

CLIENT ALERT

# Toward a Unified Name, Image and Likeness Regime: Proposed Federal Legislation Would Create National Standard

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Since the National Collegiate Athletic Association (“NCAA”) amended its name, image, and likeness (“NIL”) policies in 2021, various state laws have created a patchwork of inconsistent laws.<sup>1</sup> The diverse NIL landscape has allowed some schools to pursue “pay-to-play” incentives that have skewed collegiate competition. These inconsistent rules also open the door to abuse and exploitation of students.<sup>2</sup> To remedy these problems, federal legislators are considering intervening to create national standards.

At a hearing on January 18, 2024, the House of Representatives Innovation, Data and Commerce Subcommittee held a hearing that included testimony and feedback on draft legislation that would create a federal standard preempting these inconsistent state laws and regulate the NIL market. Specifically, the hearing focused upon the Fairness, Accountability, and Integrity in Representation of College Sports Act (FAIR College Sports Act). This bill contains provisions found in several other draft bills that address NIL rules for student athletes, creating a set of comprehensive national standards that

<sup>1</sup> U.S. HOUSE COM. ON ENERGY AND COMMERCE, *Hearing Memorandum: “NIL Playbook: Proposal to Protect Student Athletes’ Dealmaking Rights”* (Jan. 16, 2024), [https://d1dth6e84htgma.cloudfront.net/01\\_18\\_2024\\_IDC\\_NIL\\_Hearing\\_Memo\\_2b714cbf5a.pdf](https://d1dth6e84htgma.cloudfront.net/01_18_2024_IDC_NIL_Hearing_Memo_2b714cbf5a.pdf).

<sup>2</sup> U.S. HOUSE COM. ON ENERGY AND COMMERCE, *Hearing Memorandum*.

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would govern the provision of these benefits to student athletes in NCAA member institutions. This bill would specifically accomplish the following:<sup>3</sup>

- Regulate Boosters, Collectives, Agents, and Third Parties: require transparency and registration for agents, boosters, collectives, and third-party licensees when NIL deals are signed to ensure disclosure on the types of deals signed, amount of money involved, and actual activities performed because of an NIL agreement;
- Ban Pay-for-Play: remove pay-for-play incentives by prohibiting boosters, collectives, and other third parties from offering inducements to attend or transfer to specific institutions or to perform specific actions or promotions;
- Clarify the Status of Student-Athletes as Non-Employees: clarify that athletes will not be deemed employees and that universities cannot provide NIL compensation directly to athletes;
- Establish Independent Oversight and Regulation: create the U.S. Intercollegiate Athletics Commission (USIAC) to independently oversee, set rules, enforce, and provide guidance to student athletes and collectives on the NIL process, through creating a registration process and database for NIL information, providing quarterly transparency reports, and referring enforcement actions to existing agencies and state AGs for agents and third parties, and to the NCAA for students; and
- Protect the Rights of Student Athletes to Earn Compensation from Their NIL Under Regulated Contracts: conserve the rights of student athletes to enter into NIL contracts and establish certain restrictions on those contracts for the benefit of student athletes.

While members on both sides of the aisle seem to agree that the proposed federal legislation would bring some much-needed consistency, oversight, and transparency to NIL regulation, specific provisions are particularly contentious. The hearing featured inconsistent testimony on the issue of whether student athletes should be treated as employees, with two female athletes from Radford University and University of Michigan suggesting that employee status would jeopardize their status as scholarship athletes and a male football player from UCLA with active NIL deals testifying that employee status accurately represents his relationship with the university for which he competes. NCAA President Charlie Baker appeared at the hearing and testified that employee status for student athletes would be prohibitively expensive for member institutions, leading to the elimination of the majority of non-revenue programs. “The money is just not there,” he said.

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<sup>3</sup> See CONGRESSMAN GUS BILIRAKIS, *Chairman Bilirakis Releases Discussion Draft of NIL Reform Package* (May 23, 2023), <https://bilirakis.house.gov/media/press-releases/chairman-bilirakis-releases-discussion-draft-nil-reform-package>; FAIR College Sports Act Discussion Draft, H.R. \_\_ (118th Cong.), [https://bilirakis.house.gov/sites/evo-subsites/bilirakis.house.gov/files/evo-media-document/fair-college-sports-act\\_1.pdf](https://bilirakis.house.gov/sites/evo-subsites/bilirakis.house.gov/files/evo-media-document/fair-college-sports-act_1.pdf).

