

## How Name, Image, and Likeness Reforms are Eroding Amateurism in the NCAA and How that Will Affect the NCAA's Tax-Exempt Status

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### ABSTRACT

*On June 30, 2021, just before numerous state laws regarding name, image, and likeness (“NIL”) went into effect, the National Collegiate Athletic Association (“NCAA”) enacted a temporary policy allowing college athletes to monetize their NIL.<sup>1</sup> By allowing its college athletes to capitalize off of their NIL, the NCAA risks losing its status as an amateur athletics organization, which could result in the NCAA losing its ability to remain tax-exempt under § 501(c) of the Internal Revenue Code. The NCAA, with this new NIL allowance, is disputably a pseudo-professional organization, and, if so, it could arguably no longer stipulate that it is promoting the tax-exempt purpose of amateur athletics. Instead, the NCAA is promoting what is essentially professional athletics and, consequently, could risk losing its status as a tax-free nonprofit. This would subject the organization to federal income taxes and force it to forfeit millions of dollars to the federal government annually. To fix this, the NCAA may lobby Congress for a solution or could restructure itself, with the former presenting as the best solution for the NCAA. This Note is a novel look at how NIL monetization for college athletes affects the tax-exempt status of the NCAA and how the NCAA can respond.*

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<sup>1</sup> See Michelle B. Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy>.

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## INTRODUCTION

In response to state legislation effective July 1, 2021,<sup>2</sup> the National Collegiate Athletic Association (“NCAA”) announced a policy that allows college athletes from its member universities to profit from their name, image, and likeness (“NIL”) while remaining eligible to play collegiate sports.<sup>3</sup> The NCAA’s new policy relies on currently enacted state legislation and has minimal details and limitations.<sup>4</sup> Allowing college athletes NIL rights is a role reversal for the NCAA which has traditionally rebuked NIL

<sup>2</sup> See discussion *infra* Section II.A.

<sup>3</sup> See discussion *infra* Section II.B.

<sup>4</sup> See discussion *infra* Section II.A.

rights because of the potential to undermine the amateur status of college sports.

Amateurism is imperative to the NCAA because it lets the organization to maintain its power as the governing body of college athletics and ensures that its profits do not need to be shared with the college athletes themselves.<sup>5</sup> Amateurism is also vital for the NCAA's tax-exempt status under § 501(c) of the Internal Revenue Code, which grants nonprofit entities exemption from federal taxes. The NCAA's tax-exempt status hinges on its purpose as an organization that "foster[s] . . . amateur sports."<sup>6</sup> Allowing athletes to profit from their NIL threatens the NCAA's athletes' amateur status because college athletes can obtain endorsements and sign autographs for money like professional athletes,<sup>7</sup> which erodes the NCAA's amateurism principle. This erosion will likely cause the NCAA to fail at least one of the two determining tests under § 501(c), thus jeopardizing its tax-exempt status. This Note will explore how college athlete NIL rights are diminishing the NCAA's principle of amateurism, likely resulting in the NCAA becoming ineligible for tax exemption under § 501(c). Maintaining tax-exemption is presumably essential to the NCAA, as it would be subject to federal income taxes without it. Thus, this Note will also explore potential ways the NCAA can maintain its tax-exempt status despite its recent NIL changes.

Section I will explain the history of amateurism in the NCAA and give a brief overview of the NCAA's tax-exempt status. Section II will examine the NCAA's interim NIL policy, the NCAA's new constitution, and the legislation efforts within Congress. Section III will discuss the tax status of the NCAA under § 501(c) prior to implementing its interim NIL policy and describe how the new interim NIL policy and new constitution impact that tax status, placing the NCAA at risk of losing its tax-exempt status if the Internal Revenue Service ("IRS") chooses to reexamine the organization. In

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<sup>5</sup> Athletes are considered amateurs when their main motivations for participation in sports are getting an education, increasing physical fitness, improving mental health, and socializing with their peers. See NAT'L. COLLEGIATE ATHLETIC ASS'N., 2021-22 NCAA DIVISION I MANUAL, Const. art. 2.10 (2021), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> [hereinafter NCAA MANUAL]. The NCAA has characterized participation in college sports as a hobby and has wanted its athletes to be protected from exploitation by commercial or professional enterprises. *Id.*

<sup>6</sup> See 26 U.S.C. § 501 (2018).

<sup>7</sup> See e.g., Patrick Schmidt, *Ohio State quarterback Quinn Ewers just signed his biggest NIL deal yet*, FANSIDED, <https://fansided.com/2021/08/31/quinn-ewers-nil-autograph-million-dollar-deal/> (last updated Sept. 2021).

Section IV, solutions to avoid losing its tax exemption are proposed for the NCAA to consider. The NCAA will likely seek assistance from Congress first, but if Congress cannot decide on an ideal legislative solution, the NCAA could consider restructuring the organization as described in this Note.

## BACKGROUND

### I. THE NCAA HAS GROWN INTO THE PREEMINENT COLLEGE SPORTS ORGANIZATION BY RELYING ON AMATEURISM AND ITS TAX-EXEMPT STATUS.

#### *A. The NCAA's Focus on Amateurism Came After Its Initial Development, but It Is Now a Fundamental Principle of the Organization That the NCAA Regularly Defends.*

To understand how amateurism is linked to the NCAA's power and tax-exempt status, the history of the NCAA and the rise of amateurism must be examined. College athletics began their rise to popularity in the mid-nineteenth century.<sup>8</sup> In 1905, eighteen men died playing college football and an additional 150 men were injured.<sup>9</sup> In response to the high levels of injury, colleges agreed to form the American Football Rules Committee, which would restrict the dangerous maneuvers previously allowed in the sport.<sup>10</sup> A subsequent death in a football game then spurred a meeting of those colleges and resulted in the formation of the Intercollegiate Athletic Association of the United States ("IAAUS").<sup>11</sup>

In 1910, the IAAUS changed its name to the NCAA.<sup>12</sup> It was not until 1916 that the first definition of amateurism was created by the NCAA, defining an amateur as "one who participates in competitive physical sports only for the pleasure, and the physical, moral, and social benefits directly derived therefrom."<sup>13</sup> The leaders of athletic programs at NCAA schools did

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<sup>8</sup> See Kathryn Kisska-Schulze, *This Is Our House! - the Tax Man Comes to College Sports*, 29 MARQ. SPORTS L. REV. 347, 349 (2019).

<sup>9</sup> See Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 215 (2006).

<sup>10</sup> *Id.* at 216.

<sup>11</sup> The IAAUS was formed on December 28, 1905. *Id.* at 217.

<sup>12</sup> See Daniel Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 331 (2007).

<sup>13</sup> *Id.* at 331–32.

not want college athletics to transform into professional leagues, and so in 1919, they prohibited college athletes' participation in professional leagues,<sup>14</sup> a proposition with which the professional leagues agreed.<sup>15</sup> The original proponents of the NCAA amateurism requirement likely did not imagine the flashy, luxurious state of college sports today.<sup>16</sup> Further, athlete NIL rights were not a concern during this time as the right to publicity was not mentioned in American common law until 1950.<sup>17</sup>

After World War I, the rise in disposable income, national media coverage, and the broadcasts of games made college sports extremely popular.<sup>18</sup> This popularity made enforcing amateurism difficult, exemplified by a 1929 study which found that 81 out of 112 schools surveyed were providing inducements to their athletes that violated the NCAA principles.<sup>19</sup> Thus, in 1948, the NCAA enacted a "Sanity Code," which prohibited schools from granting financial aid based on athletic ability.<sup>20</sup> While the Sanity Code did not explicitly prevent payment for college athletes' NIL from outside sources, it did implicitly prohibit NIL payment from member universities by only allowing schools to give athletes compensation in the form of need-based scholarships and meals.<sup>21</sup> This Sanity Code, which was abolished in 1951, and the subsequent regulatory developments from it, influenced the contemporary NCAA compliance rules.<sup>22</sup> Because the right to publicity was only established in 1970s with limited state recognition thereafter, NIL was not a focus of subsequent rule developments until recently.<sup>23</sup> The right to publicity is made up of NIL and is defined as an individual's right to use or

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<sup>14</sup> See Carter, *supra* note 9.

<sup>15</sup> The professional organizations liked the idea of better-developed players entering their leagues. *Id.* at 264–65.

<sup>16</sup> *Id.* at 276.

<sup>17</sup> See Mark Roesler & Garrett Hutchinson, *What's in a Name, Likeness, and Image? The Case for a Federal Right of Publicity Law*, AM. BAR ASS'N (Sept. 16, 2020), [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/#2](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/september-october/what-s-in-a-name-likeness-image-case-for-federal-right-of-publicity-law/#2).

<sup>18</sup> See James Koch, *The Economic Realities of Amateur Sports Organization*, 61 IND. L. J. 9, 13 (1985).

<sup>19</sup> *O'Bannon v. NCAA*, 802 F.3d 1049, 1054 (9th Cir. 2015).

<sup>20</sup> *Id.*

<sup>21</sup> See Alex Kirshner, *The NCAA Wants to Make up Its Own Subpoena Power*, BANNER SOC'Y (Aug. 14, 2019, 10:24 AM), <https://www.bannersociety.com/2019/8/14/20706902/ncaa-enforcement-policy>.

<sup>22</sup> See Lazaroff, *supra* note 12.

<sup>23</sup> See Roesler, *supra* note 17 (stating that the right to publicity was only recognized by statute or common law in 35 states as of 2020).

prevent the use of their NIL to promote a product or service.<sup>24</sup> College athletes only began bringing NIL lawsuits in 2009 because NIL rights stem from this recently-established right of publicity.<sup>25</sup>

The NCAA has no legitimate rival in the college athletics industry. It has over 1,000 member schools and over 100 conferences.<sup>26</sup> It has become “the most powerful nongovernmental regulator in America.”<sup>27</sup> The National Association for Intercollegiate Athletics (“NAIA”), the NCAA’s only potential rival, is significantly smaller with only 200 member schools, making it hard for the NAIA to compete with the NCAA.<sup>28</sup> While the NCAA has instituted some reforms to benefit its players, it has largely opposed any reforms that alter the foundation of amateurism, only enacting NIL legislation in response to state action.

