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Student Athlete Name, Image, Likeness Legislation: Considerations for the 117th Congress

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Student Athlete Name, Image, Likeness Legislation: Considerations for the 117th Congress

The national debate on college athlete compensation, fueled in part by high-profile litigation and state legislative enactments, has prompted calls for congressional action on the issue of student athlete name, image, and likeness (NIL) compensation. NIL refers generally to the use of an athlete's name, picture, or appearance, often for commercial purposes. The National Collegiate Athletic Association (NCAA), the primary regulator of intercollegiate athletics, prohibits student athletes from receiving compensation for their athletic skills beyond allowed grant-in-aid provided by their higher education institutions. The NCAA justifies these rules as a way to promote amateurism in intercollegiate athletics. Among other compensation-related rules, the NCAA prohibits student athletes from profiting from the use of their NIL to promote or endorse products or services.

The NCAA's rules prohibiting student athlete NIL compensation have become the focus of several lawsuits. One of the most notable, *O'Bannon v. National Collegiate Athletic Association*, challenged the NCAA's rules under federal antitrust laws that prohibit unreasonable restraint on trade. In *O'Bannon*, the plaintiff—a former college athlete—discovered his likeness was being used in a commercial video game without his permission or compensation. Representing a class of current and former college athletes, the plaintiff sued the NCAA, claiming that its rules prohibiting student athletes from being compensated for the use of their NIL in video games, live game telecasts, and other video footage, violated the Sherman Antitrust Act (Sherman Act). In a 2015 decision, the U.S. Court of Appeals for the Ninth Circuit held that the rules violated the Sherman Act, but determined that the rules had some pro-competitive justifications. The court required the NCAA to permit schools to provide student athletes compensation up to the full cost of attendance, but it did not directly change the specific rules regarding NIL compensation. Since the *O'Bannon* litigation, several other antitrust lawsuits have been filed that challenge the NCAA's compensation rules, one of which, *NCAA v. Alston*, was recently resolved by the Supreme Court.

Soon after the *O'Bannon* decision, individual states began considering legislation to grant NIL rights to student athletes. The first, the California Fair Pay to Play Act, was signed into law on September 30, 2019, and goes into effect on January 1, 2023. The Fair Pay to Play Act generally makes it illegal for postsecondary institutions and athletic associations, conferences, or groups with authority over intercollegiate athletics to prevent student athletes from earning compensation for the use of their NILs. At least 19 other states have passed similar laws in the years following the Fair Pay to Play Act, and several of these laws go into effect as soon as July 2021.

Shortly after California passed the Fair Pay to Play Act, the NCAA began working on reforming its own NIL compensation rules. In October 2020, the NCAA approved a proposal to generally allow student athletes to be compensated for a commercial, nonprofit, or charitable entity's use of their NIL. These proposed bylaw amendments were first scheduled for a vote before NCAA leadership in January 2021, but the vote was postponed after NCAA President Mark Emmert received a letter from the Department of Justice's (DOJ's) antitrust division that suggested the DOJ may object to new NIL rules on antitrust grounds. Recently, the NCAA proposed a temporary policy that would allow student-athletes to earn NIL compensation according to the laws of the state where they attend school.

Although the NCAA claims that it remains committed to modernizing its NIL rules, it has called on Congress to pass federal NIL compensation legislation. NCAA President Emmert, while testifying at a July 2020 Senate Judiciary Committee hearing, emphasized that 36 states had either passed or introduced NIL legislation, and argued that a patchwork of different state laws would create a burden for the NCAA. At least eight bills were introduced in the 116th Congress that addressed, among other things, NIL compensation rights. Although none of the bills were passed into law, they each provided a unique framework for addressing the NIL issue, covering topics such as NIL rights and professional representation for NIL matters. At least three bills have been introduced on the topic in the 117th Congress, including a bill from the 116th Congress that was reintroduced with minimal changes.

Contents

Background	1
Relevant NCAA Rules Regarding NIL Compensation	1
Relevant Litigation.....	3
State Legislative Responses	7
NCAA Proposed Bylaw Changes	8
Congressional Legislative Proposals.....	11
Legislative Proposals from the 116th Congress	12
Legislative Proposals from the 117th Congress	22
Considerations for Congress	25

Contacts

Author Information.....	27
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The national debate on college athlete name, image, and likeness (NIL) compensation, fueled in part by high-profile litigation and state legislative enactments, has prompted calls for congressional action.¹ Currently, the National Collegiate Athletic Association’s (NCAA’s) rules prohibit student athletes from receiving compensation for the commercial use of their NIL. Receiving such compensation jeopardizes an athlete’s eligibility to compete in intercollegiate athletics. These rules—and other NCAA rules prohibiting student athlete compensation—have been the subject of several court cases, but no court has yet to invalidate them. Although the NCAA has proposed changes to its NIL compensation rules, it has tabled the matter amidst concerns that its proposed changes may violate federal antitrust laws.

In recent years, individual states have begun enacting legislation to provide student athletes with NIL compensation rights. Many of these laws take effect as early as July 2021. The NCAA, concerned with the potential for a patchwork of individual state laws, has called on Congress to enact federal standards on the issue of NIL compensation rights.

This report begins by providing a background on NIL compensation issues, including a brief summary of recently passed state laws and a discussion of the NCAA’s proposed rule changes, and then addresses the bills that were introduced in the 116th Congress and those that have been introduced so far in the 117th Congress.

Background

Relevant NCAA Rules Regarding NIL Compensation

The NCAA was founded in 1905 to create rules, also known as bylaws, for intercollegiate athletics.² Today the organization is composed of nearly 1,100 member institutions³ with the basic purpose of “maintain[ing] intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports.”⁴ To further this purpose and association principles, the NCAA issues and enforces rules that govern athletic competition between its member institutions.⁵ Under its stated “Principles for Conduct of Intercollegiate Athletics,”⁶ the NCAA emphasized its commitment to amateurism and the idea that “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student

¹ See Rachel Stark-Mason, *Name. Image. Likeness*, NCAA Champion, <http://www.ncaa.org/champion/name-image-likeness> (last visited May 3, 2021) (defining name, image, and likeness as three elements that make up the legal “right to publicity” which involves a situation “where permission is required of a person to use their name, image, or likeness.”).

² See generally *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

³ *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited May 3, 2021). NCAA member institutions are divided into three divisions, Division I, Division II, and Division III based generally on size. *Our Three Divisions*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> (last visited May 3, 2021). Because larger institutions are in Division I, this report will focus on Division I rules.

⁴ NAT’L COLLEGIATE ATHLETIC ASS’N, 2020-21 NCAA DIVISION I MANUAL § 1.3.1 (2020), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [hereinafter *Division I Manual*].

⁵ *Id.* at § 2.01.

⁶ Pursuant to the *Division I Manual*, any rules passed by the NCAA that govern intercollegiate athletics “shall be designed to advance one or more basic principles . . . to which the members are committed.” *See id.*

participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”⁷

With this guiding amateurism principle, the NCAA has issued a series of rules that govern matters such as student athlete eligibility, financial aid, scholarships, and compensation; including specific rules that limit how student athletes may earn money.⁸ For example, NCAA rules state that student athletes may receive “scholarships or educational grants-in-aid administered by an educational institution” within the bounds of NCAA rules.⁹ NCAA rules limit financial aid to include only the “cost of attendance that normally is incurred by students enrolled in a comparable program at that institution.”¹⁰ Student athletes receiving financial aid other than that permitted by the NCAA lose their intercollegiate athletic eligibility.¹¹ Because the NCAA does not consider financial aid “to be pay or the promise of pay for athletics skill,”¹² any other compensation to student athletes other than “financial aid” for athletic services may deem the athlete ineligible for intercollegiate competition.¹³

NCAA rules also allow compensation for non-athletic work, and student athletes may earn compensation for “work actually performed . . . at a rate commensurate with the going rate in that locality for similar services.”¹⁴ However, compensation earned from outside employment may not include “any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.”¹⁵ NCAA rules also provide that a student athlete may start his or her own business, however, “the student-athlete’s name, photograph, appearance or athletics reputation are not used to promote the business.”¹⁶

Importantly, section 12.5 in the NCAA Division I Manual—entitled “Promotional Activities”—governs the permissible¹⁷ and non-permissible uses of a student athlete’s NIL, which refers generally to the use of an athlete’s name, picture, or appearance.¹⁸ Current NCAA rules state that a student athlete becomes ineligible for intercollegiate athletic competition if the student athlete

- (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or

⁷ *Id.* at § 2.9.

⁸ *See generally id.* at §§ 12-13 & 15.

⁹ *Id.* at § 15.01.1.

¹⁰ *See id.* at §§ 15.1, 15.01.6.

¹¹ *Id.* at § 15.01.2.

¹² *Id.* at § 12.01.4.

¹³ *Id.* at § 12.1.2.

¹⁴ *Id.* at § 12.4.1.

¹⁵ *Id.* at § 12.4.1.1.

¹⁶ *Id.* at § 12.4.4.

¹⁷ *Id.* at § 12.5.1.1 (noting that “[a]n institution or recognized entity thereof (e.g., fraternity, sorority or student government organization), a conference or a noninstitutional charitable, educational or nonprofit agency may use a student-athlete’s name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete’s participation in intercollegiate athletics” so long as certain listed conditions are met.).

¹⁸ *Id.* at § 12.5. *See also* Stark-Mason, *supra* note 1.

(b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.¹⁹

Relevant Litigation

There have been several challenges to the legality of the NCAA's amateurism rules, specifically the prohibition on NIL compensation. One of the most notable examples, *O'Bannon v. National Collegiate Athletic Association*,²⁰ challenged the amateurism rules under federal antitrust laws that prohibit unreasonable restraints on trade. In *O'Bannon*, the plaintiff—a former college athlete—discovered his likeness was being used in a commercial video game without his permission or compensation.²¹ Representing a class of current and former college athletes, the plaintiff sued the NCAA claiming its rules prohibiting student athletes from being compensated for the use of their NILs in video games, live game telecasts, and other video footage, violated the Sherman Antitrust Act (Sherman Act).²² In a 2014 decision, the district court ruled that the challenged NCAA rules had both anticompetitive and pro-competitive effects on trade. However, because two “less restrictive alternatives”²³ were available to fulfill the NCAA's stated pro-competitive justifications for the rules, the rules ultimately violated the Sherman Act.²⁴ The two less restrictive alternatives, according to the court, included (1) payment of scholarships or stipends up to the cost of attendance beyond the grant-in-aid cap,²⁵ and (2) permitting colleges to

¹⁹ *Id.* at § 12.5.2.1.

²⁰ 7 F. Supp. 3d 955 (N.D. Cal. 2014), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 277 (2016).

²¹ *Id.* at 965.

²² *Id.*

²³ In antitrust cases, courts may apply the “less restrictive alternatives” test when the alleged conduct has both anticompetitive and pro-competitive effects on trade. Under the less restrictive alternatives test, a court may compare the alleged conduct to a “hypothesized alternative” and determine whether “the alternative action is less harmful in the particular sense that it is ‘less restrictive,’” or, in other words, “could the good have been achieved equally well with less bad?” If the alternative action is less harmful to competition, then the conduct at issue will be deemed to be in violation of antitrust law. *See C. Scott Hemphill, Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 929 (2016).