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The hearing also highlighted disagreements over the NCAA's ability to regulate member institutions going forward. The creation of an independent oversight board would usurp the traditional function of the NCAA and divest the organization of regulatory authority. Mr. Baker testified in favor of granting the NCAA an antitrust exemption, which would provide the association with protection from litigation and give it authority to regulate the provision of benefits to college athletes.<sup>4</sup> The bill before the subcommittee does not include an antitrust exemption, and many members are intractably opposed to providing legal protection to the NCAA.

The January 18 hearing emphatically demonstrated how difficult it will be to achieve bipartisan agreement on the complex issue of benefits available to student athletes. Members of Congress in both parties are clearly interested in remedying the “wild west environment where pay for play is rampant,” as expressed by Subcommittee Chairman Gus Bilirakis (R-Fla). Rep. Bilirakis and others cited the advent of alumni boosters and third-party “collectives” established to pursue NIL deals for students, which have injected money into the high school and transfer recruiting process. The NIL market has created and exacerbated disparities between large and small institutions<sup>5</sup> and between more and less popular sports,<sup>6</sup> frequently disadvantaging female athletes relative to their male peers.<sup>7</sup> According to Chairman Bilirakis, the enactment of federally mandated “common sense rules of the road” is necessary to “save college sports as we know it.”

Other members are more pessimistic about the prospect of a national standard. They fear that congressional regulation will put undue restrictions on the amount and nature of NIL benefits available to student athletes. “Athletes have more power today than ever before,” said Representative Lori Trahan at the hearing. “The last thing that this committee should be considering is legislation that limits those opportunities.”

The January 18 hearing and the large number of pending NIL reform bills suggest that this issue will continue to receive attention in Congress. Congress has held 11 hearings on NIL since the 2021 interim NIL policies were enacted. At least 10 federal discussion drafts or bills to regulate the NIL landscape have been announced in that time as well. The stakeholders are aligned in the need for a uniform federal standard, even while they disagree on employee status and the antitrust exemption. Some sort of national standard that regulates the actions of boosters and collectives seems to have bipartisan support and is thus likely to be enacted.

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<sup>4</sup> Katherine Knott, *Draft NIL Legislation Aims to “Save College Sports as We Know It,”* INSIDE HIGHER ED (Jan. 19, 2024), [https://www.insidehighered.com/news/government/2024/01/19/draft-nil-bill-aims-save-college-sports-we-know-it?utm\\_source=Inside+Higher+Ed&utm\\_campaign=5d737e8d80-DNU\\_2021\\_COPY\\_02&utm\\_medium=email&utm\\_term=0\\_1fcbc04421-5d737e8d80-237993354&mc\\_cid=5d737e8d80&mc\\_eid=f1e4d9f11c](https://www.insidehighered.com/news/government/2024/01/19/draft-nil-bill-aims-save-college-sports-we-know-it?utm_source=Inside+Higher+Ed&utm_campaign=5d737e8d80-DNU_2021_COPY_02&utm_medium=email&utm_term=0_1fcbc04421-5d737e8d80-237993354&mc_cid=5d737e8d80&mc_eid=f1e4d9f11c).

<sup>5</sup> 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>.

<sup>6</sup> Alan Blinder, *The Smaller, Everyday Deals for College Athletes under New Rules,* THE NEW YORK TIMES (Dec. 9, 2021), <https://www.nytimes.com/2021/12/09/sports/ncaafotball/college-athletes-nil-deals.html>.

<sup>7</sup> Amanda Christovich, *Advocacy Group Asks DOE To Fix Gender Inequities In NIL,* FRONT OFFICE SPORTS (Jan. 17, 2023), <https://frontofficesports.com/drake-group-nil/> (“In the first 18 months of NIL, women’s sports athletes have made significantly less than their male counterparts, despite major brand interest.”).

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Congress will likely peel the contentious issues out of the bill as it moves toward passage of a more limited NIL standard. Federal legislation will almost certainly aim to reduce the influence of boosters and collectives, increase transparency of NIL deals, and create some kind of oversight authority. In that event, schools will have to adjust to the national standard in the midst of an active NIL market. It therefore behooves NCAA member institutions to closely monitor these bills and evaluate how they would impact their programs and collectives. Regulation of some sort is clearly on the horizon. As would be true in any industry, schools which navigate the transition from “wild west” to national standard will have a competitive advantage when that change occurs.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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