As of 2021, one of the NCAA’s main purposes was to “encourage its members to adopt eligibility rules to comply with . . . amateurism.”<sup>29</sup> Further, its basic purpose was to “retain a clear line of demarcation between intercollegiate athletics and professional sports.”<sup>30</sup> With the advent of NIL, this line between college sports and professional sports is blurring. NIL reform began when critics started questioning the legitimacy of requiring amateurism and disallowing NIL monetization for athletes who help create the large business of college sports.<sup>31</sup>

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<sup>24</sup> See *NCAA Name, Image, and Likeness Rules*, NEXT COLL. STUDENT ATHLETE, <https://www.ncsasports.org/name-image-likeness> (last visited Feb. 27, 2021).

<sup>25</sup> See Adam Wells, *Supreme Court Questions NCAA's Amateurism amid Name, Image, Likeness Bill Debate*, BLEACHER REP. (Mar. 31, 2021), <https://bleacherreport.com/articles/10000546-supreme-court-questions-ncaas-amateurism-amid-name-image-likeness-bill-debate>.

<sup>26</sup> See *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> (last visited Nov. 15, 2020).

<sup>27</sup> See Carter, *supra* note 9.

<sup>28</sup> See Koch, *supra* note 18.

<sup>29</sup> See NCAA MANUAL, *supra* note 5, at art. 1.2.

<sup>30</sup> *Id.*

<sup>31</sup> See Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> (“In 2010, despite the faltering economy, a single college athletic league, the football-crazed Southeastern Conference (SEC), became the first to crack the billion-dollar barrier in athletic receipts.”); Virginia Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L. J. 555, 567 (2009) (“College sports [are] a \$60 billion industry.”); Kisska-Schulze, *supra* note 8 (finding that the NCAA’s licensing affiliate has made over \$200 billion in royalties and in 2017, the NCAA made over \$1.1 billion in

NIL monetization was proposed to help student athletes benefit from the system they play for. NIL monetization could help many athletes avoid poverty, but it would have serious consequences for the NCAA's tax exempt status.<sup>32</sup> The historical reasoning behind denying NIL rights was based on the NCAA's desire to protect amateurism.<sup>33</sup> NIL monetization likely erodes the amateurism principle that the NCAA relies on for its tax-exempt status, so this interim NIL policy for college athletes may affect the NCAA's tax-exempt status.<sup>34</sup> However, some talented athletes are already gaining a significant amount of capital through monetizing their NIL since the policy change,<sup>35</sup> and giving these athletes the chance to capitalize on their NIL gives them the ability to save money to prepare for life post-graduation<sup>36</sup> and

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revenue); Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> (“The combined revenue for the five major conferences (SEC, Big Ten, ACC, Big 12, Pac-12) increased by 266 percent from 2005-15.”).

<sup>32</sup> See David Bayard, *After Further Review: How the N.C.A.A.'s Division I Should Implement Name, Image, and Likeness Rights to Save Themselves and Best Preserve the Integrity of College Athletics*, 47 S. UNIV. L. REV. 1, 9 (2020) (stating that as many as eighty-five percent of athletes fall below the poverty line and only fifty-nine percent of athletes receive scholarships within the NCAA).

<sup>33</sup> See Michael McCann, *Key Questions, Takeaways from the NCAA's NIL Announcement*, SPORTS ILLUSTRATED (Oct. 29, 2019), <https://www.si.com/college/2019/10/30/ncaa-name-image-likeness-announcement-takeaways-questions> (“The NCAA has premised this ban on its system of ‘amateurism.’ Amateurism captures the NCAA’s overarching desire to clearly distinguish college athletes from professional athletes and, in what some view as a peculiar form of protection, ‘protect’ college athletes from a sports business world that the NCAA often paints as rife with unethical agents and deceptive businesses.”).

<sup>34</sup> See discussion *infra* Section III.B.

<sup>35</sup> Nick Saban, the head coach of football at the University of Alabama, mentioned that Bryce Young, the Alabama quarterback, who had only thrown 13 passes at the time, was making almost \$1 million from NIL deals. See David Kenyon, *Biggest and Most Notable Deals in NIL so Far*, BLEACHER REPORT (July 26, 2021), <https://bleacherreport.com/articles/2946352-the-biggest-and-most-notable-nil-deals-in-college-football-so-far>; Doug Robinson, *Why now, more than ever, the notion of student-athletes is an antiquated ideal*, DESERET NEWS (Aug. 27, 2021), <https://www.deseret.com/sports/2021/8/27/22639690/why-now-more-than-ever-notion-of-student-athletes-is-an-antiquated-ideal>. One athlete made as much as \$210,000 in July of 2021. Kayvon Thibodeaux, an Oregon edge rusher, signed a six-figure memorabilia deal with Nike. *Id.* Quinn Ewers, a quarterback for The Ohio State University, signed a multi-year deal with an autograph company worth reportedly over \$1 million. See Schmidt, *supra* note 7.

<sup>36</sup> Arguably, NCAA institutions may not be properly preparing athletes to graduate and may not be setting up athletes to have great job prospects if they do. See Ramogi Huma et al., *The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism*, Drexel Univ. 1, 5 (2012), [http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study\\_Full.pdf](http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study_Full.pdf).



provide them with a safety net in the unsure world of professional sports.<sup>37</sup> Students who participate in college basketball or football give a direct financial benefit to the NCAA<sup>38</sup> and many argue that they should share in that benefit.<sup>39</sup> While smaller sports like softball or women's lacrosse typically do not generate huge profits,<sup>40</sup> NIL rights are arguably even more important for the athletes that play these sports as future career opportunities in these sports are often slim and lower paid.<sup>41</sup>

Amateurism, according to the NCAA, serves to protect students from exploitation by professional and commercial enterprises and ensures that student athletes are motivated to participate in sports primarily by education and the physical, mental, and social benefits of their participation.<sup>42</sup> By allowing student athletes to capitalize from their NIL, college athletics are becoming similar to a professional league and losing their amateur elements. This loss of amateurism means the NCAA's tax-exempt status may be in jeopardy.

However, because the NCAA desires to maintain its status as an amateur athletic league along with its corresponding tax-exempt status, the NCAA

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("[O]nly 47% of NCAA Division I men's basketball and 57% of football players graduate within a six-year period of time."); Solomon, *supra* note 31 (finding that athletes are not getting a quality education and decide to major in easier fields to remain eligible).

<sup>37</sup> Less than two percent of college athletes will play professional sports for any amount of time. See Martin La Monica, *Let's Get Real with College Athletes About Their Chances of Going Pro*, THE CONVERSATION (Apr. 24, 2019, 6:47 AM), <https://theconversation.com/lets-get-real-with-college-athletes-about-their-chances-of-going-pro-110837>.

<sup>38</sup> College athletes bring in a significant amount of revenue for the NCAA and their participation is worth a significant amount of money. See Huma et al., *supra* note 36 (finding that each season the average college football and basketball player is "denied \$114,153 and \$265,827 of their fair market value, respectively").

<sup>39</sup> E.g., Corey Walker, *Why Collegiate Athletes Should be Paid*, BLEACHER REP. (Feb. 19, 2013), <https://bleacherreport.com/articles/1535900-why-collegiate-athletes-should-be-paid> ("The NCAA should allow their athletes to get paid, because the NCAA has grown to become much more than what it used to be.").

<sup>40</sup> Softball generates around \$700,000 in profit for the NCAA and women's lacrosse generates around \$710,000 in profit for the NCAA. These numbers are much lower than other sports like football, which generates around \$31 million in profit for the NCAA. See Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5, 2017), <https://www.businessinsider.com/college-sports-football-revenue-2017-10>.

<sup>41</sup> For example, professional softball players make an average of between \$5,000 and \$6,000. See Patrick Pinak, *Pro Softball Player: "Yankees Bat Boy Salary is More Than My Professional Contract"*, FANBUZZ (Oct. 28, 2021, 10:59 AM), <https://fanbuzz.com/college-softball/delanie-gourley-softball-contract/>.

<sup>42</sup> See NCAA MANUAL, *supra* note 5, at art. 2.10.

has been active in litigation. The NCAA recently lost a litigation battle over compensation when the Supreme Court affirmed a lower court's findings that the NCAA's limits on education-related benefits violated the Sherman Antitrust Act.<sup>43</sup> In the concurring opinion, Justice Kavanaugh strongly criticized the NCAA and suggested that any further legal challenges to the NCAA's limits on compensation for athletes would likely result in a loss for the NCAA.<sup>44</sup> Notably, the majority declined to entertain the conversation around amateurism in college athletics.<sup>45</sup> Adding to this NCAA criticism, the General Counsel of the National Labor Relations Board ("NLRB") recently explained that some NCAA athletes qualify as employees of their universities and that the NCAA can be liable as their employer under a theory of joint employer liability.<sup>46</sup> The General Counsel further explained that the NLRB would be taking this position in any future litigation and investigations.<sup>47</sup> This creates the possibility for a future litigation battle for the NCAA, who would likely argue that its athletes are not employees, but rather amateurs, to maintain its tax-exempt status and control over college athletics. In response to mounting criticism, the NCAA ratified a new constitution in January 2022<sup>48</sup> likely in hopes that this will improve its potential litigation position and prevent further liability to college athletes.

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<sup>43</sup> See *NCAA v. Alston*, 141 S. Ct. 2141, 2162, 2166 (2021).

<sup>44</sup> Justice Kavanaugh said "[t]he NCAA's business model would be flatly illegal in almost any other industry in America." *Id.* at 2167 (Kavanaugh, B., dissenting). He noted that the NCAA generates billions of dollars in revenue and the "sums of money flow to seemingly everyone except the student athletes." *Id.* at 2168. Further, he put the NCAA on alert that they cannot rely on amateurism to keep college athletes from being employees. *Id.* ("[I]t is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes.")

<sup>45</sup> *Id.* at 2166 (quoting *Alston v. NCAA*, 958 F.3d 1239, 1265 (9th Cir. 2020)) ("[W]e... agree with the Ninth Circuit: 'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we.'")

<sup>46</sup> The General Counsel found that the law "fully supports a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees [of these institutions] under the NLRA." See Memorandum from Jennifer A. Abruzzo, General Counsel of the National Labor Relations Board on Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act (Sept. 29, 2021) (on file with National Labor Relations Board). Further, the General Counsel made clear that because the NCAA places strict limitations on its players and can terminate their eligibility to play college sports, she will consider pursuing charges against it. *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See discussion *infra* Section II.B.

