

# ADDRESSING COLLEGE ATHLETIC *RECRUITING*



IN THE NEW ERA OF *NAME, IMAGE, & LIKENESS*

PREPARED BY JOCELYN WILLOUGHBY

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## **DISCLAIMER**

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The author conducted this study as part of the program of professional education at the Frank Batten School of Leadership and Public Policy, University of Virginia. This paper is submitted in partial fulfillment of the course requirements for the Master of Public Policy degree. The judgements and conclusions are solely those of the author and are not necessarily endorsed by the Batten School, by the University of Virginia, or by any other agency.

## **ACKNOWLEDGEMENTS**

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## **HONOR PLEDGE**

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On my honor I have neither given nor received unauthorized aid on this assignment.

*Jocelyn Willoughby*

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## EXECUTIVE SUMMARY

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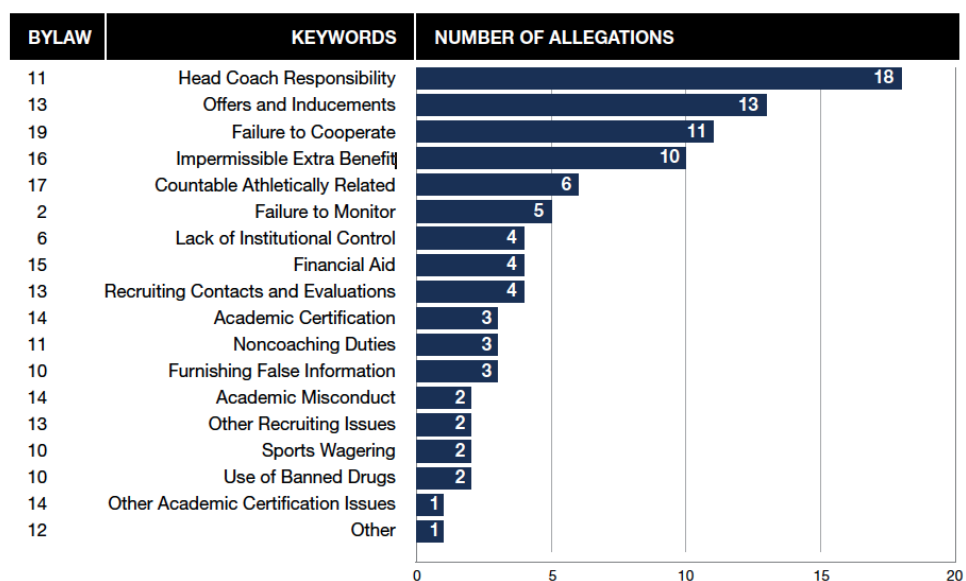
Name, Image, and Likeness legislation was recently introduced, allowing student athletes to profit from their publicity rights. It has since been used as a recruiting inducement, violating some of the NCAA's current rules. This report conducts an analysis to understand why and how the advent of NIL may exacerbate cheating behaviors and recruiting violations. It offers and evaluates three policy alternatives on the criteria of effectiveness, equity, legality, and earning potential. It is ultimately advised that the NCAA and member institutions clarify and better define rules in order to help mitigate NIL being used improperly and in ways that violate NCAA rules and values of fair play.

## PROBLEM DEFINITION

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The poor regulatory system and nonuniform standards surrounding Name, Image, and Likeness (NIL) activity has resulted in NIL being used as “pay for play” and improper recruiting inducements. Prior to the advent of NIL, “Offers and Inducements” and “Impermissible Extra Benefit” were the second and fourth, respectively, most common allegations reported to the NCAA infractions committee (Division I Infractions). New NIL activity threatens to further reinforce a culture of cheating in college athletics, particularly with regard to the recruiting process.

**ALLEGATIONS BY BYLAW — 2019**



## CLIENT OVERVIEW

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*LEAD1 is a membership organization that represents the athletics directors of the 130 member universities of the Football Bowl Subdivision (FBS), that encompasses 42 states, 55,000 student athletes, and more than 25,000 athletic administrators. Key to LEAD1's mission is advocating on policy facing NCAA Division I FBS athletic departments, promoting consensus among FBS athletic directors, and providing valuable services to member schools – all dedicated towards supporting the success of student-athletes and future of college sports.*

Name, Image, and Likeness is one of the newest developments and many have revolutionary effects on college athletics. LEAD1 has been working on several fronts to inform policies around NIL and educate membership on its most recent developments.



## BACKGROUND

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### RECRUITING: THE CORNERSTONE OF COLLEGE ATHLETICS

Any system can be simplified and understood as a combination of basic inputs and outputs. Reducing the system of college athletics in this way would show that the inputs include student-athletes and coaches, while the output is entertainment in the form of games and tournaments. As in any other system, higher quality inputs generally result in a better output. Thus, translating this principle to the world of college athletics means that acquiring elite athletes and “qualified” coaches will generally produce more winning teams and successful athletic programs. Importantly, winning introduces a host of other benefits to athletic departments. For example, competing in postseason Football Bowl Games can earn schools payouts amounting to several million dollars; alumni donations increase when teams make postseason appearances; and application and enrollment rates rise after schools experience successful athletic seasons (Yost 2009).

