



Radical Changes Proposed to NIL and Other Compensation of College Athletes

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On December 5, 2023, recently installed NCAA President Charlie Baker sent a letter to at least 350 NCAA member schools in which he proposed numerous “fundamental changes” to college athletics, including two proposed changes that would significantly impact the ways in which collegiate student-athletes can earn compensation.

Baker’s proposal would permit, but not require, Division I schools to compensate their student-athletes directly through an “enhanced educational trust fund” and name, image, and likeness (NIL) deals.

The proposal’s trust fund component envisions the NCAA’s creation of a new athletic subdivision into which its most affluent Division 1 athletic programs could opt-in voluntarily. Schools opting into the subdivision would have to invest at least \$30,000 per year into the trust fund for at least half of the school’s eligible student-athletes.

The proposal’s NIL component would allow schools at all NCAA levels to compensate their student-athletes directly with NIL deals, rather than the student-athletes having to depend solely upon NIL deals from NIL collectives and, for some higher profile athletes, other third parties.

Both proposals radically depart from the NCAA’s long-standing and oft maligned amateurism rule, which prohibits schools from compensating their student-athletes directly, and the NCAA’s NIL regulations, which have been haphazard, inconsistent, and unsound to date.

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Driving Forces Behind Baker's Proposal

Baker cites several express reasons underlying his proposal, but he also tacitly and inferentially acknowledges other reasons.

Economics

Baker's proposal expressly acknowledges the NCAA's challenges in governing its member schools with a single model across all athletic divisions, especially from an economics standpoint, considering the vast disparities among, and even within divisions.

According to Baker, "[T]he growing financial gap between the highest-resourced colleges and universities and other schools in Division I has created a new series of challenges," which "are competitive as well as financial and are complicated further by the intersection of name, image and likeness opportunities for student-athletes and the arrival of the Transfer Portal." The proposal, Baker summarized, "gives the educational institutions with the most visibility, the most financial resources, and the biggest brands an opportunity to choose to operate with a different set of rules that more accurately reflect their scale and their operating model."

Baker's proposal cites some eye-opening economic disparities among and within the NCAA athletic divisions. Baker notes that Division I schools spend between \$5 million and \$250 million annually on their athletics programs, including (i) 59 schools that spend greater than \$100 million annually, (ii) 32 schools that spend greater than \$50 million annually, and (iii) 259 schools that spend less than \$50 million annually (and, of those, 144 of them spend less than \$25 million). These figures dwarf what Division II and Division III schools spend -- 98% of which spend less than \$20 million annually.

Contextual Environment

Baker's proposal acknowledges that it originated, at least in part, due to the challenging "contextual environment," as Baker called it, the NCAA faces from "the courts and other public entities," which "continue to debate reform measures that in many cases would seriously damage parts or all of college athletics."

Although Baker did not elaborate further regarding his so-called "contextual environment," he was apparently referencing the various antitrust, unfair labor practices, and Title IX lawsuits the NCAA has recently lost and continues to face (not to mention their staggering defense costs) and the numerous state legislatures that have enacted laws intended to neuter the NCAA's ability to regulate NIL compensation and student-athlete rights.

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Congressional Apathy Toward the NCAA

Baker's proposal mostly avoided discussing the elephant in the room -- the United States Congress, which has been largely apathetic toward the NCAA, its recent legal plights, and student-athlete rights generally over the last few years.

Congressional apathy has particularly frustrated the NCAA, considering the NCAA's aggressive Congressional lobbying efforts in recent years for an antitrust exemption and for a uniform federal NIL law that would preempt increasingly aggressive state NIL laws.

To date, Congress has shown no outward movement toward granting the NCAA an antitrust exemption. In addition, notwithstanding nine different student-athlete rights/NIL-related bills having been introduced in Congress since 2019, Congress has not enacted any of them into law.

NIL Collectives

The rapid rise and significant influence of NIL collectives doubtlessly played a role in Baker's proposal.