*B. Nonprofit Organizations Were Designated as Tax-Exempt in 1954 and the NCAA Qualified as One of Those Organizations Prior to Implementing its NIL Policy.*

Tax exemptions for nonprofit entities have existed in the United States for decades. The Revenue Act of 1954 established the modern tax code, including § 501(c), which grants a tax exemption to nonprofit organizations.<sup>49</sup> Until the Tax Reform Act of 1976 (“Tax Reform Act”), it was unclear whether the NCAA’s purpose would have been a prima facie charitable purpose under § 501(c).<sup>50</sup> However, the Tax Reform Act added that under § 501(c)(3), entities that “foster national or international amateur sports competition” are also tax-exempt, giving the NCAA an applicable exemption under § 501(c).<sup>51</sup> While the NCAA’s status as a tax-exempt organization has not been challenged in court, Congress has questioned it.<sup>52</sup> Section 501(c)(3)’s definition indicates that amateurism is the key to the NCAA remaining a tax-exempt organization. Thus, the interim NIL policy for college athletes, which potentially eliminates the amateur aspect of the NCAA sports, places the NCAA’s § 501(c) tax-exempt status in jeopardy.

II. THE NCAA INSTITUTED AN INTERIM NIL POLICY AND APPROVED A NEW CONSTITUTION, AND CONGRESS HAS DRAFTED ITS OWN NIL LEGISLATION.

*A. In Response to State NIL Legislation, The NCAA Created an Interim NIL Policy That Relies on State Legislation.*

The first challenges to the NCAA ban on NIL compensation came from state legislatures. On September 30, 2019, California became the first state to challenge the NCAA by enacting the Fair Pay to Play Act (“FPTPA”).<sup>53</sup>

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<sup>49</sup> See Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. OF INCOME BULL. 105, 106 (2008), <https://www.irs.gov/pub/irs-soi/tehistory.pdf>.

<sup>50</sup> See Eric Carlson, *Unsportsmanlike Conduct: Why the NCAA Should Lose Its Tax-Exempt Status If Scholarship Athletes Are Considered Employees of Their Universities*, 66 SYRACUSE L. REV. 157, 165 (2016).

<sup>51</sup> 26 U.S.C. § 501.

<sup>52</sup> See *infra* p. 32; see also Steve Wieberg, *NCAA’s Tax-Exempt Status Questioned*, USA TODAY (Oct. 5, 2006, 2:40 PM), <https://usatoday30.usatoday.com/sports/college/2006-10-04-ncaa-tax-statusx.htm>. and note 160.

<sup>53</sup> See Kathryn Kisska-Schulze & Adam Epstein, *Changing the Face of College Sports One Tax Return at a Time*, 73 OKLA. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3684573](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3684573).

Under the FPTPA, student athletes are allowed to “hire athlete agents, entertain endorsement deals, and financially benefit from their college sport-related activities by permitting the use of their NIL to promote products, services, and companies.”<sup>54</sup> By the end of 2019, twenty states had either introduced NIL legislation or made plans to introduce NIL legislation.<sup>55</sup> As of October 2021, twenty-eight states passed NIL legislation and eight states were in the process of passing such legislation.<sup>56</sup>

State legislation allowing college athletes to capitalize from their NIL poses a significant problem for the NCAA. As a national organization, the NCAA depends on all its member schools to adhere to its uniform rules to facilitate fair competition. The NCAA was forced to create its interim NIL policy because, without it, schools located in states where the law provides college athletes with an irrefutable right to NIL monetization<sup>57</sup> would have had a significant advantage in recruiting athletes, especially those athletes whose NIL have significant value.<sup>58</sup> Initially, the NCAA opposed the FPTPA and even threatened to ban California member schools from participating in NCAA competition because of it.<sup>59</sup> Of course, the NCAA’s objective was to end all NIL reform attempts with this ban, but unfortunately for the NCAA, other states followed California’s lead.<sup>60</sup> In the end, the NCAA was left with few options and ultimately responded by creating its interim NIL policy.

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<sup>54</sup> *Id.*; see also CAL. EDUC. CODE § 67456 (West 2020).

<sup>55</sup> See Kisska-Schulze & Epstein, *supra* note 53.

<sup>56</sup> See *NIL Legislation Tracker*, SAUL EWING ARNSTEIN & LEHR (last visited Oct. 10, 2021), <https://www.saul.com/nil-legislation-tracker>. Each state has chosen a different effective date for their law, with the earliest being July 1, 2021 and with the latest being in 2025; see Kristi Dosh, *Tracker: Name, Image and Likeness Legislation by State*, BUS. OF COLL. SPORTS, <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (last updated Sept. 21, 2021).

<sup>57</sup> California’s FPTPA, for example, makes it illegal for California schools, many of which are NCAA member universities, to deny student athletes the opportunity to monetize their NIL. See Michael McCann, *What’s Next After California Signs Game Changer Fair Pay to Play Act into Law?*, SPORTS ILLUSTRATED (Sep. 30, 2019), <https://www.si.com/college/2019/09/30/fair-pay-to-play-act-law-ncaa-california-pac-12>.

<sup>58</sup> See Ross Dellenger, *The First Thing to Understand About NIL Is That Nobody Fully Understands NIL*, SPORTS ILLUSTRATED (Aug. 26, 2021), <https://www.si.com/college/2021/08/26/ncaa-recruiting-name-image-likeness-daily-cover>.

<sup>59</sup> See Kisska-Schulze & Epstein, *supra* note 53.

<sup>60</sup> *Id.* (“Florida introduced analogous legislation the same day as the FPTPA’s signing, while the New York College Athletic Participation Compensation Act was introduced in the state of New York one day prior.”).

Under the interim NIL policy, three main changes were made: (1) athletes located in states without NIL laws or in states where NIL laws are not in effect yet can participate in NIL activities without violating NCAA amateurism bylaws; (2) athletes located in states with operating NIL laws can participate in NIL activities without violating amateurism bylaws; and (3) athletes are allowed to use a professional service provider to consult on NIL activities unless a state NIL law says otherwise.<sup>61</sup> The interim policy does not allow for pay-for-play, improper recruiting tactics, compensation for work not performed, or compensation from a member university to an athlete for their NIL.<sup>62</sup> Under the policy, member universities must report potential violations of NCAA bylaws, certify eligibility of their players, complete due diligence on questionable NIL activities, and monitor their own compliance with state NIL laws and/or institutional NIL laws.<sup>63</sup> Member institutions can create their own NIL rules if there are no active NIL laws in their state and can also create their own rules that further restrict NIL deals as long as those rules are in accordance with their home state's laws.<sup>64</sup> The NCAA will provide interpretive guidance for its rules that remain in effect under the new NIL policy, will enforce the NCAA bylaws when there is a violation, and will refrain from monitoring compliance of member universities with state or institutional NIL laws.<sup>65</sup> The NCAA does not place any restrictions on the types of NIL deals allowed nor does the NCAA create a payment scale, essentially leaving it up to the member universities to implement NIL based on their state's law and/or their own NIL rules.<sup>66</sup> This

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<sup>61</sup> See *Interim NIL Policy*, NCAA, [http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_InterimPolicy.pdf](http://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf) (last visited Oct. 10, 2021).

<sup>62</sup> See *Name, Image and Likeness Policy: Question and Answer*, NCAA, [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_QandA.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf) (last visited Oct. 10, 2021). Pay-for-play is when payment for NIL is conditioned on athletic performance, like points scored. See *Cycle of Individual Engaged in NIL Activities*, NCAA, [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_CycleofIndividual.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_CycleofIndividual.pdf) (last visited Oct. 10, 2021). A student's NIL value can increase based on their athletic performance, but the NIL compensation cannot be conditioned on it. *Id.* Additionally, NIL deals cannot be "contingent on enrollment at a particular school." *Id.*

<sup>63</sup> See *New Interim Policy Key Takeaways*, NCAA, [https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL\\_PolicyKeyTakeaways.pdf](https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_PolicyKeyTakeaways.pdf) (last visited Oct. 10, 2021).

<sup>64</sup> See Hosick, *supra* note 1.

<sup>65</sup> *New Interim Policy Key Takeaways*, *supra* note 63.

<sup>66</sup> See James Leonard & Richard Wegener, *Name, Image and Likeness Scouting Report, Week 3: What's Next for the NCAA?*, JD SUPRA (Sept. 27, 2021), <https://www.jdsupra.com/legalnews/name-image-and-likeness-scouting-report-8606880/>

interim NIL policy will remain in effect until the new NCAA constitution goes into effect in August of 2022.<sup>67</sup>

Since the interim NIL policy's implementation, athletes have been cashing in on their NIL.<sup>68</sup> It is unclear whether the NCAA could still claim to organize amateur athletics when its athletes are acting similarly to professionals under the interim rules,<sup>69</sup> something the NCAA's President thought would happen if there was no congressional intervention or the interim NIL policy was forced to become permanent.<sup>70</sup> Further, schools have been self-enforcing under the interim NIL policy, which could potentially lead to corruption and skirting of the rules.<sup>71</sup> Additionally, while the NCAA explicitly says that NIL deals cannot be made contingent on an athlete's enrollment in a specific school, certain schools will have an advantage in recruiting anyway.<sup>72</sup> Some states have more lenient NIL policies, and some schools are in geographic areas with greater potential for NIL partnerships.<sup>73</sup> It is not illogical that athletes would consider or prioritize NIL compensation in choosing their school in the future, nor is it illogical that coaches would

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("[T]he NCAA's interim rule does not seek to define the 'fair market value' of NIL compensation.").

<sup>67</sup> See *infra* note 77.

<sup>68</sup> Dellenger, *supra* note 58. Athletes are cashing in at a rate that even experts didn't expect. [An expert estimates the] enterprise will exceed \$1.5 billion annually if all athletes were to participate.").

<sup>69</sup> See *id.*

<sup>70</sup> See *A Level Playing Field: College Athletes' Rights To Their Name, Image, And Likeness: Hearing Before the Subcomm. on Consumer Prot. & Com. of the H. Comm. on Energy & Com.*, 117<sup>th</sup> Cong. 1 (2021) (statement of Mark Emmert, President, National Collegiate Athletic Association) ("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 trying to ensure that its schools have a competitive advantage over other states until eventually the protections for student-athletes become so thin that there is little discernible difference between college athletes and professional sports figures.").

