



The NCAA, at the Division I level, is once again in a state of transition as a result of challenges to the traditional NCAA regulatory system and collegiate sports model exerted by outside entities, including plaintiffs' attorneys, state attorneys general, courts, administrative agencies, and state legislatures who are challenging the NCAA's authority to govern sport and attempting in some cases to establish a new economic relationship between colleges and universities and the athletes who represent them. The collegiate sports model and the regulatory system that governs it were designed with the fundamental principal that college athletics is an avocation and not a vocation, and individuals receive intrinsic value through their involvement in higher education as both students and athletes. The U.S. Supreme Court's 2021 decision in *Alston v. NCAA*, however, reignited the debate regarding the appropriate economic relationship between college athletes and their schools, specifically, whether colleges and universities should share the revenue generated through lucrative television contracts with their athletes and whether college athletes should be employees of colleges and universities. The outside legal and social pressures, exacerbated by

compensation restrictions to account for educational and economic realities so as to include the full cost of attending a university or college. The plaintiffs' request in *White*

On March 5, 2024, the Dartmouth men's basketball student-athletes voted 13-2 to unionize. However, Dartmouth has appealed the decision to the full Board. If Dartmouth is

The Transfer Portal and Name, Image and Likeness (NIL)

The athletics news cycle for the first quarter of 2024 has centered on two things: the transfer portal and college athletes' ability to earn compensation based on the use of their Name, Image and Likeness (NIL), which in some instances appear to go hand in hand based on the current prevalence of some NIL collectives and schools attempting to use NIL to entice athletes to transfer to other athletics programs.

Previously, all Division I student-athletes, regardless of sport, had a free one-time transfer, provided they met the following conditions found in the NCAA Division I Bylaws:

1. The student-athlete has not previously transferred, unless they used the discontinued/non-sponsored sport exception.
2. The student-athlete would have been academically eligible had the student remained at his or her prior institution.

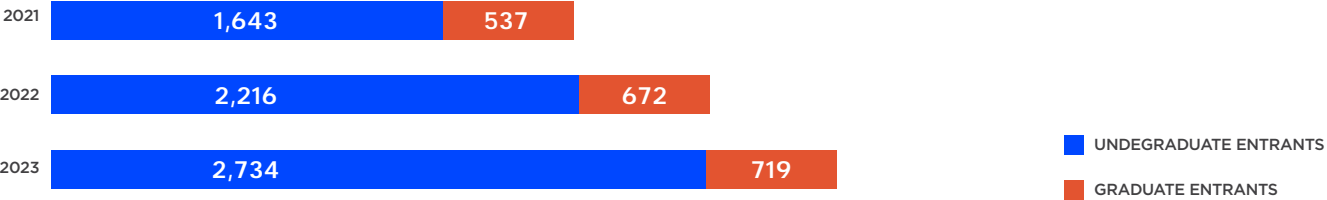
3. The head coach of the institution to which the student-athlete transfers certifies that no contact was made with the student-athlete or any individual associated with the student-athlete without authorization through the notification of transfer process.
4. The student-athlete provided written notification of transfer to the institution during the time period specified for their sport (i.e., "Transfer Portal Window").

As expected, the joy of increased flexibility did not last long. Almost immediately upon establishing a uniform one-time transfer exception, the onslaught of waiver requests for two-time and three-time undergraduate transfers, transfers who missed the Transfer Portal Window, and midyear transfers seeking immediate winter or spring eligibility began.

DIVISION I TRANSFER PORTAL DATA



DIVISION II TRANSFER PORTAL DATA



Source: [A](#), NCAA

In an attempt to explain additional parameters, NCAA transfer waiver guidelines reached an unsustainable length, and member schools, who were not privy to specific personal and protected information of other student-athletes, had difficulty reconciling the waiver granted for Student-A from the waiver denied for Student-B. Then, a few institutions, received one waiver denial too many.

After the NCAA denied the transfer waiver appeals of several men's basketball student-athletes, from West Virginia, Miami of Ohio, and Cincinnati, several Attorneys General filed suit in U.S. District Court for the Northern District of West Virginia alleging that (1) NCAA transfer rules restrain the labor market of Division I talent, and restrain student-athletes from freely moving to improve their economic opportunity, personal growth, and well-being; and (2) the NCAA Rule of Restitution is unlawful.

Ohio Attorney General Dave Yost commented, "The rule is riddled with so many exceptions that the NCAA cannot plausibly substantiate its prior justifications...We're challenging it in order to restore fairness, competition and the autonomy of college athletes in their educational pursuits."

The District Court granted a 14-day Temporary Restraining Order (TRO), finding the NCAA's Transfer Eligibility Rule likely violates Section 1 of the Sherman Act. Five days later, on December 18, plaintiffs and the NCAA agreed to convert the TRO into a preliminary injunction, and the NCAA agreed to suspend enforcement of its transfer restrictions for all student-athletes seeking to transfer and be eligible for the 2024-25 academic year.

