

White Paper

**The NCAA and “Non-Game Related” Student-Athlete Name, Image and Likeness
Restrictions**

Prepared for the Knight Commission on Intercollegiate Athletics

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Part I: Introduction

The on-field success of NCAA Division I student-athletes has translated into billion-dollar television deals, multi-million dollar coaching contracts, extravagant facilities, and lucrative commercial licensing agreements that benefit schools but provide limited and capped benefits to the student-athletes. Universities derive enormous benefit from young men and women who do not share equitably in the value they create. The rapid and largely unconstrained escalation of the commercialization of college sports makes it increasingly difficult to justify the ever-expanding divide between the student-athlete, paid only with restrictive, in-kind benefits or expense reimbursement, and the business of the sports they play. This divide has also given rise to high-profile violations of NCAA rules and costly, time-consuming investigations that often shine an ugly spotlight on questions about the influence of money in college sports and the lack of commitment to education.

From both a moral and legal perspective, there is eroding tolerance for selective commercialization restrictions on student-athletes in a system that many perceive to be exploitative, unethical, unfair, inequitable, and unnecessary. Such continued selective enforcement in the name of protecting intercollegiate sports will continue to leave the NCAA vulnerable to litigation and invite broader attacks on the amateurism model as the perception (if not reality) of the unfairness intensifies.

The Supreme Court has recognized that the NCAA is permitted to restrict competition in ways that are reasonably necessary to maintain the unique and distinct enterprise of college athletics. The sole question addressed by this paper is whether restrictions on payments from third-parties for non-game related student-athletes' names, images, and likenesses (endorsements, personal appearances, etc.), as further defined below (collectively, "NILs" and "non-game related NILs"), are in fact necessary for these purposes. This paper assumes that the status quo will remain regarding "pay-for-performance" and payment for "game-related NILs" (in television broadcasts, rebroadcasts, and all derivative uses) or any educational-related compensation from the institution to the student-athletes, and therefore does not address whether any changes should be made in these areas.

This paper ultimately concludes that the non-game related NIL restrictions are unnecessary to the NCAA's core goals and may actually be counterproductive. This paper thus recommends that the NCAA's definition of "amateurism" should be narrowed to permit a regulated market for non-game related NILs. This narrowed, less-restrictive definition will allow for improvements to student-athlete welfare while also permitting the NCAA to more effectively focus its relatively limited resources on its core educational and amateurism/anti-professionalization goals.

As the Knight Commission has recommended in the past, the NCAA and its member institutions should take further steps to protect the integrity of college sports and its academic ideals. The NCAA should institute regulations that ensure that NIL arrangements, like all other forms of commercial activity undertaken as part of college athletics (including broadcast and sponsorship deals), are conducted within the appropriate constraints of higher education and do not unduly interfere with the NCAA's core mission. We should move past the question of "should we allow student-athletes to be paid for their non-game related NILs" to "how should we allow student-

athletes to be paid for their non-game related NILs” while maintaining the prominence of education and the overall mission of the NCAA.

Part II of this paper provides a brief summary of the legal landscape related to NIL restrictions. Part III lists and addresses the justifications historically (and to-date successfully) used to support the NCAA’s broad prohibitions on student-athlete compensation and makes the case for why student-athletes should be able to receive compensation for non-game related NIL uses. Part IV briefly addresses proposals that have been made to allow for non-game related NIL payments. Part V offers the framework for a new proposal to create a regulated system for non-game related NIL payments.

Part II: Legal Framework

The NCAA’s amateurism restrictions have received broad and virtually unwavering support from the courts. The seminal case is the Supreme Court’s antitrust decision in *NCAA v. Board of Regents*.¹ The Court held that the NCAA’s rules should be evaluated under the “rule of reason”, rather than declared per se illegal, because of the unique interdependent nature of the institutions participating in college sports. The court observed as follows:

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like.²

The Court recognized that agreements among NCAA institutions often serve valid procompetitive goals, but held that the challenged television restrictions violated antitrust law because, among other things, they were not reasonably tailored to achieve the NCAA’s otherwise legitimate objectives. The Court also concluded that:

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.³

There have only been a few cases that have directly addressed legal challenges to NIL restrictions,⁴ including the Ninth Circuit’s recent decision in *O’Bannon v. NCAA*.⁵ In *O’Bannon*, a former Division I college basketball player brought a class action antitrust suit against the NCAA, challenging (in relevant part here) the set of rules that prevent student-athletes from receiving a share of revenue that the NCAA and its member institutions receive from the use of student-athletes’ NILs in live game broadcasts, related footage, and video games. The District Court held that the NCAA’s restrictions were more restrictive than necessary for achieving the NCAA’s legitimate amateurism-related goals⁶ and therefore permanently enjoined the NCAA

from prohibiting its member schools from paying up to 1) the full cost-of-attendance (“COA”) and 2) \$5,000 per year in deferred compensation to FBS football and Division I men's basketball players for the use of their NILs, through trust funds distributable after they leave school.⁷

The Ninth Circuit (in a 2-1 vote) affirmed the liability finding and COA portion of the remedy but reversed on the deferred payments, holding that the district court clearly erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint.⁸ The Ninth Circuit explained that the “district court ignored that not paying student-athletes is *precisely what makes them amateurs*”⁹ and that “the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”¹⁰

