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# **EXCERPTED/MODIFIED FROM 'The NCAA's New NIL Guidance: How the NCAA Has Loosened Restrictions on Collectives'**

*EXCERPT/MODIFIED  
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On October 26, 2022, the NCAA released regulatory guidance addressing:

**The New Guidance clarifies that Institutional based NIL educational and monitoring efforts are permissible in three important ways.**

- Institutions can and, according to the NCAA's announcement of the New Guidance, should proactively educate recruits and enrolled student athletes on NIL related subjects including, among others, financial literacy, taxes, entrepreneurship, and social media use/practices.
- Second, Institutions can conduct NIL related educational sessions for Collectives and other Institutional boosters.
- Third, Institutions can require student athletes to report their NIL activities to their Institutions' athletics departments.

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**Institutions can meaningfully interact with student athletes and Collectives, including in the following ways:**

- Institutions can engage Collectives to inform student athletes of NIL opportunities;
- Without further Institutional involvement, Institutions can engage Collectives to administer marketplaces that match student athletes with NIL opportunities;
- Without further Institutional involvement, Institutions can provide or transmit information to student athletes about NIL opportunities of which Institutions are aware;
- Institutions can provide student athletes' contact and other directory information to Collectives, including Collectives specifically seeking to engage those student athletes in NIL activities;
- Institutions can introduce student athletes to Collective representatives; and
- Institutions can arrange space for student athletes and Collectives to meet on campus, including within Institutional facilities.

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**The New Guidance permits the following Institutional promotional efforts:**

- Institutions can promote student athlete NIL activities if no monetary value applies to the promotion or the Institutions incur no cost for the promotion, such as retweeting or liking a social media post.
- Institutions can provide stock, stored photo/video, graphics to both student athletes and Collectives.

- Institutions can promote NIL activities on Institutional platforms if student athletes or NIL Collectives pay "going rates" for advertisements on those platforms. For example, Collectives can pay to advertise themselves on video boards during football games, which place them in positions pivotal to solicit funds directly from tens of thousands of potential donors.
- Institutions can purchase items relating to student athletes' NIL deals if the items are *de minimis* in value and Institutions pay the same rate for the items as the general public would pay.

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## SUMMARY OF NCAA NIL REGULATION

The New Guidance adds to the NCAA's three prior NIL missives regulating NIL (collectively, the **NIL Regulations**):

- First, the NCAA's July 1, 2021 adoption of its Interim Name, Image, and Likeness Policy (**NIL Policy**), which, for the first time, allowed NCAA student athletes to earn NIL compensation without jeopardizing their NCAA eligibilities;
- Second, the NCAA's November 2021 Question-and-Answer Guidance (**Q&A Guidance**), which, among other things, clarified that Institutions may not (1) use NIL transactions to compensate student athletes for athletics participation or achievement or as improper inducements, (2) dictate how student athletes use their NIL compensation, or (3) compensate student athletes for their NIL; and
- Third, the NCAA's May 2022 Guidance Regarding Third Party Involvement (**May 2022 Guidance**), which addressed Institutional involvement with prospective student athletes (*i.e.*, recruits) and NIL collectives.

The New Guidance does not create new rules. Instead, the New Guidance attempts to contextualize concepts under the NIL Policy and implement them, like the prior NIL Regulations, under an **overarching premise that NIL activities are subject to the NCAA’s long-standing prohibitions against pay-for-play and other impermissible inducements**. Beyond that crystalline premise, however, the NCAA has been reticent to fully regulate NIL and, consequently, it has released its NIL Regulations intermittently and haphazardly, creating interpretive challenges and implementation headaches for those subject to the NIL Regulations.

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## **THE NEW GUIDANCE – THE NCAA REGULATES FOUR CATEGORIES OF INSTITUTIONAL INVOLVEMENTS IN NIL ACTIVITIES**

The New Guidance regulates four categories of Institutional involvements with NIL activities:

- Institutional education and monitoring.
- Institutional support for student athlete NIL activities.
- Institutional support for NIL entities, and NIL Collectives.
- Institutional involvement in negotiating for student athletes, revenue sharing with student athletes, and compensating student athletes.

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### **Category 1 - Institutional Education and Monitoring**

The New Guidance clarifies that Institutional based NIL educational and monitoring efforts are permissible in three important ways.