<sup>71</sup> See Dellenger, *supra* note 58 ("As long as there is a documented exchange between an athlete and a business, it passes muster for not being facilitated by the school. If a restaurant wants to give an offensive lineman free meals for a year for tweeting an endorsement, it's fine. If a local shoe store wants to pay a quarterback \$10,000 a year to wear its cleats once, it's cool.").

<sup>72</sup> See Darren Heitner, *Will the NCAA Intervene on NIL Deals Tied to Enrollment?*, ABOVE THE LAW (Jan. 7, 2022, 12:42 PM), <https://abovethelaw.com/2022/01/will-the-ncaa-intervene-on-nil-deals-tied-to-enrollment/>.

<sup>73</sup> See Liz Clarke, *State-by-state Rating System Gives College Recruits Road Map to Evaluate NIL Laws*, WASH. POST (Oct. 21, 2021, 12:34 PM), <https://www.washingtonpost.com/sports/2021/10/21/name-image-likeness-laws-state-rankings/>.

use NIL as a recruiting tactic.<sup>74</sup> When athletes begin to consider compensation in choosing their school, it makes the amateur aspect of the sport seem like a distant concept. Additionally, the ability of a college athlete to hire “professional service providers” to facilitate NIL deals under the new interim policy is extremely akin to professional athletes hiring agents.<sup>75</sup>

With the interim policy, the main differences remaining between professional and college athletes are essentially a salary and whatever restrictions states or universities place on NIL deals. Given that the difference between a professional and amateur player is so slight with NIL capitalization, it is hard for the NCAA to claim amateurism is maintained with its current NIL policy.

*B. The NCAA Ratified a New Constitution That Is Slated for a Vote in 2022 in Response to Changes in NIL Monetization.*

While the interim NIL policy remains in effect, the NCAA ratified a new constitution to govern itself and its member universities. The NCAA formed the new constitution to handle NIL issues and to avoid potential litigation over the antitrust concerns expressed by the Supreme Court.<sup>76</sup> This constitution was affirmatively voted on in January 2022, and the NCAA plans to implement it within one year of approval.<sup>77</sup> The new constitution gives each division of the NCAA the power to govern and enforce itself, while the NCAA will be left to handle championships and create the rules of

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<sup>74</sup> The University of Southern California has admitted that it pitches NIL to prospects and has found that it has made them more successful in recruiting better athletes. *See* Dellenger, *supra* note 58.

<sup>75</sup> *See Name, Image and Likeness Policy Question and Answer, supra* note 62 (“A professional service provider is an individual who provides third-party services to a prospective or current student-athlete. It includes, but is not limited to, an agent, tax advisor, marketing consultant, attorney, brand management company or anyone who is employed or associated with such persons.”).

<sup>76</sup> *See* Alan Blinder, *How College Sports May Change Under Proposed N.C.A.A. Rule Revisions*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/15/sports/ncaafootball/ncaa-constitution.html>.

<sup>77</sup> Associated Press, *NCAA Releases Draft of Streamlined Constitution that Would Give Power to Schools*, ESPN (Nov. 8, 2021), [https://www.espn.com/college-sports/story/\\_/id/32583346/ncaa-releases-draft-streamlined-constitution-give-power-schools](https://www.espn.com/college-sports/story/_/id/32583346/ncaa-releases-draft-streamlined-constitution-give-power-schools); *see* *NCAA members approve new constitution*, NCAA, <https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx> (last visited Apr. 14, 2022).

play for each sport.<sup>78</sup> It allows athletes to profit off their NIL<sup>79</sup> but explicitly prohibits paying athletes for their participation in sports.<sup>80</sup> Most notably, the new constitution does not contain the word “amateur” or make any references to amateurism aside from prohibiting the compensation of athletes for their participation in sports.<sup>81</sup>

The new constitution is drastically different from the former NCAA constitution.<sup>82</sup> It gives more power to the divisions of the NCAA and the member universities by allowing the divisions to govern themselves.<sup>83</sup> With the new constitution, the NCAA loses enforcement power and becomes more of an overarching figurehead.<sup>84</sup> However, under the new constitution, the NCAA will still be fostering sports because it will handle the national competitions and create rules of play for the sports played in each division.<sup>85</sup> Thus, the NCAA’s tax-exempt status may be in jeopardy if the sports that it fosters are not actually amateur in nature.<sup>86</sup>

*C. Numerous Bills at The Federal Level Have Been Introduced to Create NIL Uniformity but None Have Been Signed into Law.*

Some members of Congress have introduced federal legislation on NIL monetization to create a national uniform NIL policy for college athletes. Four bills were introduced in 2020 during the second session of the 116<sup>th</sup>

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<sup>78</sup> See Laine Higgins, *In a New Constitution, the NCAA Reduces the Power of a Key Player: Itself*, WALL ST. J. (Nov. 15, 2021, 9:59 AM), <https://www.wsj.com/articles/ncaa-new-constitution-11636988097> (“It is up to each division to organize and govern itself, determine academic eligibility standards and regulate what financial benefits athletes can receive either tied to their education or the commercialization of their name, image and likeness.”).

<sup>79</sup> It is up to each division to regulate NIL itself. *Id.*

<sup>80</sup> See Memorandum from Robert M. Gates, Const. Comm. Chair, NCAA, to NCAA Membership (Nov. 8, 2021) (on file with author).

<sup>81</sup> See Higgins, *supra* note 78.

<sup>82</sup> In fact, it is less than half of the length of the current NCAA constitution. *Id.*

<sup>83</sup> See *id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See discussion *infra* Section III.



Congress,<sup>87</sup> including the Student-Athlete Equity Act,<sup>88</sup> the Student Athlete Level Playing Field Act,<sup>89</sup> the Fairness in Collegiate Athletics Act,<sup>90</sup> and the College Athletes Bill of Rights.<sup>91</sup> Many of these proposals include more rights for athletes than just compensation for NIL<sup>92</sup> and show that members of Congress are supportive of college athletes capitalizing off of their NIL expansively. Other recent proposals include the College Athlete and Compensation Rights Act,<sup>93</sup> the Amateur Athletes Protection and

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<sup>87</sup> See Dennis Dodd & Matt Norlander, *NCAA Expected to Table Planned Vote on Name, Image, Likeness Rights Amid Supreme Court Case, Senate Changes*, CBS SPORTS (Jan. 9, 2021, 4:53 PM), <https://www.cbssports.com/college-football/news/ncaa-expected-to-table-planned-vote-on-name-image-likeness-rights-amid-supreme-court-case-senate-changes/>.

<sup>88</sup> This bill was introduced by representative Mark Walker and Cedric Richmond. The bill would modify the IRS code to prevent entities like the NCAA from restricting players from using their NIL by requiring it to allow NIL monetization in order to qualify as tax-exempt. See Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

<sup>89</sup> This bill was introduced by Republican Representative Anthony Gonzalez and Democratic Representative Emanuel Cleaver. The bill allows for student-athletes to use agents to negotiate sponsorships and allows for sponsorships that conflict with the school's own sponsorships. See Gregg E. Clifton & Iciss Rose Tillis, *NCAA Takes Additional Steps Toward Ratification of Name, Image, and Likeness Legislation*, NAT'L L. REV. (Oct. 15, 2020), <https://www.natlawreview.com/article/ncaa-takes-additional-steps-toward-ratification-name-image-and-likeness-legislation>.

<sup>90</sup> This bill was introduced by Republican Representative Marco Rubio. It requires that the NCAA create NIL rules that allow for NIL monetization for student athletes. These rules must go into effect the day prior to Florida's NIL law's effective date. *Id.*

<sup>91</sup> This bill was introduced by four Democratic Senators and has the full support of the National College Players Association. Some features include that athletes are allowed to profit off of their NIL, revenue-generating sports must share some of their revenue with the athletes who participate in them, and increased education and health benefits must be provided for the athletes. See Press Release, Cory Booker, U.S. Senator for New Jersey, Senators Booker and Blumenthal Introduce College Athletes Bill of Rights (Dec. 17, 2020), <https://www.booker.senate.gov/news/press/senators-booker-and-blumenthal-introduce-college-athletes-bill-of-rights>.

<sup>92</sup> *Id.*

<sup>93</sup> This proposed bill will prohibit college athletes from being classified as employees, allow college athletes to be compensated for their NIL, and appoint the Federal Trade Commission to oversee a private, independent party that will create NIL rules and policies. See Press Release, Committee on Commerce, Science, & Transportation, U.S. Senate, Wicker Introduces Bill Establishing a National Framework for Student Athlete Name, Image, Likeness (Dec. 10, 2020), <https://www.commerce.senate.gov/2020/12/wicker-introduces-bill-establishing-a-national-framework-for-student-athlete-name-image-likeness>.

Compensation Act of 2021,<sup>94</sup> the College Athletes Right to Organize Act,<sup>95</sup> and the College Athlete Economic Freedom Act.<sup>96</sup> While these NIL proposals are helpful for setting a national standard for NIL, the NCAA may not agree with every provision of each of these proposals.<sup>97</sup> The NCAA has lobbied Congress to introduce bills or change already-introduced bills in its favor in hopes of getting federal legislation that will solve any NIL issues.<sup>98</sup>

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<sup>94</sup> This proposed bill was introduced by Senator Jerry Moran and provides that athletes will not be considered employees, establishes a uniform set of federal NIL rules, creates a corporation to oversee and implement NIL policies, allows athletes to transfer schools once without penalty, and requires universities to cover healthcare costs relating to athletics. *See* Press Release, Jerry Moran, U.S. Senator for Kansas, Sen. Moran Introduces Bill to Establish a Federal Standard for Student Athletes to Receive Compensation for Their Name, Image and Likeness (Feb. 24, 2021),

<https://www.moran.senate.gov/public/index.cfm/2021/2/sen-moran-introduces-bill-to-establish-a-federal-standard-for-student-athletes-to-receive-compensation-for-their-name-image-and-likeness>.