O'Bannon was not a complete victory for the NCAA. Aside from the COA issue, the Ninth Circuit rejected the NCAA's argument that any amateurism rules are valid as a matter of law, holding that the NCAA's “amateurism rules' validity must be proved, not presumed.”¹¹ The majority also emphasized that the plaintiffs' challenge to the NIL restrictions failed, at least in part, because the plaintiffs did not produce sufficient evidence to show that deferred payments were equally effective at preserving amateurism.¹² This may open the door for future plaintiffs to make such an evidentiary showing, either in the NIL-context or in the broader compensation cap context of the pending *Alston* and *Jenkins* cases.¹³

Part III: NCAA Justifications and the Case for Allowing Non-Game Related NIL Payments

The basic case for allowing non-game related NIL payments is straightforward. As a general matter, free markets lead to the optimal economic outcome and interference with free competition leads to an inefficient allocation of resources and a variety of potential economic harms. The harm to student-athletes from collusion in the market for non-game NIL payments is obvious. Student-athletes (like all people) have a property right in their name, image, and likeness (“NIL”). Many student-athletes have created tremendous value in their NILs and, absent NCAA restrictions, would receive significant compensation for them in an open market. These men and women—often from socio-economically disadvantaged families—are deprived of the economic benefit the market would pay for their property.

Courts have long recognized that the NCAA and its member institutions are different than traditional competitors and therefore have been permitted to implement restrictions on competition that are reasonably necessary for intercollegiate athletics to exist. The operative question here is thus whether blanket restrictions on non-game related NIL payments are reasonably necessary for college sports to exist.

Critics of a system that permits non-game related NIL compensation express broad fears that it will be abused as a recruiting tool, lead to compliance and oversight nightmares, and cause the “ending [of] college athletics as we know it.”¹⁴ The NCAA offers three primary justifications embedded in those broad concerns for restricting (among other things) NIL compensation and other restraints on athlete compensation (generally referred to as “Amateurism” throughout this paper)— 1) maintenance of “amateurism” and a clear line of demarcation between college and professional sports; 2) protection of the NCAA's educational mission; and 3) prevention of

exploitation. The NCAA has argued that any non-educational related compensation to student-athletes would undermine these principles and eventually destroy the very fabric of college sports. This section fleshes out those arguments and briefly addresses a series of related rationales advanced by the NCAA—motivation for playing, financial viability, and competitive balance—and concludes that a narrowed version of amateurism that permits non-game related NIL payments will not unduly interfere with the NCAA’s core goals. In other words, the NCAA’s restrictions on non-game related payments are not reasonably necessary for college sports to exist as we currently know it.

1) Maintenance of Amateurism and Demarcation Between College and Professional Sports

The NCAA argues that Amateurism restrictions are necessary to preserve the distinctive character and product of amateur collegiate sports and to maintain a clear line of demarcation between intercollegiate athletics and professional sports. The Ninth Circuit agreed, holding in *O’Bannon* that “the difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point.”¹⁵

Response: The key narrow question here is whether a subset of the NCAA’s Amateurism rules—the prohibition on non-game related NIL compensation— is necessary to preserve the distinctive character and product of amateur collegiate sports and to maintain a clear line of demarcation between intercollegiate athletics and professional sports. The short answer is “no,” because the NCAA’s two core principles of amateurism¹⁶—the student athlete 1) does not receive compensation for play in excess of educational-related expenses and 2) must be a full-time student in good academic standing—are sufficient to create the line of demarcation between college and professional sports without additional non-game NIL restrictions.¹⁷ College athletes are full-time students with significant academic obligations who are not paid for their services. Professional athletes have no academic obligations and are paid for the work they perform. This is an easy line to draw—student-athletes are still amateurs as long as they are not paid directly for their athletic performance, and they are still college students as long as they pursue a legitimate college education. This line remains clear without a prohibition on non-game related NIL payments.¹⁸

The Ninth Circuit’s concerns in *O’Bannon* about the “quantum” leap to non-educational related expenses are inapposite here for at least three related reasons. First, *O’Bannon* focused almost exclusively on *game*-related NIL payments and NIL payments for video games. During the trial, Judge Wilken questioned at one point whether third-party payments for non-game related uses of NIL—the only issue in this paper—were even relevant to the case and Plaintiffs specifically excluded them from their requested relief.¹⁹ Second, limiting the compensation to non-game related NIL does not “cross a line” of amateurism that would lead to a point of no return because it retains the clear distinction between amateur college and professional sports. The NCAA’s own expert witness in *O’Bannon* emphasized the distinction between game and non-game related NILs, arguing that it is difficult to distinguish pay for NIL in game broadcasts from payment for play in the games being broadcast. No such difficulty exists for non-game related NIL. Third, as

Chief Judge Thomas pointed out in his dissent, the majority mistakenly focused on whether the NCAA's rules were necessary to achieve its self-defined concept of amateurism rather than whether their rules were necessary to preserve the popularity of college sports.²⁰

Arguably, a narrower definition of amateurism that permits non-game NIL payments might clarify the line between college and pro sports by focusing on academic requirements and the absence of direct payments for services (the true hallmark of professionalism), rather than a complete (and completely selective) ban on all forms of money. A more permissive construct would also be consistent with the historical evolution of the concept of amateurism in the NCAA, where yesterday's forbidden conduct (such as the granting of athletic scholarships) easily becomes a "natural" element of amateurism.

Granted, protections against *abuses* of the NIL payment system would be necessary to protect the core principles of amateurism and prevent this from turning into a disguised pay-for-play system. But, fears of potential abuses of the system should not be conflated with fears of the system itself, nor do they justify blanket restrictions. Instead, protections can be included—as discussed in Part V below—to eliminate or minimize the abuses.

