House Rules: Offering Thoughtful Rev Share & NIL Packages in College Athletics' New Compensation Era

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We hardly got to know the college sports NIL era, and it will soon radically evolve.

The new *House*[1] era promises to bring revenue sharing (or "rev share") payments made directly by NCAA Division I schools to collegiate athletes. It seeks to reign in disguised "pay-to-play" arrangements through untethered name, image and likeness ("NIL") packages. It allows schools more direct involvement in brokering NIL payments to collegiate athletes from third parties.

Will it work? If so, how will schools and collegiate athletes be successful in the new era?

The most prepared schools have been busy planning for these changes for a while. In the short run, some schools are reported to have been furiously memorializing NIL deals to front-run the expected effective date for the *House* settlement.[2] But that is a one-time opportunity. Success in the *House* era means living within the *House* rules. The application of the new rules and "market" practices are not set. Innovation, creativity and thoughtful strategic planning in the months and years to come can create "win-win" arrangements for schools and collegiate athletes and stability in a fluid landscape. Schools and collegiate athletes can collectively prosper in this new era.

EXECUTIVE SUMMARY

In this white paper we explore the new collegiate athlete compensation landscape under the *House* settlement agreement, as well as features schools should consider in implementing a holistic compensation program for collegiate athletes, which will include both rev share compensation programs and third-party NIL arrangements facilitated by schools as "marketing agents" under *House*. We identify certain key issues and contractual provisions in rev share deals and NIL arrangements that will almost certainly be fleshed out

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[1] The *In re College Athlete NIL Litigation* case is generally referred to as the *House* litigation after former NCAA swimmer and lead plaintiff Grant House.

[2] *See*, *e.g.*, Ross Dellenger, "*With non-football early signing period upon us, we're about to see how messy college sports is going to get.*" Yahoo Sports (November 13, 2024), available at: https://sports.yahoo.com/with-non-football-early-signing-period-upon-us-were-about-to-see-how-messy-college-sports-is-going-to-get-150224345.html; Don Williams, "*Kirby Hocutt details Texas Tech athletics plan for revenue sharing, scholarships*," available at https://www.lubbockonline.com/story/sports/college/red-raiders/2024/12/16/texas-tech-football-kirby-hocutt-details-plan-for-revenue-sharing-era/76962416007/; and Ross Dellenger, "*As expanded College Football Playoff arrives, the sport's chaotic realities are on full display: 'It is absolute bedlam'*", available at https://sports.yahoo.com/as-expanded-college-football-playoff-arrives-the-sports-chaotic-realities-are-on-full-display-it-is-absolute-bedlam-135732172.html.

over the coming months and years as market practices evolve. We also identify important questions that, as of the date of this paper, remain unanswered based on fluid commercial dynamics or under applicable law; the answers to these questions will materially impact go-forward rev share and NIL arrangements under *House*.

Schools that ultimately prove to be successful recruiting and retaining collegiate athletes in the new compensation landscape under *House* will weigh rev share investments, alongside third party NIL arrangements, strategically within the lens of their existing athletic department budgets as a long-term investment in their contractual media rights deal participations. Successful schools will endorse and maintain structured and collaborative partnerships with strong NIL collectives as a "marketing agent" on behalf of their collegiate athletes to architect premium NIL deals for collegiate athletes who could bolster schools' brand recognition (particularly for commercial leverage in media rights participations).

Schools designing, structuring and implementing rev share arrangements will need to:

- Clearly understand how the *House* annual rev share cap is calculated, as well as be prepared for important inflection points in the *House* settlement agreement term when the annual rev share cap could materially change in ways that impact their rev share strategy and program from a competitive-positioning standpoint;
- Delicately balance economic, recruiting, retention, Title IX and other legal, supplementary third-party NIL arrangements and other important factors in assessing how to spread rev share allocations within the annual cap across all athletic programs;
- Carefully devise and apply contractual terms and conditions to rev share payments that programmatically enable schools to efficiently recruit and retain collegiate athletes and incentivize collegiate athletes to contribute to their athletic programs' and department's success, while also addressing cases where forfeitures, "claw-backs" or other value-shift or re-allocation provisions should apply;
- Consider whether an annual-cash-payment or other rev share program structure (*e.g.*, deferred-cash-payment, equity or "phantom" equity structure) – or some combination of the foregoing – would be optimal from a financial and competitive-positioning standpoint, as more "exotic" structures for certain collegiate athletes could potentially mitigate cap space challenges and create compelling and enticing brand-building opportunities for collegiate athletes craving special recognition for special contributions to athletic program success;
- Consider to what extent they can fill rev share cap space "gaps" for athletic programs generally or collegiate athletes specifically with third-party NIL arrangements that will likely continue to proliferate in sophistication over the years

to come, giving schools an opportunity to build a competitive distinction as "marketing agents" under *House*; and

- Be proactive and vigilant, on the one hand, and reactive and nimble, on the other hand, as the legal landscape impacting collegiate athlete compensation and NIL arrangements continues to rapidly evolve and shift, heightening the need for schools to find access to sophisticated advisors and resources to help them navigate a dynamic environment ripe with pitfalls and traps that, if not avoided, could prove costly.

BACKGROUND

The "amateurism" model of college sports has been under pressure for decades,[3] but the model has crumbled in the last ten years. As top-tier college sports and players have become ever bigger revenue engines for colleges and universities enjoying more lucrative participations in media rights contracts, a model that prohibits collegiate athletes from participating in the wealth they help create has become increasingly untenable.

The combination of litigation and new statutes has opened up opportunities for collegiate athletes to be compensated for their NIL and gain more leverage with schools (including through increased mobility rights through the transfer portal). However, to date, those collegiate athletes have not been permitted to receive payments directly from schools, and schools have been prohibited from managing third-party NIL payment arrangements, creating a messy environment where third parties have had significant influence over college sports programs and schools have been handcuffed in their ability to manage key relationships impacting their own collegiate athletes and athletic programs. Quarterback Matthew Sluka's broken NIL deal at UNLV,[4] and quarterback Jaden Rashada's NIL debacle at the University of Florida,[5] offer two higher-profile examples of the tortured dynamics.

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[3] *See*, *e.g.*, Nicholas Fram & Thomas Frampton, "*A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*," 60 Buffalo Law Review, 1003–1078 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2001027; Marc Edelman, "*A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*," 64 Case Western Law Review, 61-99 (2013), available at https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1176&context=caselrev; and "*The Future of Name, Image and Likeness: Past, Present and Future*," available at https://www.fredlaw.com/alert-the-future-of-name-image-and-likeness-past-present-and-future.

[4] *See*, *e.g.*, Richard Johnson, "*Matthew Sluka's NIL fallout with UNLV raises questions about agent's unregistered status in Nevada*," available at https://www.cbssports.com/college-football/news/matthew-slukas-nil-fallout-with-unlv-raises-questions-about-agents-unregistered-status-in-nevada/.

[5] *See*, *e.g.*, Paula Lavigne and Dan Murphy, "*Jaden Rashada sues Billy Napier, Florida booster over NIL deal*," available at https://www.espn.com/college-football/story/_/id/40189896/jaden-rashada-florida-recruit-lawsuit-nil.

The settlement reached between the NCAA and the "Power" conferences,[6] on the one hand, and the plaintiffs, on the other hand, in the *House* litigation is on track to smash yet another pillar of the amateurism model. For the first time, "pay-for-play" for NCAA Division I collegiate athletes would be permitted through direct rev share arrangements between schools and collegiate athletes. Schools would also be permitted to serve as "marketing agents" for collegiate athletes in NIL arrangements with third-parties, giving schools more influence over relationships between third parties and their collegiate athletes.

***HOUSE* SETTLEMENT STRUCTURE**

The New NCAA Rev Share System

The *House* settlement, assuming its final approval, will for the first time allow NCAA Division I schools to directly pay collegiate athletes – up to an annual cap. The annual cap for each school (as described further below) will equal 22% of the "average shared revenue" across all subject Division I schools. Average shared revenue generally captures all revenues schools generate from their athletic programs, including revenues from event tickets and admission fees, game guarantees, TV, media, licensing, advertising, sponsorships and royalty rights, bowl games, NCAA and conference distributions and all related revenues included under NCAA financial statement reporting requirements. The *House* plaintiffs' expert has estimated that the cap will be greater than $20 million per school in the 2025-2026 academic year, and industry-wide common knowledge is that the cap is anticipated to be approximately $20.5 million for the 2025-2026 academic year.

The settlement will permit these payments for both colleges and universities that are members of the Power conferences, as well as any other college, school or university that is a member in any sport of NCAA Division I. The settlement received preliminary approval from Judge Claudia Wilken on October 7, 2024, and the hearing for final approval of the settlement is scheduled for April 7, 2025. If final approval is given on that timeframe, NCAA Division I colleges could begin making payments during the 2025-2026 academic

[6] The defendant conferences are the Pac-12, the Big Ten (or "BIG"), the Big 12, the Southeastern Conference (or "SEC") and the Atlantic Coast Conference (or "ACC"), which used to be known as the "Power 5" conferences. However, following the 2022-2023 season, when 10 of 12 teams in the Pac-12 departed the Pac-12 for other Power conferences, the number of Power conferences now stands at 4. (By the time this paper is read, this number could change again.) *See, e.g.*, Mark Giannotto, "*FSU v. ACC lawsuit explained: What it means for college football, conference realignment*," available at https://www.usatoday.com/story/sports/college/2024/08/31/fsu-acc-lawsuit-conference-realignment-2024-college-football-season-florida-state/74909159007/.

year, which begins on July 1, 2025, and continue to do so for at least a decade through the 2034-2035 academic year.[7]

The cap is similar in certain respects to salary caps used in professional sports leagues and is an amount that is calculated by a formula that is the same for each school. However, the salary cap provisions for professional football and professional basketball have been developed over many decades of collective bargaining and have more prescriptive and rigid rules. While the NCAA and the defendant Power conferences may ultimately put forward more prescriptive rules,[8] as a threshold matter, the settlement allows schools significant latitude to determine how to structure payments and benefits within the cap.

The Art of Slicing a New Pie

In deciding whether and to what extent to pay collegiate athletes *House* rev share monies, schools will want to consider the following factors (among others described in more detail in this paper):

- The cap will be the same for all Division I schools;
- The cap applies across all sports; and
- The cap will be reset periodically.

One Size Fits All?

Schools with more resources will be able to offer more resources to recruits and existing collegiate athletes. That is not new. Historically, though, that was supposed to happen only indirectly through resources like facilities or, more recently, NIL deals made available through parties independent (at least, on paper) of schools like NIL collectives.

For the best-resourced schools, the across-the-board rev share cap under *House* may artificially limit what the school and its contributing donor base could otherwise pay collegiate athletes directly.[9] In those cases, well-off schools will expect to spend up to the

[7] The *House* settlement contemplates that the initial ten-year term may be extended under terms set forth in the settlement agreement. If the *House* settlement is approved, it is difficult to imagine going back to the pre-*House* amateurism model.