<sup>95</sup> This proposed bill was introduced by Senators Chris Murphy and Bernie Sanders. It classifies athletes as employees and allows them to unionize to negotiate with the regional conferences and NCAA. *See* Ray Glier, *Chris Murphy and Bernie Sanders Introduce Senate Bill That Would Allow College Athletes to Unionize*, FORBES (May 27, 2021, 11:50 AM), <https://www.forbes.com/sites/rayglier/2021/05/27/sen-chris-murphy-sen-bernie-sanders-introduce-bill-that-would-allow-college-athletes-to-unionize/?sh=4a30083c5e8d>.

<sup>96</sup> This proposed bill was introduced in the Senate by Senator Chris Murphy and in the House by Representative Lori Trahan. It gives “athletes broad rights, including virtually unrestricted access to earning NIL income in individual and group NIL agreements.” *See* Andrew Zimbalist, *The College Athlete Economic Freedom Act Proposed in Congress Is a Step Forward on NIL Rights*, FORBES (Feb. 7, 2021, 1:20 PM), <https://www.forbes.com/sites/andrewzimbalist/2021/02/07/the-college-athlete-economic-freedom-act-proposed-by-senator-chris-murphy-d-ct-and-congresswoman-lori-trahan-d-ma-is-a-step-forward/?sh=13f9299e2bbd>.

<sup>97</sup> For example, the NCAA criticized the College Athletes Rights to Organize Act saying that it would “undercut the purpose of college: earning a degree.” *See NCAA Statement on Murphy-Sanders Bill*, NCAA (May 27, 2021, 1:05 PM), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-murphy-sanders-bill>.

<sup>98</sup> The NCAA spent \$480,000 on lobbying Congress for NIL legislation in 2020 and will likely spend a similar amount this year. Of note, the Power Five NCAA conferences spent \$1.73 million combined on lobbying Congress for NIL legislation in 2020. *See* Ben Nuckols, *By the Numbers: Federal Lobbying by NCAA, Power Five in 2020*, ASSOCIATED PRESS (Jan. 26, 2021), <https://apnews.com/article/lobbying-college-sports-770ac6e29e6b3e3a64350fe2375a69d0>.

The NCAA's tax-exempt status depends upon its amateurism principle.<sup>99</sup> The NCAA's tax-exemption under § 501(c)(3) requires it to foster amateur athletics, not professional athletics.<sup>100</sup> To qualify under § 501(c)(3) as tax-exempt, an organization must pass two tests.<sup>101</sup> This analysis explores how the NCAA fares under both tests prior to implementing its interim NIL policy, under its interim NIL policy, and under its new constitution. Additionally, it will discuss whether the IRS can revoke the tax-exempt status of the NCAA under the interim NIL policy and the new constitution. Lastly, it will explore potential solutions for the NCAA to maintain its tax-exempt status despite permitting NIL monetization for college athletes.

### III. THE NCAA QUALIFIED AS A TAX-EXEMPT ORGANIZATION PRIOR TO IMPLEMENTING ITS INTERIM NIL POLICY BUT WILL NOW LIKELY FAIL TO QUALIFY UNDER ITS NEW NIL POLICY AND CONSTITUTION.

For an organization to be tax-exempt under § 501(c), it must pass two tests—the operational test and the organizational test.<sup>102</sup> Under the operational test, an entity must “operate solely for one of the exempted purposes defined in § 501(c)(3).”<sup>103</sup> Under this test, an organization can operate a business as long as the business is furthering the purpose of the organization and its reason for exemption.<sup>104</sup> To determine whether the exempt organization's purpose is being furthered, “all of the circumstances must be considered, includ[ing] the size and the extent of the trade or business and the size and extent of the activities which are in furtherance of one or more exempt purposes.”<sup>105</sup> Hence, this test focuses on the actual activities of the organization rather than its underlying charter.<sup>106</sup> An

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<sup>99</sup> See Benjamin Kurrass, Comment, *The Swelling Tide of Commercialized Amateur Athletics: How Growing Revenues Have Called Public Attention to the NCAA and Its Member Universities' Tax-Exempt Status*, 27 JEFFREY S. MOORAD SPORTS L.J. 285, 288–89 (2020).

<sup>100</sup> See Carlson, *supra* note 50, at 169–70.

<sup>101</sup> Treas. Reg. § 1.501(c)(3)-1(a)(1) (2021).

<sup>102</sup> *Id.*

<sup>103</sup> See Kurrass, *supra* note 99, at 308.

<sup>104</sup> *Id.* at 308–09. See also Treas. Reg. § 1.501(c)(3)-1(c)(1) (2021) (“An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3).”).

<sup>105</sup> Kurrass, *supra* note 99, at 309 (quoting Treas. Reg. § 1.501(c)(3)-1 (2017)).

<sup>106</sup> See *The Organizational Test Under IRC 501(c)(3)*, INTERNAL REVENUE SERV., <https://www.irs.gov/pub/irs-tege/eotopic85.pdf> (last visited Oct. 10, 2021).

organization is not exempt if the organization (1) operates as an “action organization,” (2) engages in private inurement, (3) engages in private benefits, or (4) operates a business not in furtherance of its purpose.<sup>107</sup>

Under the organizational test, an organization must meet “certain organizational technicalities” to be properly classified as a charitable organization.<sup>108</sup> This test focuses on the contents of the organization’s underlying charter.<sup>109</sup> To pass this test, the organization must establish in its charter that it is organized exclusively for an exempt purpose.<sup>110</sup> An organization is created for an exempt purpose when its charter “limit[s] its purposes to one or more exempt purposes and do[es] not expressly empower it to engage . . . in activities . . . [that] are not in furtherance of one or more exempt purposes.”<sup>111</sup> When the organization creates its purpose, it must ensure that the purpose is not broader than those exempted in § 501(c), though it can be more specific.<sup>112</sup> The failure of an organization to meet both the operational and organizational tests indicates that the organization will not be exempt.<sup>113</sup> Thus, when the organizational charter is weak, an organization’s tax-exempt status cannot be established even if its operations conform with the statute. Further, when the organization’s operations do not conform to the statute, its tax-exempt status cannot be established solely by the organizational charter.<sup>114</sup>

*A. The NCAA Passed Both § 501(c) Tests Prior To Implementing Its Interim NIL Policy, However, It Is Likely the NCAA Does Not Pass At Least One of the § 501(c) Tests Under Its Interim NIL Policy and New Constitution.*

1. The NCAA passed the § 501(c) operational test prior to implementing its interim NIL policy.

The NCAA’s past and current activities must be examined under the operational test. An organization will fail the operational test when it (1)

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<sup>107</sup> See John D. Colombo, *The NCAA, Tax Exemption, and College Athletics*, 2010 U. ILL. L. REV. 109, 114-15 (2010); Treas. Reg. § 1.501(c)(3)-1(c) (2021); Carlson, *supra* note 50, at 166.

<sup>108</sup> *Id.*; see also Kurrass, *supra* note 99, at 307.

<sup>109</sup> See *The Organizational Test Under IRC 501(c)(3)*, *supra* note 106.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See Treas. Reg. § 1.501(c)(3)-1 (2021).

<sup>114</sup> See *The Organizational Test Under IRC 501(c)(3)*, *supra* note 106.

operates as an “action organization,” (2) engages in private inurement, (3) engages in private benefits, and (4) operates a significant amount of commercial business not in furtherance of its purpose.<sup>115</sup>

When the NCAA outlawed NIL, it did not fail the operational test.<sup>116</sup> The NCAA was not an “action organization” because a substantial portion of its activities were not related to lobbying for legislation or campaigning for members of Congress.<sup>117</sup> For the NCAA to have engaged in private inurement, its “net earnings [must have] manifest[ed] in whole or part to the benefit of private individuals.”<sup>118</sup> The NCAA could have been engaging in private inurement via payment of salaries exceeding the current fair value.<sup>119</sup> Traditionally, however, the IRS has refused to apply the private inurement doctrine to the NCAA, so the NCAA did not fail the operational test with regards to private inurement.<sup>120</sup> An organization provides private benefits when “it confers [an] excessive benefit to parties outside of the defined charitable class.”<sup>121</sup> It is questionable whether the NCAA met this requirement prior to NIL monetization, as its television and streaming contracts and pseudo-professional atmosphere gave benefits to external parties such as television providers and professional sports leagues.<sup>122</sup> Traditionally, however, as with the private inurement doctrine, the IRS has refused to apply the private benefits doctrine to the NCAA.<sup>123</sup> Thus, the NCAA did not fail the operational test under this doctrine prior to NIL monetization.

Lastly, the organization cannot engage in excessive commercial activities, or it will lose its tax-exempt status, even if it is engaging in a substantial amount of exempt activities.<sup>124</sup> Under this element, no more than an “insubstantial part” of the NCAA’s activities can be unrelated to its

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<sup>115</sup> See Treas. Reg. § 1.501(c)(3)-1(c) (2021); Carlson, *supra* note 50, at 166; Colombo, *supra* note 107, at 114-15.

<sup>116</sup> See Carlson, *supra* note 50, at 167.

<sup>117</sup> An “action organization” is one that strongly advocates for or against legislation and that supports political campaigns, which is something the NCAA does not do. See Treas. Reg. § 1.501(c)(3)-1(c)(3) (2021).

<sup>118</sup> See Carlson, *supra* note 50, at 166.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 166-67.

charitable and tax-exempt purpose.<sup>125</sup> While the IRS has previously determined that college athletics are exempt under the commercial activities portion of the operational test, the NCAA has not been subject to such a determination.<sup>126</sup> However, the NCAA distributes ninety-six percent of its commercial profits to its members, which means that, prior to the NIL changes, its commercial activities were in support of its purpose of advancing amateur sports, and, as a result, the NCAA was not invalidated under the fourth provision.<sup>127</sup>

2. The NCAA passed the § 501(c) organizational test prior to implementing its interim NIL policy.

Before § 501(c) was amended in 1976 to add “foster[ing] national or amateur sports competition” as a charitable purpose, the NCAA would have failed the organizational test and would not have been automatically considered an exempt organization.<sup>128</sup> Traditionally, only organizations that operated for a religious, charitable, educational, or other listed purpose were protected under § 501(c).<sup>129</sup> The NCAA did not automatically fall under any of these listed purposes, but came closest to having an educational purpose.<sup>130</sup> However, the NCAA’s status as an educational program was precarious because it did not instruct or train any individuals.<sup>131</sup> The NCAA’s position was solidified in 1976 when its *prima facie* charitable purpose was established with a Congressional amendment that added “foster[ing] national or international amateur sports competition” as a charitable purpose.<sup>132</sup> Thus, beginning in 1976 and until it allowed NIL, the NCAA clearly met the charitable purpose portion of the organizational test and met this purpose until NIL policies became effective.