2) Protection of the NCAA's Educational Mission

The NCAA argues that Amateurism restrictions help integrate the athletic and academic components of student-athletes' college experiences and that compensation for NILs or compensation based on athletic performance or skill would "subvert the educational mission."²¹ The NCAA views college athletics as part of the "ideal objective of educating the whole person."²²

More specifically, in *O'Bannon*, the NCAA argued that permitting payments for NILs would "create a wedge" between student-athletes and the student body at large which would "detract from the academic self-identity of student athletes." The NCAA is additionally concerned that the "chase for endorsements" will interfere with the student-athletes' focus on education and that any compensation system will force the institutions to limit the educational and athletic opportunities for other student-athletes.

Response: The NCAA's concern for its educational mission is obviously legitimate and significant, but education and NIL payments are not mutually exclusive. Any increase in "commercialization" that will arise with NIL agreements need not undermine the educational values and overall mission of the NCAA. Commercialization and education can co-exist (as it has for over a century) as long as the NCAA, universities, and student-athletes increase their commitment to education. NIL agreements, if properly monitored and regulated, can enhance—not detract from—the educational experience. The NCAA can only fix the over-emphasis on athletics by emphasizing education, which at its core is unrelated to how student-athletes' are able to commercialize their non-game NIL rights.

Payment for non-game related NIL will also better reflect the dual commercial-educational reality of the NCAA and may allow the NCAA and student-athletes to better achieve their educational mission by focusing on reforms that can truly provide more meaningful educational

opportunities. Done right, not only can such a system improve athletes' access to the same market available to all other students, but could also improve funding for the educational institution and the reach and popularity of college sports. Additionally, requiring student-athletes to maintain minimum academic standards to receive compensation for NIL would provide strong incentive for student-athletes to perform in the classroom, and NIL agreements can be crafted to provide for meaningful educational opportunities for student-athletes.

Fears regarding time demands and creation of a “social wedge” that interferes with education may also be reasonable, but they cannot be used to justify the blanket restriction on non-game NIL payments. The NCAA recognizes that student-athletes already face extreme time demands in their sports²³ and that athletics have not been perfectly integrated into academics.²⁴ These time demands, television exposure, and celebrity status, among other things, already contribute to a wedge between the student and the student-athlete. The NCAA needs to address all of the time-demands and potential educational distractions faced by student-athletes (including reducing length of seasons, practice time, etc.), not simply the ones that offer the student-athletes a financial benefit.²⁵ And, of course, this social wedge concern is selective, given that no restrictions are placed on time spent or money earned by students who are not athletes.

This model would not limit educational opportunities for other student-athletes because it places no additional financial burden on the institutions (beyond increased compliance costs) given that compensation can only come from third parties. There is, however, some risk that funds given to institutions under the current system might be directed to student-athletes under the new system.

3. Prevention of Exploitation

A related concern is that a loosening of Amateurism rules will lead to “over-commercialization, which transposes the collegiate model into a system that more closely resembles the professional sports approach...where athletes are used by their teams and team sponsors to brand and promote products...and threatens the integrity of college sports.”²⁶ The NCAA has argued that its no-endorsement rules “prevent students from becoming billboards for commercialism.”²⁷ The NCAA also fears an NIL system would be abused as a recruiting tool and as a disguise for improper payments to induce a student-athlete to choose a particular school.

Response: In a system where billions of dollars are generated in part due to the athletic success of student-athletes, the restrictions on non-game related NIL deals do not prevent exploitation—they are exploitative. Whatever downside comes from commercialization is already affecting student-athletes; the current rules simply ensure they have a limited share in the benefits. The NCAA has long conceded that commercialization and amateurism can co-exist, just not with respect to student-athletes.²⁸ The perceived—and actual—unfairness in this arrangement grows with each new television deal, coaching contract, and facility renovation, while the selective and blanket restrictions on student-athletes are maintained.²⁹

The harm to the student-athletes is exacerbated by the fact that only a small percentage of college athletes will play professionally. Although this fact is often trumpeted by the NCAA as a justification for not compensating them, it highlights that for many of these student-athletes, the

college years are when their NIL is most valuable—the only time they are not allowed to benefit from it.

Opening up a well-regulated market for non-game related NIL payments can also help close the black market that has sprouted up to work around the restrictions. The current restrictions create an incentive and temptation for student-athletes to violate the rules and receive under-the-table benefits³⁰ from boosters, agents,³¹ third parties, and others.³² Institutions already spend millions on recruiting student-athletes through coaches, facilities, and other amenities, and student-athletes often choose their institutions based on these factors.³³ The absence of an above-the-board market creates an environment where actual exploitation is more, not less, likely.³⁴ Permitting regulated non-game related NLI payments will allow the NCAA to more effectively monitor and prevent circumvention, protect the student-athletes, provide transparency, and maintain integrity of the NCAA's core educational concerns.