NIL collectives seemingly formed overnight in 2021 after the NCAA adopted its Interim Name, Image, and Likeness Policy, which, for the first time, allowed collegiate student-athletes to earn NIL compensation without jeopardizing their collegiate athletic eligibility.

Collectives have become the only source of NIL compensation for the bulk of student-athletes and have maintained their prominence due to the NCAA's initial reticence and ultimately inconsistent attempts to regulate collectives, including adopting a guilty until proven innocent standard of review pertaining to potential NIL violations, which ran counter to longstanding principles of U.S. jurisprudence in the process.

To date, the NCAA has been unable to limit the significance or importance of well-heeled NIL collectives.

The Proposal's Staggering Economics

Opting into the proposed subdivision would be expensive for Division I schools.

To demonstrate the cost, consider the NCAA Division I Football Bowl Subdivision (FBS). The FBS is the United States' highest level of college football and consists of 10 conferences and 133 schools, 68 of which schools are in the Atlantic Coast, Big 12, Big Ten, and Southeastern Conferences (i.e., the four "Power 5" conferences excluding the now two-team Pacific 12 Conference). Most of those 68 schools would likely opt-in to the new subdivision.

Presently, FBS schools can have 85 scholarship football players on their rosters. Assuming schools would invest the \$30,000 minimum into the proposed trust fund for all 85 scholarship football players, that investment would equal \$2,550,000.

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In reality, numerous athletic departments have more than 400 scholarship athletes across various sports, which, based upon the \$30,000 minimum investment per athlete for at least half of the athletes, would require schools to invest a minimum of \$6 million annually in the trust fund.

Baker himself has speculated that some schools with 800-900 athletes would be investing \$12 million to \$15 million per year into the proposed trust fund.

The Proposal's Revolutionary NIL Approach

Baker's proposal would permit schools to directly compensate student athletes through NIL deals.

The proposal is radical because, despite the NCAA's Interim NIL Policy, the NCAA's long-standing amateurism rule still prohibits schools from compensating their student-athletes directly due to concerns that schools would use NIL deals as ways to circumvent the NCAA's continued prohibitions against schools and boosters providing improper recruiting inducements to student-athletes or compensating student-athletes on a pay-for-play basis (i.e., paying student-athletes for scoring points, making rosters, receiving third party awards, etc.).

The proposal sidesteps the hot-button issue regarding whether student-athletes would or should be classified as employees of their schools. Presumably, the schools would compensate student-athletes as independent contractors for their NIL rights, which is how third parties typically compensate student-athletes for NIL deals now.

The Proposal's Impact on NIL Collectives

The proposal's enactment could significantly change the landscape in which NIL collectives operate and make them significantly less important, if not unnecessary, because schools would likely insource the functions that outside NIL collectives currently serve.

Theoretically, NIL collectives operate separately and independently from the schools they benefit, but the NCAA has deemed collectives "boosters" for purposes of NCAA rules. As boosters, collectives subject schools to NCAA penalties if they violate NCAA rules governing booster conduct. By insourcing collectives' functions, schools would eliminate or at least mitigate the risks that rogue or undisciplined collectives pose to them.

Schools insourcing collective functions, coupled with the Internal Revenue Code's application, of all things, would further diminish the importance of collectives. At present, donors who contribute to outsourced NIL collectives cannot claim charitable tax deductions for their donations because collectives, as currently operated, are not operated exclusively for one or more charitable or other exempt purposes as the IRS requires.

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Some collectives were formed under state laws as non-profit entities, and the IRS initially recognized their 501(c)(3) tax-exempt status on a mostly ministerial basis. However, some professionals, including our firm, cautioned collectives against seeking 501(c)(3) tax-exempt status due to significant risks they and their donors would incur were the IRS, upon closer substantive examination of their initial ministerial recognition, to ultimately determine that collectives did not, in fact, qualify for tax-exempt status.

In May 2023, the IRS essentially resolved the issue when its Office of Chief Counsel issued a ruling concluding that NIL collectives were, in many, if not most cases, operating for substantially non-exempt purposes (that is, servicing the private interests of student-athletes as opposed to charitable functions) and did not qualify for 501(c)(3) tax-exempt status.