In mid-January 2024, the Department of Justice joined 10

and other third parties from offering inducements to students to play for a particular university, and establish disclosure requirements. However, legislatures seem uninterested in participating in the NCAA's whack-a-mole approach to governance. Instead, they want to see comprehensive legislation that includes guaranteed rights to student athletes, including health and safety measures and long-term protections. With an upcoming election and a number of domestic and international issues to manage, few are optimistic that the NCAA's legislative issues will be addressed by Congress any time soon. As a result, it will be up to the individual institutions, conferences, and NCAA national office to figure out how to make this work. The NCAA subsequently announced it would pause NIL investigations until further notice. For all the months of controversy regarding the nuances of NIL rules, Division I membership seemed to unanimously agree on two NIL concepts: no pay-for-play and no recruiting inducements.

Title IX: College Sports Equity Conscience

Contrary to popular belief that Title IX was passed to create gender equality in sports, the 1972 Title IX statute does not reference athletics programs. Instead, athletics program requirements are specifically addressed in a 1975 rule.

Title IX prohibits discrimination in educational programs or activities on the basis of “sex.” Title IX applies to all institutions that receive Federal Student Aid funds as well as all their programs and activities.

It is important to note that while the courts decide issues of antitrust and employment status, which could result in billions of dollars in damages or a never-before-seen compensation model, it will be up to individual institutions to determine how to comply with Title IX. Justice Kavanaugh, in his concurring opinion in *Alston*, acknowledged the complexities of difficult policy questions such as how “any compensation regime would

comply with Title IX.” However, the Courts will not be the ones to answer such questions. They will, however, be called upon later to further address cases of non-compliance.

The current and future budgetary strain has campuses all over the country attempting to determine how they will not only survive but also be competitive long-term and ensure that Olympic sports remain viable. One commonly discussed solution is, unfortunately, cutting sports. It should be noted that according to the Office for Civil Rights, “[N]othing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and the elimination of teams is a disfavored practice. Because the elimination of teams diminishes the opportunities for students who are interested in participating in athletics instead of enhancing opportunities from discrimination, it is contrary to the spirit of Title IX” (Dear Colleague Letter from the Assistant Secretary

EQUITABLE PARTICIPATION

- Participation opportunities that are “substantially proportionate” to their respective full-time undergraduate enrollments; or
- “History and continuing practice of program expansion” for the underrepresented gender; or
- “Full and effective” accommodation of the underrepresented gender’s interests and abilities.

EQUITABLE FINANCIAL SUPPORT

Financial support should be substantially proportionate to the participation rate of each gender (i.e., within one percentage point). For example, if female athletes make up 46% of an institution’s athletic participants, then the Office for Civil Rights expects that the female athletic scholarship budget would be within 45%-47% of the total discussed

entitled “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.”). However, if schools may one day be required to share revenue or pay student-athletes minimum wage, it is hard to imagine a world where they can all maintain]TJyo16-sgmda canOa wDivis of I mols

NCAA: Don't Bet On It

As if the current legal and regulatory landscape of college sports was not already challenging enough, legalized and online sports gambling has created yet another risk area for institutions, athletes and the integrity of sporting events. Sports gambling is legal in more than 30 states and contributes hundreds of millions of dollars in tax revenue for those states. Positive impacts on state revenues result in positive impacts on state budgets and therefore state school budgets, regardless of whether the state sports gambling law includes an institutional distribution specifically from gambling-related tax revenue. Thus, even those who have no interest in placing wagers on March Madness are motivated to promote sports gambling.

Scandals and harm to students are the quickest ways to get legislative flexibility taken away. The NCAA, the member schools, state legislatures, and the public all seem to agree that protecting the integrity of the game and the health and safety of student-athletes are priorities. How that protection is managed is the sticking point.

CAA E

The NCAA rules prohibit student-athletes, coaches, and staff—at any level—from betting on professional, collegiate, or amateur sports in which the NCAA conducts a championship. This means bets cannot be placed on MLB, NBA, NFL, or NHL games, as well as fencing, beach volleyball, and field hockey, among others.

In November 2023, the NCAA adjusted the guidelines for student-athlete reinstatement cases in which student-athletes wager on other teams at their own schools.

In situations where a student-athlete engages in any sports wagering activity involving their own institution, other than their own team, the committee directed the student-athlete reinstatement staff to require the student-athlete participate in sports wagering rules and prevention

education and begin its withholding analysis at sit-one-season of competition and be charged with the use of one season of competition.

In situations where a student-athlete engages in activities designed to influence the outcome or integrity of an intercollegiate contest or in an effort to affect win-loss margins (“point shaving”), who participates in any sports wagering activity involving the student-athlete’s own team at their institution, or who knowingly provides information to individuals involved in or associated with any type of sports wagering activities, the committee directed the reinstatement staff to begin its withholding analysis at permanent loss of eligibility in all sports.