[8] The NCAA's most recently published FAQ's for Division I colleges and universities are available here: https://ncaaorg.s3.amazonaws.com/governance/d1/legislation/2024-25/Dec2024D1Gov_PhaseTwoInstSetQuestionandAnswer.pdf. See Q/A #18-21 regarding pending NCAA rulemaking.

[9] *See, e.g.*, Ross Dellenger, "*With NIL era ending, college sports is on verge of seismic change. How will schools adapt with industry in upheaval?*," available at https://sports.yahoo.com/with-nil-era-ending-college-sports-is-on-verge-of-seismic-change-how-will-schools-adapt-with-industry-in-upheaval-154722732.html?guccounter=1.

annual cap to offer a rev share package competitive with that of similar well-resourced schools. Spending rev share money wisely, of course, will still be important.

For well-resourced schools, the question will be how to maximize other permitted pay arrangements (*i.e.*, third-party NIL deals) to gain a competitive advantage. NIL collectives will likely continue to offer NIL deals to elite recruits and collegiate athletes from substantial "war chests" largely funded by boosters.[10] However, as discussed below, those deals are slated to receive more scrutiny and schools will therefore have incentives to work with national and international brands on more sophisticated (and more lucrative) NIL deals.

An important threshold consideration for schools is to what extent to fill the rev share cap with expanded scholarship offerings permitted under *House*. Under the pre-*House* system, roster limits do not apply to NCAA sports but scholarships are limited for each sport based on NCAA rules. In the *House* era, all NCAA sports will have roster limits, and each school will be able to provide as many scholarships as there are roster spots. New spending on scholarships (up to $2.5 million annually) would be deducted from the annual rev share cap under *House*. In assessing how much money to allocate to its rev share pool for collegiate athletes, each school will need to consider how many (if any) additional scholarships will be available across its athletic department generally and within each program.

As of the date of this paper, it appears that certain Power conferences' member schools are aligning on go-forward frameworks for competitive reasons. For example, SEC

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[10] The NCAA estimates that the Power 4 conferences and the re-forming Pac-12 (*i.e.*, soon to be the Power 5 again) will, collectively, offer NIL collectives to collegiate athletes with approximately $677 million in assets (~$9.8 million per Power 5 school). See https://nil-ncaa.com/power5/. The NCAA, however, provides a prognostication: "Note: The average funding per collective will decline substantially with the advent of revenue sharing beginning in the 2025-26 academic year. NIL collectives became a factor in college sports as they performed a function that schools were prohibited from doing themselves. However, with revenue sharing, schools can directly compensate athletes up to $20.5 million annually, and the reliance on collectives will be significantly reduced going forward. Schools are facing steep new financial obligations, and most will be looking to redirect booster contributions currently going to collectives, back to the schools to help pay for revenue sharing and increased scholarship commitments." *See also* Ross Dellenger, "*With NIL era ending, college sports is on verge of seismic change. How will schools adapt with industry in upheaval?*," available at https://sports.yahoo.com/with-nil-era-ending-college-sports-is-on-verge-of-seismic-change-how-will-schools-adapt-with-industry-in-upheaval-154722732.html?guccounter=1. The article notes, "The new athlete-revenue sharing world, at least at the highest levels, will be built on transactional recruiting relationships within a system that permits universities to use direct school funds in a more regulated structure featuring a compensation cap and new enforcement arm. In a world where more parity is expected, where does that leave the big boys? As it turns out, keeping their advantage is quite simple, experts contend. They use their big brand, sprawling metro areas, massive alumni bases, wealthy donors and rich relationships to exceed college football's new cap. 'That's going to be the new frontier: the above-the-cap, supplemental NIL,' says Walker Jones, the head of the Ole Miss collective and a leading member of The Collective Association. 'That's the new battlefield. The question is, can it really be regulated?'"

member schools anticipate maintaining football scholarship limits at 85 (the current maximum) instead of the proposed new roster limit of 105, retaining monies for rev share allocations.[11] Other schools are taking a different approach and are offering both increased scholarships for certain programs and other rev share opportunities for other programs.[12]

Schools will have to weigh new scholarships and other rev share investments strategically based on their athletic department budgets and individualized circumstances (including, in the case of public universities, political considerations around using taxpayer money to fund rev share payments).

The Multi-Sport Cap Dilemma

The *House* rev share pool differs significantly from a professional sports league salary cap in that it applies across all sports within each school's athletic department, rather than having different caps that apply on a sport-by-sport basis within each athletic department. This creates interesting dynamics. For example, a school with highly successful football, men's basketball and women's basketball programs may have a more difficult time providing competitive rev share payments to collegiate athletes than a school with (merely) one great program. On the other hand, having multiple highly successful programs likely creates more revenue opportunities for the school, which makes it easier to pay up to the cap every year.

For the best-resourced schools with multiple successful programs, helping collegiate athletes secure third-party NIL deals will be critical, as rev share dollars available to collegiate athletes directly from a school will be relatively lower because of inter-program cannibalization of rev share monies up to the cap.

The Ever-Changing Cap

The *House* plaintiffs' expert has estimated that the annual rev share cap will start at greater than $20 million per school for the 2025-2026 academic year and grow to

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[11] *See*, *e.g.*, Don Williams, "*Kirby Hocutt details Texas Tech athletics plan for revenue sharing, scholarships*," available at https://www.lubbockonline.com/story/sports/college/red-raiders/2024/12/16/texas-tech-football-kirby-hocutt-details-plan-for-revenue-sharing-era/76962416007/.

[12] *See*, *e.g.*, Ross Dellenger, "*With NIL era ending, college sports is on verge of seismic change. How will schools adapt with industry in upheaval?*," available at https://sports.yahoo.com/with-nil-era-ending-college-sports-is-on-verge-of-seismic-change-how-will-schools-adapt-with-industry-in-upheaval-154722732.html?guccounter=1. As the article notes, "In a sitdown with Yahoo Sports, [Ohio State University's] president, Carter, and athletic director, Ross Bjork, detail their plan. Ohio State will offer 91 new scholarships (58 to women for Title IX purposes) at an additional cost of $4.5 million (roughly $2 million in *Alston* payments will be eliminated). The school plans to 'stratify' its sports, Carter says, presumably tiering them based on their revenue generation as a way to determine for each the allocation of resources, including the portion of athlete-revenue distribution. Football, naturally at the top of the tiered system, will have at its disposal 'right around' 90 scholarships, Bjork says, only a five-scholarship increase from the current limit. However, the sport will see the most significant distribution of revenue to athletes."

approximately $32.9 million per school by the end of the ten-year term. While the cap will be same for each school each year, like with professional sports' salary caps, it will be a moving target over time.

Initially, the calculation is done by adding the "shared revenue" of all "Power" conference schools, as well as Notre Dame, based on the most recently available financial statements, then dividing it by the number of schools in all Power conferences (plus Notre Dame). The resulting number is then multiplied by 22% in order to set the "cap" for each school for the first year.

On the "default" track under the *House* settlement agreement, for each three-year cycle, the cap will increase automatically by 4% over the prior year's cap in each of the second and third years of the three-year cycle, before getting reset for the fourth year (starting a new three-year cycle) based on actual financial results from the third year, and so on until the end of the term. Thus, under the default track, the fourth, seventh and tenth years of the ten-year term of the *House* settlement agreement are re-set years.

However, there are exceptions that can cause the cap to vary from the default track. First, the "TV deal" exception could apply: if a new broadcast agreement would increase the average year-over-year growth rate in media rights fees by more than 4%, then during the portion of each three-year cycle during the term (*i.e.*, years 2 and 3 after each "reset" year), the actual average broadcast rights rate will be used in lieu of the 4% growth rate (but solely for the media rights revenue subcategory).[13] Second, plaintiffs' counsel in the *House* litigation will have two opportunities to accelerate a "reset" of the cap based on their review of any prior year's available financial statements. If they do, the 4% automatic increases will resume for the following two years, accelerating the three-year cycles contemplated under the default track and increasing the "floor" against which the automatic escalators will apply.

The net effect of these adjustments is that in some years it may be easier to plan for the following year's rev share pool than it is in other years (*i.e.*, where automatic escalators are supposed to apply), which may affect allocation decisions. The exceptions could increase (not decrease) the cap, so schools setting payments based on fixed dollar amounts within each three-year cycle should feel confident that they will not exceed the cap.

Predicting the cap through a "reset" is more complicated (*e.g.*, a school trying to plan during year 3 for year 4, assuming the "default" track is followed). While a school may feel confident that the cap will grow, there could be certain countervailing forces that

[13] The Big Ten's current media rights deals with Fox, CBS and NBC run through the 2029-2030 academic year, and the SEC's existing media rights deal with ESPN expires in the 2033-2034 academic year. *See also* footnotes 50, 51 and 52 in this paper.

temper the growth. For example, continuing conference realignment may have an interesting effect on the rev share pool in future years. For instance, in the fall of 2024, it was announced that schools from smaller conferences – including Boise State University, Colorado State University, Fresno State University, San Diego State University, Utah State University and Gonzaga University – will be joining the PAC-12 on July 1, 2026.[14] Because of this, shared revenue may average out to a slightly lower level than it otherwise would have due to the inclusion of these schools in the calculation described above.

Schools may address the uncertainty in the cap amount in a variety of ways, including by relying more on variable or contingent compensation constructs that adjust to changes in the cap. But these variables and contingencies need to be taken into account before entering contractual guarantees with collegiate athletes to avoid contractual commitments to collegiate athletes that universities cannot fulfill, on the one hand, while also "under"-compensating collegiate athletes compared to other competitive universities with rev share arrangements, on the other hand.

Additional spending on scholarships up to program roster limits would, as described above in this paper, be deducted from the rev share pool. Therefore, in addition to monitoring the uncertainty in the rev share cap on a recurring annual basis, schools will also want to monitor to what extent the costs of scholarships provided to collegiate athletes outpace (or trail) escalations or decreases in the rev share cap.

STANDARD CONTRACTS VS. CREATIVE ARRANGEMENTS

In competing for talent in the new rev share landscape, schools will need to carefully assess their approach to their rev share contracts, balancing "GM" style budget planning across sports and class years while preserving appropriate retention and/or performance incentives and protection of the school's values and "brand." Schools will also need to consider the extent to which the specific structure of their rev share contracts might provide a competitive edge. Especially as the annual rev share cap is the same for each school, there will be practical limits on the ability of schools to compete in "hard" rev share dollars. It is in this context that strategic creativity may play a critical role.

Sticking to Your Standards

A "standard" contract has many virtues. Indeed, it has been reported that the Power conferences have provided their schools with example template rev share contracts ahead

[14] *See* https://pac-12.com/news/2024/9/12/general-ushering-in-a-new-era-the-pac-12-conference-strengthens-its-legacy-by-welcoming-four-respected-academic-and-athletic-universities.aspx; https://spectrumlocalnews.com/hi/hawaii/sports/2024/09/24/conference-realignment-utah-state-pac-12-mountain-west-2024; and Chris Vannini, "*Gonzaga to join Pac-12 in 2026 as conference's remake continues*," available at https://www.nytimes.com/athletic/5809454/2024/10/01/gonzaga-pac-12-conference-realignment/.

of the first year recruiting in the new era.[15] Although the schools are not required to use these specific templates, we expect each school will quickly settle on its own "standard form" for all (or almost all) of its rev share agreements, whether based on a conference template or created "in house."