The NCAA's related rationales – motivation for playing, financial viability, and competitive balance – are all similarly unavailing in this context.³⁵

4. Slippery Slope and Unintended Consequences

Some have argued that NIL payments would open the door to further incursions on amateurism and any wavering from a strict commitment to amateurism would weaken the NCAA's legal positions under antitrust, labor, and tax law.³⁶

Response: Maintaining a commitment to (a newer form of) amateurism and a clear line between college sports and professional sports has potentially significant beneficial legal implications under antitrust, labor, and tax law³⁷. An oft-cited concern of narrowing the NCAA's amateurism rules is that it will render the NCAA and its member institutions more vulnerable to attack under these (and perhaps other) legal regimes. In reality, however, a more narrowly tailored—but still clear, if not clearer—definition of amateurism that focuses on ensuring the primacy of meaningful educational opportunities for student-athletes may actually strengthen the NCAA's legal protections. For example, under Section 1 of the Sherman Act, the operative question is whether the challenged restraint is “reasonably necessary” for the NCAA to achieve its procompetitive goals. Unnecessarily restrictive rules, such as blanket prohibitions on NIL payments, leave the NCAA open to obvious antitrust attacks that could threaten the entire system of amateurism. A danger of having blanket restrictions is that it invites a plaintiff to argue that there are less restrictive alternatives, given that *any* alternative (short of another blanket restriction) is less restrictive than a complete prohibition. The NCAA may be better equipped to defend its rules in antitrust cases if they are clearly necessary to protect amateurism.

This paper proposes a less restrictive alternative in Part V—a regulated market for non-game related NIL payments. This proposal, like any agreement by the NCAA and its member institutions to regulate or restrict competition, raises its own possible antitrust risks. The restrictions in this proposal, however, may be easier to justify under antitrust law because they are narrowly tailored to achieve the NCAA's legitimate goals of, among other things, promoting education and protecting (a modified) amateurism. This may lead to continued deference from the courts and obviate the need for Congressional intervention (or, in the alternative, it could

strengthen the NCAA's argument for a limited statutory antitrust exemption that would protect its remaining core amateurism rules). Modifications should be made where appropriate to ensure that the rules are no more restrictive than necessary, but antitrust is a notoriously unpredictable area of law, so no set of restrictions (particularly those that have an impact on price) should be considered immune from antitrust attack.

Emphasizing educational requirements—and maintaining a prohibition on non-educational related expense payments from schools— would also solidify the NCAA's positions under labor law and tax law.³⁸ And, non-game related NIL payments are unlikely to raise any Title IX issues, given that these will be good-faith transactions between third parties and the student-athletes.

Additionally, a modified system that reduces the restrictions on student-athletes would seem to naturally limit the potential targets and thus frequency of lawsuits. Of course, a modified NIL system falls far short of the relief sought in *Alston* and *Jenkins*, but, as discussed above, it could strengthen the NCAA's legal argument in those cases by clarifying the line between college and pro sports and thus allowing the NCAA to argue that its remaining restrictions are reasonably necessary to protect the NCAA's core amateurism concerns. It would also likely dampen the public criticism and eliminate some of the perceived hypocrisy that comes with selectively enforced, overly restrictive rules. Until the rights of student-athletes are better protected or respected, it appears inevitable that they and others will continue to seek judicial or legislative alternatives that present a greater threat to the NCAA's amateurism foundation.

Part IV: Existing Proposals

Many have argued that the NCAA should permit student-athletes to receive compensation for their non-game related NILs, but there have been very few concrete proposals. The Pac 12 tabled a proposal that would have permitted a student-athlete to use his/her NIL to promote his/her business, "provided the business is not athletically related." The National College Players Association has called for an elimination of all limitations on all college athletes' commercial opportunities by implementing the "Olympic" amateur model.

The Drake Group has provided the most detailed Position Statement regarding student-athlete compensation, including a model for non-game related NIL payments.³⁹ The Position Statement provides a detailed set of recommendations that cover areas beyond the scope of this paper, but it is worth noting that the Position Statement recommends that institutions "should not pay students for participating in curricular or extracurricular activities except for educational scholarships not to exceed full cost of attendance."⁴⁰

The Position Statement recommends, among many other things, that college athletes can receive compensation for the use of NIL as long as the athlete "independently obtain[ed] such employment (i.e., such activities are not arranged by the athlete's institution, its athletic program sponsors or advertisers or representatives of its athletic interests)" and the athlete does not use the name of his/her institution. The statement also recommends that the student-athlete's institution review any NIL deal to ensure, among other things, that the compensation is within a fair market range and there is no use of institutional names or intellectual property.⁴¹ The statement further

recommends that the institutions have the right to own and commercially exploit college athletic events, though the student-athletes must consent to use in such events (without any compensation to the student-athlete).

Although the Drake Group's Position Statement is largely consistent with the ideas in this paper, it does not provide as many details or protections as the proposal set forth in Part V. There are also a few differences worth noting. First, the Position Statement does not appear to allow for the possibility of group licensing agreements among student-athletes and the potential for student-athlete(s) and the institution to jointly agree to license their intellectual property (e.g., for video games, trading cards, etc.).⁴² Second, it does not provide for independent oversight of the NIL criteria (outside of institutional review). Third, it does not provide limitations on non-game related NIL deals designed to ensure the primacy of education.

Part V: Recommended Proposal

This proposal recommends redefining amateurism to allow student-athletes to secure endorsement deals or otherwise receive compensation for use of their NILs, including value derived from their athletic ability, as long as such use is not related to their participation in the underlying athletic event or derivative of the underlying event (including broadcast, re-broadcast, etc.).

Note: This proposal does not include "game-related" uses of NIL. Game-related uses include any broadcast, re-broadcast, photo, promotion, or any products derived from the broadcast of the underlying athletic competition (e.g., highlight reels, historical footage, etc.). This proposal presumes the current status quo, in which student-athletes receive no direct compensation (beyond educational-related expenses) for performance or game-related uses of NIL, and that other rules regarding game-related uses of NIL would remain the same as currently exist. The NCAA or related entities will continue to use NILs to promote the underlying athletic competition, the team, the athletic department, ticket sales, or other uses related to the athletic competition or its broadcast or re-broadcast.