The IRS's ruling severely hampered NIL collectives' abilities to generate revenue because potential donors could no longer validly claim charitable tax donations for their donations.

If the NCAA were to allow schools to compensate their student-athletes directly and insource the functions of NIL collectives, schools would likely delegate those newly acquired functions to their associated non-profit, tax-exempt athletic foundations. Such foundations are typically validly designated 501(c)(3) charitable organizations and exist under the authority or in furtherance of the school or its athletics programs, which means donations to them are typically and validly tax deductible.

In addition to donors having the ability to make tax-deductible donations to fund NIL deals for a school's athletes, schools could provide additional benefits to donors, such as event tickets and seating priorities, which current NCAA rules prohibit in exchange for donations to NIL collectives.

If schools were to insource NIL collective functions to their foundations, collectives could still theoretically exist and would not necessarily go completely by the wayside, but their importance and influence would diminish greatly.

Potential Benefits of the Proposal

NCAA schools could certainly benefit from Baker's proposal in many ways.

As Baker noted, the NCAA would be giving schools with the "most visibility, the most financial resources, and the biggest brands an opportunity to choose to operate with a different set of rules that more accurately reflect their scale and their operating model."

Among other potential benefits, some of the more obvious benefits include: (i) elite student-athletes would have enhanced educational and athletics experiences; (ii) female student-athletes would likely have greater financial opportunities than currently available; (iii) schools that do not opt-in to the new subdivision would still be able to generate income opportunities for their student-athletes through NIL deals; and (iv) schools most impacted by NIL collectives, the transfer portal, and NIL generally could create rules, programming, and other resources that best serve most of their student-athletes rather than just a few.

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In sum, as the proposal itself acknowledges, the proposal's flexibility "kick-starts a long-overdue conversation among the [NCAA] membership that focuses on the differences that exist between schools, conferences, and divisions and how to create more permissive and flexible rules across the NCAA that put student-athletes first."

The Proposal's Unanswered Questions

Baker's proposal leaves unanswered many important questions affecting the compensation of collegiate student-athletes, including the following:

1. How will schools comply with Title IX – the federal civil rights law that prohibits sex-based discrimination in federally funded schools and other educational programs -- while making determinations regarding which of its student-athletes would receive payments from the proposed trust fund?
 - Would 50% of trust fund payouts have to go to male student-athletes and the other 50% go to female student-athletes?
 - Would disproportionate payouts to male athletes in the highest revenue-producing sports compared to female athletes in non-revenue producing sports trigger Title IX liability for a school?
2. Would each school form and administer its own trust fund, or would the NCAA form a single trust fund?
3. Would schools simply have to invest \$30,000 for at least half their eligible student-athletes, or would \$30,000 be a minimum payout for each student-athlete?
4. Will schools subject themselves to lawsuits under theories that the trust fund payments are really wages or employment compensation without otherwise treating their student-athletes as employees?
5. How will schools compensate their athletes through NIL deals without violating the NCAA's prohibitions against improper recruiting inducements and pay-for-play (i.e., what would the student-athletes provide as consideration for the NIL deals they are not already providing to schools)?
6. Will trust fund payouts to international student-athletes, who make up more than 12% of Division I student-athletes, subject them to deportation for violating their student visa employment restrictions?
7. How would the proposal's enactment affect Congressional apathy toward the NCAA?
8. How and when would the proposal be implemented?

An infinitely greater number of questions will emerge, and the breadth of the proposal's intended and unintended consequences is unknown.

Conclusion

Baker's proposal has generated enthusiasm, disdain, and frustration from interested parties, just to name a few of the wide-ranging reactions, particularly because he apparently did not vet the proposal with the power brokers of college athletics, including Power 5 Conference Commissions, before making it public.

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One thing is clear, however, we are witnessing the dawn of a new collegiate sports era. Although the proposal is a significant step forward and a radical departure from the NCAA's historic approach to compensation of student-athletes, the proposal raises as many questions as it answers, and its future success seems, at best, like a Hail Mary pass during a game's first quarter.