



January 16, 2024

TO: Members, Subcommittee on Innovation, Data, and Commerce
FROM: Committee Majority Staff
RE: Legislative Hearing Entitled “NIL Playbook: Proposal to Protect Student Athletes' Dealmaking Rights”

I. INTRODUCTION

The Subcommittee on Innovation, Data, and Commerce will hold a legislative hearing on January 18, 2024, at 10:30 a.m. in 2123 Rayburn House Office Building. The hearing title is “NIL Playbook: Proposal to Protect Student Athletes' Dealmaking Rights.”

II. WITNESSES

- Witness 1 – Hon. Charlie Baker, President, National Collegiate Athletic Association
- Witness 2 – Jeff Jackson, Commissioner, The Missouri Valley Conference
- Witness 3 – Meredith Page, Student Athlete, Radford University Volleyball
- Witness 4 – Chase Griffin, Student Athlete, UCLA Football
- Witness 5 – Kaitlin “Keke” Tholl, Student Athlete, University of Michigan Softball
- Witness 6 – Dr. Victoria Jackson, Associate Clinical Professor of History, Arizona State University

III. BACKGROUND

College athletics provide opportunities for many students. For some, it provides a launch pad to professional sports, but for most it provides an education and the opportunity for a better future. The competitions these athletes participate in are some of the most popular sporting events in the United States and provide unique opportunities for the student athletes who participate in them. In the past few years, college athletics have provided many student athletes with a name, image, and likeness (NIL) that businesses may wish to use to market their products or services.

Despite the popularity of college athletics and reputation of student athletes, the National Collegiate Athletic Association (NCAA) prohibited student athletes from receiving compensation for their NIL for decades. These prohibitions barred student athletes from earning

compensation from activities such as endorsements, advertisements, and autograph signings.¹ Following recent court cases and a change in NCAA policy,² student athletes can now profit from their NIL, with some student athletes securing brand partnerships with companies like Amazon and State Farm.³ While the changes in NIL rules have provided massive upside for some student athletes, it has harmed others and started a race to the bottom as States compete to lower or reverse standards and win recruits. Instead of using NIL as a marketing tool, some wealthy boosters and collectives are allegedly using NIL as a pay-for-play scheme designed to advantage schools with more resources.

IV. PAY-FOR-PLAY AND FAIR COMPETITION

Paying players to attend a university through the use of payments that masquerade as an NIL deal, has set college athletics on an unsustainable path. Current frameworks require no transparency or accountability, creating incentives for fraud, unfair advantages, and abuse of the system.

While payments to players are conducted under the guise of endorsement opportunities, the opaque market, estimated to exceed \$1 billion,⁴ is ripe for manipulation and abuse by those looking to exploit student athletes. In relation to pay-for-play, boosters have been surprised to learn that “everybody is doing it now” and that “if we don’t get the money, we’re going to lose players”⁵ The number of collectives is currently unknown, though experts estimate more than 200 exist.⁶ In March 2022, The Athletic reported that a five-star football recruit had signed an \$8-million NIL agreement before the end of his junior year in high school.⁷ The deal was said to pay out \$350,000 “almost immediately, followed by monthly payouts escalating to more than \$2 million per year once he begins his college career.”⁸ After a booster posted a picture hosting a dinner for two transfer recruits currently playing at another school, the University of Miami’s

¹ National Collegiate Athletic Association, *Division I Manual* (January 11, 2024), <https://web3.ncaa.org/lstdbi/reports/getReport/90008>.

² Ben Kercheval and Dennis Dodd, *NCAA approves interim name, image, and likeness policy removing restrictions for college athletes to earn money*, CBS Sports (June 30, 2021), <https://www.cbssports.com/college-football/news/ncaa-approves-interim-name-image-and-likeness-policy-removing-restrictions-for-college-athletes-to-earn-money/>.

³ Michael Ehrlich, *Iowa Star Clark Stars in New State Farm Commercial*, Sports Illustrated (December 28, 2023), <https://www.si.com/fannation/name-image-likeness/news/iowa-star-clark-stars-in-new-state-farm-commercial-michael9>; Pete Nakos, *Amazon launches NIL program with officially licensed apparel*, ON3 (August 24, 2022) <https://www.on3.com/nil/news/amazon-launches-nil-program-with-officially-licensed-apparel/>.

⁴ Opendorse, *NIL at Two: Analyzing the First Two Years of Name, Image, and Likeness in College Sports*, https://biz.opendorse.com/nil-2-report/?utm_source=PR&utm_medium=owned&utm_campaign=media_n21

⁵ Ross Dellenger, *Big Money Donors Have Stepped Out of the Shadows to Create ‘Chaotic’ NIL Market*, Sports Illustrated (May 2, 2022) <https://www.si.com/college/2022/05/02/nil-name-image-likeness-experts-divided-over-boosters-laws-recruiting>.