First, each school must grapple with the specific, overlapping laws and rules that apply to it — the NCAA rev share rules, any applicable conference rules and federal law and state law (which may have different impacts on private and public universities). Once a school has established its approach to rev share agreements in context of the specific policy landscape to which it is subject, establishing a template contract will be necessary to ensure its rev share arrangements align consistently with the policy approach.

Second, as a practical matter, each school is likely to have hundreds, if not thousands, of rev share agreements with its collegiate athletes across sports and class years. Even minor variations across rev share contracts could, over time, create significant uncertainty and administrative burden.

Separately, even though standard terms may not be imposed "top down" by the NCAA or a conference (or, at least at this stage, through collective bargaining with a national collegiate athlete union), we expect schools to experience market pressure to adopt relatively similar rev share arrangements. Collegiate athletes weighing rev share offers from different schools likely will focus on comparing (and negotiating) a few key terms — the dollar amounts, but also the structure of any retention and/or performance incentives, and any vesting, forfeiture, claw-back and similar terms (as described further below in this paper). It may not take long for "market" customs and practices to emerge, as schools collectively adapt their approach to competing for talent in the new era.

There are powerful reasons, then, for a school to standardize its rev share arrangements — both in its own contracts and to be competitive in the market for collegiate athlete talent. But if the annual rev share cap, to a certain extent, limits the ability of schools to differentiate themselves with direct rev share dollars, a school must ask itself, how can it gain an edge in attracting top talent?

Creativity Within the Cap

Initially, a school should consider how it can best use the dollars available within the annual rev share cap. The first pass is to allocate rev share "cap space" across sports. As described elsewhere in this paper, many schools have quickly settled out along unsurprising lines, with a large majority of cap space allocated to football, men's

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[15] *See, e.g.*, Ross Dellenger, "*With non-football early signing period upon us, we're about to see how messy college sports is going to get.*" Yahoo Sports (November 13, 2024), available at: https://sports.yahoo.com/with-non-football-early-signing-period-upon-us-were-about-to-see-how-messy-college-sports-is-going-to-get-150224345.html.

basketball and women's basketball as the principal revenue-generating sports.[16] In this respect, schools with nationally recognized programs in a single sport may have an advantage, in terms of cap space availability for that leading program, compared to schools that wish to compete at the national level in multiple programs. Multi-program schools may be required to make some hard decisions regarding cap space allocations.[17]

Schools will also need to consider what conditions should attach to specific rev share payments within the cap. For instance, rev share payments may be linked to certain retention and/or performance conditions, with different payments "unlocked" based on different criteria (as discussed further below).

Less resourced schools may prefer to rely more heavily on retention and/or performance conditions, compared to the biggest (and richest) athletic programs at the national level, so that the school's rev share payments scale with performance. With a carefully structured "pay for performance" model, a school might approach (or hit) the annual limit only if a program performs significantly above expectations. In contrast, a Power conference school might more readily commit to a greater amount of unrestricted (or less restricted) rev share payments in order to provide greater certainty around a higher "baseline" amount to attract potential recruits.

Creativity Around the Cap

The second axis for competing against peer schools in recruiting collegiate athletes is providing or facilitating incentives that do not count toward the annual rev share cap. A significant portion of that competition "outside the cap" will play out along familiar lines. Collegiate athletes want playing time. They want to play for the best coaches and programs. Especially for football and basketball, they might value the potential for alumni connections, or a school's track record serving as a pipeline for professional leagues. Many want certain academic offerings or want to live in areas with attractive opportunities outside sports and school. But schools should also plan whether and how to differentiate their offers with economics that do not "hit" the annual rev share cap.

In the immediate term, ahead of the new *House* era, schools and boosters are rushing to front-load NIL payments to secure recruits, on the understanding that payments made before July 1, 2025 will fall outside the *House* rules and will not count toward the

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[16] Note, however, the Title IX considerations and recent developments cited in the "**BIG QUESTIONS REMAIN**" section of this paper.

[17] For example, Kirby Hocutt, athletic director at Texas Tech, has signaled that third party NIL deals (which do not count toward the annual rev share cap) will likely be necessary to keep Texas Tech baseball competitive nationally, as its baseball program will not share significantly in the university's available direct rev share. *See*, *e.g.*, Don Williams, "*Kirby Hocutt details Texas Tech athletics plan for revenue sharing, scholarships*," available at https://www.lubbockonline.com/story/sports/college/red-raiders/2024/12/16/texas-tech-football-kirby-hocutt-details-plan-for-revenue-sharing-era/76962416007/.

annual rev share cap.[18] This is a smart play, though naturally limited at this stage (assuming the *House* settlement ultimately goes into effect). If the landscape changes further in the future, due to additional litigation or policy making, schools should be mindful of any future "gold rush" periods that might arise. Strategic leveraging of those opportunities if and as they occur, including by coordination with collectives, boosters or other third parties, could provide a recruiting advantage.

Within the *House* framework, schools could have another potential strategic opportunity with the use of new scholarships. As noted above, spending on new athletic scholarships counts toward the annual rev share cap up to a maximum of $2.5 million per year.[19] To put it another way, if a school offers more than $2.5 million in new scholarship spending (compared to the pre-*House* baseline) in a year, the excess amount is "free" for purposes of the annual rev share cap. Dollar for dollar, then, a scholarship could be more efficient, in terms of cap space, compared to a direct rev share payment. And the effect would scale for more universities with relatively higher tuition and room-and-board costs.

Some reporting suggests that certain schools may not plan to emphasize new scholarships in structuring a post-*House* recruiting approach.[20] There could be good reasons for that. Most obviously, for many decades, the pre-NIL model has relied on giving scholarships to the most sought-after collegiate athletes in the higher profile programs as a primary economic consideration – so the incremental scholarships would benefit less prominent collegiate athletes. Put bluntly, scholarship expansion may yield less competitive advantage than increasing payments to top-tier collegiate athletes.

There are other reasons that scholarship expansion may not be the right choice. For example, especially for less expensive universities, it may be that there is limited ability to materially exceed $2.5 million a year in new scholarship spending within the school's overall allocation of rev share across sports and class years, so the marginal efficiency is not enough to outweigh other competing considerations. Schools should carefully consider their individual factors to determine whether, and to what extent, scholarships

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[18] *See* Ross Dellenger, "*As expanded College Football Playoff arrives, the sport's chaotic realities are on full display: 'It is absolute bedlam'*", available at https://sports.yahoo.com/as-expanded-college-football-playoff-arrives-the-sports-chaotic-realities-are-on-full-display-it-is-absolute-bedlam-135732172.html; Ross Dellenger, "*With non-football early signing period upon us, we're about to see how messy college sports is going to get.*" Yahoo Sports (November 13, 2024), available at: https://sports.yahoo.com/with-non-football-early-signing-period-upon-us-were-about-to-see-how-messy-college-sports-is-going-to-get-150224345.html.

[19] *Alston* academic and graduation awards (currently $5,980 and subject to future adjustment) stemming from the permanent injunction entered on March 8, 2019 in the *In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation* case would also count against the cap, subject to a $2.5M aggregate limitation. However, the limited amount per individual may cause schools to reduce *Alston* spending in favor of greater flexibility under the general rev share cap.

[20] *See* footnote 18.

might provide an opportunity to increase the total economics available for the school's recruitment program.

Schools might also explore deferred payment structures or equity or equity-like arrangements. Under a deferred payment arrangement a collegiate athlete would earn amounts in one year that are then delayed and paid out only in future years.[21] A deferred payment structure could provide a recruiting tool enabling the school to leverage the presumably larger annual rev share cap applicable to future years, or to provide extended "tail" earnings to marquee recruits. Schools would also have to ensure that such a structure is permissible under NCAA and conference rules in effect at the time, and should also be mindful of the tax rules potentially applicable to deferred payment arrangements.[22] More critically, schools should carefully consider whether the additional "up front" recruiting power potentially afforded by a deferred payment structure would be worth the risk of throttling future year recruitment efforts once the deferred bill comes due.

An equity or equity-like (*e.g.*, "phantom" equity) structure might afford a different lever. Under the *House* settlement, the annual rev share cap applies with respect to new payments or benefits provided to student athletes in a given academic year (other than third-party NIL payments). Instead of providing cash rev share payments to collegiate athletes, a school could consider providing a participation right in future revenue streams, funneling a portion of relevant revenue (*e.g.*, ticketing or media rights) into an NIL vehicle, then granting collegiate athletes a right to receive a share of proceeds from that vehicle over a certain number of years. That approach might prove more attractive to collegiate athletes, compared to "flat" cash payments, if it affords them "upside" opportunity to participate in the future growth and success of a program. However, in considering such a structure, there is one key hurdle: In what year would an NIL vehicle participation right count toward the annual rev share cap? If for cap purposes the participation right counts as "distributed" under the cap in the "grant" year (*e.g.*, based on the fair market value of the participation right on the date issued), then a structure along these lines might be feasible, as payments out of the vehicle, including increased payments as a result of growth over

[21] This is distinct from a multi-year contract which sets out, up front, the payments a collegiate athlete might earn with respect to multiple seasons.

[22] It is important to note that under the *House* settlement, rev share payments by schools cannot extend beyond the term of a collegiate athlete's eligibility to participate in NCAA sports, which would limit the deferral opportunities. Further, the deferred rev share payments may require compliance with, or compliance with an exemption from, the general nonqualified deferred compensation tax rules under Sections 409A of the Internal Revenue Code of 1986, as amended (the "Code"), and the special nonqualified deferred compensation tax rules for state and local governments and tax-exempt organizations under Section 457(f) of the Code. While those rules are complex and a full description is outside the scope of this paper, schools will need to consider their potential application to any deferred arrangement.

time, would fall outside the cap.[23] But if for cap purposes the participation right itself is disregarded, while payments out of the vehicle are treated as distributed under the cap in the year paid, then the structure would not necessarily solve against the cap. In that case, the mortgaging-the-future considerations noted above with respect to deferred payments would apply. It is not clear on the face of the *House* settlement how a creative structure along these lines would interact with the rev share rules.

Finally, third-party NIL payments do not count against the annual rev share cap. In that light, the advantage again accrues to the most-resourced schools and markets, which will provide richer opportunities for collegiate athletes to secure NIL deals with third parties above and beyond a school's direct rev share payments. We anticipate that the most ambitious schools will leverage this angle by offering new marketing agent services to facilitate third-party NIL deals for key collegiate athletes, free of the limits of the cap. As described below, NIL deals with associated third parties would be subject to review and approval through the *House* clearinghouse. And to a certain extent third-party deals could dilute the effect of retention and performance incentives under a school's direct rev share contracts (though they may come with their own performance incentives, depending on the priorities of the contracting parties). Regardless, a professionalized collegiate athlete NIL marketing offering could provide a school with a clear competitive advantage compared to peer institutions in attracting and retaining key talent in the post-*House* world.