Although this proposal is limited to non-game NIL rights, the NCAA must continue to ensure that all forms of commercial activity undertaken as part of college athletics (including broadcast and institutional sponsorship deals), are conducted in a manner consistent with the NCAA's educational mission and other core goals. The regulated non-game NIL rights granted to student-athletes in this proposal will allow for an appropriate focus on education and improvements to student-athlete welfare while maintaining a clear line of demarcation between college and professional sports and allowing the NCAA to stay true to what makes college athletics a vibrant part of the American fabric.

As a starting point, this proposal recommends the Knight Commission advocate for the following structural changes.

1. Student-athlete and Institutional non-game NIL rights
 - a. Student-athletes have the right to use their NIL, including the elements of NIL value derived from their athletic ability, for non-game-related commercial

purposes (including, but not limited to, endorsements, product licensing, personal appearances, books, movies, television or radio shows, or providing autographs), subject to institutional, NCAA, and other approval as detailed below.

- b. Individual NIL agreements between student-athletes and third parties cannot use any NCAA or school marks or logos and cannot make any express or implied endorsement on behalf of the NCAA, except where the athlete and the NCAA or school jointly agree to license their intellectual property or otherwise provide consent.
 - c. The NCAA and its member schools cannot use a student-athlete's NIL for non-game-related commercial purposes and cannot make any express or implied endorsement on behalf of the student-athlete, except where the student-athlete and the NCAA or school jointly agree to license their intellectual property or the student-athlete otherwise provides consent.
 - d. The NCAA and its member schools can jointly agree to license their collective intellectual property (student-athlete NIL and NCAA/school name, marks, logos, etc.) to third parties.
2. All NIL agreements will be filed with the institution and the NCAA and will be subject to approval of the student-athlete's institution.
 3. An institution's staff member or any representative of its athletics interests should not be involved, directly or indirectly, in making arrangements for NIL deals for individual student-athletes.
 4. Student-athletes may only enter into NIL agreements or receive the benefits of existing NIL agreements if they are full-time students in good academic standing and are making progress towards a degree.
 5. Grant of NIL rights by a student-athlete shall expire upon graduation or expiration of eligibility, and rights would revert to the athlete.
 6. NIL Committee
 - a. The NIL Committee will be composed of representatives from the NCAA, conferences, athletic departments, faculty, current and former student-athletes, and individuals with expertise in NIL-related markets.
 - b. The NIL committee will create objective criteria and guidelines to ensure all NIL agreements fit within the overall educational mission of the NCAA and are not otherwise inconsistent with NCAA values and amateurism rules.
 - c. NIL agreements may only be approved by an institution if they fit within these guidelines. The committee should consider the following factors, among others, in creating its criteria and standards:
 - i. Appropriateness of level of compensation—The committee can set a permitted compensation range based on market value benchmarks.
 - ii. Appropriateness of required activities.
 - iii. Character and integrity of the third party.
 - iv. Time-demands of the athlete's involvement.

- v. Educational benefits, such as an internship or other non-playing career advancement opportunity that can enhance the student-athlete's educational experience and provide valuable life skills.
 - d. The NIL Committee will review particular agreements where appropriate.
- 7. Standard NIL Agreements: Any grant of NIL rights by a student-athlete to a third party should be pursuant to a "Standard NIL Agreement." The Standard NIL Agreement should be designed to minimize interference with the student-athlete's educational experience and uphold the overall mission of the NCAA and must be consistent with the standards established by the NIL Committee. The Standard NIL Agreement can include, among other things:
 - a. Time limits for activities related to the agreement (e.g., a cap on the total number of hours per week or month that can be spent at appearances, etc.) during the academic year. Potentially, less restrictive caps could exist for summer work.
 - b. Limited time period for activities related to the agreement (e.g., appearances and other agreement-related work can only take place during the summer).
 - c. Student-athletes cannot miss class, exams, or any other required academic activities to perform agreement-related activities.
 - d. Compensation may only be provided for a student-athlete's NIL and only within an acceptable market range.
 - e. Inclusion of an educational element, such as a required reflection paper.
 - f. A "reverse" morals clause which will terminate the agreement based on any conduct that brings the third party into public disrepute, etc.
- 8. Group Licensing Agreements
 - a. The NCAA can adopt the Group Licensing Agreement (GLA) model used by the major professional sports leagues in the United States, with a distinction drawn between game-related NIL uses and non-game related NIL uses.
 - b. Game-related NIL
 - i. Status quo will remain.
 - c. Non-Game-related NIL
 - i. As a condition of participating in NCAA competitions, a student-athlete will be required to sign a GLA that gives the student-athlete's institution the right to use the student-athlete's NIL for non-game related uses in a group of a defined minimum number of other student-athletes from that institution (e.g., for video games, trading cards, jersey sales, etc.).
 - ii. Student-athletes are free to enter into individual NIL deals as specified above.
 - iii. Revenue from GLA non-game related deals will be shared between the institution and its student-athletes.
 - iv. Additional payments will be made for use of individual student-athlete NILs within the GLA non-game related context (e.g., name or likeness on a jersey).
 - d. GLA deals should contain the same limitations and criteria recommended in the Standard NIL Agreement to minimize interference with the student-athlete's educational experience and uphold the overall mission of the NCAA.