⁶ *Supra Note 4*

⁷ Stewart Madel, *Five-star recruit in Class of 2023 signs agreement with collective that could pay him more than \$8 million*, The Athletic (March 11, 2022) <https://theathletic.com/3178558/2022/03/11/five-star-recruit-in-class-of-2023-signs-agreement-with-collective-that-could-pay-him-more-than-8-million>.

⁸ *Ibid.*

women’s basketball coach was suspended for what the NCAA called a “recruiting inducement.”⁹ In 2021, a booster for the Brigham Young University football team offered to pay the full tuition of all 36 walk-on athletes through an NIL agreement, which the university’s athletic department helped to establish.¹⁰

Tampering has also become a major issue and occurs when boosters or collectives associated with one school inappropriately approaches players at another school. Florida Atlantic University basketball coach Dusty May accused boosters and collectives of tampering with his roster ahead of the team’s first-ever trip to the Final Four.¹¹ Other coaches have noted that tampering has been enflamed by the use of NIL payments as an incentive for recruits.¹²

V. REGULATORY UNCERTAINTY IS HURTING STUDENT ATHLETES

Despite the spread of regulatory proposals, both at the State and federal level, a clear, unified framework for navigating the new landscape has not been established. In the absence of formal organizational rules and transparency requirements to ensure legitimacy, rouge NIL actors have seized the opportunity to earn money, victimizing student athletes in the process.

While a number of states are proposing and passing state laws to regulate the new environment,¹³ each state has different standards and protections, leaving athletes, universities, and conferences confused on how to act. This patchwork of differing state laws with inconsistent NIL reporting and disclosure requirements, which often favor the in-state institutions, threatens the viability and integrity of college athletics.

The interstate nature of college athletics requires a national, preemptive framework to ensure a level playing field. Student athletes have raised concerns about navigating such a confusing, ambiguous, and turbulent regulatory environment, especially athletes that call one state their home and another state their home field. A patchwork of protections cannot provide for the long-term health and stability of college athletics.

The wild-west atmosphere of NIL has enabled bad actors to take advantage of student athletes at all levels:

⁹ Ahmand R. Johnson, Esq., *The Cavinder Twins Case: NCAA’s First NIL Ruling*, Greenspoon Marder LLP. (March 6, 2023) <https://www.gmlaw.com/news/the-cavinder-twins-case-ncaas-first-nil-ruling/>.

¹⁰ Lorenzo Reyes, *BYU helped broker NIL deal with Built Bar company that will pay tuition for football walk-ons*, USA Today (August 13, 2021) <https://www.usatoday.com/story/sports/ncaaf/independents/2021/08/13/nil-deal-pay-tuition-byu-football-players/8120059002/>.

¹¹ David Hookstead, *FAU Coach Dusty May Alleges People Are Tampering with His Players*, Outkick (March 29, 2023), <https://www.outkick.com/dusty-may-fau-tampering-allegations-nil/>

¹² *Claims of tampering abound in college basketball, and getting it under control won’t be easy*, Fox Sports (November 2, 2023) <https://www.foxsports.com/stories/college-basketball/claims-of-tampering-abound-in-college-basketball-and-getting-it-under-control-wont-be-easy>

¹³ Braly Keller, *NIL Incoming: Comparing State Laws And Proposed Legislation*, Opendorse (January 31, 2023), <https://biz.opendorse.com/blog/comparing-state-nil-laws-proposed-legislation/>.

- Chicago Bears rookie Gervon Dexter signed an NIL deal with an investment company which, in exchange for \$436,485, he unknowingly pledged 15% of his pre-tax NFL earnings for the next 25 years.¹⁴
- The NCAA declared two brothers ineligible because they played professional basketball in the Overtime Elite NBA development league after high school but failed to be recruited to the NBA and wished to play in the NCAA.¹⁵
- In one draft NIL agreement reviewed by The Athletic, a “collective agreed to pay an athlete \$1.5 million across two years but could ‘from time to time’ ask for repayment of that money, *plus* a 10 percent commission and expenses — even if the agreement were to be terminated.”¹⁶

Without clear guardrails, NIL has also become a new vector for traditional fraud or deception. Many athletes have to conduct small, one-off agreements without assistance from an agent or lawyer. For example, Savannah Schoenherr, then a gymnast at the University of Florida, was nearly scammed by bad actor posing as a New York clothing brand.¹⁷ Other NIL agreements reportedly contain potentially exorbitant commissions, while others fail to define who would own the athlete’s intellectual-property rights, even after they graduate.¹⁸

