



## Education ADVISORY ■

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### NCAA President Proposes New Model for College Athletics

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On December 5, 2023, Charlie Baker, president of the National Collegiate Athletic Association (NCAA), sent a letter proposing a new tier for Division I (DI) sports for certain schools that are in the Power Five conferences (Big Ten, Southeastern Conference, Big 12, Atlantic Coast Conference, and Pac-12) and other changes to athletic benefits and compensation. The proposal aims to solve what some argue are issues facing college athletics, such as the ability for athletes to transfer schools, athletes receiving payments for their name, image, and likeness (NIL), and revenue sharing.

Baker argues that revenue-making sports, such as major college football and basketball, operate so differently from the rest of college athletics that they muddle attempts to modernize NCAA sports across the board. Instead of addressing these issues at a broad level, Baker recommends certain schools that spend more than \$50 million on their athletics programs be allowed to set their own rules. According to Baker, DI schools spend between \$5 million and \$250 million annually on their athletics programs – 59 DI schools spend over \$100 million, another 32 DI schools spend over \$50 million, 259 DI schools spend less than \$50 million, and of those, 144 DI schools spend less than \$25 million.

#### Proposed Changes for All Division I Institutions

Baker first proposes two changes for DI institutions as a whole to enhance financial opportunities for all athletes.

First, Baker proposes giving all DI institutions the ability to make any level of “enhanced educational benefit” available to their athletes. The phrase “enhanced education benefit” stems from the U.S. Supreme Court’s *Alston v. NCAA* decision to prohibit certain NCAA rules prohibiting education-related benefits. Under *Alston*, the Court explained that education-related expenses might include post-eligibility scholarships to complete undergraduate or graduate degrees, vocational school scholarships, tutoring, study abroad expenses, and paid post-eligibility internships. Baker’s proposal pushes the boundaries of the *Alston* decision, which permitted up to \$5,980 in education-related benefits by recommending colleges and universities have an unlimited ability to change the amount and form of the benefits.

Second, Baker proposes that DI institutions have the option of unilaterally and directly entering into NIL licensing opportunities with their athletes. This proposal starkly contrasts with the NCAA’s October 26, 2022 memo and its long-standing prohibition on institutional involvement in NIL, which expressly prohibited schools from entering into NIL contracts with athletes. Following a flurry of state laws permitting athletes to monetize their NIL, institutions were thrust into a newly created NIL market for college athletes. This novel NIL market runs parallel to classic athletics recruiting where athletes consider NIL opportunities when choosing a school to attend for athletics.

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Because of the conflict between state laws and the NCAA's views on institutional participation in the NIL market, schools began promoting NIL collectives (a school-donor-created entity that provides NIL opportunities to a particular university's athletes) to help with recruiting without being directly involved with the NIL deals. If the NCAA reverses its guidance, as Baker proposes, DI institutions that have been out of the NIL market to avoid NCAA rules violations could turn to these donor collectives as a quick, out-of-the-box solution to keep up with the ever-changing NIL market trends and keep continuity in recruiting.

## Proposed Changes for "Highest Resourced" Division I Institutions

The most novel change Baker seeks to implement is a new set of rules coupled with increased athlete compensation for the highest-resourced DI schools. Baker did not directly define what constitutes a high-resource school but stated it should be up to the DI schools to decide, though the letter implies that schools with a \$50 million athletic budget is a fair line of demarcation. Baker did, however, ask the institutions to consider two changes for this group of schools: (1) within the framework of Title IX, that they invest at least \$30,000 per year into an enhanced educational trust fund for at least half of the institution's eligible student-athletes; and (2) commit to work with peer institutions in this subdivision to create rules that differ from the rest of DI schools, including scholarship commitments, roster size, recruitment, transfers, and NIL.

The first suggestion is not likely to garner much scrutiny since it is a request to enhance student-athlete benefits through the trust with benefits like insurance, additional scholarships, and other education-related expenses.

The second request will undoubtedly raise scrutiny from a number of players in the college athletics space. The NCAA has been hit with a flurry of antitrust lawsuits for its scholarship, transfer, and pay-for-play rules. The second request shifts the risk of antitrust litigation from the NCAA to the DI schools that will institute the new rules. Athletes and their lawyers are sure to keep a close eye on any new rules implemented by an institution that might violate the antitrust laws.

Additionally, a new subdivision ultimately will leave a group of schools behind in what was the original DI designation. It is yet to be seen if this will be beneficial for these schools, but in the current landscape of the college athletics arms race, there are likely to be schools left behind either by market forces or personal missteps in the new model. Schools that do not meet the highest-resourced threshold will need to plan for a future model on a much-reduced budget.

Finally, the NCAA, Power 5 conferences, and other colleges and universities have been lobbying the federal government to grant a legislative exemption to eliminate antitrust risk for certain NCAA rules or enact a uniform federal law with NIL payment guardrails such as a national ceiling and floor for payments. A change for some schools but not all is sure to elicit increased lobbying and interest from Congress on the matter, which could result in federal oversight or an antitrust exemption of some sort for the NCAA or for a smaller subset of schools.

## Takeaways

Baker's proposed changes are a significant departure from the NCAA's current position. Adopting Baker's proposal could result in increased claims for antitrust and Title IX violations, as well as other changes to the college athletics model not previously contemplated (e.g., revenue sharing for TV rights deals, granting athletes employee status, or even athletics breaking off from universities or colleges altogether). Not only will 2024 bring a number of changes to college athletics, from conference realignment to potentially new NCAA rules, but following close behind will be Baker's proposals for what is sure to be an entirely different college athletics model in the near future.

Stay tuned for updates on future developments.

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