While there is much to gain from being a winning and successful athletic program, it is largely the student-athletes, *not* the coaches, that determine this outcome. Coaches are like managers and supervisors. While these are indisputably important roles, they become obsolete without the physical laborers who create the product... or in this case, without the student-athletes who play the games. That being said, because the system of college athletics is built on the backs of athletes, and because success rests squarely on their shoulders, recruiting the best athletes is of paramount importance in this system.

Notably, this simplified understanding of college athletics can be applied to all athletes and sports teams. However, the dynamics are even more exaggerated for football and men's basketball because success in these sports comes with higher stakes. These teams are generally the only revenue-generating sports in an athletic department and therein keep athletic departments financially afloat by subsidizing all other sports (Yost 2009).

The wide-reaching benefits of athletic success make it such that universities and their officials have a great incentive to attract elite athletes (i.e. the highest quality inputs) to their athletic

programs. The NCAA, however, attempts to temper this incentive as it does not allow schools to compete for prospects by offering competitive salaries and benefits. Instead, it imposes a limit to student-athlete compensation, and prohibits offers and inducements during recruitment and extra benefits after enrollment (BYLAWS, ARTICLE 13). This incentive can help explain corrupt and unethical behaviors seen in the recruiting process including doctoring transcripts, hiring prospective athletes' family members to athletic staffs, or providing under-the-table payments to athletes' high school/ grassroots coaches, their family members, and/or the athletes themselves (Harper 2017).

### **NAME, IMAGE, & LIKENESS (NIL): AN NEW EXTENSION OF THE ARMS RACE**

The intense pressure to recruit and retain top caliber athletes has created an arms race in college athletics. This arms race is largely characterized by the development of new facilities since facilities are 1) a key factor in students' decision to attend schools and 2) are strongly correlated with student satisfaction at schools (Huml et. al. 2018). Colleges and universities are in an unrelenting competition to develop the largest arenas, in addition to lavish locker rooms, training tables, academic centers, and more. A review of financial statements from 48 schools noted that in 2014, they spent a combined 772 million dollars on athletic facilities, which amounted to an eighty-nine percent increase from the 408 million dollars spent a decade earlier, in 2004 (Hobson & Rich 2015). This trend in spending is showing no sign of reversing. In fact, athletic departments are increasing spending (particularly on capital projects) as their revenue increases. Yet, the nature of the arms race makes it such that there is no benefit gained from constructing new facilities (though there is a cost to lagging behind), precisely because other schools are keeping pace and remodeling at the same time. For example, studies suggest that upgrading facilities does not increase the number of high ranking recruits that commit to that school (Huml et. al. 2018).

The important thing to note is that as schools are constantly seeking ways to differentiate themselves from their competitors during the recruiting process, the arms race is increasingly extending beyond the physical infrastructure. The programs and services housed within these buildings are becoming another important facet of the arms race that is peaking the attention of recruits. With the advent of Name, Image, and Likeness legislation, which allows student-athletes to profit from their publicity rights for the first time in college athletic history,

programs assisting student athletes to develop their brands, market themselves, become more financially literate, discover NIL opportunities and generally create more value for themselves, are momentous. Afterall, “Coaches are beginning to see that NIL plays a part in almost every recruiting conversation...[as] Prospects want to know how coaches are ensuring NIL success in their program.” (Cavale 2021).

## **PLAYING BY DIFFERENT RULES: THE CAUSE & EFFECT OF NON-UNIFORM NIL RULES**

In September 2019 the governor of California signed the “Fair Pay to Play Act” into law, essentially gutting the NCAA’s amateurism rules. The “Fair Pay to Play Act” allows student-athletes at universities in the state of California to be compensated for their Name, Image and Likeness. It also prohibits universities, conferences, or any “other group with authority over intercollegiate athletics” from preventing or punishing student-athletes for (e.g. by revoking scholarships) engaging in NIL activities (SB-206). Although the California law wasn’t scheduled to go into effect until 2023, it created a conflict. Californian schools would be forced to comply with their state laws. However, in doing so, they would violate NCAA amateurism rules.

According to the NCAA, amateurism intends to, “create a level playing field for all student-athletes” (NCAA). All NCAA member institutions agree to a “maximum player salary” that they can offer student-athletes: a scholarship equal to the full cost of attending a university. This includes tuition, room & board, books, plus additional dollars to cover expenses such as food and travel. This max salary of a scholarship attempts to maintain a distinction between college and professional sports, and ensure that no one school amasses an advantage in recruiting based off of compensation offered.