9. There should be a cap on the maximum number of total hours a student-athlete can engage in NIL-related activities during the academic year and/or on the total number of separate Standard NIL Agreements permitted per student-athlete.
10. There should be a “signing period” for Standard NIL Agreements. This time period will be selected to minimize interference with the academic responsibilities of the student-athletes.
11. Third parties should be required to register with the NCAA before entering into any agreements with student-athletes.
12. All compensation generated from NIL agreements should be deposited in a university managed, interest-bearing trust fund and distributed to the student-athlete by the institution upon the student-athlete’s graduation or termination of eligibility.
13. Anti-circumvention rules
 - a. Designed to prevent circumvention of the NIL restrictions and amateurism rules.
 - b. Can be modeled after major professional sports leagues’ rules designed to prevent circumvention of salary restrictions.
 - c. NCAA will investigate if it suspects, among other things, that a third party is compensating a student-athlete on behalf of or at the request of an institution or any of its representatives or if the institution and its representatives are assisting a student-athlete in obtaining an NIL contract.
 - d. Whenever an NIL contract is signed, the student-athlete, institution, and third party must certify, under penalty of perjury, that there are no side agreements or understandings of any kind.
14. Student-athletes should be permitted to sign agents to assist with pursuing, evaluating and negotiating Standard NIL Agreements.
15. Agents
 - a. The role of the Professional Sports Counseling Panel can be expanded to include assistance with selection of an agent solely for representation related to Standard NIL Agreements and related opportunities.
 - b. Other agent requirements should be considered.
16. Current NCAA bylaws will be amended or deleted to accommodate the above changes.

This proposal only presents the general framework for a model that would allow non-game related NIL payments. Specific rules and requirements within this model would need to be carefully considered and evaluated, with particular attention paid to policies in the following areas: 1) Mechanisms for determining appropriate level of compensation for NIL, both in context of individual deals and as part of GLA; 2) Time limits; 3) Agent oversight; 4) Involvement of institution in assisting with or facilitating deals for student-athletes; and 5) Management of additional burden on compliance and enforcement.

End Notes

¹ 468 U.S. 85 (1984).

² *Id.* at 101-02.

³ *Id.* at 120. Courts have consistently relied on the above language in *Board of Regents* to reject a variety of challenges to the NCAA's amateurism restrictions. *See, e.g., Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) ("The no-draft rule and other like NCAA regulations preserve the bright line of demarcation between college an 'pay for play' football.").

⁴ *Bloom v. NCAA*, NCAA 93 P.3d 621, 622 (Colo. App. 2004), involved a challenge by a college football player to the NCAA's endorsement restrictions. Jeremy Bloom sought an injunction that would allow him to endorse ski equipment and model clothing while remaining eligible to play college football. The court denied the injunction, holding that the NCAA's restrictions on endorsements and media appearance were "rationally related to the legitimate purpose of retaining the "clear line of demarcation between intercollegiate athletics and professional sports."

⁵ 802 F.3d 1049 (9th Cir. 2015). In a related case, the Ninth Circuit held that EA Sports' use of the likenesses of student-athletes in video games was not, as a matter of law, protected by the First Amendment. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013). This case settled. Current and former college football and men's basketball players who appeared in the EA games between 2003 and 2014 have received settlement checks. This likely marks the first time current student-athletes have been permitted by the NCAA to receive compensation for their NILs. The Third Circuit reached a similar result in *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013). Other cases have recently held that copyright law trumps a student-athlete's right of publicity with respect to the broadcast of a game. *See, e.g., Marshall v. ESPN*, 111 F.Supp.3d 815 (M.D. Tenn. 2015). A substantive discussion of the underlying right of publicity issues is well beyond the scope of this paper. For most of the non-game related NIL uses (e.g., endorsement deals), however, there is little doubt that the student-athletes have a cognizable right of publicity.

⁶ Judge Wilken recognized two legitimate procompetitive benefits of the NCAA's restrictions—maintaining amateurism to help drive consumer demand for college sports and the prevention of a "wedge" between student-athletes and other students. Judge Wilkin also concluded that the compensation rules at issue did not promote competitive balance, did not increase output in the college education market, and played a limited role in integrating student-athletes with their schools' academic communities. *Id.* The Ninth Circuit accepted these findings on appeal. 802 F.3d at 1072.

⁷ As the Ninth Circuit later noted, "the district court's decision is the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices." *Id.*

⁸ The Ninth Circuit agreed with the District Court's conclusion that "that there is a concrete procompetitive effect in the NCAA's commitment to amateurism: namely, that the amateur nature of collegiate sports increases their appeal to consumers."

⁹ The Seventh Circuit reached a similar conclusion in *Agnew v. NCAA*, noting, in dicta, that "bylaws eliminating the eligibility of players who receive cash payments beyond the costs attendant to receiving an education...clearly protects amateurism...and are essential to the very existence of the product of college [sports]." 683 F.3d 328, 343 (7th Cir. 2012). The court added that, "[f]or the purposes of college sports, and in the name of amateurism, we consider players who receive nothing more than educational costs in return for their services to be "unpaid athletes." *Id.* The Seventh Circuit concluded that the scholarships regulations at issue in the case were not amateurism rules entitled to broad deference, but dismissed the plaintiffs' claims on other grounds.

¹⁰ *Id.* In dissent, Chief Judge Thomas concluded that the testimony at trial provided sufficient evidence to support Judge Wilken's holding that "providing student-athletes with small amounts of compensation above their cost of attendance most likely would not have a significant impact on consumer interest in college sports." In particular, Chief Judge Thomas noted that Neil Pilson, the NCAA's own expert witness, testified that paying student athletes \$5,000 year in deferred compensation would have minimal impact on consumer demand and that there was no evidence to distinguish the impact that allowing payments for NIL might have on college sports compared to Olympic sports.

