

NCAA Name, Image, and Likeness Update

By Max Forer and Nicoleas Mayne

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2020 was a difficult year and understandably, many educational institutions prioritized other issues over preparation for NCAA name, image, and likeness (“NIL”) changes. Nevertheless, state and federal legislatures, the U.S. Supreme Court, and the NCAA have continued to press on and with at least one state bill set to go into effect July 1, 2021, change to college sports for D-1, D-2, and D-3 institutions is now just months away. This update is a distilled summary for the benefit of educational institutions and should not be used as a statement of the rules or laws. For a summary of the competing enacted and proposed NIL laws and rules, download our summary chart, “[Miller Nash’s Name, Image, and Likeness Legislation Chart](#).”

State Legislation

Six states have enacted NIL legislation and NIL legislation has been proposed in every other state except one.¹ Each state bill is slightly different, but almost all contain certain common themes: (1) specified agent compliance standards; (2) student-athlete disclosure of NIL deals; and (3) institutional sponsorship carve-out. Without a federal solution, more states will likely enact NIL legislation in order to avoid hampering the recruiting efforts of their educational institutions. While we hope to see a uniform standard in place prior to July 1, 2021, institutions need to prepare for a potential state-by-state patchwork approach to NIL and an uneven recruiting playing field in the short term.

Federal Legislation

There are six federal bills introduced to the U.S. Senate or House. A federal bill is preferred by all parties in order to create a single national standard for NIL and render the various state bills moot. However, the scope of each federal bill varies widely. Currently, the consensus is that any federal legislation will be more protective of athletes (less restrictions on endorsement opportunities, for example), less friendly to the NCAA (minimal to no antitrust exemptions) and cover issues beyond just NIL (including healthcare protections, revenue-sharing, etc.).

NCAA v. Alston

The Northern District Court of California ruled (March 8, 2019) that the NCAA rules violated antitrust law by limiting the amount of education related benefits (ex. money to cover the cost of computers) that athletes could procure, a decision that was later upheld by the 9th Circuit (May 18, 2020). The NCAA appealed the 9th Circuit’s ruling, and the U.S. Supreme Court granted certiorari on December 16, 2020, with arguments set for March 31, 2021 and a decision likely in June or July. A decision upholding the lower court’s ruling could open the door to significant competition between schools for athletes by paying athletes for an “uncapped amount” of education related benefits. On the other hand, a decision siding with the NCAA could bar that type of competition and continue to uphold current NCAA structure. Irrespective of the changes to NIL, the Supreme Court’s decision may result in drastic changes to NCAA student-athlete compensation.

¹ Legislation has been proposed in Idaho amending its current athlete-agent regulations, but the amendments do not relate to name, image and likeness or change the impacts of agent representation on student-athlete eligibility.

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NCAA NIL Legislation

The [NCAA's timeline](#) was supposed to result in a vote on NIL rules at the NCAA convention in January 2021, but they've since stated they will delay, citing a letter sent by the DOJ's Anti-Trust Division. In addition to anti-trust uncertainty, the delay is also likely due to the NCAA wanting to see (1) the Supreme Court's *Alston* ruling and (2) which federal bill might pass Congress (or be best positioned to do so). There are still a number of unanswered questions with the NCAA's proposed rules as well, including the details of a contemplated a third party clearinghouse that would vet NIL deals signed by athletes to ensure they are not de facto recruiting inducements. The NCAA has not yet identified who this clearinghouse will be and how they will monitor and record NIL deals.

Even with all the uncertainties, we still expect NIL rules to be adopted by the NCAA in June or July in order to be in place by the 2021-2022 academic year. The Supreme Court's ruling on *Alston*, while not specifically related to NIL, will impact whether more than just the NCAA NIL rules need to be changed. Any enacted federal legislation, if not in line with the anticipated adopted NCAA rules will likely also cause additional NCAA NIL rule changes.

We believe it is prudent for institutions to start modernizing before the NIL rules go into effect by (a) developing procedures and policies to manage potential liabilities to institutions, student-athletes, donors, and agents, (b) creating educational programs to advise student-athletes on professional services and contracts that they will encounter in exploiting their NIL, and (c) reviewing existing contracts issue spotting NIL issues.



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