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Sent Via Email

August 29, 2022

Dear Senators Manchin and Tuberville:

Thank you for offering the Knight Commission on Intercollegiate Athletics the opportunity to respond to your August 3 letter regarding legislation about college athlete compensation for the use of their name, image, and likeness (“NIL”).

The Knight Commission supports college athletes earning legitimate compensation for the use of their NIL, from sources other than their institutions, and believes that stabilizing legislation or other actions are needed and overdue. We share most of your objectives of “an Alston-compliant NIL regulatory structure”, “protecting student-athletes (and) ensuring fair competition and compensation.”

The Commission’s regulatory solutions for college sports emphasize the primacy of education, the health and safety of college athletes, and gender equity. Unfortunately, in the first year of NIL opportunities, NCAA leaders failed to enforce the Association’s rules for fear of legal challenges after the *Alston* decision. Your letter also appears to cite *Alston* as an obstacle to the NCAA’s ability to enforce its NIL rules. We respectfully disagree. In our view, *Alston* does not prevent the NCAA from enacting NIL restrictions and providing other forms of compensation unrelated to education.

In fact, the NCAA abdicated its responsibility to enforce its constitutional principles and operating bylaws with respect to NIL, which led to predictable results—many athletes benefited from legitimate NIL deals, but NIL compensation quickly devolved into thinly disguised “player compensation” and “recruiting inducements.” The NCAA’s recent written notice to institutions requesting cooperation as the NCAA begins to investigate and enforce NIL rules may signal a change in approach. Nevertheless, we believe stabilizing legislation would support your goals and simultaneously strengthen NCAA enforcement and the collegiate model by addressing perceptions of Alston-related antitrust concerns through legislated and uniform standards.

In the attached memorandum, we outline five principles that should be considered in legislation and explain the reasons we believe the *Alston* ruling does not hinder the NCAA’s ability to enforce its rules. Additionally, we highlight other NCAA governance and financial reforms that we believe can provide a more comprehensive solution to the current college sports environment by embedding the principles of the educational model of college sports into its governance and financial framework.

We would highlight one point of emphasis to underscore our frame of reference: Our proposals are designed for a college sports model that continues to operate as part of a university’s broader academic mission. It appears that some university athletics programs are on a trajectory toward a different model, in which their athletics programs may function as commercial, auxiliary units.

Senators Manchin and Tuberville

August 29, 2022

Page 2

The great majority of NCAA schools rely on institutional funding, including fees from non-athlete students, to provide college sports as co-curricular activities for their students. An updated educational model of college sports requires clear and enforceable operating guidelines—distinct from a professionalized model—that allows it to continue to operate as a not-for-profit endeavor among educational institutions.

We would welcome the opportunity to discuss our thoughts and proposals with you.

Best regards,



Arne Duncan
Co-Chair



Len Elmore
Co-Chair



Nancy Zimpher
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Memorandum on Aston-compliant NIL regulatory structure and broader reforms

Prepared in response to Manchin/Tuberville letter of Aug. 3, 2022

Name, Image, and Likeness Principles

The Knight Commission believes that any updated model of college sports should allow college athletes to earn legitimate compensation, from sources other than their institutions, for the use of their NIL. That model, however, must maintain the two foundational elements that distinguish college sports from professional sports: college athletes must be full-time academically eligible students, and institutions must be prohibited from paying them for their athletics participation. The Commission first released a [set of five principles](#) in April 2020¹ to guide the development of new policies to protect the rights of college athletes to earn compensation for the use of their NIL while ensuring these payments do not become forms of pay for play or create improper recruiting advantages. These principles, which will be discussed in more detail below, are:

- 1) Fairness to Athletes as Students;
- 2) Informing Athletes on their NIL Rights;
- 3) Oversight of NIL Rights;
- 4) Guardrails for NIL Rights; and,
- 5) Uniformity.

The Commission believes that these five guiding principles are as important today—if not more so—than they were when first released.

Our five recommended principles were designed to help achieve the following goals:

- Prevent NIL payments from being used as a means of or disguise for paying athletes based on their athletic ability (i.e., “pay for play”).
- Prevent NIL payments from eroding the distinctive character and product of amateur collegiate sports and blurring the line of demarcation between college and professional sports.
- Minimize the potential abuse of NIL payments as a recruiting tool and the use of NIL as a disguise for improper payments to induce a student-athlete to choose a particular school.
- Provide an enforceable and transparent system that will not unduly burden institutions with compliance and oversight.
- Ensure opportunities are gender equitable.
- Enhance broad-based athletic opportunities as part of the educational model.
- Minimize the potential of college athletes being classified as employees rather than students.

¹ See Knight Commission on Intercollegiate Athletics Principles for New Rules on the Use of College Athletes’ Name, Image and Likeness April 3, 2020.