²⁴ *O'Bannon*, 7 F. Supp. 3d at 1007. The district court found the NCAA produced “sufficient evidence” that some of its restrictions on student athlete compensation yielded pro-competitive benefits. For example, rules preventing schools from paying athletes large sums of money “may serve to increase consumer demand for its product,” and “may facilitate its member schools’ efforts to integrate student-athletes into the academic communities on their campuses.” *Id.* at 1004.

²⁵ As the district court explained, the cost of attendance is usually higher than the value of a full grant-in-aid under NCAA rules. NCAA bylaws “define a full ‘grant-in-aid’ as ‘financial aid that consists of tuition and fees, room and board, and required course-related books.’ This amount varies from school to school and from year to year. Any student-athlete who receives financial aid in excess of this amount forfeits his athletic eligibility.” *Id.* at 971. The NCAA however, “imposes a separate cap on the total amount of financial aid that a student-athlete may receive. Specifically, it prohibits any student-athlete from receiving financial aid in excess of his ‘cost of attendance,’” which is “a school-specific figure defined in the bylaws.” *Id.* Cost of attendance is usually “an amount calculated by [a school]’s financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance” at that school.” *Id.* The court noted that “[b]ecause it covers the cost of ‘supplies, transportation, and other expenses,’ the cost of attendance is generally higher than the value of a full grant-in-aid,” and that “the gap between the full grant-in-aid and the cost of attendance varies from school to school but is typically a few thousand dollars.” *Id.* at 971–72. In 2015, however, the “Power Five” conferences—that generate the most revenue—voted to increase overall grant-in-aid limits to allow scholarships up to the full cost of attendance. *See In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1064 (N.D. Cal. 2019) (noting “[t]he revised ‘full grant-in-aid’ comprises ‘tuition and fees, room and board, books and other expenses related to attendance at the institution up to the cost of attendance’”), *aff’d*, 958 F.3d 1239 (9th Cir. 2020).

hold a portion of licensing revenues generated from the use of student athlete NILs in trust, to be distributed to student athletes in equal shares after they leave school or their eligibility expires.²⁶

On appeal, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) upheld the district court’s determination that the NCAA rules violated the Sherman Act; however, the Ninth Circuit rejected the district court’s determination that creating a trust fund for student athletes was a less restrictive alternative to the current NCAA rules.²⁷ As a result, the Ninth Circuit affirmed the district court’s determination that the NCAA’s compensation rules, at that time, violated the Sherman Act and affirmed the injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance.²⁸

While the *O’Bannon* case targeted specific NCAA rules that restricted a student athlete’s income from outside sources, other litigation has challenged the “interconnected” set of NCAA rules that cap the amount of compensation a student athlete may receive.²⁹ As mentioned above, NCAA bylaws provide that “[a] student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance.”³⁰ In *In re National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* (*Grant-in-Aid* litigation), plaintiffs brought antitrust claims alleging that the NCAA and athletic conferences had colluded to cap the compensation a school may provide to athletes.³¹ Applying an analysis similar to that used in *O’Bannon*, the district court held that NCAA limits on *education-related benefits* provided to student athletes were unreasonable restraints of trade under the Sherman Act;³² however, the NCAA could continue to limit “compensation and benefits unrelated to education.”³³

On appeal, the Ninth Circuit affirmed the district court’s conclusion and injunction prohibiting the NCAA from limiting education-related benefits.³⁴ This decision effectively allowed for athlete compensation for certain education-related benefits that had previously been prohibited by the NCAA such as “computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies.”³⁵

While the *Grant-in-Aid* litigation was not a direct challenge to the NCAA’s NIL compensation rules, the antitrust allegations implicated the *O’Bannon* decision, in which the Ninth Circuit required the NCAA to allow scholarships up to the cost of attendance.³⁶ The *Grant-in-Aid*

²⁶ *O’Bannon*, 7 F. Supp. 3d at 983–84.

²⁷ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1053 (9th Cir. 2015).

²⁸ *Id.* at 1075–76.

²⁹ See *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *aff’d*, 958 F.3d 1239 (9th Cir. 2020), *cert. granted sub nom.*, *Am. Athletic Conference v. Alston*, No. 20-520, 2020 WL 7366279 (U.S. Dec. 16, 2020), *Nat’l Coll. Athletic Ass’n v. Alston*, No. 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020) [hereinafter *Grant-in-Aid I*].

³⁰ Division I Manual, *supra* note 4, § 15.1.

³¹ *Grant-in-Aid I*, 375 F. Supp. 3d at 1061.

³² *Id.* at 1062.

³³ *Id.* at 1087.

³⁴ *In re Nat’l Collegiate Athletic Ass’n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1266 (9th Cir. 2020), *cert. granted sub nom.*, *Am. Athletic Conference v. Alston*, No. 20-520, 2020 WL 7366279 (U.S. Dec. 16, 2020), *Nat’l Coll. Athletic Ass’n v. Alston*, No. 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020) [hereinafter *Grant-in-Aid II*].

³⁵ *Grant-in-Aid I*, 375 F. Supp. 3d at 1088.

³⁶ *Id.* at 1065 (noting that “[b]y the time the *O’Bannon* injunction went into effect, the NCAA had already increased, through the Autonomy structure, the grant-in-aid limit to the cost-of-attendance amount for all Division I student-

litigation essentially opened the door to allow additional compensation and benefits (so long as they were related to education) that a school could choose to offer its student athletes.³⁷

On December 16, 2020, the Supreme Court granted petitions for certiorari in the *Grant-in-Aid* litigation,³⁸ and agreed to review the Ninth Circuit’s decision regarding whether NCAA rules governing compensation of student athletes violate federal antitrust law.³⁹ On June 21, 2021, the Court issued a unanimous decision in the case—known before the Supreme Court as *NCAA v. Alston*—affirming the Ninth Circuit.⁴⁰ The Court held that the district court’s injunction prohibiting NCAA rules that capped education-related benefits was consistent with established antitrust principles.⁴¹ The Court rejected the NCAA’s arguments that because of the unique nature of its product, it should be entitled to a more deferential review under antitrust law.⁴²

Recently, however, another group of college athletes sued the NCAA for antitrust violations. This time the allegations were aimed more directly at the specific NCAA rules prohibiting student athletes from receiving compensation for the commercial use of their NIL based on new evidence that has developed since the *O’Bannon* decision.⁴³ The plaintiffs in *House v. National Collegiate Athletic Association* allege that the NCAA conspired with the five largest athletic conferences to fix the price for student athlete NIL compensation at zero, thereby depriving the athletes of compensation for the use of their NIL in violation of Section 1 of the Sherman Act.⁴⁴ The plaintiffs argue that the NCAA effectuates its price fixing through its rules and regulations, such as Bylaw 12.5.2.1 (“Advertisements and Promotions After Becoming a Student Athlete”),⁴⁵ which collectively prohibit student athletes from receiving compensation based on athletic skills or ability.⁴⁶ Among other requested relief, the plaintiffs ask the court to declare the relevant NCAA bylaws void and to enjoin the NCAA and athletic conferences from enforcing those rules.⁴⁷ The case is assigned to the same judge who heard the *O’Bannon* case and the *Grant-in-Aid* litigation.

Beyond challenging NCAA rules under antitrust theories, student athletes have also sought to establish their rights to NIL compensation by claiming the NCAA NIL rules violate their right to

athletes, regardless of NIL use or revenue.”).

³⁷ Jayma Meyer & Andrew Zimbalist, *A Win Win: College Athletes Get Paid for Their Names, Images, and Likenesses and Colleges Maintain the Primacy of Academics*, 11 HARV. J. SPORTS & ENT. L. 247, 277 (2020).

³⁸ *Am. Athletic Conference v. Alston*, No. 20-520, 2020 WL 7366279 (U.S. Dec. 16, 2020), *Nat’l Coll. Athletic Ass’n v. Alston*, No. 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020).

³⁹ *See* Petition for Writ of Certiorari at i, *Nat’l Coll. Athletic Ass’n v. Alston*, No. 20-512 (U.S. Oct. 15, 2020).

⁴⁰ *Nat’l Collegiate Athletic Ass’n v. Alston*, No. 20-512, 2021 WL 2519036 (U.S. June 21, 2021).

⁴¹ *See id.* *See also*, CRS Legal Sidebar LSB10613, *National Collegiate Athletic Association v. Alston and the Debate over Student Athlete Compensation*, by Whitney K. Novak.

⁴² *Id.*

⁴³ Complaint at 5, *House v. Nat’l Collegiate Athletic Ass’n*, No. 4:20-cv-03919 (N.D. Cal. filed June 15, 2020).

⁴⁴ *Id.* at 86.

⁴⁵ Bylaw 12.5.2.1 states that “[a]fter becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) [a]ccepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) [r]eceives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.” *See* Division I Manual, *supra* note 4 at § 12.5.2.1.

⁴⁶ Complaint at 24, *House v. Nat’l Collegiate Athletic Ass’n*, No. 4:20-cv-03919 (N.D. Cal. filed June 15, 2020).

⁴⁷ *Id.* at 90.

publicity. Publicity rights—which are often found in state statutes⁴⁸ or in the common law⁴⁹—allow a cause of action for individuals to challenge the unauthorized use of their identity for commercial gain. Courts have held however, that the right to publicity must be balanced against a defendant’s First Amendment interests in free expression.⁵⁰ In two appellate cases decided in 2013, former college athletes asserted right-to-publicity claims under state law against a video game producer (EA Sports) who allegedly used the likeness of the plaintiffs—without permission—in NCAA sports-themed video games.⁵¹ In both cases, the courts balanced EA Sports’ free expression interests against the individuals’ interest in protecting their right to publicity. The courts held in each case that EA Sports had not sufficiently transformed the video game characters’ likenesses to justify a First Amendment free-expression defense against the athletes’ right-of-publicity claims.⁵² However, in 2016, another appellate court held that college athletes did not have a right to publicity when they appeared in television broadcasts of games because their claims were brought under the Tennessee Personal Rights Protection Act, which “expressly permits the use of any player’s name or likeness in connection with any ‘sports broadcast.’”⁵³ Thus, the outcome of NIL challenges brought under right to publicity theories may vary depending on the law in each jurisdiction. Some laws—such as Tennessee’s law—may include statutory exemptions for athletes in certain circumstances, and other laws may have limits on, for example, the scope or duration of protection of the right to publicity claim.⁵⁴

⁴⁸ See, e.g., CAL. CIV. CODE § 3344(a) (“Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.”).

⁴⁹ See Restatement (Third) of Unfair Competition § 46 (Am. Law Inst. 1995) (“One who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability . . .”).

⁵⁰ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1284 (9th Cir. 2013) (citing *Doe v. TCI Cablevision*, 110 S.W.3d 363, 373 (Mo. 2003) (noting “the use of a person’s identity in news, entertainment, and creative works for the purpose of communicating information or expressive ideas about that person is protected ‘expressive’ speech.”)).

