



Mark A. Emmert
President

November 2, 2021

VIA EMAIL

The Honorable Frank Pallone Jr.
Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
United States House of Representatives
Washington, D.C. 20515

Chairman Pallone:

On behalf of the NCAA, I would like to thank the U.S. House of Representatives Committee on Energy and Commerce for holding a hearing to discuss the issue of student-athlete name, image and likeness (NIL). As I underscored in my testimony, the NCAA wholly supports the right of student-athletes to be compensated for the use of their NIL. While the interim NIL policy the Association's membership adopted this summer has resulted in millions of dollars in new financial prospects for student-athletes across the country, the nearly 30 disparate state laws have left them without a level playing field and without equal earning opportunities or protections. We look forward to working with you, Chairwoman Schakowsky, Ranking Member Bilirakis, Ranking Member McMorris Rodgers and other esteemed members of the committee to adopt a uniform, national framework for NIL that will best protect student-athletes, support a level playing field, ensure broad-based opportunities for future college athletes and retain the integrity of college sports as part of higher education.

As requested, below are answers to your questions for the record.

Respectfully,



Mark A. Emmert
President

MAE:msc

Questions for the Record

Representative Lori Trahan

Written Questions Submitted by Representative Lori Trahan to Dr. Mark Emmert:

NCAA Bylaw Updates. During the hearing, many members referred to a patchwork of NIL laws existing across the United States. When California enacted the “Fair Pay to Play Act” in 2019, the NCAA and non-California member institutions went on the offensive; including threatening to ban championships and cancel games in the state. As more states followed California’s lead, the NCAA declined to amend its bylaws. Instead, following the *Alston* decision, the NCAA issued a short-term interim policy.

Question. Why has the NCAA struggled to make comprehensive updates to its bylaws to proactively permit athletes to be compensated for the use of their NIL prior to July 2021?

The NCAA governance process is intentionally deliberative; the 1,100 member schools of the NCAA develop and adopt the Association’s rules through a representative legislative process, not unlike the U.S. Congress and most legislatures in the country. As part of this process, the NCAA Board of Governors proactively created a Federal and State Legislation Working Group in 2019 to study the complex issue of name, image and likeness and provide thoughtful, carefully considered solutions. Though it should be noted that earlier attempts by the Association to address this issue were hindered by recurring litigation, the establishment of the working group nevertheless predated the enactment of California’s “Fair Pay to Play Act.” As a result of the working group’s efforts, the Division I, II and III memberships developed proposals that would allow student-athletes to benefit from the use of their NIL, consistent with guiding principles. These proposals were to be voted on by the membership in January 2020, however these efforts were paused due to judicial, political and governmental activities, including communication from the U.S. Department of Justice Antitrust Division. The NCAA membership was again poised to vote on these proposals in June 2021, however the U.S. Supreme Court released a ruling prior to the membership’s vote which limited the Association’s rulemaking ability. To mitigate the uneven playing field caused by the patchwork of state laws, the Association felt it was paramount to pass its interim NIL policy in June 2021 to provide clarity, allay confusion and provide all student-athletes, regardless of what state they were located in, the ability to benefit from their NIL. We remain committed to working with Congress to chart a uniform path forward that will best support college athletes.

Question. Given the progress over the last few months, do you believe the NCAA will issue comprehensive updates to its bylaws to proactively permit athletes to be compensated for the use of their NIL in the near future?

All college athletes, under current NCAA rules, are permitted to be compensated for the use of their name, image and likeness. The adoption of the [interim NIL policy](#) last summer by the Association's colleges and universities has already resulted in millions of dollars in new financial prospects for student-athletes across the country. The nearly 30 disparate state laws, however, prevent student-athletes from having the level playing field and uniform protections that a national framework ensures. Because the Association does not have legislative authority over individual states, a federal solution is necessary to ensure student-athletes have the critical protections they need and deserve.

Antitrust Exemption. As part of the NCAA's request to Congress for a federal NIL standard, you asked for an antitrust exemption to be included. However, in Congress there are many who believe providing an antitrust exemption would only hurt college athletes.

Question. Would the NCAA support a bill that does not include an antitrust exemption?