¹¹ The Ninth Circuit also rejected the NCAA's other threshold arguments, holding that the compensation rules at issue in the case constituted commercial activity and the plaintiffs have standing to sue. *Id.* at 1076.

¹² The Ninth Circuit determined that Judge Wilken gave too much weight to the “offhand” testimony of Neal Pilson, who testified that his opinions about amateurism “depend on the level of money” paid to players and that “a million dollars would trouble me and \$5,000 wouldn’t.” The court held that “even taking Pilson’s comments at face value, as the dissent urges, his testimony cannot support the finding that paying student-athletes small sums will be virtually as effective in preserving amateurism as not paying them.”

¹³ *Alston v. NCAA*, 2014 WL 843274 (N.D.Cal. 2014); *Jenkins v. NCAA*, 2014 WL 6685467 (N.D. Cal. 2014) These cases claim that the NCAA’s scholarship limits are price fixing violations under antitrust law and impose an artificial ceiling on the remuneration student-athletes may receive for their services as football and basketball players.

¹⁴ Similar fears—obviously proven unfounded-- were also raised about allowing student-athletes to obtain outside employment during the academic year. “Two years after implementation, Prop 62 neither boon nor bane,” NCAA News (March 27, 2000)

<http://fs.ncaa.org/Docs/NCAANewsArchive/2000/division+i/two+years+after+implementation.+prop+62+neither+boon+nor+bane+-+3-27-00.html>

¹⁵ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1078-79 (9th Cir. 2015)

¹⁶ The NCAA conceded in its post-trial brief in *O’Bannon* that “the question whether [student-athletes] are commercially exploited is different than the question whether college sports are amateur” and further explained that it “has never wavered from its commitment to the core value of amateurism—that athletes do not get paid for playing their sport.” *Id.*

¹⁷ Payment for non-game related NIL may actually be more firmly on the “amateur” side of the line than athletic scholarships and other NCAA-sanctioned inducements to student-athletes, which are closer to “pay for play.”

¹⁸ Granted, it is ultimately an empirical question whether allowing compensation for non-game NIL would blur the distinction and diminish the popularity of college sports, but there is strong evidence to support the contrary. Although not perfect analogs for the NCAA, many other sports governing bodies which also saw their commercial success as driven by amateurism have significantly relaxed rules regarding compensation over the last several years without evidence of any decline in commercial success or consumer interest. For example, the International Olympic Committee (IOC)—long committed to the concept of amateurism—eliminated the word “amateur” from its charter in 1986. By the mid 1990’s, professional athletes in every sport except boxing were eligible to compete in the Olympics. The Olympics popularity has not slackened even though National Governing Bodies now pay medal bonuses to its athletes and permit athletes to market their NILs as part of group licensing deals or an individual basis.

¹⁹ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014), *aff’d in part, vacated in part*, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015). Nevertheless, the District Court concluded that allowing student-athletes to receive money for endorsements “does not offer a less restrictive way for the NCAA to achieve its purposes” because it “would undermine the efforts of both the NCAA and its member schools to protect against the ‘commercial exploitation’ of student-athletes.” *Id.*

²⁰ 802 F.3d at 1080.

²¹ *Board of Regents*, 468 U.S. 85 (1984).

²² James J. Duderstadt, *Intercollegiate Athletics and the American University* 70 (Univ. Mich. Press 2003).

²³ For example, according to the NCAA’s recent GOALS study, FBS football players reported median in-season time commitments of 42 hours per week, up from 39 hours per week in 2010. Two-thirds of Division I and Division II (and half of Division III) student-athletes reported that they spend as much or more time on athletics during the off-season as during their competitive season. *NCAA, Growth, Opportunities, Aspirations, and Learning of Students in College (GOALS) study* (January 2016)

http://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final.pdf

²⁴ See, e.g., NCAA post-trial brief in *O’Bannon* (arguing that the relevant inquiry under antitrust law is not whether the NCAA and its member schools have achieved the ideal level of integration).

²⁵ And, indeed, there is substantial scholarly literature on the isolation that lower socio-economic status creates for poorer students attending America’s colleges and universities. Arguably, allowing college athletes to commercialize their NIL rights could help put them on a more even footing with the middle and upper-middle class students that fill many elite institutions.

²⁶ Knight Commission on Intercollegiate Athletics Report (2010).

²⁷ *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 627 (Colo. App. 2004). In upholding the NCAA's no-endorsement rules, the trial court in *Bloom* cautioned against "those who would be less than honest and seek profit for profit's sake." *Id.*

²⁸ In fact, Myles Brand, the former NCAA President, stated in 2006 that the NCAA "has an obligation to conduct its revenue-generating activities in a productive and sound business-like manner. Anything less would be incompetence at best and malfeasance at worst." CNN Money, "College Sports' Fuzzy Math," November 10, 2006 (<http://money.cnn.com/2006/11/10/commentary/sportsbiz/>).

²⁹ Nike recently agreed to pay \$173.8 million as part of its sponsorship deal with the University of Michigan's varsity athletic teams and \$252 million to Ohio State.

³⁰ See, e.g. Steven Godfrey, "Meet the Bag Man," SB Nation (April 10, 2014) <http://www.sbnation.com/college-football/2014/4/10/5594348/college-football-bag-man-interview>.