Clearly, the California law undermines this arrangement between schools. It consequently put pressure on the NCAA to take action and determine a way to restore equality among its member institutions. In October 2019, the NCAA’s Board of Governors directed its divisions to consider how the NCAA could modify its rules and structure to incorporate NIL principals. At the same time, in recognizing that the California law would give schools in that state an advantage over schools in other states that were still bound by NCAA rules, state legislators began introducing their own NIL bills. To date, twenty-seven states have adopted NIL laws. Florida, being one of these states, adopted an NIL law to go into effect on July 1, 2021.



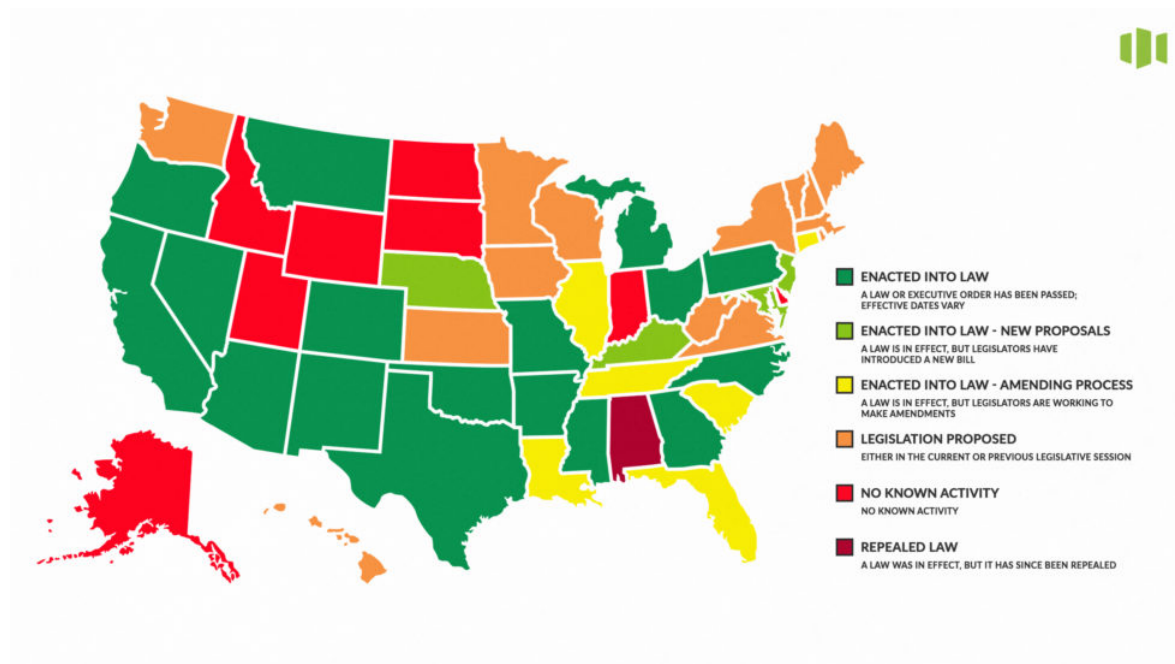


Figure 1: Status of NIL laws by State as of March 2022 (Opendorse 2022)

While the NCAA had created working groups to develop NIL concepts, votes to formally adopt legislation were tabled after the Supreme Court ruled that the NCAA was in violation of antitrust laws as a result of them restricting educational related benefits. This NCAA vs. Alston ruling did not cover the NCAA's restriction of athletic-related compensation, which is not to say that these constraints aren't also antitrust violations, but simply that athletic related compensation was not within the scope of the case. With its hands tied, the NCAA prompted the federal government to take action to introduce a national law and uniform standard that all states and schools would have to comply with. This federal law has yet to be adopted. On June 30, 2021 the NCAA put out an interim policy that was to go into effect on July 1. This is a very broad policy that largely defers to individual states and institutions. Its key components are that student-athletes:

- Can monetize their NIL, regardless of whether their state has an NIL law,
- Must comply with their institution's policies and state's laws (if applicable),
- Report NIL deals to their institutions, and
- Are allowed to hire professional services (i.e. financial adviser, agents, lawyers, etc) to assist student athletes.

Schools and their athletic administrations scrambled to understand their state policies, craft their institutional policies and develop programming and resources to educate their student-athletes. As a result, different states and schools are playing by different rules. The general language of many of these state laws is consistent. However, there is some variation that creates looser rules for some states and institutions, giving them an advantage over those that face greater restrictions. Actors in states and schools with stricter laws, may be incentivized to bypass rules in order to overcome the recruiting disadvantage created by their relative restrictions. Interestingly, many states are currently modifying or repealing their state laws to grant them greater leeway with NIL activity. Alabama, for example, was once ranked as having the most restrictive legislation (Clarke 2021). Within a span of months, they repealed their state law.