Under the tax code, there are specific rules for organizations like the NCAA.<sup>133</sup> The special rules for qualified amateur sports organizations state

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<sup>125</sup> However, neither the IRS or the judicial system has defined what is more than an insubstantial part. *Id.* at 167.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Colombo, *supra* note 107, at 118; see also 26 U.S.C. § 501.

<sup>129</sup> See Treas. Reg. § 1.501(c)(3)-1 (2020).

<sup>130</sup> Colombo, *supra* note 107, at 118.

<sup>131</sup> See *id.*; Treas. Reg. § 1.501(c)(3)-1 (2020).

<sup>132</sup> See Carlson, *supra* note 50, at 160.

<sup>133</sup> See Kurrass, *supra* note 99, at 308. For the statutory rules surrounding tax exemption for amateur sports organizations, see 26 U.S.C. § 501 (2020).

that the rules preventing providing equipment or athletic facilities do not apply,<sup>134</sup> and that these organizations remain qualified amateur sports organizations if the organizations are local in scale.<sup>135</sup> To be a qualified amateur sports organization, the organization must be “organized and operated exclusively to foster national or international amateur sports competition.”<sup>136</sup> The NCAA met the definition of “qualified amateur sports organization” prior to implementing its interim NIL policy because it was adhering to its main stated purpose, which was to maintain the separation between amateur and professional athletics.<sup>137</sup> Thus, the NCAA passed the organizational test under § 501(c) prior to implementing its NIL policy because it had a prima facie charitable purpose and met the special rules required for its organization type.

3. The NCAA is unlikely to pass the § 501(c) operational test under its interim NIL policy and new constitution.

With the new interim NIL policy and new constitution, the NCAA does not fare as well under the operational test. The NCAA is still not an “action organization” as the changes in NIL do not increase its political activities. Additionally, the NCAA is not engaged in private inurement. Further, the NCAA is not engaging in excess commercial activity as its profits will still be distributed to member universities even with the new NIL rights. However, the NCAA may be engaging in private benefits.

With the new NIL changes, the NCAA’s annual profit distribution could be excessive benefits because the collegiate athletic programs are arguably outside of the charitable class as it no longer provides amateur sports. With the new NIL policy, NCAA member institutions are running programs similar to those of professional athletics because student athletes are receiving thousands of dollars in external endorsements.<sup>138</sup> As a result, when the NCAA gives excessive benefits to these member universities in the form of payouts from television contracts or tournament revenue, it may be giving an excessive benefit to programs outside of its charitable class.

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Kurrass, *supra* note 99, at 308; NCAA MANUAL, *supra* note 5.

<sup>138</sup> *See* Kenyon, *supra* note 35.

With the new constitution, the NCAA has seemingly given up on the principle of amateurism by not including it in the constitution.<sup>139</sup> In fact, the new constitution allows for NIL monetization and only mentions that athletes cannot be paid to participate in the sport.<sup>140</sup> This creates an even stronger argument for the IRS that the NCAA is not fostering amateur sports, but is instead giving excessive benefits to the universities. With the NCAA relenting on defining its sports as amateur within its constitution and with the increasing similarities between professional and collegiate sports, it is hard to say that the member universities are fostering amateur athletics and, thus, these universities will likely be outside of the NCAA's charitable class under the new NCAA constitution. Therefore, the argument will be that the NCAA is giving excessive benefits to those outside of its charitable class and is unable to pass the operational test with its interim NIL policy or with its new constitution. However, the IRS has historically refused to apply this doctrine to the NCAA,<sup>141</sup> so there will not be any potential operational test failures under this doctrine unless the IRS changes its long-held position.

4. The NCAA likely does not pass the § 501(c) organizational test under its interim NIL policy or constitution.

With the new NIL changes, it is questionable whether the NCAA has a *prima facie* charitable purpose under § 501(c) because the NCAA is arguably no longer fostering amateur sports competition and likely would not meet the requirements for a "qualified amateur sports organization."<sup>142</sup> The line between amateur and professional athletics is typically separated by compensation.<sup>143</sup> With the addition of NIL compensation for NCAA athletes, there is little to differentiate a professional league and the NCAA besides a salary<sup>144</sup> and even then some argue that student athletes are receiving salaries in the form of scholarships, food, and housing benefits.<sup>145</sup> In fact, the NCAA President admits that the current NIL policy has the

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<sup>139</sup> See discussion *supra* Section II.B.

<sup>140</sup> See Memorandum from Robert M. Gates, *supra* note 80.

<sup>141</sup> See Colombo, *supra* note 107, at 114-15; Treas. Reg. § 1.501(c)(3)-1(c) (2021).

<sup>142</sup> See 26 U.S.C. § 501.

<sup>143</sup> See *Amateur vs. Professional Athletes*, USLEGAL, <https://education.uslegal.com/amateur-athletics/amateur-vs-professional-athletes/> (last visited Jan. 24, 2021).

<sup>144</sup> See discussion *supra* Section II.B.

<sup>145</sup> *Id.*



potential to make college athletes seem like professionals.<sup>146</sup> Prior to implementing its interim NIL policy, the NCAA's charitable purpose of fostering amateur athletics was already questioned because of the enormous businesses of college basketball and football.<sup>147</sup> This questioning was refuted by the argument that nonrevenue sports such as swimming or tennis are still considered amateur athletics even with NIL allowed.<sup>148</sup> However, NIL rules are not limited to revenue sports, and while this interim policy does not change the revenue of the sport itself, it does change the availability of revenue streams for the athletes involved in them.<sup>149</sup>

When college athletes can accept money based on their reputation, amateurism is called into question. With NIL monetization, it is unlikely that the NCAA is "foster[ing] national or amateur sports competition" or meeting the special conditions required under the organizational test. While the NCAA's stated purpose is to maintain the line between intercollegiate and professional athletics, this interim policy makes that purpose hard to obtain.<sup>150</sup> That purpose is even more difficult to achieve with the removal of the word "amateur" from the NCAA's new constitution and the explicit allowance of NIL monetization.<sup>151</sup> Likely, the only argument that the NCAA has to support that it is still fostering amateur athletics under its new constitution is that the NCAA forbids paying athletes for their participation in sports. However, this is likely not enough to classify college athletics as amateur sports given their similarities to professional sports via monetization. Therefore, the NCAA likely does not pass the organizational test with its interim NIL monetization policy nor with its new constitution.

*B. The IRS Could Respond to Changes in the NCAA's Amateur Status by Revoking Its Tax-Exempt Status.*

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<sup>146</sup> See *A Level Playing Field: College Athletes' Rights To Their Name, Image, And Likeness Before H. Comm. on Energy and Com.*, 117th Cong. (2021) (statement of Mark Emmert, President, NCAA).

<sup>147</sup> Colombo, *supra* note 107, at 118; *infra* notes 189, 190.

<sup>148</sup> Colombo, *supra* note 107, at 119.

<sup>149</sup> See Dellenger, *supra* note 58.

<sup>150</sup> See Kurrass, *supra* note 99, at 308; Ronald Katz, *Ending the NCAA's Tax Exemption Should Be a Slam Dunk*, THE NATION (Mar. 27, 2019) ("[I]f the entertainment provided by the NCAA is not provided by amateurs, it is really no different from entertainment provided by media companies like ESPN or Amazon, which are not tax exempt."), <https://www.thenation.com/article/archive/march-madness-tax-exemption-inequality/>.

<sup>151</sup> See Higgins, *supra* note 78.

1. The IRS could find the NCAA ineligible for tax exemption under the organizational test.

If the IRS determines that the NCAA is no longer an organization that is “foster[ing] national or amateur sports competition[s]”<sup>152</sup> under the NCAA’s interim NIL policy or new constitution, the NCAA will lose the benefit of § 501(c) and would be subject to federal income taxes. Considering the NCAA made \$1.2 billion in the 2018-2019 fiscal year, the new burden of federal income taxes would be a significant expense.<sup>153</sup> With a set rate of twenty-one percent, federal income taxes can be costly.<sup>154</sup> In the past, the IRS determined the NCAA was tax-exempt,<sup>155</sup> but previously exempt business transactions including the sale of broadcasting rights would be subject to taxation if that status were revoked.

The IRS could elect not to take any action against the NCAA and allow the NCAA to remain tax-exempt under § 501(c), but the IRS will face challenges in justifying its classification of the NCAA under the current NIL policy. The IRS defines an amateur athlete as “an athlete who meets the eligibility standards established by the national governing body (NGB) for the sport in which he or she competes.”<sup>156</sup> This definition comes from the Amateur Sports Act of 1978 and was adopted by the IRS.<sup>157</sup> Typically, the IRS defers to NGBs when defining an amateur.<sup>158</sup> While the NCAA is not an NGB, the IRS will likely defer to the NCAA’s definition of amateur.<sup>159</sup>

The problem is that the NCAA’s interim NIL policy conflicts with its

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<sup>152</sup> See 26 U.S.C. § 501.

<sup>153</sup> See Steve Berkowitz, *NCAA Built Tournament Safety Net of Nearly \$400 Million and Then Spent It*, USA TODAY (Mar. 16, 2020), <https://www.usatoday.com/story/sports/2020/03/14/march-madness-ncaa-built-tournament-safety-net-then-spent/5038279002/>.

<sup>154</sup> See I.R.S. PUB. NO. 542, CORPORATIONS (Jan. 2019), <https://www.irs.gov/publications/p542>. These taxes could become even more costly as the federal tax rate for corporations may be raised to twenty-eight percent. See Erica York & Garrett Watson, *25 Percent Corporate Income Tax Rate Would Make U.S. Above Average Compared to Peers*, TAX FOUND. (May 4, 2021), <https://taxfoundation.org/25-percent-corporate-income-tax-rate/>.

<sup>155</sup> See Fitt, *supra* note 31 (“When the tax-exempt goal of the organization is to promote awareness of and participation in amateur sports, the IRS has ruled that the sale of broadcasting rights to those amateur sports events is not taxable.”).