- First, Institutions can and, according to the NCAA's announcement of the New Guidance, should proactively educate recruits and enrolled student athletes on NIL related subjects including, among others,

financial literacy, taxes, entrepreneurship, and social media use/practices.

- Second, Institutions can conduct NIL related educational sessions for Collectives and other Institutional boosters.
- Third, Institutions can require student athletes to report their NIL activities to their Institutions' athletics departments.

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### **Category 2 - Institutional Support for NIL Activities**

The New Guidance's most developed subject area addresses the extent to which Institutions can directly support student athlete and Collective NIL activities. The NCAA's newly sanctioned support levels seem more lenient and tolerant of Institutional support than many Institutions have interpreted the NIL Regulations to date.

- Institutions can engage Collectives to inform student athletes of NIL opportunities;
- Without further Institutional involvement, Institutions can engage Collectives to administer marketplaces that match student athletes with NIL opportunities;
- Without further Institutional involvement, Institutions can provide or transmit information to student athletes about NIL opportunities of which Institutions are aware;
- Institutions can provide student athletes' contact and other directory information to Collectives, including Collectives specifically seeking to engage those student athletes in NIL activities;
- Institutions can introduce student athletes to Collective representatives; and

- Institutions can arrange space for student athletes and Collectives to meet on campus, including within Institutional facilities.

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## **Institutional Promotion**

The New Guidance clarifies the extents to which Institutions can promote student athlete NIL activities, and the key to Institutional promotional involvement is, as is often the case, rooted in financial considerations.

The New Guidance permits the following Institutional promotional efforts:

- Institutions can promote student athlete NIL activities if no monetary value applies to the promotion or the Institutions incur no cost for the promotion, such as retweeting or liking a social media post.
- Institutions can provide stock, stored photo/video, graphics to both student athletes and Collectives.
- Institutions can promote NIL activities on Institutional platforms if student athletes or NIL Collectives pay "going rates" for advertisements on those platforms. For example, Collectives can pay to advertise themselves on video boards during football games, which place them in positions pivotal to solicit funds directly from tens of thousands of potential donors.
- Institutions can purchase items relating to student athletes' NIL deals if the items are *de minimis* in value and Institutions pay the same rate for the items as the general public would pay.

The NCAA limited certain Institutional promotional activities where the activities seemingly have indirect financial benefits to student athletes (i.e., student athletes do not have to pay for the benefits). Unless the benefits derived are generally available to all students and not just student athletes, Institutions cannot:

- Proactively assist in developing, creating, executing, or implementing student athlete NIL activities, including developing product or promotional materials or ensuring student athlete performance of contractual NIL activities.
- Provide non-educational services to support NIL activities, such as graphics design services, tax preparation services, or contract review services.
- Provide equipment access to support NIL activities, including, specifically, cameras, graphics software, or computers.

The three key criteria to permissible Institutional promotional activities include whether the promotional benefits (i) are available to all students and not strictly student athletes, (ii) have a direct or indirect financial value to student athletes or financial cost to Institutions, and (iii) are made available on commercially arm's length bases.

### **Institutional "On Call" Involvement**

Institutions cannot allow student athletes to participate in NIL activities while they are "on call." In other words, Institutions cannot allow student athletes to promote NIL activities while they are participating in required athletic related activities, specifically including practices, pregame activities, postgame activities, on-court celebrations, or news/press conferences. Accordingly, as long as student athletes are "off duty" from an Institutional standpoint at the time, they can, from an NCAA standpoint, generally devote however much time they want to NIL activities, and, subject to the New Guidance's limitations, Institutions can assist and support those activities.

### **Category 3 - Institutional Support for NIL Collectives**

The New Guidance clarifies certain permissible and impermissible types of support Institutions can provide to Collectives.

The following are impermissible types of support:

- Institutions cannot financially subscribe to Collective efforts.
- Institutions cannot donate cash to Collectives, regardless of whether the Institutions earmark the funds for specific sports or student athletes. Although this prohibition does not expressly extend to, for example, Institutional coaches, the NCAA's announcement of the New Guidance states unequivocally that coaches "cannot donate cash directly to" Collectives.
- Institutions cannot provide assets, such as game tickets or stadium suite access, to donors as incentives for them to donate funds to Collectives.
- Collectives cannot employ staff members of Institutions' athletic departments, including coaches.

Although the New Guidance does not specifically address the reasons for these prohibitions, they appear to be rooted in anti-commingling and anti-conflict of interest reasons.