While some argue NIL may help mitigate cheating by allowing student athletes to receive compensation that is more reflective of their real market value, it is important to recognize that NIL has the potential to reinforce a culture of cheating because it forces actors at schools disadvantaged by their local policies to bypass those rules, in addition to providing more resources for universities to be able to fund and organize what were previously “under-the-table” deals for inducements and extra benefits.

## **THE COST OF NIL NORMALIZING CHEATING**

Responses to the 2017 FBI investigation and college basketball scandal suggest that payment to athletes is common practice. In fact, Chris Dawkins, the primary defendant in the scandal stated plainly “paying players has been going on for hundreds of years, so that's not something that's brand new,” (HBO 2020). Additionally, Jay Bilas, an ESPN basketball analyst and former Duke player and assistant coach, noted, “We've had cheating in this game forever. Players have been paid forever. Was that confirmed here [i.e. in the FBI investigation]? Yes” (HBO 2020). While these comments paint the picture of a pervasive culture of cheating, YahooSports attempted to provide numbers for context. In reviewing the documents and bank records used in the federal investigation, YahooSports reported that 20 Division I basketball programs were traced in the documents acquired from one sports agent (Forde & Thamel 2018). These were all FBS schools. Notably, this 2017 scandal focused solely on men's college basketball. Though we would have to question the prevalence of similar practices in the less profitable, non-revenue sports, we could readily see football—a more lucrative sport— using similar

systems. Still, all teams, coaches, and athletes, experience pressures (to varying degrees) to win and can all be susceptible to these unethical behaviors.

This problem has significant ethical costs which are hard to quantify in meaningful ways, or translate to financial values. Non-uniform NIL standards meant to preserve amateurism, create a highly corrosive system that is detrimental to the integrity of individuals and our institutions. Non-uniform rules make it such that the behavior that is authorized at some schools is impermissible at others. As a result, schools with relatively lax policies have an advantage over schools with stricter policies. A quote attributed to UNLV basketball coach Jerry Tarkanian shows the detriment of this structure as it says “Nine out of 10 schools are cheating. The other one is in last place” (HBO 2020). This quote shows that cheating is not only harmful to participating schools that ultimately damage the integrity of their own athletic programs and institutions, but it is also damaging to individuals who don't participate. These individuals lose out on more talented recruits and the ability to build competitive programs. Thus, schools that have stricter policies will be incentivized to bend their rules and minimize the degree to which they're disadvantaged. This is especially the case since schools are incentivized with big payouts.

Research shows that ethical standards can be gradually eroded in a way that is virtually imperceptible to actors. In what is described as a slippery slope effect, actors initiate this process by justifying and excusing small infractions (Baezerman & Tenbrunsel 2011). Eventually actors, once they've begun to slightly bend rules, continue to make more allowances and commit increasingly bigger infractions without detecting a shift in their moral standards (Baezerman & Tenbrunsel 2011). The 2017 college basketball scandal is a prime example of how this plays out. Actors shifted from violating NCAA or institutional rules onto violating federal laws, unwittingly. Many other cases of fraud and corruption will show similar patterns of a gradual spiral into criminality. While there is no pre-established way to quantify these ethical costs, having non-uniform NIL standards and an incentive structure that encourages cheating, erodes our ethical standards and normalizes what eventually can become criminal behavior.

There are also many externalities since the corrosive practices in college athletics reach and impact different levels of society. First and foremost, college athletic programs cause universities and academic institutions to shift their values and compromise their educational mission (Fizel & Fort 2004). Looking beyond the college strata, professional agents and grassroots basketball coaches also adopt morally compromised behaviors in order to align with this college system. In short, unethical practices aren't isolated to college athletics, but instead become diffused and normalized in different levels and aspects of society. The direct costs are

borne by student-athletes and young recruits who are being exploited. Adults—including parents, coaches, and agents—who possess different forms of power and authority over athletes consistently leverage their power to create profit for themselves.

These are all great costs that are generally just understood to be wrong, undesirable, and extremely costly to society...particularly if unethical behaviors are scaled up and normalized to form a new status quo.

## EVALUATIVE CRITERIA

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The following section outlines four criteria that will be used to evaluate each policy alternative. These four criteria are 1) effectiveness 2) equity 3) legality and 4) earning potential. Alternatives will be given a score of low, fair, or high for each criteria. Additionally, each criteria is weighted differently. Effectiveness is given the most weight, followed by legality (as this largely translates into feasibility), equity, and finally earning potential. The scores will be displayed in a decision matrix that allows for alternatives to be evaluated against each other, and that is used to inform the ultimate policy recommendation.

### ***Effectiveness***

This criterion asks whether the alternative will reduce the likelihood of NIL opportunities being used as improper recruiting inducements and/or pay-for-play. Notably effectiveness is about *reduction* rather than complete *elimination* of these behaviors.