<sup>156</sup> See Carlson, *supra* note 50, at 171.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

traditional definition of amateurism. Under the NCAA's traditional rules, an amateur cannot "enter into an agreement with an agent."<sup>160</sup> An "agent," per the NCAA bylaws, is anyone who "represents or attempts to represent an individual for the purpose of marketing his or her athletics ability or reputation for financial gain."<sup>161</sup> With the interim provision allowing for an athlete to enter into an agreement with a "service provider,"<sup>162</sup> the NCAA is violating its most recent definition of amateurism. The NCAA attempts to combat this by simply stating that entering into these types of agreements will not ruin athlete eligibility.<sup>163</sup> However, the NCAA is reversing course on its own definition of amateurism, likely only because it wishes to retain its lucrative nonprofit status. The IRS could revoke this status, because without the NCAA changing the definition of amateurism to accommodate NIL, the NCAA would not be fostering amateur athletics according to its own rules. The IRS could decide that allowing NIL elevates NCAA athletes to professional status, thereby disregarding the NCAA's attempts to maintain amateurism through changing the bylaws.

Even if this definition did not exist, the IRS could still act because the NCAA has blurred the line between professional and amateur sports to the point where it may no longer be considered a tax-exempt organization.<sup>164</sup> Under the new NIL policy, athletes are paid for their NIL, which is only valuable because they play a college sport. The demarcation between a professional athlete and college athlete is almost nonexistent except for the professional athlete's ability to enter into all sponsorship deals virtually without restriction and also receive a salary for their participation on a team.<sup>165</sup> When an athlete plays professionally, they get more exposure and opportunities for sponsorship, but some of the top college athletes are getting those same opportunities.<sup>166</sup> Allowing the NCAA to remain tax-exempt as it acts as a pseudo-professional league that likely does not pass the organizational test can set a dangerous precedent because other organizations may attempt to skirt the tax-exemption requirements in a similar way. This

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<sup>160</sup> See NCAA MANUAL, *supra* note 5.

<sup>161</sup> *Id.* at 43.

<sup>162</sup> See *Name, Image and Likeness Policy: Question and Answer*, *supra* note 62.

<sup>163</sup> See *Cycle of Individual Engaged in NIL Activities*, *supra* note 62.

<sup>164</sup> See discussion *supra* Section II.A.

<sup>165</sup> In fact, the NFL has been loosening the few restrictions it has. See Mark J. Burns, *NFL Relaxes Policy on Alcohol Sponsorships*, MORNING CONSULT (May 29, 2019, 6:36 PM), <https://morningconsult.com/2019/05/29/nfl-relaxes-policy-on-alcohol-sponsorships/>.

<sup>166</sup> See Dellenger, *supra* note 58.

could result in a plethora of organizations claiming to be tax-exempt when these organizations are not tax-exempt at their core.

While IRS precedent is to defer to the definitions of amateur promulgated by NGBs, the IRS is not bound to this deference.<sup>167</sup> A significant amount of time has passed since the tax code was amended to name the NCAA a tax-exempt organization.<sup>168</sup> The organization has gone through significant changes and is arguably no longer complying with the policy that previously granted them the tax exemption.<sup>169</sup> In fact, in 2006, Congress questioned the NCAA's tax-exempt status.<sup>170</sup> In a letter sent to the president of the NCAA, the House Ways and Means Committee questioned whether college athletics were fulfilling their exempt charitable purpose.<sup>171</sup> One representative said that "the exempt purpose of intercollegiate athletics ... is less apparent, particularly in the context of major college football and men's basketball programs."<sup>172</sup> Additionally, a Circuit Court has called their tax exempt status questionable,<sup>173</sup> something the Supreme Court recently reiterated.<sup>174</sup>

Further, under the new constitution, the word "amateur" is nowhere to be found.<sup>175</sup> Thus, it may be even easier for the IRS to revoke the NCAA's nonprofit status because the NCAA's most important document, its constitution, will not even refer to "foster[ing] national or . . . amateur sports

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<sup>167</sup> See Carlson, *supra* note 50, at 171.

<sup>168</sup> *Id.* at 165.

<sup>169</sup> See Kisska-Schulze, *supra* note 8 ("It has been argued that the NCAA and its member institutions engage in activities not generally affiliated with nonprofit organizations, including the imposition of politically correct standards of tolerance on member organizations and entering into billion dollar contract agreements."); Robinson, *supra* note 35.

<sup>170</sup> See Wieberg, *supra* note 170 (In the letter, the committee "points to the lucrative television contract, coaches' escalating salaries and schools' 'state-of-the-art' facilities, and questions college athletics' connection to higher education.").

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 101 n.22 (1984) ("[T]he economic significance of the NCAA's nonprofit character is questionable at best . . . [T]he NCAA and its member institutions are in fact organized to maximize revenue . . .").

<sup>174</sup> Alston, 141 S. Ct. 2159.

<sup>175</sup> Higgins, *supra* note 78; See also NCAA Constitution, Draft (Dec. 6, 2021), [https://naaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov\\_DraftConstitutionDec6.pdf](https://naaorg.s3.amazonaws.com/governance/ncaa/constitution/NCAAGov_DraftConstitutionDec6.pdf) (last accessed Feb. 8, 2022).

competition[s].”<sup>176</sup> The NCAA would have difficulty defending its tax-exempt status solely on the basis that it promotes amateur sports when the NCAA would no longer utilize amateurism in its constitution. It also suggests that because amateur would be removed from the NCAA constitution after years of use that even the NCAA may not no longer believe it is promoting amateur athletics. If the NCAA did believe amateurism was still fundamental to its sports, it surely would have included amateurism and updated the definition in the constitution to account for NIL changes. Further, with the deletion of the definition of amateurism, there is no definition from a national governing body that the IRS can defer to. Even if the IRS chose to defer to the old definition, the NCAA is violating it. Thus, the IRS could challenge the NCAA’s charitable purpose and underlying tax-exempt status based on amateurism under the interim NIL policy and under the new constitution.

## 2. The IRS Could Apply the Private Benefit Doctrine and Potentially Find the NCAA Ineligible for Tax Exemption Under the Operational Test.

The IRS could also find the NCAA to fail the operational test if it applies the private benefit doctrine to the organization. Under the NIL policy or the new constitution, it would be difficult for the NCAA to argue that its organization is not giving private benefits to the universities themselves. While these universities were members of the NCAA’s protected class prior to the interim NIL policy, the addition of NIL rights makes these universities ineligible as entities that promote amateur sports because their athletes would be so similar to professional athletes. Thus, the NCAA giving the universities a portion of its profits would be considered an excessive benefit to members outside of their protected class, with the class being athletic departments organizing amateur sports. Further, specifically under the new constitution, these universities would no longer be promoting sports under a constitution that classifies these activities as amateur, making them arguably outside of the charitable class in that situation, as well. Therefore, if the IRS were to apply the private benefit doctrine, it could render the NCAA ineligible to be tax-exempt because the NCAA would likely fail the operational test with its interim NIL policy and with its new constitution.

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<sup>176</sup> See 26 U.S.C. § 501(c)(3), (j)(2).

IV. THE NCAA CAN RESPOND TO CHANGES IN NIL AND A POTENTIAL CHANGE IN TAX STATUS BY LOBBYING CONGRESS OR ALTERING ITS ORGANIZATIONAL STRUCTURE

A. *The NCAA Can Lobby Congress to Create National Legislation that Will Allow for NIL Monetization but also Protect Its Tax-Exempt Status.*

Going forward, the NCAA may try to secure its tax-exempt status by lobbying Congress to create a national solution for the current NIL issues. Nationwide legislation is vital to the NCAA maintaining its tax-exempt status because the legislation can include a carve-out for NCAA to remain a nonprofit even when its athletes are arguably no longer amateurs under the new NIL policy and are not even classified as amateurs under its new constitution. Congress has been actively proposing bills,<sup>177</sup> likely because of college athletics' value to the economy and because of its entertainment value to the country.<sup>178</sup> However, some of the bills that have been proposed do not address the issue of the NCAA's tax-exempt status and give the athletes more rights than the NCAA has proposed.<sup>179</sup> Though the NCAA approves of some bills that have been introduced,<sup>180</sup> it will inevitably want to give input on the final writing. The NCAA wants a restrictive set of NIL rights granted to athletes, while many members of Congress want athletes to

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<sup>177</sup> See discussion *supra* Section II.C.

<sup>178</sup> See Rochelle Olson, *NCAA Final Four Economic Infusion Set at \$143 Million*, STAR TRIB. (Jun. 26, 2019, 7:03 AM), <https://www.startribune.com/ncaa-final-four-economic-infusion-set-at-143-million/511794692/> (“The wrap-up analysis of the economic impact of the NCAA’s Final Four at U.S. Bank Stadium came in Tuesday at \$143 million, about what was predicted before the event.”); Jabari Young, *CBS saw 14% decline in viewers for NCAA men’s basketball championship game, while ratings for women’s title match on ESPN grew*, CNBC (Apr. 6, 2021, 5:54 PM), <https://www.cnbc.com/2021/04/06/ncaa-2021-final-four-championship-ratings-mens-down-14percent-womens-up.html> (finding that there 19 million viewers of the Final Four championship game in 2019, and 22 million viewers in 2017).

<sup>179</sup> See discussion *supra* Section II.C.

<sup>180</sup> The NCAA has reviewed The Fairness in Collegiate Athletics Act and the Student Athlete Level Playing Field Act positively, while maintaining that it wants to work with the bill proponents on the legislation. See *NCAA Statement on Gonzalez-Cleaver Bill*, NCAA (Apr. 26, 2021), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-gonzalez-cleaver-bill-0>; *NCAA statement on Sen. Marco Rubio bill*, NCAA (June 18, 2020), <https://www.ncaa.org/about/resources/media-center/news/ncaa-statement-sen-marco-rubio-bill>.

get a more expansive set of rights. This tension has resulted in members of Congress publicly criticizing the NCAA.<sup>181</sup>

There are many bills that have been introduced about NIL but getting Congress to agree on a particular solution to this high-profile issue will take some time. If the NCAA cannot obtain congressional support, it will be unable to secure equality for players across states if it allows universities in states with less restrictive NIL monetization laws to compete against those with more restrictive laws.<sup>182</sup> Additionally, the NCAA will not be able to secure its tax-exemption status without explicit legislation naming them a nonprofit even when it allows NIL monetization. Without uniform NIL rules, the NCAA faces a loss in power, a loss of its tax-exempt status, and a chaotic patchwork of state legislation-based NIL rules, so Congressional action is crucial and would likely be the best solution to the issues the NCAA faces.