I would like to emphasize that the NCAA does not seek a full antitrust exemption; rather our membership seeks limited safe harbor protections to protect against ongoing and recurring litigation. Even before the Association's colleges and universities passed the interim policy allowing student-athletes to be compensated for their NIL, some of the same lawyers who have challenged the NCAA's other rules changes brought suit against our member schools to seek damages as a result of policies the membership had not yet even passed. Without legislation that includes these narrow protections, the colleges and universities that make up the NCAA will continue to be subject to these litigation challenges and will be significantly undermined in their ability to take meaningful action and adopt common-sense and adequate solutions to support the evolving needs of student-athletes. I welcome further engagement and conversation around this issue to find an adequate solution that addresses the concerns of Congress and the Association's ability to support the needs of student-athletes.

Transparency in NIL Deals. During your testimony, you described the need for a national database of NIL deals that college athletes have entered into, but explicitly stated that the NCAA should not be tasked with managing it.

Question. Why should college athletes be required to register their NIL deals in a national database?

In this new and evolving NIL environment, it is critical that a transparency mechanism exists that ensures privacy, protects college athletes from exploitative agreements and safeguards the integrity of college sports. While some NIL-related data has been disclosed through third-party service providers, there is no one entity that has a complete picture of the types of deals that have been made or the parameters of such deals. Without such a mechanism, these transactions will be made in the dark, without any way of knowing whether a deal is a fair and legitimate arrangement, or if it is simply a “pay-for-play” scheme or a recruiting inducement designed by unscrupulous actors. Access to data will also allow for the tracking and monitoring of NIL-related trends and for policies to be modified as appropriate. Without good data, future discussions and reviews may not be properly informed.

Question. Please describe the NCAA’s justification for this prospective requirement for college athletes given the wide range of young people who have been working successfully in the influencer economy for years, including college cheerleaders.

Since the membership passed its NIL policy, NCAA student-athletes from across the country have financially benefited from the use of their NIL. With many national companies making NIL offers over social media and direct messaging, student-athletes are often making impulse decisions about binding, and sometimes long-term, contractual agreements without appropriate counsel to evaluate a contract or maximize their earning potential. Without the lawful collection, storage and disclosure of data with appropriate confidentiality, there will be no instrument to provide sunshine on NIL transactions and no apparatus to protect college athletes from entering into agreements that are clearly one-sided and perhaps even harmful to a student-athlete’s future earning potential. The recruiting process is also unique to college sports, so a transparency function would help protect student-athletes from unscrupulous actors who have no regard for a student’s best academic, cultural, competitive or team fit, but who are incentivized by their own financial interests. Indeed, many states have themselves recognized the importance of a transparency function and included disclosure provisions in their NIL laws. These provisions, however, are inconsistent from state to state, and we have no evidence that any state is enforcing these requirements or ensuring accountability.

Question. If the NCAA should not be responsible for maintaining the national database, who should be?

For the reasons stated above, a third-party, independent, nonpartisan and transparent clearinghouse entity should be responsible for maintaining a national database.

Question. What data would you want provided to the database and what would you use said data for?

Any third-party entity should collect data in such a way as to ensure the privacy of college athletes and provide a full picture of the types of NIL transactions so that student-athletes maximize their earning power and bad actors are prevented from profiting from this new, almost entirely unregulated environment. I expect collected data would include information about the type and amount of payment for services provided, as well as information about the entity with which the agreement was made. The collection, storage and disclosure of NIL information would also be compliant with local, state and federal law. This type of transparency will allow the enforcement entity to hold the appropriate individuals accountable for predatory and exploitative practices and possibly include monitoring elements to ensure that services are rendered and student-athletes are compensated pursuant to the relevant agreement. Further, I would expect that reporting based on the disclosures would be done in aggregate form to identify trends that would lead to better policymaking and protections for student-athletes.