### ***Legality***

This criterion asks whether the alternative will provide unequal benefits and opportunities to men and women, as this determines whether the alternative will be in compliance with Title IX legislation. Title IX prohibits “discrimination on the basis of sex in educational programs receiving Federal financial assistance.” It mandates that all benefits and opportunities that are provided to men, including publicity, are also provided to women (U.S. Department of Education 2020). The criterion of legality also asks whether the alternative will significantly and unreasonably limit the benefits athletes are entitled to. Antitrust legislation prohibits

constraints of the market beyond what is deemed necessary for procompetitive purposes. In the case of the NCAA, market constraint generally boils down to restrictions on student- athlete compensation.

### ***Equity***

The NCAA and its member institutions are committed to fair play and gender equity. Institutional reports assert that these values are to be protected, if not advanced, through the modernization of NIL rules (NCAA Report 2020). Because the previous criterion, legality, factors in compliance with Title IX legislation that is meant to advance gender equity, there may be some overlap between the two criterion (i.e. legality and equity). However, this criterion still asks a separate, distinct question of whether male student-athletes benefit more from the alternative than female student-athletes? While it may be tempting to conflate legality and equity, it is important to recognize that a policy can be legal (i.e. in compliance with Title IX) *and* produce inequitable results (i.e. benefit men more than women). This criterion also considers whether the alternative will create an advantage for some schools over others? Finally, though less of a factor, there is some consideration to the benefit alternatives will have on revenue sports compared to non-revenue sports.

### ***Earning Potential***

This criterion is meant to ensure that the alternatives maintain the initial spirit and impetus behind NIL. NIL legislation emerged because college athletics has become increasingly commercialized. As a result, institutions had been generating greater streams of revenue, while student-athletes were forbidden from profiting from their labor. This criterion asks how the alternative will impact schools' and student-athletes' ability to earn compensation. If the potential to earn increases, the alternative will receive a higher rating in this category, while the rating will decrease if the potential to earn decreases.

## POLICY ALTERNATIVES

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### ***Alternative 1: Strike “Pay for Play” Restrictions from College Athletics’ Policies and Laws***

Various studies and analyses of the NCAA have modeled the Association as a cartel. Member institutions all agree to restrict the cost of inputs (i.e. student athletes) to the value of a scholarship, although student-athletes’ (particularly football and men’s basketball players’) real market value is higher. While scholarships, the compensation student-athletes receive, is on average 16% of what programs generate in total revenue (18% of expenses), professional sports teams spend 50 to 70% of total revenue on player compensation (Humphreys & Ruseski 2006). This disparity between college and professional leagues’ expenditure on player compensation, is an indication that college athletes (particularly the few who become professionals) are being paid well below what they’re worth. Furthermore, this gap between current compensation and real market value, creates an incentive for coaches to violate the cartel agreement and illegally provide athletes with compensation above the scholarship limit. As one author posited, the only way to end cheating and corruption is to allow athletes to be compensated (Closa 2020). NIL legislation is a step in this direction given that it allows student-athletes to monetize their name, image, and likeness. However, this alternative goes a step further, getting members to stop colluding over the cost of inputs (i.e. student athletes’ compensation) and moving towards offering competitive salaries.

This alternative advocates that the NCAA, individual school policies, and state laws all eliminate the pay for play restrictions imposed on college athletes, essentially allowing college athletes to be compensated for their athletic participation. This alternative is promoted in recognizing that much of the notoriety that makes athletes NIL valuable to companies and businesses, is a result of individuals’ athletic participation and status as an athlete. As a result, it can be challenging to distinguish what is and is not “pay for play” (i.e. payment for athletic participation). In this alternative, schools, coaches, athletic directors, and other employees or representatives of the

university can reward student-athletes with scholarships totaling cost of attendance, but may not compensate student athletes beyond that value. They may, however, coordinate with boosters, sponsors, and other third-party administrators to provide student athletes with opportunities. Individuals providing compensation may *not* be employed by the university and can compensate student-athletes with values they determine to be fair.

This alternative is meant to acknowledge and address the present-day realities of NIL activity and enforcement. For example, it accepts that coaches are, and historically have (even before NIL) been coordinating with boosters and other peripheral actors to help secure commitments from highly-coveted recruits (HBO 2020). The delineation of who can and cannot compensate student athletes is meant to acknowledge that compliance office(r)s and the NCAA have little jurisdiction over the behavior of fans, boosters, alumni and other peripheral actors, and in doing so, eliminate the false pretense of controlling these actors. Additionally, this alternative acknowledges the increased presence of collectives—groups of alumni, donors, fans, and other individuals separate from the university, that are emerging to pool resources together and provide NIL opportunities to student athletes. This alternative simply legitimizes and universalizes behaviors that have developed and are currently being practiced in the initial stages of NIL.