³¹ Moreover, the "autonomy" conferences have recently voted to loosen agent restrictions for high school baseball players.

³² As an imperfect example, Tracy McGrady received \$12 million in endorsements directly out of high school, while AJ Green violated NCAA rules for receiving less than \$1,000 for selling his jersey.

³³ The NCAA's 2016 GOALS study has unsurprisingly shown that educational opportunity is not the sole driver for college choice and that some student-athletes make college choices based at least in part on athletic opportunities—and coaches—at that school. The study reported that "[a]thletics continues to play a prominent role in college choice across division. This includes quality of athletics facilities and presence of a particular coach. [Men's and women's] basketball stands out as a sport where the decision to enroll or to transfer (especially among Division I men) often depends on the coach at that college." *NCAA, Growth, Opportunities, Aspirations, and Learning of Students in College Study (GOALS)* (January 2016)

http://www.ncaa.org/sites/default/files/GOALS_2015_summary_jan2016_final.pdf. The Seventh Circuit has explicitly recognized that "student-athletes contemplating scholarship offers likely include economic factors in their decision-making process, such as the value of a given degree or the increased potential for entry into professional football." *Agnew v. NCAA*, 683 F.3d 328, 343 (7th Cir. 2012).

³⁴ That is, for some student-athletes, the cost-benefit analysis under the current regime weighs in favor of accepting improper benefits from third parties because they have no other source of income, and the risk of losing eligibility may be less salient when family needs are urgent. Providing student-athletes with a source of income (while regulating the behavior of the third parties) would provide a meaningful shift in the cost-benefit analysis for many student-athletes and reduce the incentive to obtain improper benefits.

³⁵ The NCAA has argued that NIL payments would interfere with the fundamental notion that "participation should be motivated primarily by education and by the physical, mental and social benefits to be derived," and that college athletics should be an "avocation, not a vocation." In reality, however, college athletes are motivated by a wide range of factors, and playing purely for the "love of sport" is an outdated notion that is not required to help the NCAA achieve its more concrete and legitimate educational-based goals.

Some have argued that schools cannot afford to pay student athletes above and beyond their full cost of attendance. Unlike concerns with a pay-for-play model, however, permitting non-game related NLI payments allows for meaningful improvement in student-athlete welfare without requiring any additional expenditures from the institutions, as all funds will come from third parties.

The NCAA has also argued that NIL payments would destroy competitive balance and diminish the popularity of college sports by tilting the distribution of talent and success towards the universities with greater booster support and NIL opportunities. Many economists have concluded that, rather than improving competitive balance, the NCAA's Amateurism rules either have no impact or actually worsen competitive balance. For example, see Katie Baird, "Dominance in College Football and the Role of Scholarship Restrictions," *Journal of Sport Management* Vol. 18, No. 3 (2004). And, as even the NCAA and its representatives have conceded, competitive balance is largely non-existent under current rules, as schools are free to compete for student-athletes based on coaches, facilities, etc., and schools with higher revenues consistently attract more highly-rated recruits.

³⁶ NIL payments may impact student-athlete eligibility for competitions with other sports associations. These rules should be monitored on a sport-by-sport basis.

³⁷ Although beyond the scope of this paper, payment for student-athlete NIL would not seem to impact the NCAA's tax status as an organization that serves an educational purpose.

³⁸ For example, the NLRB focused on whether the relationship between graduate students and universities is primarily economic or educational. The NLRB ultimately concluded "it simply does not effectuate the national

labor policy to accord [graduate student assistants] collective bargaining rights, *because they are primarily students.*” Brown Univ., 342 N.L.R.B. 483, 492 (2004). Permitting non-game related NIL would also loosen some of the “control” schools exercise over student-athletes, further strengthening their argument under labor law. *See, e.g.,* Northwestern University *and* College Athletes Players Association (CAPA), Case 13–RC–121359 (2014). Moreover, there is an ethical problem with forbidding otherwise acceptable conduct that may be vital to the livelihoods of some because it creates unfavorable legal arguments with respect to other prohibitions.

³⁹ The Drake Group, “Position Statement: Compensation of College Athletes Including Revenues from Commercial Use of Their Names, Likenesses, and Images,” Originally issued March 26, 2015; Revised February 12, 2016. <https://drakegroupblog.files.wordpress.com/2015/03/tdg-position-paper-name-image-likeness-final1.pdf>

⁴⁰ *Id.*

⁴¹ The Drake Group further recommends that:

- 1) Schools continue to be prohibited from compensating student-athletes for use of their NIL in conjunction with their participation in the underlying athletic competition;
- 2) Schools must obtain consent from the athlete for use of their NIL in the broadcast of the underlying athletic competitions;
- 3) Schools may condition the participation of students in the athletic competition on consent to use of their NILs;
- 4) Schools may not license current student NILs for “non-extracurricular program activities,” including videogames, licensed apparel, etc.
- 5) Schools can use student NILs, with their consent, in conjunction with “school extracurricular events, students’ graduation or other purposes supporting current student activities,” as long as revenues from such use are used to support the extracurricular program or the institution. Such use cannot extend to commercial sale of products that exist separate from the athletic competition.
- 6) Schools must obtain consent to use former student NILs.

⁴² The Position Statement states that the “institution should not otherwise [outside of game-related uses] exploit current student NILs for non-extracurricular program activities such as entering into licensing agreements using current student NILs for videogames, licensed apparel, licensed products, etc. Such institutional or third party exploitation of students is inappropriate for a non-profit higher education institution.”