.
- Any individual or entity acting on behalf of the athletics department (e.g., third-party rights holders, third-party agents) may not represent student-athletes in NIL deals.
- An institution may not enter into a contract with a student-athlete for the sale of products.
- An institution may not permit its student-athletes to share in any revenue generated by the institution or its athletics department.
- An athletics department staff member who owns a business separate from the institution cannot engage in a NIL deal with a student-athlete.
- A coach of an institution cannot compensate an athlete to promote the coach's camp.

The NCAA did not recognize a single activity where an institution or its employees, agents, or other affiliates can be directly involved in arranging a NIL deal for a specific student-athlete. This approach is consistent with the NCAA's guidance above. Institutions may educate and facilitate NIL deals for the benefit of their student-athletes. They may not, however, directly negotiate, provide compensation, or share revenues with their student-athletes.

Conclusion

Ultimately, the NCAA's most recent guidance does not mark drastic change. Nevertheless, the list of permissible and impermissible activities is a helpful guide for institutions hoping to stay within the NCAA's regulatory framework. More importantly, the guidance presents a glimpse into what may eventually make its way into the NCAA's governing bylaws or a more permanent policy.

Stay tuned for further developments on the topic of NIL and other subjects relating to intercollegiate athletics.

This article is general in nature and does not constitute legal advice. The authors of this article, Tate Thompson and Curry Sexton, are members of Seigfreid Bingham's Sports and Entertainment Group and routinely represents clients in collegiate athletics. If you or your organization have questions about the impact of the NCAA's most recent announcement, please contact Tate or Curry at 816.421.4460.