VESTING, FORFEITURE & OTHER PROTECTIVE TERMS

Schools that decide to offer rev share compensation programs for collegiate athletes will want to plan carefully for success as well as contingencies. Presumably, these programs will function as a means to an end: to secure a competitive edge in recruiting, to secure a competitive edge in athletic program on-field results, to secure greater brand recognition, and to secure a greater cut of media rights and other revenue streams from future Power conference (or, in the case of Notre Dame, stand-alone) negotiating cycles with prospective rights holders (*e.g.*, ABC/ESPN, FOX, NBC, *etc*.). Put another way, rev share monies paid should be viewed as a long-term investment to yield downstream benefits to the school. After all, rev sharing under the *House* settlement is permitted but not required.

[23] If a "growth" structure is feasible at a basic level, in addition to the potential issues under Section 409A and Section 457(f) noted above, other complexities may arise, including treatment under applicable securities and tax laws, and how to communicate and effectively "sell" the program to recruits (who may implicitly or explicitly discount the value of an "exotic" program that is less familiar than straight cash payments). However, it is possible, if not likely, that collegiate athlete appetite for such opportunities will become more mainstream over time as market forces across the landscape evolve. *See*, *e.g.*, Jerome Johnson, "*Unrivaled Basketball League gives Angel Reese, WNBA stars equity in league,*" available at https://thetriibe.com/2024/10/unrivaled-basketball-league-gives-angel-reese-wnba-stars-equity-in-league/.

With this backdrop, schools will need to ensure that rev share compensation programs are structured and operationalized to foster their economic and brand-building goals and also protect the school from events, circumstances and conditions that, if not carefully considered in advance, could exacerbate the costs of "downside" cases.

Planning for Success: Result-Incentivizing Allocations

Allocations Across Programs

As a threshold matter, each school offering a rev share compensation program for recruits and collegiate athletes will need to determine allocations across programs within an athletic department, all of which must add up collectively to fit within the annual cap permitted under *House* for the applicable academic year. "Football schools" and "basketball schools," respectively, may be inclined to offer relatively heavier allocations to football and basketball collegiate athletes, respectively, compared to allocations made to other programs' collegiate athletes, primarily because of the brand recognition (and rev sharing monies) produced by football and basketball programs. Indeed, as of the date of this paper, it is reported that Power 4 member schools from the SEC and the Big 12 are anticipated to allocate approximately 90% or more of 2025-2026 academic year rev share monies to football and men's basketball collegiate athletes, with the remainder spread across all other programs at the member school.[24]

Other major schools from Power conferences, however, have already publicly committed to spreading rev share monies across collegiate athletes through the lens of Title IX, with an express or implicit signal that NIL collectives will gap-fill amounts intended to provide richer all-in participations for football and men's basketball collegiate athletes.[25] At least one other "football school" appears to be applying a "stratified" approach to allocate rev share monies across its various athletic programs, the details of which are undisclosed.[26] As of the date of this paper, however, momentum appears to be building

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[24] *See*, *e.g.*, Don Williams, "*Kirby Hocutt details Texas Tech athletics plan for revenue sharing, scholarships*," available at https://www.lubbockonline.com/story/sports/college/red-raiders/2024/12/16/texas-tech-football-kirby-hocutt-details-plan-for-revenue-sharing-era/76962416007/. In the case of Texas Tech University (a Big 12 member school), assuming a $3.6 million allocation to its men's basketball program, and assuming there are 15 scholarship athletes in its men's basketball program for the 2025-2026 academic year, on average, each scholarship collegiate athlete within the program would receive approximately $240,000 in rev share money for the 2025-2026 academic year (in addition to scholarship monies). Of course, payments should be expected to vary. See also the Title IX considerations and recent developments cited in the "**BIG QUESTIONS REMAIN**" section of this paper.

[25] *See*, *e.g.*, a statement released by The University of Michigan available at https://www.championscircleuofm.com/statement.

[26] *See*, *e.g.*, Ross Dellenger, "*With NIL era ending, college sports is on verge of seismic change. How will schools adapt with industry in upheaval?*," available at https://sports.yahoo.com/with-nil-era-ending-college-sports-is-on-verge-of-seismic-change-how-will-schools-adapt-with-industry-in-upheaval-

amongst Power 4 programs to provide the lion's share of rev share allocations (~90% in the aggregate) to football and men's basketball collegiate athletes.[27]

Other schools may, notwithstanding the brand recognition (and rev sharing monies) contributed by commercially mainstream football or men's basketball programs, ultimately decide to increase allocations to historically successful but less commercially popular programs (*e.g.*, women's volleyball in the case of the University of Nebraska, as a theoretical example) to strategically invest in programs and collegiate athletes that offer diversified branding and economic opportunities or that further the school's constituencies' values, preferences or demands.

Although these issues are not explored in detail here, as noted below in this paper, federal, state and local law considerations will quickly become front-and-center issues for schools offering rev share compensation programs, as allocating participations disproportionately to male collegiate athletes compared to female collegiate athletes across and within programs, for example, will almost certainly trigger Title IX challenges from collegiate athletes and their attorneys preparing to navigate the post-*House* landscape. How threshold allocation issues will be determined by schools will be fascinating to see and may reveal, in stark manner, how many schools weigh competing commercial, legal and other considerations.

Allocations Within Programs

Additionally, each school offering a rev share compensation program for recruits and collegiate athletes will need to determine allocations within programs, all of which must add up collectively to fit within the annual cap permitted under *House* for the applicable academic year. Although countless factors could presumably be relevant in this calculus, at a very high level, schools could view this issue programmatically and apply a "blanket" approach across programs, meaning that, regardless of the program, the same criteria and factors would be applied in determining allocations to collegiate athletes within the program. Alternatively, schools could use different approaches for different programs based on its unique circumstances. A school could also apply a hybrid structure

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154722732.html?guccounter=1. The article notes that Ohio State University "plans to 'stratify' its sports … presumably tiering them based on their revenue generation as a way to determine for each the allocation of resources, including the portion of athlete-revenue distribution."

[27] *See*, *e.g.*, Dennis Dodd, "*In or Out? College Athletics Preparing for Every Conundrum as Revenue Sharing Promises to Reshape Landscape*", available at https://www.cbssports.com/college-football/news/in-or-out-college-athletics-preparing-for-every-conundrum-as-revenue-sharing-promises-to-reshape-landscape/. "In an informal canvassing of the industry, CBS Sports found that most schools who opt in will follow the 75-15-5-5 formula for distribution of that revenue sharing going forward. Those are the percentages established by Judge Claudia Wilken in the back pay portion of the settlement to athletes from 2016 to the present -- 75% to football, 15% to men's basketball, 5% each to women's basketball and the other minor sports." See also the Title IX considerations and recent developments cited in the "**BIG QUESTIONS REMAIN**" section of this paper.

and apply a combination of the two approaches: for example, a "blanket" approach by default with designated exceptions for only specific criteria or factors applied to designated programs. As an example, a school may decide that, because of the comparative differences in NBA draft and NFL draft rules, an allocation factor based on collegiate athlete class level may be applied differently within its men's basketball program compared to its football program.

Regardless of how a school frames allocations within programs, at the outset, it will need to consider how, if at all, to apply various criteria and factors in determining allocations. Such criteria and factors could include:

- collegiate athlete class levels (*e.g.*, freshman, sophomore, junior, senior, graduate, graduate transfer, *etc*.);
- "red-shirt" status (if applicable);
- eligibility extensions (*e.g.*, for injuries or for extenuating circumstances like the Covid-19 pandemic during the 2020-2021 academic year);
- mid-year participation of transfer portal collegiate athletes;
- scholarship collegiate athlete participation compared to "walk-on" collegiate athlete participation;
- program, team, individual or group achievements, awards and recognitions (*e.g.*, team and/or individual success measures such as record, playoff success, statistics, *etc.*; individual awards; group awards);
- game participation levels (*e.g.*, minimum games played);
- NIL collective or other third-party NIL monies received by collegiate athletes;
- state or international residency of collegiate athletes;
- participation by underaged (*i.e.*, minor) collegiate athletes; and/or
- participation by collegiate athletes in multiple programs in any single academic year and/or in different academic years.

Many Division I schools with less lucrative athletic departments or programs may not have the resources to provide payments up to the cap — or at least may be very reluctant to part with compensation up to the cap. In those cases, schools may consider, in addition to the list of exemplary factors identified above, whether performance-based conditions attached to all or certain rev share opportunities should apply. For example, a school may limit its financial risk tied to its rev share program or with respect to a specific outsized rev share award by linking payout to athletic and/or financial performance metrics that align greater compensation levels with the school's athletic department and/or program success. In framing any such conditions, a school will need to tread carefully and navigate potential (or foreseeable) legal, contractual, public relations and other concerns in offering what may be perceived, and operate, as a bonus or other incentive program to

collegiate athletes who, at least as of the date of this paper, are not recognized as employees of schools under applicable law.[28]

Timing of Allocations

An important design consideration materially impacting threshold allocation considerations relates to the general award or grant structure of a school's rev share compensation program and how frequently a school intends to provide for rev share allocations. Although this matter is not explored here in detail, a school could determine to provide for annual (or other recurring) allocations, with multiple allocations made to a collegiate athlete who contributes to an athletic program over multiple years. Alternatively, a school could determine to provide a single, one-time allocation up front upon a collegiate athlete's enrollment in an athletic program, with the allocation intended to subsume the collegiate athlete's participation in an athletic program (or all athletic programs) until the collegiate athlete's departure from the program (or all programs). How a school views the above criteria and factors in framing allocations within programs will likely be impacted, at least somewhat, by whether the school offers one-time or recurring allocations of awards or grants in its program.