VI. THE NEED FOR FEDERAL ACTION

If Congress continues to stall in providing certainty for college athletics, student athletes will continue to be hurt by the lack of clear standards and the integrity of college athletics will be diminished. For example, Florida initially signed into law a framework for NIL that restricted the direct involvement of institutional staff and supporting entities in NIL activities.¹⁹ In contrast, Utah does not have an NIL law, which permitted Brigham Young University to broker directly a groundbreaking NIL deal for its entire football team.²⁰ This prompted Florida’s state legislature to repeal its NIL law in an attempt to eliminate a competitive disadvantage.²¹ Alabama infamously took a similar approach, repealing its NIL law not even one year after it had been

¹⁴ Matthew Bereche, *Chicago Bears Rookie Gervon Dexter Files Lawsuit Over NIL Deal*, Brooklyn Sports & Entertainment Law Blog (November 15, 2023) <https://sports-entertainment.brooklaw.edu/sports/chicago-bears-rookie-gervon-dexter-files-lawsuit-over-nil-deal/>

¹⁵ Mark Schlabach, *Chicago State brothers sue NCAA over denied eligibility*, ESPN (November 3, 2023) https://www.espn.com/mens-college-basketball/story/_/id/38809045/chicago-state-brothers-sue-ncaa-denied-eligibility

¹⁶ *Supra Note 7*

¹⁷ Nicole Sadek and Ronnie Greene, *College Athletes Lured by NIL Deals, Exploited by Fine Print*, Bloomberg Law (July 18, 2023) <https://news.bloomberglaw.com/antitrust/college-athletes-lured-by-nil-deals-exploited-by-fine-print>

¹⁸ *Ibid.*

¹⁹ Andrew Atterbury, *Florida lawmakers put name, image and likeness changes on the fast track*, Politico Pro (February 3, 2023), <https://subscriber.politicopro.com/article/2023/02/florida-lawmakers-put-name-image-and-likeness-changes-on-the-fast-track-00081150>

²⁰ Wilton Jackson, *BYU Football Strikes NIL Deal to Pay Tuition for Walk-On Players*, Sports Illustrated (August 12, 2021), <https://www.si.com/college/2021/08/12/byu-football-nil-deal-walk-on-tuition-built-bar>

²¹ Andrea Adelson, *Florida updates NIL legislation to remove legal restrictions*, ESPN (February 16, 2023), https://www.espn.com/college-football/story/_/id/35673223/florida-updates-nil-legislation-remove-legal-restrictions.

enacted.²² A patchwork of state NIL laws will lead to varying and changing protections, creating confusion for student athletes and loopholes for bad actors. College athletics are played across state lines and require a national preemptive framework to provide certainty on the field.

VII. DISCUSSION DRAFT UNDER CONSIDERATION

H.R. ___, FAIR College Sports Act

The FAIR College Sports Act would establish a national framework to protect the rights of student athletes to earn compensation and sign agents to profit from their NIL. The framework established by the bill would increase transparency by requiring the disclosure of NIL agreements and the registration of boosters, collectives, agents, and third parties. The bill would also ban pay-for-play by prohibiting such parties from offering inducements to attend or transfer to a specific institution or to perform specific in-competition actions or promotions.

The bill also would establish an independent non-governmental self-regulatory organization to govern registration and disclosure requirements, the United States Intercollegiate Athletics Committee (USIAC). The USIAC is tasked with creating a registration process, creating a public database for NIL information, and providing transparency reports.

VIII. ISSUES

- How is the lack of a national standard impacting competition and recruiting between universities in states with different or no NIL laws?
- How, without preemption, would a national law not be sufficient to protect student athletes?
- How would creating a self-regulatory organization to oversee NIL agreements be different from giving the authority to an existing agency?
- How may recruiting rules promote fairness and protect athletic competition and students when it comes to NIL?
- In what ways has engaging in the NIL deal making process offered student athletes new educational and experiential learning opportunities?
- What transparency measures are necessary to safeguard the integrity of college sports in a world where collegiate athletes have opportunities to receive compensation for their NIL?

IX. STAFF CONTACTS

- Tim Kurth, Chief Counsel
- Teddy Tanzer, Senior Counsel
- Brannon Rains, Professional Staff Member
- Michael Cameron, Professional Staff Member
- Jessica Herron, Clerk

²² *Alabama and Florida Call an Audible on NIL Laws*, The National Law Review (March 8, 2022), <https://www.natlawreview.com/article/alabama-and-florida-call-audible-nil-laws>.