Guiding Principles for NIL

The five guiding principles that we recommended for structuring the future of NIL rights were as follows:

1. Fairness to Athletes as Students

The Commission believes that NIL rules must be fair and equitable, allowing college athletes to pursue NIL opportunities like other students, provided such opportunities do not unduly interfere with the educational experience of the student or create pay-for-play arrangements. College athletes must be allowed to use approved and duly licensed third-party professionals, who are not employees or independent contractors² of the university, to arrange opportunities for athletes to earn compensation for the use of their NIL.

It is important to note that this principle is *not* intended to restrict legitimate NIL compensation for college athletes or to treat college athletes differently than non-athlete students. Non-athlete students do not receive payments—under the guise of NIL compensation—to attend or perform at a particular institution. This principle thus seeks to treat college athletes like non-athletes and ensures that college athletes receive *actual* NIL compensation, rather than disguised recruiting inducements or pay-for-play.

2. Informing Athletes on NIL Rights

The Commission believes that institutions must be required to provide college athletes with information and opportunities to be educated on their NIL rights and related legal and regulatory issues, including the uses of and restrictions on third-party professionals. College athletes, most of whom will not be represented by counsel when they enter NIL deals, are vulnerable to abuse, exploitation or incompetence by third parties that could have significant impact on their financial aid, immigration status, taxes, and intellectual property rights.

3. Independent Oversight of NIL Rights

The Commission believes that the management and application of NIL rules (e.g., reporting requirements, approval framework, morals clause) must be overseen by an entity led by a board with a majority of independent directors, who are not employed by the NCAA, conferences, or its member institutions. In addition, the Commission believes that one-third of the board must be current and former college athletes. This entity can be granted authority by the appropriate governmental body.

A board with a majority of independent directors would help eliminate inherent conflicts of interest and ensure that decisions regarding NIL are made by directors who can independently and objectively assess what is best for intercollegiate athletics and college students, rather than simply what is best for the conferences and institutions they represent. An independent majority would also be consistent with governance best practices for corporate and nonprofit boards, which typically have a majority of independent directors who provide independent and expert input to minimize the risk that board decisions are unduly influenced by one interest or member group at the expense of others.

² Independent contractors are defined as entities or individuals other than employees who provide services to institutions or conferences, such as, but not limited to, multimedia rights holders that sell institutional or conference sponsorships or companies paid by the institution and/or conference to manage and optimize its social media content. Companies that provide products, not services, such as shoe and apparel companies, are not deemed to be independent contractors and may enter into NIL arrangements with college athletes.

In addition, given concern that college athlete perspectives have been underrepresented in decision-making, we believe it is essential that current and former student-athlete voices play an integral role in NIL oversight.

4. Guardrails for NIL Rights.

The Commission believes that NIL legislation must protect fair sports competition among institutions and be designed to permit only legitimate transactions between third parties and college athletes for use of their NIL. Rules must be put in place to avoid pay for play, impermissible benefits, and improper recruiting or retention arrangements (e.g., endorsement with an “NIL collective” or a shoe company linked to future enrollment at a specific institution).

The Commission recommends implementation of the following guardrails:

- a. Conferences, institutions, and their employees and independent contractors must be barred from providing or arranging for compensation to college athletes and prospective college athletes for the use of their NIL, including through group license deals.
- b. NIL arrangements must be broadly consistent with fair market value, with the new governing entity providing oversight and an approval process.

Note: The Commission’s original principles proposed a prohibition on the commercial use of institution and conference trademarks by individual or groups of college athletes, even if such use was granted by third-party licensees. However, this area has quickly developed with numerous contracts where the institution is at arm’s length on the royalties paid to college athletes and provides permission for commercial use of university trademarks to third-party licensees. This area requires further analysis.

5. National Uniformity

The Commission believes that NIL legislation must be uniform across all states to provide college athletes with robust protections for their NIL rights while also creating a level playing field for athletes and institutions competing across state lines. Currently, college athlete NIL rights are governed by a hodgepodge of varying and inconsistent state laws—some states have relatively strict statutory limitations on NIL activity, while a growing number of states have no statutory regulation of NIL at all.³ Missouri, Louisiana, Alabama, Illinois, South Carolina, and Mississippi have recently either modified or repealed their NIL laws to allow schools to facilitate NIL deals for their athletes and to loosen other restrictions on institutional involvement to allow their boosters to gain a competitive advantage in recruiting.⁴

Uniform federal NIL legislation can end the proliferation of inconsistent state laws and restore stability, consistency, and clarity for the governance of intercollegiate sports and better support the educational model of college sports.