Contingency Planning

In addition to planning for success, a school will want to ensure that certain vesting, forfeiture, "claw-back" and other related terms are thoroughly addressed within its rev share compensation program to protect the school in cases where the school does not receive the benefit of the collegiate athlete's contributions to its athletic programs for foreseeable (and unforeseeable) reasons. The manner in which a school frames terms and conditions to protect itself and preserve its investment in its collegiate athletes will, naturally, need to align with the school's policies, values and other relevant factors important to its values and brand "DNA." What may be compelling for one school may be unattractive for another school. A school will want to work closely with its legal, human resources, public relations and other strategic advisors in framing its approach to these issues. For public schools with athletic program budgets that are not (ever or always) self-funding, which is likely the case for the majority of NCAA Division I schools, these issues

[28] On January 19, 2025, it was reported that a Big Ten collegiate athlete rev share memorandum of understanding was "provided by a source under an agreement that the specific school not be publicized." *See*, *e.g.*, Daniel Libit, Eben Novy-Williams and Michael McCann, "*Inside a Big Ten Athlete Revenue Sharing Agreement*," available at https://www.sportico.com/leagues/college-sports/2025/big-ten-athlete-revenue-sharing-agreement-1234824623/. The article notes that, "The MOU aggressively attempts to extinguish the prospect of an athlete arguing the deal reflects an employment agreement. Most directly, one clause is bluntly coined 'No Employment.' It states the MOU 'does not create a fiduciary relationship,' and that the athlete 'acknowledges and agrees' they are not an employee and, further, 'waives, 'forever discharges' and agrees 'not to sue the [college], NCAA [and] Conference' on the basis of them being an employee because of the MOU or by 'serving as a marketing agent' as part of the deal."

may quickly be examined under a proverbial microscope by the media or other interested parties (via Freedom of Information Act (or "FOIA") or similar requests for copies of rev share contracts or records of administrative decisions made with respect to rev share program terms or specific awards, as examples) because state taxpayer dollars may effectively be spent on rev share programs.[29]

Vesting Conditions, Forfeiture Events & Claw-backs

If a collegiate athlete receives an allocation under a school's rev share compensation program, under what circumstances could or should the collegiate athlete *automatically* forfeit their allocation? Under what circumstances could or should a school be *entitled* to cancel a collegiate athlete's participation via an exercise of discretion by the school? If a school will retain discretion in its rev share compensation program to administer and execute certain decisions generally and/or with respect to individual allocations to collegiate athletes under its program, how should that administrative discretion be applied within the context of forfeiture events, particularly with public schools that are subject to FOIA and similar information requests (and the flames of modern-day media and social media fires)? These are difficult questions to answer – leveraging constructs that address similar issues within the realm of every-day executive and employee compensation structures in Corporate America may be instructive.

At a minimum, schools offering a rev share compensation program for recruits and collegiate athletes will require minimum service or retention criteria to earn or vest in allocations made under contractual arrangements with the school. For example, if a school provides for annual allocations under its program, the school may likely require a collegiate athlete receiving an allocation to remain in good standing with its athletic program through the last day of the applicable academic year (or other vesting period) to earn or vest in the allocation, at which time it will not be subject to forfeiture. Additionally, the school may require that a participating collegiate athlete maintain certain minimum academic standards and abide by certain code-of-conduct conditions, including with respect to program media interviews and the collegiate athlete's social media accounts, to vest in and earn an allocation. The school could also require that a collegiate athlete remain enrolled

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[29] Consider, for example, the potential media and public relations crisis for an athletic director at a school with an athletic department funded, in part, by state taxpayer dollars if a media FOIA request reveals that the school's five-star quarterback was determined by the school's athletic director to be permitted to retain his annual rev share award for $1,000,000 notwithstanding the quarterback's arrest for a drunken driving offense or other dangerous or harmful conduct. As one data point, the University of Wisconsin recently declined to disclose *redacted* copies of collegiate athlete rev share and NIL agreements in response to media FOIA requests in connection with the developing Xavier Lucas transfer portal dispute, asserting that disclosure could harm the university and its athletic programs from a competitive standpoint and also detriment the state's interests. *See*, *e.g.*, Daniel Libit, "*Wisconsin Says Disclosing Athlete NIL Deals Would Harm School, State*," available at https://www.sportico.com/leagues/college-sports/2025/university-of-wisconsin-foia-nil-records-denial-xavier-lucas-1234824537/.

with the university and a participant in the specific athletic program in which the collegiate athlete is a participant at the time of grant of an allocation through an outside date (*e.g.*, the second anniversary of the grant date of the allocation or some other retention date important to the school or the specific program) or through a specific event (*e.g.*, a post-regular-season bowl game, if applicable, for a football program collegiate athlete) to vest in and earn an award.

While service-based vesting conditions and criteria may seem relatively straightforward, certain foreseeable potential forfeiture conditions are important for a school to consider in designing a rev share compensation program. Should a collegiate athlete forfeit all or a portion of an allocation under a school's rev share compensation program if any of the following events, circumstances or conditions occurs? Should the collegiate athlete *be required to repay to the school* all or a portion of an allocation previously converted to payment under a school's rev share compensation program if any of the following events, circumstances or conditions occurs (or becomes first known to a school) after payment (*i.e.*, a "claw-back" mechanism)? What if the collegiate athlete was already taxed by the IRS or applicable state tax or revenue body on the applicable amount and cannot recoup the tax amount paid to the IRS or other body? Will the school effectively require the collegiate athlete to manage that "phantom" or "dry" tax problem alone?

What terms should apply if a collegiate athlete does any of the following:

- They enter the transfer portal and leave the school or program before the contractual vesting date for the allocation?
- They enter the transfer portal before the contractual vesting date for the allocation *but do not leave the school or program* (either before that vesting date or ever)?
- They enter the transfer portal *at a coach's explicit or implicit request or suggestion* and leave the school or program before the contractual vesting date for the allocation?
- They enter the transfer portal and leave the school or program before the contractual vesting date for the allocation *because of zero or limited playing time during the applicable academic year in which the allocation is made, despite explicit or implicit assurances made by a program head coach or other coach to the contrary in one or more recruiting visits*?
- They voluntarily or involuntarily leave the program for health or injury reasons?
- They voluntarily leave the program for personal reasons (*e.g.*, to tend to a sick family member)?
- They voluntarily leave the program (during an "open" transfer portal window or otherwise) because of *an involuntary termination by the school* of the program's head coach?
- They voluntarily leave the program (during an open transfer portal window or otherwise) because of a *voluntary termination by the program's head coach*?

- They die?
- They materially violate the program's terms or a school's code of conduct?
- They file or participate as a plaintiff in a lawsuit of any kind against the school or any of its personnel or other representatives (for NIL back pay or any other matter)?

As an additional layer of considerations from a rev share compensation program design perspective, will the school address all of the above issues programmatically and require all collegiate athletes to agree to the exact same program terms? Or will they entertain certain exceptions or accommodations as a condition to certain recruits committing on signing day to the school? If so, who will make that decision – the head football coach, the athletic director, the university president, the board of trustees or some other authorized decisionmaker(s) or committee?

While certain questions may be easier to answer than others, many of the above questions could raise thorny contractual, collegiate athlete-relations, public relations and other issues for schools, not only from a design and structural perspective but also from an operational and logistical perspective. While a school and its advisors may have the best intentions in contractually memorializing the school's perspective regarding these issues in its rev share compensation program terms, there will likely be situations that challenge a school's and its decisionmakers' policies in enforcing programmatic rules that cannot address every conceivable fact pattern in the future. Nonetheless, the most successful rev share compensation programs will enable schools to lean on contractual provisions when necessary and also permit administrative flexibility to do "the right thing" (whatever that means to a school in an exercise of its discretion in good faith) when facts and circumstances require an exercise of discretion by the school informed by important audiences and constituencies for the school.

"Sop-Up" Rights, Cap-Change Clauses and Other Related Matters

In addition to thoughtfully addressing potential forfeiture and claw-back provisions, schools will also want to consider how (if at all), when, and under what terms to re-allocate rev share participations forfeited by collegiate athlete participants to collegiate athlete participants who remain in good standing (*i.e.*, a "sop-up" provision). At a minimum, such a sop-up provision, if designed correctly, should enable a school to re-allocate participations in a manner that dovetails with threshold allocation considerations described above in this paper; take into account any legal restrictions and other considerations described below in this paper (*e.g.*, Title IX and applicable federal, state and local laws); and be logistically streamlined in its operation so that re-allocations (if and when made) are applied in recurring intervals (*e.g.*, annually or semi-annually) to minimize administrative burden on a school and its personnel administering and operationalizing its rev share compensation program.

Similarly, as briefly discussed above in this paper, before entering contractual guarantees with recruits and collegiate athletes, schools will want to address uncertainty in go-forward annual rev share cap amounts, including by relying on variable compensation constructs that automatically adjust to changes in the cap or through holdbacks to otherwise fixed-dollar guarantees that provide a margin for adjustment once a cap is set for an applicable year.

Additionally, schools will need to contractually address in their rev share compensation program award, grant or other participation agreements (and proactively speak to their recruits and collegiate athletes regarding) to what extent certain legal or force majeure events could materially alter, suspend, defer or otherwise impact the application of the *House* settlement in the 2025-2026 academic year and beyond. In the event the *House* settlement (if finally approved in April 2025 or otherwise) is overturned, repealed, stayed, deferred, curtailed or otherwise amended, modified or supplemented by court action, federal or state legislation or otherwise, a school's rev share program materials will need to be carefully prepared to ensure that the school does not unintentionally write (contractual) checks it cannot legally cash. Given the fluidity of the legal environment regarding these issues, the most successful schools navigating the go-forward rev share compensation landscape will work closely with their legal advisors to not only craft and finalize program contracts but also monitor (and, to the extent practical, influence) pending legal developments that could impact their ability to maintain their competitive position in the race for recruiting and retaining collegiate athlete talent.[30]

THE THIRD-PARTY NIL LANDSCAPE: CONTINUED ROLE OF COLLECTIVES AND SCHOOLS AS NIL "MARKETING AGENTS"

Even if the *House* settlement receives final approval and colleges and universities begin paying collegiate athletes directly under the settlement framework, we expect that third-party NIL deals will continue to contribute to the overall pool of consideration paid to college athletes over the next decade. Notwithstanding the NCAA's prognostication that "the reliance on collectives will be significantly reduced going forward,"[31] the slow but

[30] The Big Ten rev share memorandum of understanding reported to have been disclosed to Sportico in January 2025 appears to address certain vesting, forfeiture, claw-back and similar issues raised in this paper. *See*, *e.g.*, Daniel Libit, Eben Novy-Williams and Michael McCann, "*Inside a Big Ten Athlete Revenue Sharing Agreement*," available at https://www.sportico.com/leagues/college-sports/2025/big-ten-athlete-revenue-sharing-agreement-1234824623/. The article notes, "The seven-page memorandum of understanding includes language that says schools will be reimbursed for some revenue already paid should an athlete transfer to a different school – or even enter the transfer portal – and allows the school to adjust the payment up or down as a reflection of the athlete's performance. The MOU contains a morals clause; requires the athlete to be in good academic standing to be eligible to receive payments; and explicitly asserts the agreement is not 'pay-for-play,' leaving the door open for the deal to be terminated without further payment should the laws change."

[31] *See* https://nil-ncaa.com/power5/.

steady erosion of amateurism in college sports accelerated so much in the wake of the NCAA allowing NIL compensation in 2021 – fueled largely by money funneled to student athletes by booster- and collective-funded organizations – that we do not believe NIL collective deals will disappear.[32] Given that NIL payments from third parties – including third party NIL collectives and boosters – would not apply to the annual rev share cap under the *House* settlement agreement, schools and athletic departments will have an incentive to create "cap space" by continuing to accommodate deals with, and facilitated by, third-parties (including NIL collectives and boosters).

Those deals will, however, likely evolve. Because many such deals would be subject to increased scrutiny by a third-party clearinghouse (initially Deloitte & Touche LLP) to ensure compliance with requirements under the *House* settlement, we expect a number of trends to emerge, as follows:

- First, the number of NIL collectives that operate independent of athletic departments will dwindle, but those that remain will work more closely with schools and handle more of the market, particularly for higher-value third-party NIL deals.

