

INTELLECTUAL PROPERTY

ALERT

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Summer School for Intellectual Property: Universities Must Prepare Student-Athlete Endorsement Policies in Response to New NCAA Rules

*By Stephenie Wingyuen Yeung and W. Drew Kastner**

On June 30, 2021, the National Collegiate Athletic Association (“NCAA”) officially adopted a uniform interim policy suspending previous NCAA name, image and likeness (“NIL”) rules for all incoming and current student-athletes in all sports. The move would allow athletes in all NCAA divisions to profit from endorsements, their signatures, public appearances, and other business ventures for the first time in over a century.

Background

College student-athletes’ ability to receive full compensation has been at the forefront of statutory, litigation and political initiatives for the last several years. In addition to the class action antitrust lawsuit that culminated in the U.S. Supreme Court’s recent ruling in *NCAA v. Alston*, several states have taken legislative action to address student-athlete endorsements. California’s Fair Pay to Play Act passed in 2019 and is set to become effective on January 1, 2023. New Jersey’s NIL law will become effective in 2025, but efforts are underway to move up that date. Indeed, several other states have also taken up the baton with more immediate effect: similar endorsement laws in Alabama, Florida, Georgia, Mississippi, and New Mexico already went into effect on July 1, 2021.

The NCAA’s Board of Governors had previously proposed expanding its NIL rules in April 2020, but the Divisions failed to take action. Apparently, the abrupt implementation on June 30, 2021 of the new interim policy was likely prompted by the recent outcome in *Alston*, along with concerns that the state-by-state

approach could give rise to further litigation and complications for recruitment and compliance. The NCAA has signaled that this expansive new policy is only temporary, and that it intends to pursue a federal solution with Congress that would provide clarity on a national level.

The New Rules

The new NCAA policy provides the following guidance to college athletes, recruits, and member schools:

- Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for student-athletes regarding state law questions.
- 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 provider for NIL activities.
- Student-athletes should report NIL activities, consistent with state law or school and conference requirements, to their university.

Additionally, students are allowed to sign with agents or other professional representatives to help them acquire endorsement deals with the following caveat – students cannot stipulate that the agents would represent them in future negotiations outside of the NCAA.

Some restrictions still remain in effect. NIL compensation cannot be contingent upon enrollment at a particular school, nor can the school compensate an athlete in exchange for the use of the student's NIL. Compensation for athletic participation or achievement, or pay-for-play, remains prohibited, as affirmed by the U.S. Supreme Court in *NCAA v. Alston*.

Next Steps for Colleges and Universities

The change in NCAA policy means that higher education institutions nationwide will have to accelerate their response over this summer in time for the fall athletic season. Such preparation may be especially important, as the NCAA policy encourages student-athletes to turn to their schools for information about their state's NIL law.

Schools in states that have adopted NIL laws may have the benefit of such state rules as a guideline, but all schools will have to confront some common issues:

- Whether to permit the student-athlete to use the school's trademarks in endorsements and, if so, what kind of reasonable restrictions should be put in place?
- Would the school require an approval process for the endorsements?
- How do the NIL rules affect the school's other policies (for example, its social media use policy) or the school's existing relationships with sports retailers?
- What new resources should be made available to help the school and the students navigate the legal and compliance issues related to student endorsements?

While some schools, such as Louisiana State University, will allow students to use its official logos and facilities in endorsements so long as the athletes ask for written permission, not all schools will adopt such a broad policy.

Schools may want their policies, training, and related communications on this issue to reflect possible complications and disputes. For example, how will the school approach a situation where a student enters into an endorsement agreement for products or

services that the school does not wish to be associated with, including alcohol, casinos, tobacco products, or prescription drugs? What about possible conflicts when a student enters into an agreement with entities that are competitors of brands with whom the school has established arrangements?

Colleges and universities confronting these issues should meet with stakeholder representatives in their communities, review the school's trademark portfolio and trademark agreements to identify areas of synergy or conflict with student-athlete endorsements, and develop new policies or guidelines so that students can pursue fair compensation while the school's interests remain protected.

For this summer at least, schools have their hands full with a significant intellectual property homework assignment.

- ❖ Schnader's analysis of *NCAA v. Alston* is online here – <https://www.schnader.com/blog/what-does-the-future-hold-for-college-athletics-after-the-supreme-court-decision-in-ncaa-v-alston/>. ♦

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For more information about Schnader's Intellectual Property Practice Group or to speak with a member of the firm, please contact:

[Stephenie Wingyuen Yeung](#)

Partner

215-751-2277

syeung@schnader.com

[W. Drew Kastner](#)

Co-Chair, Intellectual Property Practice Group

215-751-2122

dkastner@schnader.com

[Ronald E. Karam](#)

Co-Chair, Intellectual Property Practice Group

215-751-2364

[*rkaram@schnader.com*](mailto:rkaram@schnader.com)

[Higher Education Group](#)

[Sports Law Team](#)

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* Anel B. Coronado, a summer associate with Schnader Harrison Segal & Lewis LLP, assisted with this article.