⁵¹ See *id.* at 1271; *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 (3d Cir. 2013).

⁵² *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1279; *Hart*, 717 F.3d at 170. In both cases, the courts considered—and rejected—the defendants’ assertion of the transformative use defense, which provides First Amendment protection so long as “the work in question adds significant creative elements as to be transformed into something more than a mere celebrity likeness or imitation.” *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1273. The defendants ultimately settled the lawsuit. See Tom Farrey, *Players, Game Makers Settle for \$40M*, ESPN (May 30, 2014), https://www.espn.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm (noting that college football and basketball players finalized a \$40 million settlement with EA Sports and the NCAA’s licensing arm for “improperly using the likeness of athletes.”).

⁵³ *Marshall v. ESPN*, 668 F. App’x 155, 157 (6th Cir. 2016).

⁵⁴ See Talor Bearman, *Intercepting Licensing Rights: Why College Athletes Need A Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 100 (2012) (noting that variations in state publicity laws may limit a student athlete’s ability to win or even bring a right to publicity case in court).

State Legislative Responses

Inspired by the *O'Bannon* litigation,⁵⁵ California state lawmakers drafted the Fair Pay to Play Act, which was signed into law on September 30, 2019.⁵⁶ The Fair Pay to Play Act, which goes into effect on January 1, 2023,⁵⁷ generally makes it illegal for postsecondary institutions and athletic associations, conferences, or groups with authority over intercollegiate athletics to prevent student athletes from earning compensation for the use of their NIL.⁵⁸ At least 18 other states have passed similar laws in the years following California's passage of the Fair Pay to Play Act.⁵⁹ Florida,⁶⁰ Colorado,⁶¹ Nebraska,⁶² New Jersey,⁶³ Michigan,⁶⁴ Arizona,⁶⁵ New Mexico,⁶⁶ Mississippi,⁶⁷ Alabama,⁶⁸ Arkansas,⁶⁹ Georgia,⁷⁰ South Carolina,⁷¹ Tennessee,⁷² Maryland,⁷³ Montana,⁷⁴ Nevada,⁷⁵ Oklahoma,⁷⁶ and Texas⁷⁷ each passed legislation that would allow student athletes in those states to receive compensation for the use of their NILs. Florida, Alabama, Mississippi, Georgia, New Mexico, and Texas's laws take effect July 1, 2021.⁷⁸ Arizona's law is scheduled to take effect 91 days after the state legislature adjourns, which means it could be effective as soon as July 24, 2021.⁷⁹ Arkansas, Tennessee, and Nevada's laws go into effect on

⁵⁵ Michael McCann, *What's Next After California Signs Game Changer Fair Pay to Play Act Into Law?*, SPORTS ILLUSTRATED (Sept. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12>.

⁵⁶ Fair Pay to Play Act, S.B. 206, 2019 Reg. Sess. (Cal. 2019).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ At least 18 other states have passed similar NIL laws as of July 1, 2021.

⁶⁰ S.B. 646, 2020 Reg. Sess. (Fla. 2020).

⁶¹ S.B. 20-123, 2020 Reg. Sess. (Colo. 2020).

⁶² L.B. 962, 2020 Reg. Sess. (Neb. 2020).

⁶³ S.B. 971, 2020 Reg. Sess. (N.J. 2020).

⁶⁴ H.B. 5217, 2020 Reg. Sess. (Mich. 2021).

⁶⁵ S.B. 1296, 2021 Reg. Sess. (Ariz. 2021).

⁶⁶ S.B. 94, 2021 Reg. Sess. (N.M. 2021).

⁶⁷ S.B. 2313, 2021 Reg. Sess. (Miss. 2021).

⁶⁸ H.B. 404, 2021 Reg. Sess. (Ala. 2021).

⁶⁹ H.B. 1671, 2021 Reg. Sess. (Ark. 2021).

⁷⁰ H.B. 617, 2021 Reg. Sess. (Ga. 2021).

⁷¹ S.B. 685, 2021 Reg. Sess. (S.C. 2021).

⁷² H.B. 1351, 2021 Reg. Sess. (Tenn. 2021).

⁷³ H.B. 125, 2021 Reg. Sess. (Md. 2021).

⁷⁴ S.B. 248, 2021 Reg. Sess. (Mont. 2021).

⁷⁵ A.B. 254, 2021 Reg. Sess. (Nev. 2021).

⁷⁶ S.B. 48, 2021 Reg. Sess. (Okla. 2021).

⁷⁷ S.B. 1385, 2021 Reg. Sess. (Tex. 2021).

⁷⁸ S.B. 646, 2020 Reg. Sess. (Fla. 2020); H.B. 404, 2021 Reg. Sess. (Ala. 2021); S.B. 2313, 2021 Reg. Sess. (Miss. 2021); H.B. 617, 2021 Reg. Sess. (Ga. 2021); S.B. 94, 2021 Reg. Sess. (N.M. 2021); S.B. 1385, 2021 Reg. Sess. (Tex. 2021).

⁷⁹ *How Can I tell When a Session Law (Chaptered Bill) Becomes Effective?*, ARIZ. STATE LEGISLATURE, <https://www.azleg.gov/faq/#:~:text=The%20general%20effective%20date%20for,are%20provisions%20for%20extending%20it> (last visited Apr. 8, 2021) (explaining that the "general effective date for bills is 91 days after session is over. It is unpredictable in determining the date for session to end. Although the rules allow for a 100-day session, there are provisions for extending it"); *Important Deadlines – First Regular Session, 55th Legislature, 2021*, HOUSE OF REPRESENTATIVES STATE OF ARIZONA (Dec. 1, 2020), <https://www.azleg.gov/alispdfs/housedeadlines.pdf> (explaining that regular sessions of the Arizona Legislature "shall be adjourned . . . no later than the Saturday of the week in which

January 1, 2022,⁸⁰ South Carolina’s law goes into effect on July 1, 2022 (or sooner, if the NCAA or other similar governing body implements similar rules),⁸¹ and Michigan’s law goes into effect on December 31, 2022.⁸² The California, Colorado, New Jersey, Maryland, and Montana laws will not take effect until at least 2023.⁸³ Two states—Nebraska and Oklahoma—allow for schools to implement NIL measures at any time, but no later than July 1, 2023.⁸⁴

Much like the Fair Pay to Play Act, all of the currently enacted state laws generally require that institutions of higher education or athletic organizations, such as the NCAA, allow student athletes to receive compensation for the use of their NIL—including, for example, allowing paid endorsements and sponsorships—without losing eligibility to participate in intercollegiate athletics.⁸⁵ There are, however, some variations among the states’ approaches to NIL compensation. For example, consider only those states whose new laws become effective on July 1, 2021: under Georgia’s law, schools can require student athletes with NIL deals contribute some of their NIL money to a pool that would be distributed to all athletes.⁸⁶ Alabama’s law establishes the Alabama Collegiate Athletics Commission that would develop rules and recommendations “to maintain the fairness and integrity of amateur collegiate athletics.”⁸⁷ The law also prohibits student athletes from making NIL deals that involve their school’s licensed or registered logos without the school’s permission.⁸⁸ New Mexico’s law prohibits any school from enforcing rules that would affect an athlete’s eligibility if the athlete receives “food, shelter, medical expenses or insurance from a third party.”⁸⁹ The law also mandates that athletes can wear any footwear of choice during official team activities.⁹⁰ Florida, Georgia, and Texas’s laws require some amount of financial literacy education for student athletes.⁹¹

NCAA Proposed Bylaw Changes

Shortly after California passed the Fair Pay to Play Act, the NCAA’s Federal and State Legislation Working Group presented recommendations related to the NIL compensation issue to the NCAA Board of Governors.⁹² The NCAA Board of Governors voted to “permit students participating in athletics the opportunity to benefit from the use of their name, image and/or

the 100th day (April 20) of a session falls,” which is anticipated to be April 24, 2021).

⁸⁰ H.B. 1671, 2021 Reg. Sess. (Ark. 2021); H.B. 1351, 2021 Reg. Sess. (Tenn. 2021); A.B. 254, 2021 Reg. Sess. (Nev. 2021).

⁸¹ S.B. 685, 2021 Reg. Sess. (S.C. 2021).

⁸² See H.B. 5217, 2020 Reg. Sess. (Mich. 2021).

⁸³ Zachary Zagger, *4 Key Issues As States Tackle College Athlete Pay*, LAW 360 (Oct. 9, 2020), <https://www.law360.com/articles/1318247/4-key-issues-as-states-tackle-college-athlete-pay>; H.B. 125, 2021 Reg. Sess. (Md. 2021); S.B. 248, 2021 Reg. Sess. (Mont. 2021).

⁸⁴ L.B. 962, 2020 Reg. Sess. (Neb. 2020); S.B. 48, 2021 Reg. Sess. (Okla. 2021).

⁸⁵ Zagger, *supra* note 83. See also H.B. 5217, 2020 Reg. Sess. (Mich. 2021); S.B. 1296, 2021 Reg. Sess. (Ariz. 2021).

⁸⁶ H.B. 617, 2021 Reg. Sess. (Ga. 2021).

⁸⁷ H.B. 404, 2021 Reg. Sess. (Ala. 2021).

⁸⁸ *Id.*

⁸⁹ S.B. 94, 2021 Reg. Sess. (N.M. 2021).

⁹⁰ *Id.*

⁹¹ S.B. 646, 2020 Reg. Sess. (Fla. 2020); H.B. 617, 2021 Reg. Sess. (Ga. 2021); S.B. 1385, 2021 Reg. Sess. (Tex. 2021).

⁹² See NAT’L COLLEGIATE ATHLETIC ASS’N, REPORT OF THE NCAA BOARD OF GOVERNORS OCTOBER 29, 2019 MEETING 4 (2019), https://ncaaorg.s3.amazonaws.com/committees/ncaa/exec_boardgov/Oct2019BOG_Report.pdf [hereinafter NCAA NIL Report].

likeness in a manner consistent with the values and beliefs of intercollegiate athletics,” and directed the NCAA’s three divisions to begin considering bylaw modifications.⁹³

In October 2020, the NCAA Division I Council approved an updated draft of proposed NCAA NIL bylaw amendments.⁹⁴ The proposed changes would amend NCAA bylaws to generally allow student athletes compensation for a commercial, nonprofit, or charitable entity’s use of their NIL.⁹⁵ According to the NCAA, the proposed measures—if adopted—would:

- Allow student athletes to use their NIL to promote camps and clinics, private lessons, their own products and services, and commercial products or services.
- Allow student athletes to be paid for their autographs and personal appearances.
- Allow student athletes to crowdfund for nonprofits or charitable organizations, catastrophic events and family hardships, as well as for educational expenses not covered by cost of attendance.
- Allow student athletes the opportunity to use professional advice and marketing assistance regarding NIL activities, as well as professional representation in contract negotiations related to name, image and likeness activities, with some restrictions.
- Prohibit schools from being involved in the development, operation or promotion of a student athlete’s business activity, unless the activity is developed as part of a student’s coursework or academic program.
- Prohibit schools from arranging or securing endorsement opportunities for student-athletes.⁹⁶

The proposed NIL bylaw amendments include some restrictions. For example, the proposed bylaws would not permit student athletes to use institutional marks in any promotional activities, and student athletes could not participate in promotional activities that conflict with NCAA policies (such as policies addressing sports wagering or banned substances).⁹⁷ Institutions would also retain the right to prohibit promotional activities that conflict with “institutional values, as defined by the institution,” or with “existing institutional sponsorship arrangements.”⁹⁸ The proposed amendments also include disclosure requirements, which were designed, at least in part, to “monitor and minimize impermissible booster activity and recruiting inducements,” because in many cases, “boosters may be the most likely sources of opportunities for student-athletes to engage in name, image and likeness activities,” and “[s]tudent-athletes should be permitted take [of] advantage legitimate opportunities, even if the source of the opportunity comes from a booster of the institution.”⁹⁹ The proposed bylaw amendments were first scheduled for a vote

⁹³ *Id.* at 3. The NCAA’s three divisions are Division I, Division II and Division III. *Our Three Divisions*, NCAA, <https://www.ncaa.org/about/resources/media-center/ncaa-101/our-three-divisions> (last visited May 3, 2021).