- Second, athletic departments likely will incubate their own in-house "marketing agencies" that source and manage compliant NIL deals for their student athletes to the extent permitted under *House*.

- Third, colleges, universities and their athletic departments will rely on third-party NIL deals to create more "cap space" and flexibility in allocating rev share payments.

Third-Party Collectives – Only the Strong Survive

In June 2021, the NCAA paved the way for third-party NIL collectives to pay student athletes when it adopted a uniform interim policy suspending NIL rules for all incoming and then-current collegiate athletes in all sports. Since then, distinct species of the NIL collective have emerged. On the one hand, many collectives pay student athletes directly from collective funds (call these "Direct Collectives"). Of these, some act like agencies and enter into agreements with student athletes that give the collectives the right to source and enter into NIL deals on each athlete's behalf. Others look and feel like a grown-up booster club that pay collegiate athletes for merchandise signings and other promotional appearances at collective-sponsored events. On the other hand, some collectives function

[32] Many observers have expressed skepticism that the provisions restricting NIL payments from athletic boosters and collectives will receive final approval and/or survive judicial scrutiny. *See*, *e.g.*, Michael McCann and Daniel Libit, "*House v. NCAA Settlement is Illegal, State NIL Lawmakers Warn*," available here: https://www.sportico.com/law/analysis/2024/house-ncaa-settlement-illlegal-nil-california-nebraska-oregon-1234819133/.

as an intermediary between brands and collegiate athletes (call these "Facilitator Collectives"). They connect brands that want to pay collegiate athletes directly for their NIL rights but do not actually pay athletes directly from collective funds.

If the *House* settlement is approved in its current form, NIL payments from third parties that are "Associated Entities or Individuals" – many collectives and most material boosters – would be subjected to increased scrutiny and restriction. The *House* settlement would not restrict or otherwise require increased scrutiny of NIL payments from third parties that are not "Associated Entities or Individuals," though avoiding that status may be difficult.[33] Accordingly, certain Facilitator Collectives may find more opportunities in the post-*House* world.

Third-party NIL collectives that are "Associated Entities or Individuals" would be prohibited from entering into NIL deals with or for the benefit of student athletes "unless the license/payment is for a valid business purpose related to the promotion or endorsement of goods or services . . . at rates and terms commensurate with compensation paid to similarly situated individuals with comparable NIL value who are not current or prospective collegiate athletes at the Member Institution."[34] In other words, NIL collectives and boosters who meet the definition of an "Associated Entity or Individual" would be prohibited from entering into "pay-for-play" deals disguised as NIL agreements. In addition, any deals with "Associated Entities or Individuals" in excess of a nominal amount ($600) would need to be submitted to a third-party clearinghouse (initially Deloitte)[35] to determine compliance with these restrictions. Deals that are determined to be non-compliant would be rejected, and there could be real consequences – including loss of athletic eligibility – if an athlete fails to terminate a non-compliant NIL deal.[36]

Accordingly, schools and their athletic departments may prefer to work only with more established third-party NIL collectives for compliance reasons. We expect those collectives to continue to become more sophisticated; in particular, to work with outside advisors and/or bring expertise in-house for purposes of calculating the "fair market value" of NIL deals in a manner intended to survive clearinghouse scrutiny. This will be

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[33] For instance, "[a]n entity that is or was known (or should have been known) to the athletics department staff of a Member Institution, to exist, in significant part, for the purpose of (i) promoting or supporting a particular Member Institution's intercollegiate athletics program or [collegiate athletes]; and/or (2) creating or identifying NIL opportunities solely for a particular Member Institution's [collegiate athletes]" would be an Associated Entity or Individual. It is hard to envision a collective acting at scale to avoid becoming known by a school.

[34] Am. Injunctive Relief Settlement at 20, Sept. 26, 2024, *In Re College Athlete NIL Litigation*, No. 4:20-cv-03919 (N.D. Cal. June 15, 2020).

[35] *See, e.g.*, Jerry Kutz, "*House-NCAA settlement could clean up wild west of NIL*," available at https://floridastate.rivals.com/news/house-ncaa-settlement-could-clean-up-wild-west-of-nil.

[36] *See id*.

increasingly important for high-value third-party NIL deals, and so schools and athletic departments that are looking to attract the biggest-name talent in the highest-revenue-generating sports through a combination of rev share payments and third-party NIL money will put a premium on working with only the most trusted collectives. Given those dynamics, as well as those described further below in this paper, we expect schools and athletic programs to work more closely with a smaller group of reputable third-party collectives in order to continue to attract marquee talent while remaining compliant with the *House* settlement agreement.

In-House Marketing Agencies

As noted above, the *House* settlement provides that third-party payments procured for collegiate athletes will not count against the rev share pool and schools will be permitted to act as a "marketing agent" for collegiate athletes with respect to NIL contracts between collegiate athletes and third parties. This means that schools may coordinate with NIL collectives and other third parties regarding collegiate athlete NIL deals so that they may exert more control over the totality of compensation flowing to collegiate athletes in a manner that, presumably, fosters the most competitive overall compensation offering on a holistic basis.

The "marketing agent" provision of the *House* settlement has received somewhat less attention than the rev share pool but may prove critical in the new environment. Well-resourced schools may want to build out this capability and devote new resources to successfully leverage and manage this opportunity. Schools will have the opportunity to serve as important gatekeepers in the NIL landscape, serving as repeat players to organize the process and enable more sophisticated (and lucrative) NIL opportunities for recruits and collegiate athletes. If done well, this would allow schools to regain more control over their programs, with an eye toward maintaining sustainable programs over time. But the task of doing so may put schools in the uncomfortable position of operating outside their traditional comfort zone – and they may need to allocate additional resources to hiring and building out these functions.[37] Of course, collegiate athletes will be amenable to having schools act as their marketing agents only if they perceive it to be in their interest.

Third-Party NIL Collectives Used to Create "Cap Space"

As outlined earlier, certain Power 4 member schools from the SEC and the Big 12 are anticipated to allocate approximately 90% or more of 2025-2026 academic year rev share monies to football and men's basketball collegiate athletes, with the remainder spread

[37] This could form a "cottage industry" within the NIL landscape, as advisors like sports agencies, investment banks and financial players look to offer models and services for the burgeoning NIL market for elite college collegiate athlete talent. *See*, *e.g.*, Alex Byington, "*Drew Rosenhaus calls for NIL transparency, structure amid college football chaos*," available at https://www.on3.com/news/drew-rosenhaus-calls-for-nil-transparency-structure-amid-college-football-chaos/.

across all other programs at the member school. If that trend continues through the 10-year *House* settlement period, it begs the question of how schools and athletic departments continue to attract talent in sports other than football and men's basketball, many of which are soaring in popularity.

As a threshold matter, it is not only about football and men's basketball anymore. The business of women's sports is improving. Student athletes like Caitlin Clark, Angel Reese, Flau'jae Johnson, and JuJu Watkins generated massive viewership ratings in 2023, and they and others, like Princeton soccer player Lexi Hiltunen, have large social media followings that have increasingly enticed brand sponsors.[38] While football and men's basketball have historically generated the lion's share of revenue for schools and their athletic programs, data reported from SponsorUnited with respect to NIL brand deals in 2023 suggests that brands are increasing investment in NIL deals with women student athletes and that the majority of reported third-party NIL deals among the top 100 most-endorsed student athletes went to women in 2023.[39] In addition, while the bulk of third-party NIL brand deals with men goes to football players, women's deals are more evenly distributed across sports, including basketball, gymnastics, volleyball and soccer.[40] These trends suggest schools' in-house marketing agencies and third-party NIL collectives that work closely with schools and athletic departments have an opportunity to supplement the rev share cap in any given year by closely coordinating rev share payments with approved third-party NIL deals.

While this paper does not address in detail the potential Title IX issues raised by the *House* settlement, we note that schools that allocate rev share participations disproportionately to male collegiate athletes compared to female collegiate athletes across and within programs could raise Title IX concerns. Further, to the extent a school or athletic department itself arranges third-party NIL deals for student athletes (for example, through an in-house marketing agency), Title IX could similarly apply and the school may need to treat male and female athletes equitably.[41] Accordingly, schools and athletic

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[38] For example, USC sophomore JuJu Watkins recently agreed to a multiyear contract extension with Nike that will reportedly give her one of the richest shoe deals in women's basketball. See, e.g., Shams Charania, "*Sources: USC's JuJu Watkins, Nike reach lucrative extension*," available at https://www.espn.com/womens-college-basketball/story/_/id/41684352/sources-usc-juju-watkins-nike-reach-lucrative-extension.

[39] *See* Jeremy Crabtree, "*Report: Women athletes outpaced men in NIL brand deals in 2023,*" available at https://www.on3.com/nil/news/report-women-athletes-outpaced-men-in-nil-brand-deals-in-2023-sponsorunited-angel-reese-caitlin-clark-paige-bueckers-cameron-brink-alex-glover/. As the article points out, observers note that the statistics reported by SponsorUnited likely exclude collective-driven "pay for play" deals, many of which would be subject to increased clearinghouse scrutiny post-*House*.

[40] *See id*.

[41] *See*, *e.g.*, Dionne Koller, "*Title IX and Athlete NIL Overview*," available at https://www.cccco.edu/-/media/CCCCO-Website/About-Us/Divisions/Educational-Services-and-Support/Academic-Affairs/Senate-

departments that supplement rev share payments with third-party NIL deals that are either sourced and facilitated in-house through their marketing agency or through third-party NIL collectives that qualify as "Associated Entities or Individuals" will need to think carefully about how the total pool of consideration payable to its collegiate athletes each year is allocated.

BIG QUESTIONS REMAIN

The *House* settlement is poised to open a new era in college athletics in which rev share compensation arrangements will likely become a key component of college athletic departments' recruiting and retention toolkit. Given the shifting landscape, there are significant questions that will need to be addressed by college administrators – and, in some cases, the legal system – as the new rev share paradigm is implemented. As of the date of this paper, college administrators are grappling with these issues and navigating the uncertain landscape with little guidance as they prepare to make rev share allocations for the 2025-2026 academic year. For many, if not the majority, of these schools, whether, to what extent and how to implement collegiate athlete rev share compensation programs raises some of the most significant financial considerations they have faced in their history. It is a challenging time for college administrators.[42]

How Will Colleges Fund Rev Share Programs?

Perhaps the most important business question for colleges that decide to offer rev share participations is how, exactly, to fund these participations. While certain top-tier schools enjoy nine-figure annual athletic department revenues and budgets, the vast majority of schools do not.[43] Providing up to approximately $20.5 million in annual rev share payments for collegiate athletes for the 2025-2026 academic year represents a material annual budget line item for even the most prolific athletic department spenders; for smaller and less-resourced colleges, attempting to remain competitive in this landscape could be extremely risky from a financial perspective absent prudent financial planning and analysis. Regardless of the college or annual rev share amount proposed to be offered to its collegiate athletes, there will presumably be immense pressure for athletic directors to deliver a return on investment for rev share payments made to collegiate athletes. Given that most colleges (with only a few exceptions like Notre Dame) do not directly negotiate media rights deals and, instead, rely on conference leadership to negotiate these deals,

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bill-206/professor-koller-ca-workgroup-title-ix-sb206-a11y.pdf?la=en&hash=66969D066E0A262BAAD16B359BDB370C0AED4BB1#:~:text=participation.,that%20receive%20federal%20financial%20assistance.

