

NCAA Allows Student-Athletes to Profit Off Name, Image & Likeness. What's Next for Student-Athletes, Universities and Corporations?

On June 21, 2021, in the case of *NCAA v. Alston*, 594 U.S. ____ (2021), the U.S. Supreme Court unanimously determined that student-athletes could receive education-related payments. Though the Court's decision did not directly address name, image, and likeness rights, it did reaffirm the NCAA's authority to adopt reasonable rules regarding a collegiate player's ability to monetize these rights. In response to the Supreme Court's ruling, the NCAA adopted an interim Name, Image, and Likeness (NIL) Policy, effective July 1, 2021. This interim NIL Policy applies to NCAA Division I, II, and III.

The NCAA's interim NIL Policy provides the following guidance:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities are responsible for determining whether those activities are consistent with state law.
- College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.
- Individuals can use a professional services (i.e. agents) provider for NIL activities.
- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.
- The NCAA's NIL Policy will remain in effect until federal legislation or new NCAA rules are adopted.

What NIL activities ARE allowed under the NCAA's interim NIL Policy?

Subject to state laws and other governing body regulations, student-athletes are allowed to start their own for-profit businesses, may profit from signing autographs, may participate in advertising campaigns, and may profit as social media influencers, just to name a few activities. The ability to profit as a social media influencer comes at an extremely opportune time. We have seen extreme growth in revenue-generating opportunities for millennials and Gen Z members in supporting or highlighting various brands on social media platforms such as Instagram and TikTok where

actors, musicians, celebrities and even individuals with limited talent but millions of "followers," are being paid thousands of dollars for a single post. Thus, the social media-verse is ripe with opportunities for student-athletes who have garnered a supportive, active fan-base even before going professional.

What NIL activities ARE NOT allowed under the NCAA's interim NIL Policy?

Under the current interim NIL policy, prospective student-athletes may engage in the same types of NIL opportunities available to current student-athletes without impacting their NCAA eligibility. However, NIL opportunities may not be used as a recruiting inducement or as a substitute for pay-for-play. Prospective NCAA student-athletes should also consider whether NIL activities could affect their high school eligibility. The NCAA remains cautious about the prospect that colleges and universities may try to take advantage of the loosened NIL rules to skirt around prohibitions against compensating athletes for recruiting purposes. Thus, the following types of NIL activities are prohibited under the interim NIL Policy:

- NIL agreement for work not performed.
- NIL compensation contingent upon enrollment at a particular school.
- Compensation for athletic participation or achievement.
- Institutions providing compensation in exchange for the use of a student-athlete's name, image or likeness.

Will a student-athlete's eligibility be affected if they enter into a contract with an agent?

According to the interim NIL Policy, student-athletes can use a professional service provider for NIL activities. A professional service provider is an individual who provides third-party services to a prospective or current student-athlete. It includes, but is not limited to, an agent, tax advisor, marketing consultant, attorney, brand management company or anyone who is employed or associated with such persons. However, if an individual entered into a contract with a professional service provider prior to

July 1, 2021, that individual may have risked their amateur status and eligibility.

Does NIL compensation affect a student-athlete's financial aid?

According to the NCAA, the interim NIL policy does not impact a student-athlete's financial aid. Compensation, including NIL compensation, is excluded from NCAA financial aid limitations.

Are there other laws or regulations that apply to NIL?

The Court's decision in *NCAA v. Alston* preserves considerable leeway for the NCAA to promulgate its own rules. Additionally, individual conferences and universities remain free to impose whatever rules they

choose. Further, several states have established NIL laws, many of which went into effect on July 1, 2021. NCAA rules, including prohibitions on pay-for-play and improper recruiting, remain in effect.

Even under the NCAA interim NIL Policy, individuals must be aware of applicable state laws, as well as the regulation of other athletic governing bodies.

The attorneys at Swanson, Martin & Bell, LLP have extensive experience drafting NIL and influencer agreements in numerous industries. If you have questions regarding the NCAA's interim NIL policy or NIL and influencer agreements, please contact jbecker@smbtrials.com or rstephens@smbtrials.com.

Prepared by Swanson, Martin & Bell, LLP attorneys Jeffrey S. Becker and Robert W. Stephens.

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