⁹⁴ *DI Council Introduces Name, Image and Likeness Concepts Into Legislative Cycle*, NCAA (Oct. 14, 2020), <http://www.ncaa.org/about/resources/media-center/news/di-council-introduces-name-image-and-likeness-concepts-legislative-cycle>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ ANNE ROHLMAN & LEELAND ZELLER, 2020-21 NCAA DIVISION I COUNCIL-GOVERNANCE PUBLICATION OF PROPOSED LEGISLATION 8 (2020), <https://web3.ncaa.org/lstdbi/reports/getReport/90001> [hereinafter NCAA Proposed Amendments].

⁹⁸ *Id.*

⁹⁹ *Id.* at 13, 17.

before the Division I Council in January 2021;¹⁰⁰ however, the Division I Council postponed the vote after NCAA President Mark Emmert received a letter from the Department of Justice’s (DOJ’s) antitrust division that suggested the DOJ may object to new NIL rules on antitrust grounds.¹⁰¹ In its statement, the Division I Council did not set a timeline for a future vote on the issue, but commented that it remained “fully committed to modernizing Division I rules in ways that benefit all student-athletes.”¹⁰² Emmert recently reiterated his commitment to adopting new “loosened” NCAA NIL rules in time for the 2021-2022 school year.¹⁰³

According to some accounts, the NCAA’s proposed NIL bylaw amendments appear to permit more NIL compensation to student athletes than existing bylaws, but would still restrict NIL compensation more than recently enacted state laws.¹⁰⁴ For example, the NCAA has proposed a bylaw amendment that would allow an institution to prohibit an athlete from involvement in an NIL activity that would conflict with an “existing institutional sponsorship arrangement.”¹⁰⁵ According to some commentators, this amendment could be at odds with many provisions in newly enacted state laws that prohibit a school from preventing student athletes from earning NIL compensation for any commercial purpose when the athlete is not engaged in team activities.¹⁰⁶ Some lawmakers, moreover, have expressed concern that the NCAA’s proposed bylaw changes would not provide enough opportunity for student athletes to maximize the use of their NIL.¹⁰⁷

On June 28, 2021, the NCAA Division I Council recommended that the Division I Board of Directors adopt an “interim” policy that would suspend amateurism rules related to NIL compensation.¹⁰⁸ According to the NCAA, this temporary action would remain in place until federal legislation is enacted or until the NCAA adopts new NIL-related rules.¹⁰⁹ The temporary policy provides that student athletes may engage in NIL activities that are consistent with the law of their school’s states.¹¹⁰ Student athletes in states without NIL laws may engage in NIL-type

¹⁰⁰ *Id.* at iii.

¹⁰¹ Michelle Brutlag Hosick, *Division I Council Tables Proposals on Name, Image, Likeness and Transfers*, NCAA (Jan. 11, 2021), <https://www.ncaa.org/about/resources/media-center/news/division-i-council-tables-proposals-name-image-likeness-and-transfers>; Alan Blinder, *N.C.A.A. President Seeks Delay on Vote to Let Students Profit from Fame*, N.Y. TIMES, (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/sports/ncaabasketball/ncaa-delays-vote-athlete-endorsements.html>.

¹⁰² Hosick, *supra* note 101.

¹⁰³ Steve Berkowitz, *NCAA President Mark Emmert to Meet with Lawmakers as Some States Push to Pay College Athletes*, USA TODAY (May 8, 2021), <https://www.usatoday.com/story/sports/2021/05/08/mark-emmert-meet-lawmakers-amid-pay-college-athletes/5007533001/>.

¹⁰⁴ *Id.*

¹⁰⁵ NCAA Proposed Amendments, *supra* note 97 at 8.

¹⁰⁶ *See, e.g.*, Fair Pay to Play Act, S.B. 206, 2019 Reg. Sess. (Cal. 2019) (“A team contract of a postsecondary educational institution’s athletic program shall not prevent a student athlete from using the athlete’s name, image, or likeness for a commercial purpose when the athlete is not engaged in official team activities.”); L.B. 962, 2020 Reg. Sess. (Neb. 2020) (“No team contract shall prevent a student-athlete from receiving compensation for the use of such student-athlete’s name, image, and likeness rights or athletic reputation when the student-athlete is not engaged in official team activities.”). *See also* Steve Berkowitz, *NCAA Unveils Proposed Rules Changes Related to Athletes’ Name, Image and Likeness*, USA TODAY (Nov. 13, 2020), <https://www.usatoday.com/story/sports/college/2020/11/13/ncaa-nil-name-image-likeness-proposal/6281507002/>.

¹⁰⁷ *See* Berkowitz, *supra* note 106.

¹⁰⁸ *DI Council Recommends DI Board Adopt Name, Image and Likeness Policy*, NCAA (June 28, 2021), <https://www.ncaa.org/about/resources/media-center/news/di-council-recommends-di-board-adopt-name-image-and-likeness-policy>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

activity without violating NCAA rules.¹¹¹ The policy also allows for student athletes to use professional services for NIL activities, and requires student athletes to report NIL activities consistent with state law or school requirements.¹¹² According to some commentators, this temporary policy indicates that the NCAA has concerns that “virtually any restriction” may draw legal challenges based on the Supreme Court’s *Alston* decision.¹¹³

Congressional Legislative Proposals

Amidst the evolving legal and legislative landscape surrounding the NIL issue, the NCAA continues to encourage Congress to take action. At a July 2020 Senate Judiciary Committee hearing, NCAA President Mark Emmert urged Members of Congress to pass federal NIL compensation legislation.¹¹⁴ Emmert emphasized that 36 states had either passed or introduced NIL legislation, and argued that “a patchwork of different laws from different states will make unattainable the goal of providing a fair and level playing field—let alone the essential requirement of a common playing field—for our schools and nearly half a million student-athletes nationwide.”¹¹⁵ According to some reports, the NCAA presented Members of Congress with its own proposal for federal NIL legislation, referred to as the Intercollegiate Amateur Sports Act of 2020.¹¹⁶ Reports indicated that the Intercollegiate Amateur Sports Act provided Congress an overview of the features the NCAA wants included in any federal NIL legislation.¹¹⁷ For example, according to commentators, the draft legislation addressed the NCAA’s concern that recently enacted state laws may have unintended effects such as threatening gender equity in athletic programs, creating tax liability for athletes, creating an employer/employee relationship between colleges and student athletes, and inviting corruption on to college campuses.¹¹⁸ According to commentators, the draft legislation included a preemption provision, an antitrust exemption, and a provision stating that no amateur intercollegiate athlete is considered an

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Steve Berkowitz, NCAA Council Recommends Name, Image and Likeness Policies Should Be Up To Schools in States Without Law Beginning Thursday, USA TODAY (June 28, 2021), <https://www.usatoday.com/story/sports/college/2021/06/28/name-image-likeness-ncaa-wants-schools-set-rules-if-state-didnt/7785176002/>.

¹¹⁴ Emily Giambalvo, *As the NCAA Asks Congress for Help on NIL Legislation, Lawmakers Want More Rights for College Athletes*, WASHINGTON POST (July 23, 2020), <https://www.washingtonpost.com/sports/2020/07/23/ncaa-asks-congress-help-nil-legislation-lawmakers-want-more-rights-college-athletes/>; *Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Dr. Mark Emmert, President, National Collegiate Athletic Association), <https://www.judiciary.senate.gov/imo/media/doc/Emmert%20Testimony.pdf> [hereinafter Emmert Testimony].

¹¹⁵ Emmert Testimony, *supra* note 114.

¹¹⁶ Ross Dellenger, *NCAA Presents Congress With Bold Proposal for NIL Legislation*, SPORTS ILLUSTRATED (July 31, 2020), <https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal>. The NCAA “Power 5” conferences also submitted proposed legislation that includes similar provisions but has more specific restrictions, including restricting student athletes from signing endorsement deals until they complete one semester of college, allowing schools to prohibit certain NIL deals, and requiring that all NIL contracts between businesses/agents and student athletes be made public. See Ross Dellenger, *Proposed NCAA NIL Legislation is a Restrictive First Step for Student-Athletes*, SPORTS ILLUSTRATED (July 17, 2020), <https://www.si.com/college/2020/07/17/ncaa-proposed-name-image-likeness-legislation-student-athletes>.

¹¹⁷ Ross Dellenger, *NCAA Presents Congress With Bold Proposal for NIL Legislation*, SPORTS ILLUSTRATED (July 31, 2020), <https://www.si.com/college/2020/07/31/ncaa-sends-congress-nil-legislation-proposal>.

¹¹⁸ *Id.*

employee of an institution.¹¹⁹ In a June 2021 hearing before the Senate Committee on Commerce, Science, and Transportation, Emmert reiterated the need for federal legislation on the NIL issue.¹²⁰ He outlined several elements the NCAA proposes should be included in federal legislation, including the preemption of state laws, safeguarding the nonemployment status of student athletes, Title IX protections, and a “limited safe harbor protection” from litigation.¹²¹

Student athlete advocate organizations, such as the National College Players Association (NCPA), have also expressed support for federal action on a range of student athlete issues, including NIL compensation.¹²² The NCPA, however, opposes most of the NCAA’s legislative proposals, including preemption provisions and antitrust exemptions,¹²³ and has offered its own model legislation regarding NIL compensation.¹²⁴ Among other things, the NCPA legislation would make it illegal for a higher education institution to uphold or implement any rule that would revoke eligibility for a student athlete who receives food, shelter, medical expenses, or insurance from a third party; or for earning compensation from a third party as a result of the use of the athlete’s NIL.¹²⁵ The NCPA legislation would also make it illegal for a higher education institution to revoke eligibility for a student athlete who obtains representation in relation to contracts or legal matters.¹²⁶ The NCPA model bill would also prohibit student athlete NIL compensation during official team activities without approval of the postsecondary educational institution, and would prohibit student athletes from receiving pay as inducement to attend a specific institution.¹²⁷

Legislative Proposals from the 116th Congress

Several bills relating to various student athlete issues—including NIL compensation—were introduced in the 116th Congress. As the discussion below illustrates, each bill would have offered a unique approach to the issue and provided varying ranges of restrictions or regulation. For example, one bill attempted to regulate the NIL issue by using the tax code to incentivize organizations like the NCAA to allow NIL compensation.¹²⁸ Other bills would have conditioned federal funding under the Higher Education Act of 1965 (HEA) on higher education institutions allowing student athletes to profit from their NIL without jeopardizing the student athletes’ eligibility to participate in intercollegiate athletic competition.¹²⁹ Some bills would have granted the Federal Trade Commission (FTC) the authority to enforce new laws that would prohibit higher education institutions and athletic organizations such as the NCAA from implementing

¹¹⁹ *Id.*

¹²⁰ *Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 117th Cong. (2021) (statement of Dr. Mark Emmert, President, National Collegiate Athletic Association), <https://www.commerce.senate.gov/services/files/B28D0810-54D7-4C53-8058-B04A8ED4684B>.