[42] *See, e.g.*, Amanda Christovich, "*Schools Are Scrambling to Prepare for the NCAA Revenue-Sharing Era*," available at https://frontofficesports.com/newsletter/how-will-ncaa-athletes-get-paid/.

[43] *See, e.g.*, https://nil-ncaa.com/football/, which provides illustrative school athletic department revenues and budgets based on the NCAA's financial reporting requirements.

college administrators and athletic directors may be skittish to dole out maximum rev share participations.[44]

Colleges are already scrambling to line up third party money to fund budgetary gaps anticipated to be created by rev share programs for the 2025-2026 academic year.[45] Many colleges, either directly through administrators or other key decisionmakers on behalf of the college or indirectly through collectives, are actively soliciting donations from fans and alumni.[46] Other colleges are assessing corporate sponsorships of the type that professional sports franchises do, including stadium or field naming rights and athletic program jersey patch sponsors.[47] Some colleges are also increasing game-day ticket prices and adding event-based revenue streams (*e.g.*, alcohol sales at athletic program events, which are now generally permitted under NCAA rules) to fund, at least partially, rev share payments.[48]

It has also been reported that certain private equity sponsors are actively seeking opportunities to invest in major college athletic programs, presumably to fund rev share commitments (at least in part) and also enable private equity sponsors to participate in future economics flowing through major college athletic programs from media rights and related monetization opportunities. Florida State University has reportedly been working with JP Morgan for the past year to explore raising investment capital. Given that most major college athletic departments have not historically operated as stand-alone profit-driven businesses and have increased expenditures almost in lock-step with increasing

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[44] *See*, *e.g.*, Dennis Dodd, "*In or Out? College Athletics Preparing for Every Conundrum as Revenue Sharing Promises to Reshape Landscape*", available at https://www.cbssports.com/college-football/news/in-or-out-college-athletics-preparing-for-every-conundrum-as-revenue-sharing-promises-to-reshape-landscape/. "Why are we going to spend $20 million that we didn't spend last year?," asked one ACC administrator. "It really doesn't make sense that we're doing that. Spending [millions] on an average football player just because the SEC's going to do it? I don't pay our coaches the same that SEC coaches get."

[45] *See*, *e.g.*, Amanda Christovich, "*How Schools Are Raising Money to Prep for House v. NCAA Settlement*," available at https://frontofficesports.com/house-ncaa-settlement-player-pay-funding/.

[46] *See*, *e.g.*, https://www.championscircleuofm.com and https://yea-alabama.com; and Alex Byington, "*Greg Byrne Explains Request for NIL Donations from Alabama Fans*," available at https://www.on3.com/college/alabama-crimson-tide/news/greg-byrne-explains-request-for-nil-donations-from-alabama-fans/.

[47] *See*, *e.g.*, Pete Nakos, "*Ross Bjork: Ohio State Putting 'Everything on the Table' for Naming Rights*," available at https://www.on3.com/nil/news/ohio-state-buckeyes-ross-bjork-putting-everything-on-the-table-for-ohio-state-naming-rights-revenue-sharing-nil/.

[48] *See*, *e.g.*, Jason Clinkscales, "*Tennessee to Add Ticket 'Talent Fee' for Athlete Revenue-Sharing*," available at https://www.sportico.com/leagues/college-sports/2024/tennessee-football-ticket-fee-athletes-revenue-sharing-1234797606/; and Nick Schultz, "*Auburn Announces Ticket Price Adjustment for 'Several Seating Zones' Ahead of 'New NIL Era'*," available at https://www.on3.com/college/auburn-tigers/news/auburn-announces-ticket-price-adjustment-several-seating-zones-ahead-new-era-nil/.

revenues, it remains to be seen whether a private equity sponsor business model can be effectively applied in college athletics.[49]

Certain rev share contractual commitments for the 2025-2026 academic year may, in many cases, be made to collegiate athletes and recruits *before* funding sources are contractually and operationally guaranteed for colleges. As discussed above in this paper, some colleges may contractually tether all or a portion of initial rev share participations to the attainment of certain financial criteria over which collegiate athletes may not have any control. For example, if the University of Tennessee's increased football home game ticket sale prices do not sufficiently increase revenues for its seven home games in 2025, to what extent will the University of Tennessee (or its collegiate athletes with rev share allocations) be financially exposed for rev share participation commitments made to collegiate athletes before 2025 college football season ticket sales are finalized?

When Will Colleges Revisit Decisions to Provide Rev Share Allocations?

An open question for colleges will be how frequently they intend to revisit their commitment to provide annual rev share allocations. Although the most obvious answer is likely annually, how will this work in practice? For example, will a college view this issue programmatically across all of its collegiate athletes and provide "blanket" communications to all collegiate athletes regarding its rev share commitment for the upcoming academic year? That seems to be the default starting point. However, could a college provide one-off multi-year rev share commitments to certain key recruits or other marquee collegiate athletes who may view single-year commitments as (further) reason to "test the waters" each year in the transfer portal? Put another way, will single-year programmatic rev share commitments be competitive, or will multi-year rev share commitments become mainstream because of competitive pressures?

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[49] *See*, *e.g.*, Michael Ozanian, "*Private Equity Looks to Buy in to College Sports*," available at https://www.cnbc.com/2024/12/19/private-equity-looks-to-buy-in-to-college-sports.html. As the article notes, "In North America, Major League Baseball, the National Basketball Association, the National Hockey League and Major League Soccer have permitted private equity firms to own limited partner stakes for several years. The National Football League voted in August to allow select private equity investors to take minority stakes. Now the attention is turning to college programs.... And even among the biggest conferences, a gap in television revenue could cause a big competitive and economic disparity. 'Schools in the ACC and Big 12, as well as the bottom of the SEC and Big Ten who are generating less local commercial revenue, will have little choice but to take on private capital and operation expertise, or they are all but guaranteed to be left out of the top echelon of competition in the future,'" commented Jason Belzer (publisher of AthleticDirectorU, who is reported to have advised universities on NIL deals and is now conducting similar work for athletic departments seeking private equity capital) in the article.

The Big Ten's current media rights deals with Fox, CBS and NBC run through the 2029-2030 academic year,[50] and the SEC's existing media rights deal with ESPN expires in the 2033-2034 academic year.[51] Given that the *House* settlement term extends through the 2033-2034 academic year, Big Ten and SEC college administrators and athletic directors, for example, may be reticent to make multi-year rev share commitments to collegiate athletes until there is greater certainty regarding their institution's participation in future conference media rights deals. It is possible that competitive angles may be taken by certain Power conference member institutions at different inflection points in the *House* settlement ten-year term. For instance, Big Ten "football schools" (*e.g.*, Michigan, Ohio State and Oregon), for example, may be more comfortable offering multi-year rev share commitments programmatically or for certain key collegiate athletes starting for the 2030-2031 academic year when their athletic directors have greater certainty regarding go-forward revenue streams, whereas SEC "football schools" (*e.g.*, Alabama, Georgia and Texas) may not have this same window unless (or until) the *House* settlement agreement term is extended by the litigation parties. It is also entirely possible that the Big Ten and the SEC – or all Power conferences collectively – explore the formation of, and actually form, a single "super-conference" to gain greater commercial leverage at the bargaining table with ESPN, Fox, CBS, NBC and other prospective media rights holders in future negotiating cycles before the *House* settlement agreement term ends.[52]

Regardless of how the above "macro" industry dynamics shake out over the years ahead, each college offering a rev share participation for its collegiate athletes and recruits for the 2025-2026 academic year will want to contractually define its commitment carefully to ensure that participation by a collegiate athlete in a rev share opportunity for one academic year does not guarantee participation in a future or any other academic year (unless, of course, that is the intent).

What Roles Will Athletic Directors and Head Coaches Have in the New Rev Share Era?

One athletic director recently commented, "I'm no longer an athletic director. I'm a CEO."[53] More and more athletic directors will likely feel this way in the years ahead, as rev

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[50] *See* Adam Rittenberg, "*Big Ten completes 7-year, $7 billion media rights agreement with Fox, CBS, NBC*," available at https://www.espn.com/college-football/story/_/id/34417911/big-ten-completes-7-year-7-billion-media-rights-agreement-fox-cbs-nbc.

[51] *See* https://www.secsports.com/sec-on-abc-and-espn.

[52] *See*, *e.g.*, Ben Portnoy, "*College Sports Tomorrow wants to transform and repair college football. Is it actually feasible?*," available at https://www.sportsbusinessjournal.com/Articles/2024/10/07/college-football; and Daniel Libit & Eben Novy-Williams, *College Football 'Super League' Pitch Deck Details Breakaway Plan*, available at https://www.sportico.com/leagues/college-sports/2024/college-football-super-league-pitch-deck-1234775652/.

[53] *See*, *e.g.*, Amanda Christovich, "*Schools Are Scrambling to Prepare for the NCAA Revenue-Sharing Era*," available at https://frontofficesports.com/newsletter/how-will-ncaa-athletes-get-paid/.

share opportunities will likely (1) require a return on investment, and (2) shift risk from athletic program head coaches to athletic directors. Although no one has a crystal ball, college administrators will likely believe that, going forward starting with the 2025-2026 academic year, rev share opportunities (or the lack thereof) provided (or not) to their athletic programs' collegiate athletes will be a material or key element of athletic department and program success. The availability of the transfer portal to collegiate athletes will likely exacerbate this perception, as rev share opportunities (or the lack thereof) will likely become a reason collegiate athletes refrain from entering (or enter) the transfer portal. Accordingly, athletic directors will likely be evaluated by college presidents, boards of trustees and similar decisionmakers, at least in part, on their delivery of rev share opportunities to collegiate athletes and how those opportunities contribute to athletic department and program success, collegiate athlete success and athletic department financial stability. Head coaches alone may not endure all of the blame for a program's failure (or enjoy all of the accolades for its success) going forward. This may be unfair in some respects – legal constraints like Title IX, competing programs and head coaches within an athletic department, and affiliations with Power or other conferences will, amongst numerous other factors, all constrain an athletic director's decision-making ability with respect to rev share allocations. However, it will likely be reality.