## **EVALUATIVE CRITERIA FOR ALTERNATIVE 1**

### ***Effectiveness (Low)***

With this alternative, NIL opportunities and compensation would still function as a recruiting tool and could possibly become a greater incentive and factor in prospective student-athletes' decision making processes. From this perspective, Alternative 1 is ineffective. However, the alternative is effective to the extent that it technically eliminates cheating by codifying pay for play, offers and inducements, and extra benefits as legal activities. Paying athletes for athletic performance or for participating in a given athletic program, would be an option available to all schools, and such that actors don't have to violate rules to gain an advantage. Yet, one of the costs and concerns of a system plagued with cheating was the exploitation of young student-athletes. Though cheating would technically be eliminated from the system with this alternative, the continued dependence on and lure of money in the recruiting process does nothing to address this underlying flaw in the system.

### ***Legality (Fair)***

Individuals unaffiliated with schools (i.e. companies and businesses facilitating and providing NIL deals) are not bound by Title IX legislation. However, because this alternative would allow university officials (i.e. coaches) to seek out and coordinate NIL opportunities for their student-athletes, there is some concern that there will be greater effort invested and resultant success in providing male student-athletes with NIL opportunities than there will be for female student-athletes. This concern is taken in recognizing that schools will have added incentive to ensure that football and men's basketball players, their revenue-generating athletes, are well compensated as this will not only help retain current players, but also serve as signaling to prospective students.

While this alternative brings Title IX compliance into question, it is beneficial in that it lifts restraints and will therefore fail to raise antitrust concerns.

### ***Equity (Low)***

Big vs. Small Schools– Better funded and resourced schools will have an advantage. Admittedly, there are already disparities between schools due to geography, facilities, alumni engagement, etc. so while this alternative will likely impact fair play, given the novelty of NIL, it is unclear how much the gap would widen as a result of this alternative.

Male vs. Female Earnings– More obvious is the gender inequities this alternative would create. Nearly 72% of all NIL compensation earned by student-athletes over the first 7 months of NIL, was earned by male athletes, while 28% was earned by women (Opendorse 2020). These disparities in NIL compensation would be grossly exacerbated by the gender pay gap for athletic participation and performance. “Whether professional players receive salaries or individual prize money from competitions, male athletes in basketball, golf, soccer, baseball and tennis make anywhere from 15% to nearly 100% more than female athletes” (“Male vs Female” 2021).

### ***Earning Potential (Fair)***

The average NIL compensation earned by a Division I athlete is \$561. This number should increase as student athletes will be able to benefit from the NIL as well as directly from their athletic participation/ performance. Furthermore, the lifting of market constraints makes it such that schools' demand or willingness to pay student athletes will be reflected in the higher earnings student-athletes receive. Schools on the other hand, may experience a decline in



earning potential as athletic alumni and donors may choose to fund a student-athlete's NIL opportunity over giving to the program and athletic department.

### ***Alternative 2: Develop Better “Pay for Play” Definition and Guidelines***

The NCAA's interim NIL policy allows student-athletes to be compensated for their name, image, and likeness, although their rules maintain that “pay for play”--compensation tied to athletic participation or performance-- is still prohibited. Given that student athlete's notoriety, and the value of their NIL, largely originates from their participation in sport, success as an athlete and/or affiliation with a team, it is increasingly becoming a challenge to measure and ensure that compensation is “independent of, rather than payment for, athletic participation” (NCAA Report 2020).

This alternative aims to clarify rules prohibiting pay for play, understanding that awareness of rules and standards reduces the chances of them being violated out of ignorance or uncertainty. Studies suggest that people often misunderstand and therein under-report what behaviors constitute cheating. However, when implicit rules are made explicit, and definitions of rules and cheating behaviors are provided, reporting of cheating behavior increases (Burrus et al., 2007). This is important because the enforcement system in college athletics is heavily dependent on self-monitoring, self-reporting and self-policing. Since clear and consistent definitions of acceptable and unacceptable behaviors reduce the prevalence of cheating, education and guidelines provided through this alternative should provide illustrations and explanations of behaviors that are legal and appropriate, while also detailing those that are not.

Educational guidelines and materials should be modeled after the major infraction cases that the NCAA currently publishes, but should be developed to include cases specific to NIL activity. The major infractions cases name the level of infraction, a summary of the violation (i.e. illegal activities), a summary and list of the penalties assessed, and a list of the related bylaws that were violated. While these cases will be limited in its ability to address every scenario, it will provide better clarity over what is (im)permissible and what are the consequences of different behaviors. Knowing penalties and the severity of them is also important in deterring bad behavior. In addition to exemplary infractions cases, supplementary materials and information listing safeguards that can be put in place (ex. Certifying activity/service has been done in exchange for compensation, random auditing, etc.) may also be helpful.