¹²¹ *Id.*

¹²² *Protecting the Integrity of College Athletics: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Ramogi Huma, NCPA Executive Director), <https://www.judiciary.senate.gov/imo/media/doc/Huma%20Testimony.pdf>.

¹²³ *Id.*

¹²⁴ NAT’L COLL. PLAYERS ASS’N, MODEL LEGISLATION – NAME, IMAGE, LIKENESS PAY, <https://www.ncpanow.org/solutions-and-resources/model-legislation> (last visited May 3, 2021).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ H.R. 1804 (116th Cong. 2019).

¹²⁹ H.R. 2036 (116th Cong. 2019), H.R. 2672 (116th Cong. 2019), H.R. 8382 (116th Cong. 2020).

certain policies that would restrict a student athlete’s ability to profit from their NIL.¹³⁰ Several proposals would have created commissions that would make recommendations to Congress on various issues related to college athletics, including NIL compensation.¹³¹ At least two bills would have provided an antitrust exemption,¹³² and several included preemption clauses.¹³³ Two others would have created independent entities that would create guidelines for various student athlete issues including NIL compensation.¹³⁴ Other themes seen throughout the proposed bills included regulations on boosters, disclosure requirements, restrictions on NIL agreements that conflict with institution agreements/contracts, and restrictions on agent representation. Relevant legislation introduced in the 116th Congress is summarized below in chronological order.¹³⁵ Because the 116th Congress adjourned on January 3, 2021, none of the following bills is pending action.

H.R. 1804—The Student-Athlete Equity Act

Deemed by some the “free market option,”¹³⁶ the Student-Athlete Equity Act would have amended Section 501 of the Internal Revenue Code, which provides tax exempt status to “corporations . . . organized and operated exclusively to foster national or international amateur sports competition.”¹³⁷ The Act would have amended the definition of a “qualified amateur sports organization”¹³⁸ to exclude “an organization that substantially restricts a student athlete from using, or being reasonably compensated for the third party use of, the name, image, or likeness of such student athlete.”¹³⁹ The Act would have, in effect, stripped organizations such as the NCAA of their tax-exempt status if they substantially restricted NIL compensation opportunities for student athletes, but would not have created any further restrictions on how student athletes are compensated for the use of their NILs.

H.R. 2036—NCAA Act of 2019

The National Collegiate Athletics Act of 2019 (NCAA Act of 2019), would have conditioned federal funds provided to higher education institutions under the HEA on compliance with the Act’s provisions. The Act would have provided general protections for student athletes, subject to some limitations.¹⁴⁰ For example, under the Act, higher education institutions would not have been able to restrict, or be members of an intercollegiate athletic association (such as the NCAA), that restricted, “amateur athletes from participating in amateur sports,” unless the restrictions related to performance enhancing drugs, controlled substances, educational requirements, and

¹³⁰ S. 4004 (116th Cong. 2020), H.R. 8382 (116th Cong. 2020), S. 5003 (116th Cong. 2020).

¹³¹ H.R. 2672 (116th Cong. 2019), H.R. 5528 (116th Cong. 2019), H.R. 8382 (116th Cong. 2020).

¹³² S. 4004 (116th Cong. 2020), S. 5003 (116th Cong. 2020).

¹³³ S. 4004 (116th Cong. 2020), H.R. 8382 (116th Cong. 2020), S. 5003 (116th Cong. 2020).

¹³⁴ S. 5003 (116th Cong. 2020); S. 5062 (116th Cong. 2020).

¹³⁵ The following includes summaries of bills that discuss student athlete and NIL issues at length based on a search of legislation introduced in the 116th Congress, but may not be a comprehensive list of every bill that may discuss similar issues.

¹³⁶ Dan Murphy, *Can Congress Help the NCAA Find NIL Consistency?*, ESPN (July 1, 2020), https://www.espn.com/college-sports/story/_/id/29392144/congress-working-multiple-legislative-options-solve-ncaa-nil-issue.

¹³⁷ 26 U.S.C. § 501(c)(3).

¹³⁸ *Id.* § 501(j)(2).

¹³⁹ H.R. 1804 (116th Cong. 2019).

¹⁴⁰ H.R. 2036 (116th Cong. 2019).

student code violations.¹⁴¹ This provision effectively would have required higher education institutions to allow student athletes to earn compensation from the use of their NIL. The Act would have also set requirements for awarding and revoking scholarships, including allowing scholarship award amounts only up to the cost of attendance of the awarding institution.¹⁴² The Act would have also required higher education institutions to ensure student athletes were provided medical insurance.¹⁴³

The NCAA Act of 2019 also included a provision governing collective bargaining agreements in professional sports.¹⁴⁴ This provision would have required that any collective bargaining agreement between a professional sports league and a professional players' association must allow "adults to enter the collective bargaining agreement at the same level as other adults with the same experience level in such professional sports league."¹⁴⁵ This provision would have effectively ended the "one and done" rule,¹⁴⁶ an eligibility rule contained within the National Basketball Association (NBA) and players' union collective bargaining agreement, which effectively prohibits high school players from entering the NBA draft immediately after graduation.¹⁴⁷

H.R. 2672—The NCAA Act

The National Collegiate Athletics Accountability Act (NCAA Act) would have addressed NIL issues in the context of a broader program to impose certain requirements for higher education institutions that have intercollegiate athletic programs and are members of an athletic association.¹⁴⁸ The proposed legislation stated that as a condition of receiving federal funds under the HEA, a higher education institution could only be a member of an athletic association (such as the NCAA) so long as the association (1) required annual concussion testing as a precondition to student athlete participation in contact sports, (2) required certain due process procedures for alleged violations of association policies, (3) required athletic-related student aid to be guaranteed for the duration of a student athlete's attendance at the institution, and (4) did not have a policy that restricted the ability of institutions to pay stipends to student athletes.¹⁴⁹

The NCAA Act would have also established the Presidential Commission on Intercollegiate Athletics, which would have reviewed and analyzed issues related to intercollegiate athletics. These issues included, for example, student athlete academic success, recruitment and retention of student athletes, oversight and governance practices. The proposed Commission would have also reviewed the financing of intercollegiate athletics, including "rules related to earnings and benefits by student athletes, including the possibility of commercial compensation for the use of the NIL of student athletes and whether a student athlete may retain a personal representative to

¹⁴¹ *Id.*, § 11.

¹⁴² *Id.*, § 12.

¹⁴³ *Id.*, § 15.

¹⁴⁴ *Id.*, § 21.

¹⁴⁵ *Id.*

¹⁴⁶ *Al Lawson Takes Aim at NCAA Treatment of Student Athletes*, (Apr. 2, 2019), <https://lawson.house.gov/media/in-the-news/al-lawson-takes-aim-ncaa-treatment-student-athletes>.

¹⁴⁷ Michael McCann, *Examining What a Change to the NBA's One-and-Done Rule Could Mean for All Involved*, SPORTS ILLUSTRATED (March 3, 2019), <https://www.si.com/nba/2019/03/03/legal-analysis-change-age-eligibility-rule-one-and-done>.

¹⁴⁸ H.R. 2672 (116th Cong. 2019).

¹⁴⁹ *Id.*, § 2.

negotiate on behalf of the student athlete.”¹⁵⁰ The commission would have consisted of 17 members appointed by congressional leadership, and would have had the power to hold hearings and access necessary information from other government agencies.¹⁵¹ The Act would have required the commission to issue a report on its findings and recommendations to the President of the United States and various Members of congressional leadership within one year after the date of the Commission’s first meeting.¹⁵²

H.R. 5528—CACIA Act of 2019

The Congressional Advisory Commission on Intercollegiate Athletics Act of 2019 (CACIA Act) would have established a Congressional Advisory Commission on Intercollegiate Athletics “to investigate the relationship between higher education institutions and intercollegiate athletic programs.”¹⁵³ The proposed commission would have reviewed policies with respect to student athlete academic and athletic success that are maintained by athletic governance associations (such as the NCAA) and higher education institutions.¹⁵⁴ The Act would have required a review of policies that cover a broad range of issues related to “highly commercialized intercollegiate athletic programs.”¹⁵⁵ These issues included academic standards, whether there was adequate faculty oversight to ensure student athletes receive a quality education, athletic-related injuries and athlete access to health care programs, parity between student athletes and non-student athletes in academic and employment opportunities, recruitment, student athlete financial assistance, and funding for intercollegiate athletic programs.¹⁵⁶ On the specific issue of student athlete compensation, the Act would have required that the commission review the interaction between NCAA and institution policies related to “employment, earnings and benefits, and personal representation by marketing agents of student athletes, including commercial compensation for the use of the name, image, or likeness of student athletes,” as well as the impact of federal and state judicial decisions that affect “compensation for student athletes” and “the right of student athletes to receive workplace protections.”¹⁵⁷

The commission would have consisted of 17 members appointed by congressional leadership and would have had the power to hold hearings, hear evidence, and issue subpoenas.¹⁵⁸ The Act would have also required the commission to issue a report to Congress within two years that would summarize its findings on the listed issues and make recommendations based on its review of the findings.¹⁵⁹

S. 4004—Fairness in Collegiate Athletics Act

The Fairness in Collegiate Athletics Act would have directed any intercollegiate athletic association—defined as the NCAA, any successor organization to the NCAA, or any organization

¹⁵⁰ *Id.*, § 3.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ H.R. 5528 (116th Cong. 2019).

¹⁵⁴ *Id.*, § 3.