Representative Neal Dunn

Written Questions Submitted by Representative Neal Dunn to Dr. Mark Emmert:

Need for federal NIL framework. I am concerned about the challenges student-athletes and athletic departments are now facing due to a patchwork of state regulations. Since NIL policies vary by individual universities and states, there will inevitably be unforeseen issues, such as state legislatures structuring their laws to provide better incentives for recruiting collegiate athletes. For example, looking at the 10 states represented in the ACC, 4 states have state legislation, 2 states have executive orders, and 4 states have no guidance.

Question. How do conflicting NIL rules on a state-by-state or school-by-school basis impact a student-athlete's experience going through the recruiting process?

The current patchwork of state laws has already negatively impacted the college sports recruiting environment and the experiences of prospective and transfer student-athletes. When attempting to navigate the NIL environment, many college athletes are confused with the varying state laws and institutional policies, unsure how to factor legitimate NIL opportunities into their decision-making process and how to engage in NIL opportunities consistent with differing state laws, particularly compared with other student-athletes in their conference and across their nationwide network. The upcoming recruitment cycle will highlight the disadvantages student-athletes in certain states will face in considering schools, sometimes in the same conference, which may have vastly different NIL

policies. We also have real concern in the present environment that a student could be persuaded away from their preferred school choice by an NIL opportunity tied to attendance at another school. In order to protect the recruiting environment and the ability of student-athletes to select an institution based on the best fit for them personally and academically, a uniform federal framework is necessary.

Question. Are you concerned the current NIL landscape will enable a “pay-for-play” environment?

Nearly every stakeholder of college sports with whom I have spoken in the last several months has expressed concerns that the current NIL landscape will enable a pay-for-play environment. As new states rush to keep up with the states that have enacted NIL reform, we are likely to see a “race to the bottom,” with each state doing its best to ensure that its schools have a competitive advantage over schools in other states until, eventually, the protections for student-athletes become so thin that it becomes difficult to discern who are college athletes and who are professional sports figures. Additionally, due to the lack of transparency and enforcement on the state level, it is becoming increasingly difficult to determine whether a transaction is legitimate, or if it is simply a pay-for-play scheme disguised as NIL compensation. Currently, it does not appear as though states are actively enforcing their NIL statutes, and contractual performance may be an afterthought at best. These worrisome trends may be difficult, if not impossible, to reverse without congressional action.

Question. Would a “pay-for-play” style model mostly affect non-revenue generating male sports?

I firmly believe that student-athletes are students first, and college athletics should remain rooted in academic success and the values and purpose of higher education. Converting student-athletes into employees through a pay-for-play model would significantly and irreparably interfere with this higher education experience. An employment model would also significantly and negatively impact female student-athletes as labor law, rather than education law, would prevail and Title IX protections would likely no longer apply. Similarly, as revenues generated for men’s teams tend to significantly exceed that of women’s teams, a pay-for-play model would trigger gender equity concerns, as men and women competing in the same sport would likely receive widely different benefits. Further, schools across all three divisions have very different financial situations, and the pressures exerted on resources from a revenue-sharing model could have a negative impact on sports that do not generate revenue. Only a handful of schools and conferences in Division I have media contracts that result in a net revenue source. Many smaller Division I conferences and most Division II and Division III schools pay to televise their contests to provide local, regional or national platforms for their student-athletes. Regardless of division, revenue earned through media

contracts, sponsorships, ticket sales and/or other sources supports broad-based opportunities for student-athletes who compete in nonrevenue sports. Finally, 75% of the U.S. Olympic team competed in college. An employment model, which reduces opportunities for non-revenue-generating sports, could in turn have a negative impact on the success of the U.S. Olympic movement. Any federal legislation must protect college athletics and the broad-based scholarship and participation opportunities it provides for nearly half a million student-athletes each year by clearly articulating that student-athletes are not school employees.

Question. How would a federal NIL standard mitigate the issues posed by the current NIL patchwork?

A federal framework for NIL is essential to mitigate the issues posed by the current patchwork of state laws. Currently, the nearly 30 disparate state NIL laws — which have no known enforcement — have created serious inequities among student-athletes and athletics programs. A federal NIL standard would provide a necessary level playing field for college athletes, protect them from bad actors and unfair agreements, increase transparency, help ensure future opportunities for all college athletes and retain the integrity and academic anchor of college sports.