## **EVALUATIVE CRITERIA FOR ALTERNATIVE 2**

### ***Effectiveness (Fair)***

By providing better definition of rules, and eliminating the amount of ambiguity and interpretation required by current rules, this alternative has the potential to reduce recruiting violations and the use of NIL as pay for play. However, cheating and corruption broadly may be viewed as a rational choice given that as long as the benefits of corruption exceed the costs, individuals will engage in corrupt practices (Kihl 2019). Considering that many view the benefits of winning (postseason payouts, increased donations, etc.) as greater than the costs, this alternative does not curb the individuals who will intentionally disregard rules for competitive advantage.

### ***Legality (High)***

This alternative clarifies current legal policy so it is unlikely to violate either Title IX or antitrust legislation.

### ***Equity (High)***

The clarity and enforcement of rules that this alternative creates will result in a more level playing field between schools. Being that greater clarity of rules is expected to result in greater levels of adherence and compliance to rules, this rule is expected to increase disparities between schools rather than result in benefitting some schools more than others. Additionally, this alternative will not necessarily improve gender equity, but it will not reduce gender equity either.

### ***Earning Potential (Fair)***

This alternative doesn't produce new avenues for revenue generation, but it also doesn't eliminate many of those currently existing in the NIL landscape. The average compensation for NIL is \$561.

## ***Alternative 3: Develop Conference-Level Group Licensing for Student-Athletes***

Group licensing is when a group of athletes pool their NIL rights together and sell them to a licensee. As a result, an agreement is made between the group and the licensee that a specified

number of players' Name, Image, and Likeness is allowed to be used on or in conjunction with retail products being sold. In return, members of the group will receive royalties from the sales (Knight Commission). Group licensing is an attractive alternative because it creates convenience for licensees— instead of negotiating hundreds of deals with individual athletes, the licensee can execute one contract on behalf of a group. Additionally, most athletes' individual NIL is not highly valued or profitable since they lack the popularity, success or other qualities that may make them more appealing to companies and consumers. Instead, these athletes' NIL becomes (more) profitable when used as part of a group. Thus group licensing may create more opportunities for both licensees and athletes.

In this alternative athletic conferences would develop group licensing programs, seek out potential licensing partners and oversee the payout of licensing dollars to schools and student athletes. Several professional sports leagues have developed group licensing models. These deals are often negotiated by the athlete's players association/ union. Some experts see a union as a prerequisite for group licensing and caution against group licensing at the collegiate level because a union doesn't exist (since student-athletes are not classified as employees). However, there are still student-athlete bodies—namely the Student Athlete Advisory Committee (SAAC)-- that may serve as a stand-in union and negotiate on behalf of student-athletes. Each university has a SAAC branch, as does each conference.

Group licensing will not be mandated. Student athletes will have the opportunity to opt in and participate in the group licensing program at the beginning of each school year. Every student who opts into the group and participates in opportunities will receive a share of the licensing dollars generated.

Grouping can happen in an assortment of ways. One to consider is grouping all student athletes in the conference together. For a decided number or percentage of student athletes in a conference, once their NIL is used for a promotional activity, group licensing is triggered, and the dollars earned from this opportunity will be split evenly amongst all student athletes in the conference. Grouping may also occur by sport, so that when a decided number or percentage of basketball players' NIL, for example, is used, all basketball players in the conference will get an equal split of the group licensing dollars generated. Notably, group licensing opportunities and agreements will not preclude individual athletes from still selling and profiting from their individual NIL.

## **EVALUATIVE CRITERIA FOR ALTERNATIVE 3**

### ***Effectiveness (Low)***

With all student athletes being provided with a base of money from group licensing, making their level of compensation more reflective of their true market value, it is assumed that the incentive to provide athletes with alternative/ additional compensation through the form of individual NIL deals, will be reduced. However, since licensing dollars would be marginal after being split conference-wide amongst student-athletes, and since individuals are not precluded from pursuing individual NIL deals, the incentive to attract top tier-athletes with the promise of facilitated NIL deals remains. This alternative will have little impact on incentives and resultant behavior of providing recruiting inducements or “pay for play”.

### ***Legality (High)***

This alternative does not create violations or pose challenges to Title IX or antitrust legislation. Benefits and opportunities will be equally provided on the basis of sex. Furthermore, this alternative does not place any constraint on the market and student-athlete compensation specifically.

### ***Equity (High)***

Since money generated from group licensing dollars will be split evenly amongst student athletes, this model does not provide more benefit to athletes at some schools than others. Furthermore, if licensing dollars are split conference-wide or sport wide (irrespective of gender) this results in equal distribution between revenue and non-revenue sports, as well as women's and men's sports.

### ***Earning Potential (High)***

Many of the group licensing opportunities will tap into markets and create revenue and opportunities that currently do not exist in college athletics. This is not a reallocation or shifting of current money, but largely the development of new money and investments in college athletics, institutions, and the athletes themselves (LEAD1 2020). Revenue for both student-athletes, conferences, and institutions may increase.