¹⁵⁵ *Id.*, § 2.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*, § 3.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

the FTC deems to be similar to the NCAA—to establish certain policies related to NIL compensation no later than June 30, 2021.¹⁶⁰ These policies must have allowed student athletes to earn compensation from third parties for the use of their NIL and permit student athletes to obtain professional representation in regard to the use of their NIL within the bounds of existing law as established in the Sports Agent Responsibility and Trust Act (SPARTA).¹⁶¹ The Act would have also required intercollegiate athletic associations to establish rules and programs for the administration of the new NIL policies that ensured the appropriate recruitment of student athletes while and preserving their amateur status.¹⁶² Under the Act, intercollegiate athletic associations would have also been required to adopt reporting policies, requiring student athletes to report any NIL compensation to their college and the intercollegiate athletic association.¹⁶³

The Act would have granted enforcement power to the FTC, deeming any violation of the Act to be an unfair or deceptive act or practice under the Federal Trade Commission Act (FTC Act).¹⁶⁴ The Act shielded both athletic associations and education institutions from any “cause of action” based on “the adoption or enforcement of a policy, rule, or program established under section 3,” except as provided under the FTC Act.¹⁶⁵ Some commentators described this as an “antitrust exemption,”¹⁶⁶ because it would have effectively protected the NCAA from certain legal challenges to rules adopted as part of the Act, including similar challenges to those brought in the *O’Bannon* litigation.¹⁶⁷ As mentioned above, the NCAA has asked Congress to include an antitrust exemption in any federal legislation on the NIL issue,¹⁶⁸ but some commentators have argued that this would give the NCAA “unbounded power to restrain athletes’ fair market rights, without facing legal repercussions.”¹⁶⁹

The Act also included a preemption provision that stated that the Act would supersede any state law “related to permitting or prohibiting a student athlete to receive compensation from an institution of higher education or a third party as a result of such athlete’s performance or participation in postsecondary athletics.”¹⁷⁰

H.R. 8382—The Student Athlete Level Playing Field Act

The Student Athlete Level Playing Field Act aimed to provide student athletes with opportunities to profit from the use of their NIL without sacrificing eligibility in intercollegiate athletics.¹⁷¹ The Act would have prohibited any covered athletic organization or higher education institution from

¹⁶⁰ S. 4004 (116th Cong. 2020).

¹⁶¹ *Id.*, § 3. SPARTA is codified at 15 U.S.C. §§ 7801–7807.

¹⁶² *Id.* See also *Rubio Introduces Legislation to Address Name, Image, Likeness in College Sports* (June 18, 2020), <https://www.rubio.senate.gov/public/index.cfm/2020/6/rubio-introduces-legislation-to-address-name-image-likeness-in-college-sports>.

¹⁶³ S. 4004 § 3.

¹⁶⁴ *Id.*, § 4.

¹⁶⁵ *Id.*

¹⁶⁶ See Murphy, *supra* note 136.

¹⁶⁷ See *id.*

¹⁶⁸ See Giambalvo, *supra* note 114.

¹⁶⁹ Thaddeus Kennedy, *NCAA and an Antitrust Exemption: The Death of College Athletes’ Rights*, HARV. J. SPORTS & ENT. L., (Aug. 31, 2020), <https://harvardjsel.com/2020/08/ncaa-and-an-antitrust-exemption-the-death-of-college-athletes-rights/>.

¹⁷⁰ S. 4004, § 5 (116th Cong. 2020).

¹⁷¹ See H.R. 8382 (116th Cong. 2020).

revoking intercollegiate athletic eligibility because a student athlete enters into an endorsement contract or an agency contract.¹⁷² The Act would have also withheld federal funding under the HEA from higher education institutions that had policies that affected student athlete scholarship eligibility for entering into an endorsement or agency contract.¹⁷³ Higher education institutions would have also been ineligible for HEA funds if they directly compensated students for the use of their NIL.¹⁷⁴ The Act, however, would have allowed athletic organizations or higher education institutions to prohibit student athletes from entering into endorsement contracts involving certain industries, such as tobacco, alcohol, controlled substances, adult entertainment, or casinos/entities that sponsor gambling.¹⁷⁵ Athletic organizations or higher education institutions could also have prohibited student athletes from wearing sponsored attire or gear during athletic competition or university-sponsored events.¹⁷⁶

The Act would have delegated enforcement authority to the FTC, providing that any violation of the Act would be considered an unfair and deceptive act or practice in violation of the FTC Act.¹⁷⁷ The Act would not have provided an explicit “antitrust exemption” like the proposed Fairness in Collegiate Athletics Act or Collegiate Athlete Compensation Rights Act (discussed below).¹⁷⁸ It specified, however, that a violation of the Student Athlete Level Playing Field Act would not have been a separate basis for an antitrust claim.

Beyond NIL issues, the Act also proposed amendments to SPARTA,¹⁷⁹ including adding a definition of the term “booster”—or “an individual . . . or an organization . . . that provides substantial financial assistance or services to the athletic program of an institution of higher education or promotes a team or athletic program of an institution of higher education for such individual’s or organization’s own substantial financial interest.”¹⁸⁰ The proposed SPARTA amendments would have made it illegal for boosters to offer or provide money or things of value as inducement for a student athlete to enroll or remain at a school, and included reporting requirements for student athletes to notify their school when they enter into an agency contract.¹⁸¹

The Act would have also mandated the creation of a Covered Athletic Organization Commission tasked with making recommendations to Congress about the implementation of NIL rules, processes for certifying or recognizing credentialed athlete agents, the establishment of an independent dispute resolution process for disputes between student athletes and athletic organizations or higher education institutions, and any additional categories of endorsement contracts that should be prohibited.¹⁸²

Also of note, the Act included a preemption clause that would have effectively preempted other state legislation that governs a student athlete’s ability to enter into an endorsement or agency

¹⁷² *Id.*, § 2.

¹⁷³ *Id.*, § 4.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*, § 2.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*, § 2.

¹⁷⁸ S. 4004, § 4 (116th Cong. 2020); S. 5003, § 9 (116th Cong. 2020).

¹⁷⁹ 15 U.S.C. §§ 7801 *et seq.*

¹⁸⁰ H.R. 8382, § 5.

¹⁸¹ *Id.*

¹⁸² *Id.*, § 3.

contract.¹⁸³ The Act also explicitly stated that nothing in the Act was intended to affect student athlete employment status and included a sense of Congress that higher education institutions should develop financial literacy programs for student athletes, and that the FTC should investigate each claim filed under SPARTA.¹⁸⁴

S. 5003—Collegiate Athlete Compensation Rights Act

The Collegiate Athlete Compensation Rights Act sought to protect the rights of student athletes while providing transparency and accountability in student athlete NIL agreements.¹⁸⁵ The Act would have required athletic associations, conferences, and higher education institutions to permit student athletes to earn market value compensation for the use of their NIL¹⁸⁶ and to obtain agents¹⁸⁷ for matters related to NIL compensation without jeopardizing their intercollegiate athletic eligibility or scholarships.¹⁸⁸ The Act would have provided protections for student athletes by permitting rescission of NIL agreements for student athletes who no longer participated in intercollegiate athletics, and by requiring access to educational resources with respect to earning NIL compensation.¹⁸⁹ The Act would have prohibited higher education institutions from making payments of “covered compensation” to student athletes and their families, and would have prohibited third party licensees from entering into NIL agreements with student athletes if the agreement conflicted with an existing contract, rule, or regulation of the student athlete’s institution, with some exceptions.¹⁹⁰ Under the Act, however, athletic associations, conferences, and higher education institutions would have been permitted to enact rules that prohibit certain NIL agreements, such as prohibiting (1) boosters from providing NIL compensation as inducement to attend an institution, (2) student athletes from entering into NIL agreements before they are enrolled at an institution, or (3) NIL agreements that endorse “gambling, tobacco or alcohol products, adult entertainment, or any other product or service that is reasonably considered to be inconsistent with the values of an institution.”¹⁹¹ Athletic associations and conferences would have been able to create rules consistent with the Act and enforce the rules by,

¹⁸³ *Id.*, § 6.

¹⁸⁴ *Id.*, § 7, § 8.

¹⁸⁵ S. 5003 (116th Cong. 2020).

¹⁸⁶ The Act defines “enroll” to mean “to receive passing grades, as determined by the applicable institution, for completing courses of instruction at such institution comprising not less than 12 percent of the credits required for graduation from the institution.” *Id.*, § 2. A provision within the Act provides that “[a]n association, a conference, or an institution may prohibit a student athlete from entering into a name, image, and likeness agreement with a third-party licensee relating to the name, image, or likeness of the student athlete . . . before the date on which the student athlete enrolls at an institution.” *Id.*, § 4. According to some commentators, allowing only a student athlete who is “enrolled” at an institution to earn NIL compensation may allow for “a delay in how quickly athletes can gain from their NIL rights, prohibiting NIL opportunities until a college athlete has completed at least 12% of credits required for graduation.” See Michael McCann, *Wicker’s NIL Senate Bill Allows Agents for Athletes and Liability Shields for Schools*, SPORTICO (Dec. 14, 2020), <https://www.sportico.com/law/analysis/2020/roger-wicker-name-image-likeness-1234618233/>.

¹⁸⁷ The Act sets forth various regulations regarding the use of agents, including, for example, requiring the agent to be certified and prohibiting agent representation before the student athlete is enrolled at an institution. See S. 5003 (116th Cong. 2020) §§ 4-5.

¹⁸⁸ *Id.*, § 3.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*, § 4.

¹⁹¹ *Id.*

for example, revoking a student athlete’s eligibility, or withholding revenue distribution payments¹⁹² from institutions who are not in compliance.¹⁹³

The Act would have granted enforcement authority to the FTC, providing that a violation of the Act would have been considered a violation of the FTC Act.¹⁹⁴ However, the Act would have also required the FTC to identify a private, independent, self-regulatory, nonprofit entity that would have developed and enforced rules and standards with respect to NIL agreements and compensation, booster involvement in NIL agreements, and guidelines for certifying agents.¹⁹⁵ This nonprofit entity would have also compiled—and made publicly available—information about NIL agreements, would have been tasked with creating a website that features information about the legal and business concepts involved in NIL agreements, and would have been required to create a student athlete health and safety committee to help develop standards to prevent serious injury and abuse of student athletes.¹⁹⁶

The Act also included provisions seen in other legislation, including provisions that explicitly stated that student athletes are not to be considered employees of their institutions,¹⁹⁷ an antitrust exemption,¹⁹⁸ and a preemption clause.¹⁹⁹

S. 5062—College Athletes Bill of Rights

The College Athlete Bill of Rights covered an array of issues related to protecting the rights of college athletes.²⁰⁰ Like many of the other bills, the Act sought to establish NIL rights for student athletes, including the ability to market their NIL both individually and as a group, and provided student athletes the right to hire representation for NIL compensation matters.²⁰¹ Also like many of the other bills, the Act included a provision that would have allowed limits on the industries that student athletes may contract with, and a provision that would have allowed higher education institutions to require student athletes to wear certain apparel during mandatory team activities.²⁰² Unique to this Act, however, was a provision that would have prohibited higher education institutions from discouraging or prohibiting a student athlete from wearing the footwear of his or her choice during mandatory or non-mandatory team activities.²⁰³ When a student athlete entered into an NIL agreement with a third party, the Act would have allowed higher education institutions to enter into a separate contract with the same third party for the use of, for example,

¹⁹² Revenue distribution payments may refer to the portion of NCAA revenue that is returned directly to NCAA member conferences and institutions. *See Distributions*, NCAA, <http://www.ncaa.org/about/resources/finances/distributions> (last visited May 3, 2021).

¹⁹³ S. 5003, § 8.