From an NCAA enforcement standpoint, while NIL investigations may have been paused, sports gambling infractions are still being processed.

In July 2023, the Associated Press reported that the NCAA found 175 infractions of its sports betting-policy since 2018, and that at the time, there were 17 active investigations. The following recent public infractions cases included Level I violations of coaches engaging in sports wagering activities:

- Feb. 1, 2024, University of Alabama Negotiated Resolution: University of Alabama baseball head coach violated sports wagering and ethical conduct legislation when he provided insider information to an individual he knew to be betting on an Alabama baseball game. The head coach was fired and issued a 15-year show-cause order.
- Sept. 28, 2023, U.S. Air Force Academy Negotiated Resolution: U.S. Air Force Academy men’s golf head coach violated sports wagering and ethical conduct legislation when he placed bets on Air Force’s football game. The head coach was fired and issued a five-year show-cause order.

The confluence of access and opportunity, coupled with a renewed focus on impermissible gambling and monitoring by schools of the same may result in additional NCAA infractions related to gambling. However, it remains unclear to what extent the NCAA will hold institutions culpable for the actions of coaches or individual student-athletes related to gambling. Certainly, education and some level of monitoring remain a requirement in order for colleges and universities to demonstrate control over its programs, and that remains true as it pertains to gambling.

C

In March 2023, an [B](#) [E](#) that it considers threats to athletes on social media to be a growing issue, and that “In the five years since legalized sports betting began spreading across the country, student-athletes have reported regularly receiving abusive messages from gamblers on social media, including death wishes and threats of violence.”

From a regulatory perspective, college and university leaders need to decide and communicate where they want to be with respect to sports wagering, if it is permitted by state law. Increased protection for student-athletes likely means more restrictions for individuals outside of athletics who have frequent interactions with student-athletes (e.g., professors, tutors, other non-athlete students). Increasing restrictions for a wider target population also decreases the ability to effectively enforce those restrictions. That said, it is important to align athletics policies related to sports gambling with any institutional student code of conduct policies, applicable state law(s) and NCAA rules. This includes having clear and consistent enforcement and penalty structures.

Conclusion: Where does the NCAA go from here?

The NCAA and its member schools appear to be on the losing side of all recent cases challenging the ability for the NCAA or its member schools to regulate student-athlete's eligibility to compete. Within the last few months, a District Judge in New Jersey granted a TRO allowing a student-athlete to count a withholding penalty from a sports wagering case served concurrent to a transfer penalty (*Williams v. NCAA*); and another District Judge in New York granted a TRO overturning the NCAA's denial of a hardship waiver and permitting a student-athlete to participate for an eighth season (*Clayton v. NCAA*). The theme has been if you do not like the rule, then sue. This is as much a reflection of institutional and conference priorities as it is the NCAA.

NCAA President Charlie Baker has taken steps to force some of the difficult conversations with its NCAA member schools. He proposed a number of concepts for discussion and consideration, such as creating a new subdivision for schools that would have to give a minimum of \$30,000 per year to at least half the scholarship athletes. Similar to the creation of the Autonomy Conferences (commonly known as the Power 5, now just four conferences after the dissolution of the traditional Pac-12), institutions in this proposed new subdivision would have their own set of rules that differ from other rules in place at the Division I level. These rules could offer "different policies surrounding areas like scholarships, roster limits, recruiting, transfers and NIL."

Any concepts arising from Division I governance should be taken in the context of the aforementioned litigation. With billions of dollars on the line, there may also be a need to re-examine the criteria for Division I membership and a sustainable financial distribution model for all three divisions.

While few may agree that President Baker's concepts are ideal, it is clear that if those at the decision-making table (i.e., university and college chancellors, presidents and athletic directors) do not engage in change that would have seemed radical in the past, courts, regulatory bodies and legislation may force upon them even less favorable mandates, without the lead time to generate ideas on how to apply them.

There is no one solution to the issues facing the collegiate sports. Certainly, the NCAA, its member schools and all constituents in college sports need to address: (1) antitrust litigation and ongoing issues related to college athletes; (2) college athlete employment; (3) name, image and likeness (NIL) and (4) governance of college sports, including Division I transfers. Failure to address these issues in a comprehensive manner that includes some reallocation of economic value to athletes, will likely result in continued ad hoc legal and regulatory determinations that effectively eliminate the uniquely American collegiate sports model, which marries higher education and varsity athletics. What could be left is a professional model that is more like those seen internationally. Ironically, this systemic change is occurring at a time when college athletics is at the height of popularity, women's sports are on the rise, and the United States' collegiate model is the envy of the world for its equitable opportunities for women and consistent Olympic medal count.