³ The areas of potential or actual conflict or inconsistencies in state legislation are vast. For example:

- Can institutions facilitate, arrange, or otherwise be involved in NIL opportunities for college athletes?
- Can college athletes use the institution’s trademarks in NIL deals?
- Can college athletes earn money for use of NIL in broadcasts of games?
- Can institutions provide compensation directly to the college athlete for use of their NIL?
- Can institutions pay their college athletes directly for the use of their NIL?
- Can athletes engage in group licensing of their NIL?

⁴ <https://www.on3.com/nil/news/how-are-recruiters-working-with-nil-collectives-in-states-where-its-allowed/>

The Supreme Court Decision in NCAA v. Alston

We also want to briefly address the relationship between *Alston* and the NIL landscape. Although *Alston* was a unanimous ruling, striking down certain NCAA restrictions on athlete compensation related to education on antitrust grounds, the Supreme Court decision **does not** prohibit the NCAA from implementing restrictions on NIL compensation. In fact, the Supreme Court was explicit that *Alston* did not address restrictions on NIL compensation or other payments “unrelated to education.” Specifically, the Supreme Court wrote that it was only addressing:

...a narrow subset of the NCAA’s compensation rules—namely, the rules restricting the education-related benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools...The rest of the NCAA’s compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. *And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.*⁵

The district court and 9th Circuit Court of Appeals did address—and explicitly upheld—the legality of the NCAA’s restrictions on compensation unrelated to education (e.g., compensation for NIL). The district court held that restrictions on compensation untethered to education are “reasonable in light of the possibility that ‘professional-level cash payments ... could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand.’”⁶ Thus, while the district court enjoined the NCAA from restricting a broad array of benefits and compensation related to education, “nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education.”⁷

On appeal, the 9th Circuit affirmed, holding that “the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to student-athletes while serving the procompetitive purpose of preserving the popularity of college sports.”⁸ The *Alston* decision thus reaffirmed the 9th Circuit’s prior ruling in *O’Bannon*, where the court held that “not paying student-athletes is precisely what makes them amateurs” and noted 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.”⁹

Allowing NIL to morph into pay for play and improper recruiting inducements is further deemphasizing the primacy of education and accelerating the professionalization of college sports. This move away from education is eroding the distinction between college and professional sports—the very distinction that the courts have permitted the NCAA to maintain. If we continue on this trajectory, college sports as know it, and have known it for over a century, may cease to exist.

⁵ NCAA v. Alston.

⁶ Alston v NCAA.

⁷ Alston v. NCAA.

⁸ Alston v. NCAA, 9th Cir.

⁹ O’Bannon v. NCAA.

Broader College Sports Reform

In our view, NIL-related chaos is only a symptom of a larger issue: The badly broken and out-of-date governance and structural model of Division I college sports. The Knight Commission has developed three broader proposals that it believes will address Division I's fundamental governance and structure mismatches and propel more holistic and transformational change.

The Knight Commission has a legacy of leading reforms that strengthen the educational mission of college sports. Over the years, the NCAA has adopted a number of the Commission's recommendations, including the rule that requires teams to be on track to graduate at least 50 percent of their players to be eligible for postseason competition.

Two years ago, the Commission [called for a major overhaul of Division I sports](#) by creating a separate entity, funded by College Football Playoff (CFP) revenues, to govern FBS football, with a concurrent restructuring of NCAA governance around its unifying sport of basketball. To ensure that any new governing entity for major college football powers is not just about maximizing revenues and acting in conference or institutional self-interest, we also recommended that the board of this new entity be led by a majority of independent directors, including current and former football players and experts on athlete physical and mental health.

More recently, we also proposed a new financial framework for college athletics, [“Connecting Athletics Revenues with the Educational Model of College Sports \(C.A.R.E. Model\).”](#) The C.A.R.E. Model would require the NCAA, CFP, and Division I conferences to more closely connect the distribution and spending of billions of dollars in shared athletics revenue distributions with the broad educational mission of NCAA Division I college athletics programs.

Under the C.A.R.E. proposal, Division I conferences would be required to implement both distribution and spending policies to ensure shared conference revenues are used *primarily* to support college athlete education, health, safety, and well-being, and athletics programs that provide broad-based opportunities and that achieve gender and racial equity. The C.A.R.E. model would help curb exorbitant spending in Division I programs on coaches' salaries and gilded facilities.

Finally, our 2021 report [“Achieving Racial Equity in College Sports”](#) spelled out a series of far-reaching steps for advancing racial equity in intercollegiate athletics.

We believe that these proposals can collectively help ensure a viable future for an updated educational model of college athletics, despite some daunting and deep-seated challenges in Division I. For your reference, [linked here is the roster of Knight Commission leaders](#), who brought their considerable expertise and experience to bear in developing the Commission's recommendations, which were informed not only by a D-I leaders survey, but also by independent studies and extensive financial and legal analyses.