¹⁹⁴ *Id.*, § 7.

¹⁹⁵ *Id.*, § 6.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*, § 4.

¹⁹⁸ *Id.*, § 9.

¹⁹⁹ *Id.*, § 10.

²⁰⁰ S. 5062 (116th Cong. 2020). *See also* Billy Witz, *Bill Offers New College Sports Model: Give Athletes a Cut of the Profits*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/12/17/sports/ncaaf/college-athlete-bill-of-rights.html> (noting that according to Senator Booker, if the bill seems “tilted toward athletes,” it is because it is the “only bill so far to be crafted from the athletes’ perspective”).

²⁰¹ S. 5062, § 3 (116th Cong. 2020).

²⁰² *Id.*

²⁰³ *Id.*

the institution's logo, so long as the third party directly compensated the student athlete pursuant to their agreement.²⁰⁴ The Act provided that NIL compensation was not considered financial aid, and that financial aid or intercollegiate athletic eligibility could not have been affected or revoked if a student athlete entered into an endorsement contract or hired an agent for NIL compensation purposes.²⁰⁵ Beyond NIL compensation, the Act would have also created opportunities for revenue sharing. Higher education institutions would have been required to share profits from revenue-generating sports with the athletes who play those sports, after deducting the cost of scholarships.²⁰⁶ The revenue-sharing provision was unique to this legislation and was considered, according to some commentators, "one of the most aggressive proposals in the bill."²⁰⁷

Beyond NIL matters, the Act would have also allowed student athletes to receive expenses for transportation, room, or board for friends or family members during any period in which the student athlete is addressing a physical or mental health concern or participating in intercollegiate athletics competition, as well as other necessities, including food, shelter, medical coverage, and medical expenses; or tuition, fees, books, transportation, or any other incidental expense that is not otherwise provided by a higher education institution.²⁰⁸ The Act would have also eliminated transfer penalties,²⁰⁹ and would have permitted student athletes to enter professional sports drafts without jeopardizing future intercollegiate eligibility so long as they did not receive compensation from a professional sports league.²¹⁰

The Act would have provided additional protections for student athletes, including prohibiting a higher education institution or organizations such as the NCAA from negotiating NIL contracts, prohibiting higher education institutions from imposing speech restrictions on student athletes that did not apply equally to other members of the student body, prohibiting schools and organizations such as the NCAA from colluding to limit the amount a student athlete may receive under an endorsement contract, and prohibiting schools from cutting athletic programs without first exploring other options such as reducing expenses and salaries.²¹¹ Also unique compared to other bills, the Act contained provisions that addressed student athlete health. The Act would have required the Department of Health and Human Services to promulgate health, wellness, and safety guidelines for intercollegiate athletics that addressed matters such as cardiac health, concussion and traumatic brain injuries, illegal performance enhancers, substance abuse, mental health, and sexual assault, among others.²¹² The Act would have also required higher education institutions to create a medical trust fund to pay for out-of-pocket medical expenses incurred by

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*, § 5.

²⁰⁷ Ross Dellenger, *Inside the Landmark College Athletes Bill of Rights Being Introduced in Congress*, SPORTS ILLUSTRATED (Dec. 17, 2020) <https://www.si.com/college/2020/12/17/athlete-bill-of-rights-congress-ncaa-football> (noting that revenue sharing is a move that the NCAA and its members "firmly stand against.").

²⁰⁸ S. 5062, § 3 (116th Cong. 2020).

²⁰⁹ In April 2021, the Division I Board of Directors ratified the adoption of legislation expanding a one-time transfer exception to all student athletes. The now-effective rule allows student athletes to compete immediately after one transfer to another higher education institution during their period of intercollegiate athletic eligibility. See Michelle Brutlag Hosick, *Division I Board of Directors, Presidential Forum discuss sustainability*, NCAA (Apr. 28, 2021), <https://www.ncaa.org/about/resources/media-center/news/division-i-board-directors-presidential-forum-discuss-sustainability?division=d1>.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*, § 7.

student athletes for sports-related injuries for up to five years after athletic eligibility.²¹³ Under this provision, the Act would have required higher education institutions to provide student athletes the opportunity for physicals and independent medical second opinions for the purpose of diagnosing sports-related injuries, and would have required that school athletic training and medical staff operate independently of school athletic departments.²¹⁴

Also unique to this legislation, the Act emphasized student athlete educational outcomes, and would have created new requirements regarding scholarships and coursework. Under the Act, higher education institutions would have been required to provide student athletes with scholarships until the athlete received an undergraduate degree, regardless of whether the athlete was participating in intercollegiate athletics.²¹⁵ The Act would have required athletic academic advisors or tutors to operate independently of the athletic department, and would have prohibited athletic departments or school personnel from interfering with a student athlete's choice of major, coursework, or participation in extracurricular activities or outside employment.²¹⁶ Higher education institutions would have also been required to develop and offer financial literacy and life skills programs that provided general information about the rights of student athletes under the Act, and information about time management and basic personal financial skills.²¹⁷

Like many other bills, the Act contained mandatory reporting provisions that would have required higher education institutions to report booster donations, the number of hours student athletes spent on athletic activities, and student athlete academic outcomes.²¹⁸ The Act also sought to create a Commission on College Athletics, a federally chartered corporation that would have benefited both scholarship and non-scholarship student athletes.²¹⁹ The Commission would have been tasked with establishing standards regarding student athlete endorsement contracts, certification of student athlete agents,²²⁰ educational requirements for student athletes, and health wellness and safety standards for student athletes.²²¹ The Commission would have also resolved disputes regarding endorsement contracts, investigated violations of title IX of the Education Amendments of 1972 and referred cases to the Office of Civil Rights of the Department of Education, created various advisory councils, and conducted audits and investigations to ensure compliance with the Act.²²² The Commission would also have been authorized to enforce the Act by imposing fines or penalties, or commencing civil actions in federal court.²²³ Potential penalties for violations of the Act would have included suspending individual athletic personnel such as coaches, athletic directors or other school employees, or fining individual higher education

²¹³ *Id.*, § 6.

²¹⁴ *Id.*

²¹⁵ *Id.*, § 8.

²¹⁶ *Id.*

²¹⁷ *Id.*, § 9. At minimum, first-year student athletes would be required under the Act to participate in these programs, and the programs may not include any marketing, referral, advertising, or solicitation from providers of financial products and services. *See id.*

²¹⁸ *Id.*, § 10.

²¹⁹ *Id.*, § 11.

²²⁰ *Id.* The Act would amend SPARTA to recognize the Commission as the certification body for student athlete agents. *See id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*, § 12.

institutions or intercollegiate athletic associations or conferences up to \$250,000 or 20% of the school's total athletic revenue.²²⁴

The Act would have also provided a private right of action for college athletes and states' attorney generals to sue for violations of the Act,²²⁵ however, the Act did not provide an antitrust exemption or a preemption provision like many other bills.

Legislative Proposals from the 117th Congress

Several bills relating to various student athlete issues—including NIL compensation—have also been introduced in the 117th Congress. Like many of the bills introduced in the 116th Congress, the newly introduced bills all contain provisions, using varying approaches that would provide NIL compensation rights for student athletes. One bill provides almost “unrestricted” NIL rights for student athletes, while others contain more limitations on the right to earn NIL compensation. Relevant legislation introduced as of July 1, 2021, is summarized below in chronological order.²²⁶

S. 238/H.R. 850—College Athlete Economic Freedom Act

The College Athlete Economic Freedom Act seeks to establish “unrestricted” NIL and athletic reputation rights for student athletes.²²⁷ Some commentators have suggested that the Act “goes well beyond existing proposed legislation at the federal and state level—and the proposed new NCAA rules—in giving athletes broad rights, including virtually unrestricted access to earning NIL income in individual and group NIL agreements.”²²⁸

The Act would prevent any higher education institution or intercollegiate athletic association from enacting or enforcing any rules that would prevent student athletes or prospective student athletes, either individually or as a group, from marketing the use of their NILs.²²⁹ The Act would also prevent institutions of higher education from colluding with any other institutions of higher education or third parties to limit the amount paid to student athletes for the use of their NIL.²³⁰ Higher education institutions and intercollegiate athletic associations would further be prohibited from enacting or enforcing any rules that would prevent student athletes from forming or recognizing “a collective representative to facilitate group licensing agreements,” and third parties would be required to obtain licenses to use the NILs of members of the group.²³¹ Further,

²²⁴ *Id.*, § 4.

²²⁵ *Id.*, § 12.

²²⁶ The following includes summaries of bills that would affect student athlete and NIL issues at length based on a search of legislation introduced as of July 1, 2021, in the 117th Congress, but may not be a comprehensive list of every bill that may discuss similar issues. H.R. 3379 (117th Cong. 2021) was introduced on May 20, 2021; however, the text of the bill was not available as of the date of publication of this report.

²²⁷ *Murphy, Trahan Introduce Legislation To Allow College Athletes to Make Money off Their Name, Image and Likeness*, (Feb. 4, 2021), <https://www.murphy.senate.gov/newsroom/press-releases/murphy-trahan-introduce-legislation-to-allow-college-athletes-to-make-money-off-their-name-image-and-likeness>.

²²⁸ Andrew Zimbalist, *The College Athlete Economic Freedom Act Proposed in Congress is a Step Forward on NIL Rights*, FORBES (Feb. 7, 2021), <https://www.forbes.com/sites/andrewzimbalist/2021/02/07/the-college-athlete-economic-freedom-act-proposed-by-senator-chris-murphy-d-ct-and-congresswoman-lori-trahan-d-ma-is-a-step-forward/?sh=57266ced2bbd>.

²²⁹ S. 238 § 3 (117th Cong. 2021).

²³⁰ *Id.*

²³¹ *Id.*

the Act would prohibit the receipt of NIL compensation from affecting a student athlete's eligibility to receive grant-in-aid.²³²

Like other proposed legislation, the Act would provide that no rules shall be enacted that would impact a student athlete's eligibility based on obtaining professional representation for contractual or legal rights related to NIL compensation, and it would prohibit higher education institutions and intercollegiate athletic associations from regulating student athlete professional representation.²³³ Although the Act would not require any higher education institution or intercollegiate athletic association to provide support regarding NIL marketing and compensation, if any support were provided, it would need to be equal and accessible to all student athletes, regardless of gender, race, or participating sport.²³⁴

Unlike some other proposed bills, the Act would not seek to create a third-party entity to develop rules and regulations related to NIL. Instead, the Act would authorize the Department of Commerce to issue grants for "eligible entities"²³⁵ to conduct a "market analysis of the monetization of the rights granted to student athletes." Such grants would be conditioned on the entity making public recommendations to the Secretary of Commerce as to how to address any disparate estimates of compensation received by student athletes based on gender, race, and sport.²³⁶ Like other proposed bills, the Act would grant enforcement authority to the FTC, but would also grant a private right of action for individuals to pursue antitrust claims against those who violate the Act.²³⁷ The Act also contains a preemption provision, which would preempt any state laws or regulations except those relating to the certification of athlete agents under SPARTA.²³⁸

S. 414—Amateur Athletes Protection and Compensation Act

The Amateur Athletes Protection and Compensation Act, which some commentators have described as falling more toward the "middle" of other legislation introduced in the 116th and 117th Congresses,²³⁹ would provide NIL compensation rights, and would require higher education institutions to provide additional protections for student athletes.²⁴⁰

Like many other proposed bills, the Act would prohibit an intercollegiate athletic association or higher education institution from adversely impacting student athlete eligibility based on a student athlete entering into an agency contract with a certified representative or receiving NIL compensation.²⁴¹ The Act's language, however, includes some limitations on student athlete NIL compensation. For example, the Act would provide that an intercollegiate athletic association or higher education institution may revoke eligibility if the student athlete enters into an

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ The Act defines eligible entity as a "business in the United States," "a public or private education and research organization in the United States," or a "consortium" of both. *See id.*, § 4.