*B. The NCAA Can Restructure into a Private For-Profit Entity, a For-Profit Organization with a Nonprofit Arm, a Benefit Corporation, or a Public Corporation.*

If the NCAA wants to avoid any challenges to its exempt status, it may consider restructuring so that it is no longer a nonprofit entity. Some potential forms the organization can take include a private for-profit entity, a nonprofit with a for-profit arm, a benefit corporation and a public corporation.<sup>183</sup> If the NCAA decides to restructure as a private for-profit entity, it can become a Limited Liability Corporation or a corporation generally.<sup>184</sup> If the NCAA restructures as a corporation, it will be able to engage in third-party business transactions without fear of giving a private benefit under the operational test.<sup>185</sup> However, restructuring the NCAA into a corporate form would expose its income to taxes, which the NCAA would

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<sup>181</sup> See Ross Dellenger, *Congress Members Lambaste NCAA's Vague and Restrictive NIL 'PR Document'*, SPORTS ILLUSTRATED (Apr. 30, 2020), <https://www.si.com/college/2020/04/30/ncaa-nil-changes-congress-reaction>.

<sup>182</sup> See *A Level Playing Field: College Athletes' Rights To Their Name, Image, And Likeness: Hearing Before the Subcomm. on Consumer Prot. and Com. of the H. Comm. on Energy and Com.*, 117th Cong. (2021).

<sup>183</sup> See Ellen M. Zavian & Sathya S. Gosselin, *The Ethical Evolution of the NCAA*, 38 ACC DOCKET 30, 31-37 (Jan. 1, 2020).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

likely be eager to avoid because it would have less funds to distribute to its member schools.

An alternate solution is for the NCAA to restructure as a nonprofit entity with a for-profit arm.<sup>186</sup> To create a for-profit arm, the NCAA would form a corporation that is wholly owned by the NCAA that would operate some of its sports that mirror professional athletics to a greater extent, such as football and basketball.<sup>187</sup> Football and basketball are considered higher revenue NCAA sports.<sup>188</sup> This would give the NCAA a better argument that it is still a nonprofit entity promoting amateur athletics because athletes in its revenue sports will likely profit the most from the new NIL regulations.<sup>189</sup> These revenue sports, like football and basketball, are the ones that resemble professional sports the closest, and thus provide the largest threat to the NCAA's amateurism ideal. This would likely be the NCAA's best option for restructuring because the NCAA could remain tax-exempt for its non-revenue sports and save a significant amount of money in federal taxes with respect to those sports.

If the NCAA were to restructure as a nonprofit entity with a for-profit arm, solely containing its basketball and football programs, there would be some intriguing consequences. Allowing athletes in the for-profit arm to capitalize off their NIL would not affect the tax-exempt status of the NCAA's nonprofit arm because those sports fall under the control of the taxed, for-profit entity that the NCAA would wholly own. Allowing athletes in the nonprofit arm's sports to capitalize off their NIL would likely not affect the nonprofit arm's tax exemption because the non-revenue sports mirror professional leagues to a lesser extent, making a stronger argument that they are amateur in nature even with NIL monetization. These sports tend to get less media attention and, as a result, generate less revenue for the

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<sup>186</sup> One example of a nonprofit entity with a for-profit arm, though unrelated to sports, is the Mozilla Foundation. The Mozilla Foundation, a nonprofit entity, formed a for-profit corporate subsidiary named Mozilla Corporation to handle its Firefox web browser. *See* Issie Lapowsky, *The Social Entrepreneurship Spectrum: Hybrids*, INC. MAG. (May 2011), <https://www.inc.com/magazine/20110501/the-social-entrepreneurship-spectrum-hybrids.html>. As of 2011, the Mozilla Corporation made \$104 million annually compared to the Mozilla Foundation who received \$222,000 annually in charitable donations. *Id.*

<sup>187</sup> *See* Zavian, *supra* note 183, at 31-37.

<sup>188</sup> *See infra* note 190.

<sup>189</sup> On Opendorse, the platform used most by athletes for NIL deals, football players make up 79% of the market share and men's basketball players make up 9.6%. *See* Dellenger, *supra* note 58.



NCAA,<sup>190</sup> meaning the opportunity for sponsorship would be substantially smaller and not like that of professional athletes. Potentially, the NCAA could decide to only allow the sports placed in its for-profit arm to monetize NIL, but the NCAA may face a Title IX claim<sup>191</sup> because all women's sports are coincidentally non-revenue sports<sup>192</sup> and would be placed in the nonprofit arm, which in this situation would not get the same benefit of NIL monetization. Thus, if the NCAA adopts this form it should allow for NIL monetization across the nonprofit and for-profit arms.

Moreover, the NCAA could restructure as a benefit corporation. As of 2022, legislation for benefit corporations had been introduced in forty-one states and passed in thirty-seven states.<sup>193</sup> One feature of a benefit corporation is that it “must pursue a general public benefit... in addition to profit.”<sup>194</sup> The standard for the public benefit that a benefit corporation must provide is measured against an “‘independent’ and ‘transparent’ third party standard.”<sup>195</sup> If the NCAA became a benefit corporation, it would have to designate a charitable purpose and maintain it on an annual basis<sup>196</sup> as well as adhere to other obligations.<sup>197</sup> However, becoming a benefit corporation has no effect on the tax status of a corporation and benefit corporations are taxed like corporations.<sup>198</sup> Becoming a benefit corporation would not provide

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<sup>190</sup> Men's college football makes around \$31 million in revenue on average for NCAA member schools, meaning it makes more than the remaining thirty-five types of college sports' revenue combined together. *See* Gaines, *supra* note 40. Only men's basketball, creating around \$8 million in revenue annually, and ice hockey, creating around \$3 million in revenue annually, come relatively close to football's annual revenue. *Id.* All other sports generate \$1.8 million in revenue or less annually. *Id.*

<sup>191</sup> Under Title IX, athletic programs must give men and women equitable opportunities to compete in sports. *See Gender Equity and Title IX*, NCAA, <https://www.ncaa.org/about/resources/inclusion/gender-equity-and-title-ix> (last visited Dec. 29, 2021).

<sup>192</sup> The highest grossing women's sport is women's basketball, which brings in \$1.8 million in revenue annually. *See* Gaines, *supra* note 40. This is small in comparison to the revenue of men's sports. Also, eight out of the ten NCAA sports with the highest annual loss are women's sports. *See* The Entertainment Strategy Guy, *Where Should the NCAA Look for Growth*, ATHLETIC DIR. U, <https://athleticdirector.u.com/articles/where-should-ncaa-look-for-growth/> (last visited Feb. 27, 2021).

<sup>193</sup> *See State by State Status of Legislation*, BENEFIT CORP., <https://benefitcorp.net/policymakers/state-by-state-status> (last visited Jan. 5, 2022).

<sup>194</sup> *See* Hans Rowhouser et al., *Benefit Corporation Legislation and the Emergence of a Social Hybrid Category*, 57 CAL. MGMT. REV. 5, 16 (2015).

<sup>195</sup> *Id.*

<sup>196</sup> *See* Zavian, *supra* note 183, at 31-37.

<sup>197</sup> *See* FAQ, BENEFIT CORP., <https://benefitcorp.net/faq> (last visited Jan. 30, 2021).

<sup>198</sup> *Id.*

any additional benefit for the NCAA because the NCAA is trying to avoid taxes, but a benefit corporation structure cannot provide a tax-exemption. It would merely have the same effects for the NCAA if it were to restructure as a normal corporation, but with more charitable obligations. Thus, this is likely an unappealing option for the NCAA.

One other potential action the NCAA could take is to restructure as a public corporation. With this model, the NCAA would have shareholders and follow the traditional corporate form.<sup>199</sup> In fact, one NCAA conference, the Pac-12, is considering this restructuring scheme.<sup>200</sup> However, this would open the NCAA to income taxes and make the NCAA answerable to shareholders, both of which the NCAA is likely eager to avoid.

Out of all the potential solutions, congressional action would present the best and simplest solution for the NCAA to remain tax-exempt. Notably, it is the one solution over which the NCAA does not have total control. With congressional action that is in the NCAA's favor, the NCAA would not need to restructure and could appease its student athletes by allowing them to capitalize from their NIL in a way that is consistent with its governance and rules. This would save the NCAA money by helping it avoid taxes and would preserve its reputation with its student athletes. Alternatively, the NCAA could restructure as a for-profit organization with a nonprofit arm. Under this structure, the NCAA could avoid some taxes on its less profitable sports, saving it money, while still maintaining control over its most profitable sports.

## CONCLUSION

New NIL rights for college athletes call the NCAA's purpose of "foster[ing]... amateur athletics"<sup>201</sup> into question. Multiple states have enacted legislation to allow for college athletes to profit from their NIL. The NCAA created an interim NIL policy in response to state legislation and is hoping for a national solution via Congressional legislation. The NCAA would likely not qualify under § 501(c) with the implementation of its

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<sup>199</sup> See Larry E. Ribstein, *Why Corporations*, 1 BERKELEY BUS. L. J. 183, 188-90 (2004).

<sup>200</sup> See Zavian, *supra* note 183, at 37 ("According to reports, the Pac-12 has multiple bids of at least US\$750 million from companies seeking to become equity investors in the conference.")

<sup>201</sup> See 26 U.S.C. § 501.

interim NIL policy or new constitution without a legislative carve-out from Congress as there would be little separating college and professional athletics. If the IRS decides to reexamine the NCAA, the NCAA's income may be subject to federal taxes unless the NCAA is able to restructure or find a federal solution. The NCAA could look to restructure as a private for-profit entity, a for-profit organization with a nonprofit arm, a benefit corporation, or a public corporation, or the NCAA could look to Congress to create legislation that protects its nonprofit status. Out of all the potential solutions for the problem the NCAA is facing with its tax-exempt status, congressional action is ideal because it offers the greatest chance for the NCAA to remain completely tax-exempt. In brief, this Note has explored how new developments in providing NIL rights to college athletes have likely eroded the NCAA's principle of amateurism, which potentially makes the NCAA ineligible for tax exemption under § 501(c).