Notwithstanding the NCAA's prohibited types of Institutional support for Collectives, the NCAA continued to dismantle the NIL firewalls separating Institutions and Collectives by permitting the following levels of support:

- Institutional coaches and other staff members can assist Collectives with fundraising, including by appearing at Collective fundraisers or donating autographed items to Collectives.
- Institutions can request that donors provide funds to Collectives, if the Institutions do not direct that the funds be used for specific sports or specific student athletes.
- Institutions can provide donor information to Collectives.
- Institutions can facilitate meetings between donors and Collectives.



- Institutions can provide assets to Collectives (for example, game tickets or stadium suite access) if the assets are available to, and on the same terms as, other Institutional sponsors.

These permissible support activities are, perhaps, the NCAA's most meaningful bricks removed from the NIL firewalls separating Institutions and Collectives. Nevertheless, for some Institutions that had taken an aggressive approach to supporting NIL entities, the New Guidance may require them to soften their aggressiveness. As Lynda Tealer, chair of the NCAA's NIL Working Group and Executive Associate Athletics Director for Administration at the University of Florida, commented in the NCAA's announcement of the New Guidance, "[T]he new guidance may require institutions and key stakeholders to modify practices, and some disentanglement may be necessary."

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#### **Category 4 - Institutional Involvement in Negotiating for Student Athletes, Revenue Sharing with Student Athletes, and Compensating Student Athletes**

The New Guidance clarifies that Institutions generally cannot negotiate for student athletes, share revenue with student athletes, or compensate student athletes.

In contrast to the category addressing institutional education and monitoring, which only addressed permissible activities, this category addresses only impermissible activities, including specifically prohibiting the following activities:

- Athletics department staff members cannot represent student athletes for NIL deals, including securing and negotiating on behalf of student athletes.

- Companies owned by athletics department staff members cannot represent student athletes for NIL deals, including securing and negotiating on behalf of student athletes.
- Institutions cannot enter into contracts with student athletes for sales of products relating to their NIL.
- Institutional staff members who own businesses separate from their Institutions cannot provide NIL deals to student athletes.
- Institutional coaches cannot compensate student athletes to promote their athletic camps.
- Conferences and student athletes cannot share revenue, including broadcast or NIL revenue.
- Student athletes cannot receive compensation for directly or indirectly promoting an athletics competition in which they participate.

Notwithstanding the NCAA's partial dismantling of the NIL firewalls separating Institutions and Collectives, the New Guidance affirms Institutional concerns that some portion of the NIL firewalls remain.

## **A NEW ALLEGATION AND CONCLUSION STANDARD FOR NCAA ENFORCEMENT ACTIONS**

The New Guidance ushers in a new and unexpected standard by which the NCAA will prosecute and adjudicate alleged violations of the NIL Regulations. Based upon the new standard's more stringent and punitive approach to alleged violations than existed previously, the NCAA has taken a material regulatory step overriding its prior NIL Regulations and contradicting its otherwise reticent approach to regulating NIL.

For NIL related violations that occurred before the New Guidance, the NCAA had directed its enforcement staff to review facts of individual cases but pursue only those individual cases that were clearly contrary to the NIL

Policy, including the most severe violations of Institutional involvement or pay-for-play. This standard was generally viewed as being largely toothless.

The new allegation and conclusion standard is far more aggressive and states that, when available information *indicates* impermissible conduct has occurred, the NCAA enforcement staff and Committee on Infractions will presume violations have occurred, unless Institutions clearly demonstrate that the conduct in question was in line with the NIL Policy and existing NCAA rules. No longer toothless, the new standard inverts due process standards and places the burden of proof on the accused Institutions rather than forcing the NCAA to prove its own cases, which cannot be a welcome development to Institutions, student athletes, or Collectives; however, considering that the NCAA reiterated its prior position that its NIL Regulations are not intended to question the eligibility of student athletes, the only logical conclusion is that the NCAA's new allegation and conclusion standard is aimed primarily at the Institutions themselves.

## **CONCLUSION**

Having not yet concluded its second year of existence, the NIL era of college sports remains in its infancy; however, the New Guidance confirms the NCAA's apparent struggle to authoritatively and consistently govern NIL's evolution and growth and, in most respects, continues the NCAA's reticent, intermittent, and haphazard approach to regulating NIL. Accordingly, Institutions and Collectives should take a cautious, deliberate, and thoughtful approach to implementing new NIL policies and procedures based upon the New Guidance.

