NCAA Division II Recommends Name, Image, and Likeness Legislative Proposals



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By Curry Sexton and Greg Whiston

On Tuesday, June 23, the NCAA Division II Legislative Committee recommended several legislative proposals that would permit NCAA Division II student-athletes to be compensated for their name, image, and likenesses ("NIL"). The proposals will now be reviewed by the NCAA Division II Management Council and Presidents Council at their respective July and August meetings. The Presidents Council will ultimately decide which proposals advance to the 2021 NCAA Convention, where the fate of the proposals will be decided via NCAA Division II's one-institution, one-vote legislative process, whereby each NCAA Division II member school is entitled to cast a single vote on each legislative proposal.

The recommendations are the result of extensive membership review and input, which included a survey taken by more than 1,000 member-institutions and conferences, including student-athletes, whose voices were prioritized throughout the process.

Division II Recommendations

- Student-Athlete Work Product

If this recommendation is adopted, student-athletes would be permitted to use their NIL to promote their own sports-related work product. For instance, student-athletes would be able to promote athletics apparel, athletics equipment, or a personal book related to athletics achievements or related topics. Currently, student-athletes can use their NIL to promote work product that is unrelated to sports, so this recommendation alone signals a potentially sizeable alteration.

- Endorsement of Third-Party Product or Service

If this recommendation is adopted, student-athletes would be permitted to promote products, whether or not related to athletics, subject to institutional policies. In any such promotions, student-athletes would be able to include their athletic status and ability. Currently, student-athletes are prohibited from using their NIL to promote commercial products if any references are made to status as a student-athlete.

Additionally, student-athletes would be permitted to model noninstitutional athletics apparel and equipment and could establish a monetized media platform (i.e., YouTube, Instagram, Twitter) for promotion of commercial products unrelated to athletics. If adopted, both of these would effect a noticeable shift from the current policies.

- Autographs

If this recommendation is adopted, student-athletes would be permitted to be paid for autographs while not representing their individual institution, either in conjunction with an endorsement opportunity or independent of their individual institution. Currently, student-athletes are entirely prohibited from receiving compensation for autographs.

- Appearances

If this recommendation is adopted, student-athletes would be permitted, subject to institutional policies, to be paid for appearances at commercial businesses, as well as charitable, educational, or non-profit agencies. Student-athletes would be able to include their athletic status and ability in any such promotions. Currently, student-athletes are restricted from using their NIL to promote a commercial product or service.

- Sale of Merchandise and/or Memorabilia

If this recommendation is adopted, student-athletes would be permitted to sell athletics apparel, used athletic equipment, and awards provided by the institution at any time in their career. Individual institutions would be tasked with educating student-athletes on which apparel items are expected to be retained for institutional events, such as team travel and promotional activities. Currently, student-athletes are restricted from selling these items while they have remaining eligibility.

- Crowdfunding for Extreme Circumstances

If this recommendation is adopted, student-athletes or their families and friends would be permitted to organize fundraisers for student-athletes or their family members in extreme circumstances beyond the control of the student-athlete. This recommendation simply removes the institutional oversight requirement that is currently in place for such fundraising activities.

- Fees for Private Lessons

If this recommendation is adopted, student-athletes would be permitted to promote and provide private lessons. If institutional facilities are used, student-athletes would be required to follow institutional processes for renting the facilities, consistent with that used by the general public. Currently, student-athletes are permitted to receive compensation for private lessons, but they are prohibited from promoting the availability of private lessons to the public.

- Fees for Camps/Clinics

If this recommendation is adopted, student-athletes would be permitted to operate camps and clinics. If institutional facilities are used, student-athletes would be required to follow institutional processes for renting the facilities, consistent with that used by the general public. Currently, student-athletes are prohibited from conducting their own camps and clinics.

- Commercial Business Promotions

If this recommendation is adopted, commercial businesses could advertise the presence of student-athletes at the business for an institutional fundraiser. Currently, commercial businesses cannot advertise the presence of student-athletes at such institutional fundraisers.

- Licensing of Student-Athlete’s NIL

If this recommendation is adopted, student-athletes would be permitted to license their NIL for commercial products unrelated to their work product. For instance, if a student-athlete becomes well

known by a nickname (i.e., “Honey Badger”), the student-athlete would be permitted to license that nickname on commercial products sold by a third party. Currently, student-athletes are restricted from using their NIL to promote a commercial product or service.

Additional Administrative Framework

In effort to align with the NCAA Board of Governors’ request that any legislative changes be transparent and enforceable, the Legislative Committee recommended an administrative framework for the concepts above that includes:

- Institutions would be permitted to counsel student-athletes on NIL activities but could not arrange NIL opportunities. Permissible institutional assistance would include educating student-athletes on applicable NCAA rules, assisting student-athletes with compliance evaluation, and offering resources to help student-athletes evaluate and select professional service providers.
- Institutions would be permitted to establish an NIL counsel panel.
- Student-athletes would be required to obtain approval for use of institutional marks for commercial purposes.
- Student-athletes would be precluded from using their NIL to promote products or services not permitted by the NCAA, which would include sports wagering companies and banned substances.
- Reporting of NIL activities would be done on an annual basis.
- Prospective student-athletes would be permitted to retain professional services for NIL activities, as well as professional athletics opportunities, if any agreement related to professional sports opportunities is terminated upon enrollment at a NCAA Division II institution.
- Current student-athletes would be permitted to have access to professional services for NIL activities, but would be prohibited from hiring an agent for professional sports opportunities.

NCAA Division I NIL Proposals

It is unclear how these proposals will or will not relate to the proposals expected to be announced by NCAA Division I by no later than October 31, 2020. Regardless, these recommendations should serve as examples of items that will be debated upon in the coming months and that could ultimately be implemented into NCAA NIL rules that are expected to go into effect Summer 2021.

The authors of this article, Curry Sexton and Greg Whiston, are members of Seigfreid Bingham’s Sports and Entertainment Group and routinely represent clients in collegiate athletics. If you or your organization have questions about the impact of the NCAA’s most recent announcement, please contact either author at 816-421-4460.

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