²³⁶ *Id.*

²³⁷ *Id.*, § 5.

²³⁸ *Id.*, § 6.

²³⁹ Ross Dellenger, *Latest Congressional NIL Bill Would Allow Athletes to Enter Draft and Return to College*, SPORTS ILLUSTRATED (Feb. 24, 2021), <https://www.si.com/college/2021/02/24/ncaa-athlete-rights-compensation-congress-jerry-moran>.

²⁴⁰ S. 414 (117th Cong. 2021).

²⁴¹ *Id.*, § 4.

endorsement contract that violates the code of student conduct of the higher education institution or any rule enacted by the Amateur Intercollegiate Athletics Corporation, an entity that is established by the Act.²⁴² A higher education institution, under the Act, would also be able to prohibit a student athlete from engaging in promotional or endorsement activities during and immediately before an intercollegiate athletic event.²⁴³ With regard to NIL contracts, both enrolled and recruited athletes would be required to disclose their endorsement contracts to their higher education institution.²⁴⁴

Beyond NIL compensation, the Act would also provide other protections for student athletes. For example, under the Act, student athletes would be allowed to participate in intercollegiate athletics after entering into a professional sports draft so long as the athlete did not receive any compensation from a professional sports league or team or an agent.²⁴⁵ The Act would also require a higher education institution to continue providing full grant-in-aid to any athlete who did not finish his or her course of study in order to pursue a career in professional sports, and would prohibit a higher education institution from revoking grant-in-aid for student athletes as a result of injury or on the basis of the athlete's ability, performance, or contribution to a team's success.²⁴⁶ The Act would prohibit certain eligibility penalties for student athletes transferring schools,²⁴⁷ and would require higher education institutions to cover health care costs related to athletic injuries or illness.²⁴⁸ Under the Act, higher education institutions would be required to make legally binding disclosures to student athletes on matters such as grant-in-aid and medical coverage, and to disclose information regarding the total compensation of the institution's athletic director and athletic coaches.²⁴⁹ The Act would also amend the HEA to make federal funding contingent on compliance with the Act's provisions.²⁵⁰

Like several other legislative proposals, the Act would create a third-party entity responsible for establishing rules and mechanisms to enforce the Act, and for creating and enforcing a certification process for amateur athlete professional representatives.²⁵¹ Under the Act, national amateur athletic associations, such as the NCAA, would be able to establish rules consistent with the Act, and enforce such rules by revoking student athlete eligibility or withholding revenue distributions from higher education institutions.²⁵² National amateur athletic associations would also have to submit biennial reports to Congress that would discuss issues, trends, and recommendations regarding the Act and intercollegiate athletics as a whole.²⁵³

Like other proposed bills, the Act would also grant enforcement authority to the FTC.²⁵⁴ While the Act does not include a total antitrust exemption, it would provide that any national amateur athletic associations, conferences, or higher education institutions that are in compliance with the

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ See Hosick, *supra* note 101.

²⁴⁸ *Id.*

²⁴⁹ *Id.*, § 6.

²⁵⁰ *Id.*, § 7.

²⁵¹ *Id.*, § 8.

²⁵² *Id.*, § 10.

²⁵³ *Id.*, § 11.

²⁵⁴ *Id.*, § 9.

Act would be shielded from any liability under any federal or state laws relating to trade or unfair competition for actions taken before the Act is in effect.²⁵⁵ Like some other proposals, the Act contains a preemption provision,²⁵⁶ and an explicit provision that student athletes are not employees of higher education institutions, conferences, or national amateur athletic associations based on their participation in intercollegiate athletics.²⁵⁷

H.R. 2841—The Student Athlete Level Playing Field Act

The Student Athlete Level Playing Field Act, first introduced in the 116th Congress and re-introduced in the 117th Congress, remains largely the same as the original version but with two notable changes.²⁵⁸ First, athletic organizations and higher education institutions would still be allowed to prohibit student athletes from entering into endorsement contracts involving certain industries, such as tobacco, alcohol, controlled substances, adult entertainment, or casinos/entities that sponsor gambling.²⁵⁹ In the reintroduced version, however, if an athletic association or higher education institution did prohibit these contracts, the association or institution would also be prohibited from having a sponsorship deal with a company in one of the proscribed categories.²⁶⁰ Second, the reintroduced version provides greater leeway for student athletes to make endorsement deals with shoe and apparel companies. The original version prohibited student athletes from wearing “any item of clothing or gear with the insignia of any entity during any athletic competition or university-sponsored event.”²⁶¹ In the reintroduced version, student athletes would only be prohibited from wearing any entity’s insignia during athletic competition or *athletic-related* university-sponsored event.²⁶²

Considerations for Congress

The national debate on college athlete compensation has escalated in the years since the Ninth Circuit’s *O’Bannon* decision. In the recent *Alston* decision, the Supreme Court—echoing the Ninth Circuit—acknowledged that while the “national debate about amateurism in college sports is important,” it is outside the role of the courts to resolve it.²⁶³ Overarching questions regarding student athlete compensation will likely have to be resolved by athletic association governing bodies—or alternatively, by Congress and state legislatures.

Individual state NIL laws will begin to go into effect as soon as July 2021, which, according to the NCAA, will create “a patchwork of different laws” that will make it difficult to operate a “fair and level playing field” for student athletes nationwide.²⁶⁴ According to some experts, a “state-by-state” approach may be problematic if each state handles NIL rights differently, and may create unequal treatment for student athletes.²⁶⁵ In turn, this may provide states opportunities to create

²⁵⁵ *Id.*, § 12.

²⁵⁶ *Id.*, § 13.

²⁵⁷ *Id.*, § 5.

²⁵⁸ *See supra*, Legislative Proposals from the 116th Congress, H.R. 8382 – The Student Athlete Level Playing Field Act.

²⁵⁹ H.R. 2841, § 2(b) (117th Cong. 2021).

²⁶⁰ *Id.*, § 2(d).

²⁶¹ H.R. 8382, § 2(a)(3) (116th Cong. 2020).

²⁶² H.R. 2841, § 2(c) (117th Cong. 2021).

²⁶³ *Nat’l Collegiate Athletic Ass’n v. Alston*, No. 20-512, 2021 WL 2519036, at * 19 (U.S. June 21, 2021).

²⁶⁴ Emmert Testimony, *supra* note 114.

²⁶⁵ *Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 117th Cong. (2021) (statement of

competitive recruiting advantages for their in-state institutions by granting more lucrative NIL rights to student athletes.²⁶⁶

There is disagreement, however, as to whether federal legislation is necessary. Some experts argue that by passing individual state laws, states have created a market in which players will have choices.²⁶⁷ Federal legislation, according to some commentators, will only benefit the NCAA by providing protections from the free market.²⁶⁸ Although a state-by-state model may resemble a free-market approach, other experts contend that a patchwork of state laws may create increased litigation.²⁶⁹ For example, the NCAA may choose—as it has in the past²⁷⁰—to assert constitutional claims against states with NIL laws, arguing the laws interfere with the contractual relationship between the NCAA and its member schools by forcing the schools to violate NCAA rules.²⁷¹ During a June 2021 hearing before the Senate Committee on Commerce, Science, and Transportation, Emmert testified that the NCAA’s Board of Governors had yet to make a decision on whether it would file injunctions over state NIL laws.²⁷²

The NCAA continues to encourage Congress to take action to implement nationwide NIL compensation standards, and a wide variety of legislative proposals have been introduced on the matter. While some of these proposals contain similar provisions, each varies in the extent to which NIL compensation is regulated by law, and the role of the federal government in such regulation. Questions remain as to how to handle issues such as the NCAA’s request for antitrust protection, whether a federal law should preempt state law or allow for states to grant more NIL rights, and the extent to which a school can control a student athlete’s endorsement opportunities. There are also questions regarding the federal government’s role in enforcing any eventual NIL law and what mechanisms would be use for enforcement.

Further, there is some debate over whether an NIL bill should be broad and include additional protections for student athletes, or whether it should be narrowly focused on the NIL issue. At a June 17, 2021, hearing before the Senate Committee on Commerce, Science, and Transportation, several current and former college student athletes testified about the important of NIL rights, but also urged Senators to adopt standards for student athlete health and safety.²⁷³ Many of the past and current proposals have included provisions that touch on issues such as student athlete health care and safety, scholarships, and the freedom to transfer schools or enter professional drafts without losing intercollegiate athletic eligibility. Congress may choose to approach the matter by

Michael McCann, Professor of Law, Director of the Sports and Entertainment Law Institute University of New Hampshire Franklin Pierce School of Law), <https://www.commerce.senate.gov/services/files/37D152EC-E8F7-49E2-93B0-32FFA9AAA73D> [hereinafter McCann Testimony].

²⁶⁶ *Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 117th Cong. (2021) (statement of Matthew J. Mitten), <https://www.commerce.senate.gov/services/files/01484B4B-1900-4341-8E82-39CD05A5083E>.

²⁶⁷ *Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 117th Cong. (2021) (statement of Rod Gilmore), <https://www.commerce.senate.gov/services/files/3074E414-D454-499D-91F4-6F2383319AD3>.

²⁶⁸ *Id.*

²⁶⁹ McCann Testimony, *supra* note 265.

²⁷⁰ *See National Collegiate Athletic Ass’n v. Miller*, 795 F. Supp. 1476 (D. Nev. 1992) (successfully challenging a Nevada law that required the NCAA to comply with certain procedural requirements in its investigatory process as a violation of the Dormant Commerce Clause and the Contracts Clause).

²⁷¹ Michael McCann, NCAA’s Collision Course with State NIL Laws: Four Scenarios, SPORTICO (April 26, 2021), <https://www.sportico.com/law/analysis/2021/nil-legal-challenges-1234628197/>.

²⁷² Daniel Libit, *Senate Panel Hears College Athlete Pay Factions as NCAA Seeks Cover*, SPORTICO (June 9, 2021), <https://www.sportico.com/leagues/college-sports/2021/nil-senate-commerce-panel-1234631670/>.

²⁷³ *See, e.g., Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 117th Cong. (2021) (statement of Christina Chenault), <https://www.commerce.senate.gov/services/files/0993C618-4C19-4BF2-9E90-8D74062C6497>.

including more comprehensive reforms for student athletes, or may consider more narrow proposals that only address the NIL compensation issue.

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