## OUTCOMES MATRIX

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	Effectiveness	Legality	Equity	Earning Potential
Alternative 1: Strike “Pay for Play” Restrictions	Low	Fair	Low	Fair (> \$561)
Alternative 2: Definition & Guidelines for “Pay for Play”	High	High	Fair	Fair (\$561)
Alternative 3: Group Licensing	Low	High	High	High (\$ 561 + <i>group licensing revenue</i> )

### RECOMMENDATION

Based on the evaluation of alternatives conducted above, Alternative 2 should be pursued and better definition and guidelines of pay for play should be developed and disseminated with membership. Effectiveness is the most important criteria. That being said, although college athletic experts really value Alternative 3: Group Licensing, and it is rated ‘high’ on all other criteria, it makes no effective headway/ progress on the central issue of NIL being used as an improper recruiting inducement and potentially violating current pay for play restrictions. This rules out Alternative 3.

Alternative 1: Strike Pay for Play Restrictions is also rated low in terms of overall effectiveness. It also has lower ratings than Alternative 2 in all criteria except earning potential, leaving Alternative 2 as the clear recommendation.

## IMPLEMENTATION CONSIDERATIONS

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### ***Stakeholders***

The primary stakeholders are NCAA boards and governing bodies and compliance officers who will ultimately be responsible for developing and implementing the alternative.

### ***Next Steps***

The NCAA has begun investigating athletic departments for potential violations of its recruiting and pay for play rules. The NCAA should complete these investigations and from its findings determine where more education and safeguards need to be implemented. The NCAA's Board of Directors has also implemented working groups to review trends of NIL around recruiting (Uggetti 2022). The NCAA and membership organizations should develop partnerships with NIL companies to develop a singular, universal database and clearinghouse for student-athletes to report NIL activity and for compliance officers and school administrators to review and approve/ certify.

### ***Perspectives***

- Compliance Officers will generally be supportive of efforts to better regulate NIL activity. Resistance may come from concerns over their capacity to do so in a meaningful way. Technology may help alleviate some of these concerns. Thus, as long as institutions support compliance officers with the manpower and technology systems to manage NIL activity, they will be supportive.
- Student-Athletes are not expected to be openly resistant to this alternative, particularly because it is not introducing new and increased constraints. Furthermore, student athletes support efforts to increase clarity and reduce confusion over what behaviors and opportunities they are and are not allowed to pursue. Though they won't be directly resistant, getting student-athletes to adopt the policy, uptake and use reporting systems is a concern.
- NIL companies including Opendorse and INFLCR may be resistant to sharing data, particularly given privacy concerns of their clients, athletes.
- Third-Party Administrators may be resistant given that there will be constraints over how they may conduct business and namely when they'll be allowed to facilitate deals.

One of the main concerns that has been a perennial consideration is the different behaviors and treatments that will be required of revenue sports (i.e. football and basketball) compared to other sports. There is a question as to whether recruiting violations related to NIL are universal or concentrated in a significant minority. This consideration will color many of the future steps related to NIL.

## **CONCLUSION: PLAYING WITH A HOUSE OF CARDS**

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Based on the analysis conducted, the best alternative is to better define existing rules and provide better guidelines. In pursuing and implementing this alternative, however, the NCAA and its member institutions will have the challenge of walking a very fine line of providing more guardrails without restricting the system, and student-athletes specifically. If definitions and guidelines are perceived as introducing new constraints that weren't present in the initial year or rollout of NIL, the NCAA will be making itself susceptible to another lawsuit claiming violation of antitrust laws. And based on the NCAA vs. Alston ruling, another antitrust lawsuit could cause the walls of college athletics to come crashing down. Yet, it seems that the current model of college athletics is unstable in any event. The move to allow student athletes to be compensated for the Name, Image, and Likeness and their athletic status is undermining the NCAA's principles of amateurism and the long-standing antitrust protections they have been granted as a result. College athletics is increasingly transitioning to a professional model and straying away from its stated educational mission and values. Scholarships function as both the base and max salary that professional leagues have. The recently adopted transfer portal creates a model similar to that of free agency on the professional level. NIL was just another step away from amateurism as it is on par with the endorsements and sponsorships that professionals profit from. The difference is that professional leagues have more guardrails and legal accountability to protect against cheating and exploitation.

Introducing better definitions and guardrails around NIL activity is just a temporary fix, however. The looming and persistent challenge will be for the NCAA and its member institutions to gain clarity and consensus over their true mission and values. It is time to acknowledge publicly that college athletics is no longer an amateur league. Furthermore, it seems unlikely that a professional league can continue to be housed in an academic setting. Yet,

stuck at the center of the system and the issue lies the student-athletes. They deserve to profit from their labor, but also deserve protection from the exploitation that often comes with big money.



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