A key question going forward, therefore, will relate to how contract terms for athletic directors and head coaches will change, if at all, starting with the 2025-2026 academic year to account for both the opportunities and challenges in the new rev share landscape under *House*. For example, will head coaches entertaining offers from college programs require contractual guarantees from colleges regarding rev share allocations to their program (for a single year, multiple years or throughout the term of their contract or through the end of the *House* settlement term, if earlier)? Will colleges be able to provide guarantees in a fluid legal landscape? Will (or should) head coach salaries decrease in certain programs or across all programs to account for athletic directors assuming more responsibility for program success and failure in the *House* era, or will (or should) such head coach salaries actually increase to reflect the more difficult recruiting and retention landscape? Will athletic director salaries increase to account for athletic directors assuming more responsibility for program success and failure in the *House* era? How will head coach and athletic director buyout clauses in contracts change going forward? Will colleges be less likely to trigger buyouts of head coaches and athletic directors because of funding challenges created by rev share allocations under *House*? If so, will a "cottage industry" of insurers of buyout risk line up to take advantage of the challenging financial landscape for colleges?

There are countless questions like these that will deserve thoughtful perspective from colleges, head coaches, athletic directors and their respective advisors in the years ahead.

How Will Title IX Affect the *House* Settlement and Rev Share Allocations?

As a threshold matter, the application of Title IX to payments and arrangements authorized by the *House* settlement will need to be clarified. Title IX prohibits educational programs and institutions funded or otherwise receiving financial assistance from the U.S. government from discriminating on the basis of sex, but the proposed framework under *House* leaves substantial uncertainty about how it applies in the current era of collegiate athlete compensation.

Among the key questions under Title IX are (i) whether payments under the new NCAA rev share pool must be split proportionately between men's and women's teams based on enrollment in an institution (or whether other splits are permissible), and (ii) as noted above in this paper, whether NIL payments by third parties facilitated by a school acting as a marketing agent would be subject to Title IX. While some school administrators believe the annual rev sharing total dollar amount will likely need to be equal between men's teams and women's teams,[54] other schools (as described above in this paper) are reported to plan to allocate the lion's share of 2025-2026 academic year rev share monies (~90%) to football and men's basketball collegiate athletes. NIL deals, because of commercial factors, will still likely favor collegiate athletes anticipated to generate the greatest revenues, but it remains to be seen whether payments by third party collectives facilitated by a school acting as a marketing agent under *House* would be subject to Title IX.

A representative of the Office for Civil Rights of the U.S. Department of Education indicated in 2024 that Title IX will be relevant to determinations of payments authorized by the *House* settlement, and several members of Congress asked the Department of Education to officially rule on whether Title IX applies to collegiate athlete rev share allocations and payments.[55] On January 16, 2025, the Office for Civil Rights of the Department of Education released a fact sheet memorandum stating that rev share

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[54] *See*, *e.g.*, Nicole Auerbach, "*How the House v. NCAA settlement could reshape college sports: What you need to know*," available at https://www.nytimes.com/athletic/5506457/2024/05/20/ncaa-settlement-house-lawsuit-college-sports/.

[55] *See* https://x.com/achristovichh/status/1857553202155073732. In a publicly available letter to the Department of Education, the members of Congress wrote, "We are deeply concerned that, if approved, the back-payment thresholds established in the settlement could be misinterpreted as compliant with Title IX or used as a justification to not apply Title IX to athlete compensation going forward. Clearly, the originally proposed breakdown that would result in less than 10% of damages going to women athletes is not equal to the rate paid to athletes of the opposite sex, and it makes gender-based distinctions in rates of pay which is in violation of the Title IX Regulations. At a time when women's sports are exploding in popularity, collegiate athletics should not take a step back by implementing a model that ignores the progress of women's sports and eliminates the opportunity for women athletes to be compensated equally as required under Title IX. Quite simply, the acknowledgement that college athletes are deserving of compensation does not invalidate Title IX or allow it to take a backseat. In fact, it should be a lynchpin of the conversation."

payments directly made by NCAA Division I institutions subject to Title IX would, in fact, be subject to the allocation requirements of Title IX; NIL payments from third parties, however, would not be deemed to be financial assistance, though the memorandum has preserved the position that, depending on the circumstances, third-party NIL monies could be viewed within a Title IX allocation lens.[56]

Despite the recent memorandum published by the Department of Education, particularly in light of the recent change in U.S. presidential administrations, it seems likely that Title IX issues related to rev share allocation and NIL arrangements will not be determined until a court issues a final, non-appealable ruling.[57] If no timely guidance emerges, schools will need to carefully balance competitive considerations with compliance and litigation risk.

Will Collegiate Athletes Be Treated as Employees Under Law?

The question of whether college collegiate athletes are employees has emerged as an important legal question.[58] The implications of collegiate athletes being classified as an employee are relevant in myriad contexts[59] but arguably the most important are their classification for purposes of the National Labor Relations Act (the "NLRA") and the Fair Labor Standards Act (the "FLSA").

If student athletes are deemed to be employees for purposes of the NLRA, collegiate athletes would be permitted to collectively bargain against private universities and other schools. This has been a hotly contested issue in recent years, most notably

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[56] *See*, *e.g.*, Paula Lavigne and Dan Murphy, "*Dept. of Education says Title IX applies to payments to athletes*," available at https://www.espn.com/college-sports/story/_/id/43443976/dept-education-says-title-ix-applies-payments-athletes.

[57] In framing the fact sheet memorandum from the Department of Education, it could quickly become stale in connection with President Trump's administration's priorities. *See*, *e.g.*, https://x.com/RossDellenger/status/1880269133448901054?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet. President Trump has been reported to desire to appoint Linda McMahon to run the Department of Education, a move that many believe will make it less likely that any guidance from the Department of Education prior to her instatement will be legally or politically relevant. *See*, *e.g.*, Amanda Christovich, "*Trump Taps WWE's Linda McMahon to Run Education Dept. He promised to Close*," available at https://frontofficesports.com/linda-mcmahon-wwe-trump-education-department/.

[58] *See*, *e.g.*, Robert T. Zielinski, "*College Athletes as Employees*," 41 The Journal of Coll. and Univ. Law 71 (2015), available at https://www.nacua.org/docs/default-source/jcul-articles/jcul-articles/volume41/41_jcul_71.pdf?sfvrsn=1db189bf_8; and Bridget Whan Tong, "*To Be or Not to Be: Student-Athlete Employees*," 2017 Moorad Sports Law Journal Blog, available at https://www1.villanova.edu/villanova/law/academics/sportslaw/commentary/mslj_blog/2017/0213.html.

[59] *See*, *e.g.*, Stephen L. Willborn, "*College Athletes as Employees: An Overflowing Quiver*," 69 U. Mia. L. Rev. 65, 67 (2014), available at https://repository.law.miami.edu/cgi/viewcontent.cgi?article=1343&context=umlr.

involving the Dartmouth men's basketball team[60] and football, men's and women's basketball players from the University of Southern California.[61] Despite some initial legal successes, very recently, in both cases, the collegiate athletes abandoned their unionization efforts.[62] Whether these moves were based on the legal merits or the prevailing political winds (in light of the recent change in U.S. presidential administrations) is the subject of debate.[63] Despite those outcomes, considerable legal uncertainty remains and the issue remains ripe for future resolution.

If collegiate athletes are deemed to be employees for purposes of the FLSA, "they'd be owed at least minimum wage for their labor and would be eligible for overtime pay."[64] The most recent significant development occurred on July 11, 2024, when the U.S. Court of Appeals for the Third Circuit in *Johnson v. NCAA*[65] "rejected the NCAA's longstanding position that college athletes cannot be employees and athletes at the same time."[66] The Third Circuit remanded the case back to the district court, ordering it to apply a different test for employment. While the "ruling does not make the athletes employees of their colleges . . . [it] is a substantial step in that direction," and "could lead to the NCAA and

[60] On February 5, 2024, NLRB regional director Laura Sacks issued a decision in favor of Dartmouth men's varsity basketball players, holding that they were employees under the NLRA. A copy of the decision is available at https://www.nlrb.gov/case/01-RC-325633. The Dartmouth players subsequently unionized. Michael McCann, "*Dartmouth Won't Recognize Hoops Union and Bargain, NLRB Told*," available at https://www.sportico.com/law/analysis/2024/dartmouth-college-union-bargain-nlrb-1234799210/.

[61] In February 2022, on behalf of the University of Southern California's football team and men's and women's basketball teams, the National College Players Association ("NCPA") filed a similar charge at the NLRB's regional office in Los Angeles against the University of Southern California, the Pac-12 Conference and the NCAA. On Friday, January 10, 2025, "the National College Players Association dropped their unfair labor practice charge regarding USC football and men's and women's basketball players." The docket for the NCPA case is available at https://www.nlrb.gov/case/31-CA-290326.

[62] On December 31, 2024, the union representing Dartmouth College men's basketball players withdrew its petition to the National Labor Relations Board. See Michael McCann, "*Fight to Recognize College Athletes as Employees Lives On*," available at https://www.sportico.com/law/analysis/2025/college-athlete-employee-legal-fight-1234823597/. On Friday, January 10, 2025, "the National College Players Association dropped their unfair labor practice charge regarding USC football and men's and women's basketball players." *See* https://www.nlrb.gov/case/31-CA-290326.

[63] *Compare* Amanda Christovich, "*Another College Athlete Employment Movement Dies Ahead of NLRB's Expected Swing*," available at https://frontofficesports.com/college-athlete-unionization-usc-withdrew-labor-charge/#:~:text=Another%20College%20Athlete%20Employment%20Movement,%2D12%2C%20and%20the%20NCAA, to Michael McCann, "*Fight to Recognize College Athletes as Employees Lives On*," available at https://www.sportico.com/law/analysis/2025/college-athlete-employee-legal-fight-1234823597/.

[64] *See, e.g.*, Michael McCann, "*NCAA Denied Appeal in College Athlete Employee Case*," available at https://www.sportico.com/law/analysis/2024/third-circuit-johnson-ncaa-flsa-case-1234780117/.

[65] *See, e.g.*, Johnson v. NCAA, No. 22-1223 (3d Cir. July 11, 2024), available at https://cases.justia.com/federal/appellate-courts/ca3/22-1223/22-1223-2024-07-11.pdf?ts=1720717215].

[66] *See, e.g.*, Michael McCann, "*NCAA Denied Appeal in College Athlete Employee Case*," available at Johnson v. NCAA Third Circuit Ruling Sides With Players as Employees.

colleges being ordered to pay many millions of dollars in unpaid wages and forced to amend amateurism rules to recognize an employee-employer relationship."[67] The Third Circuit's ruling conflicts with rulings by the Seventh and Ninth Circuits, which "is problematic for the NCAA given that it seeks uniform rules across the country," and "could eventually convince the U.S. Supreme Court to consider the issue."[68]

In both cases, if future court decisions definitively classify collegiate athletes as employees (for either the NLRA, the FLSA or both), there could be significant and lasting economic consequences that could yet again threaten to fundamentally change the nascent environment brought about by the *House* settlement. Schools will continue to closely monitor developments in this area and should consider incorporating contractual flexibility to change rev share programs as may be necessary or advisable should collegiate athletes become classified as employees for either purpose.

How Will Creative Compensation Arrangements Count Against the Annual Rev Share Cap?

As discussed above, under the *House* settlement terms, schools will be permitted to distribute, each academic year, "additional payments and/or benefits to collegiate athletes over and above annual existing scholarships and all other benefits currently permitted by NCAA rules" up to the new NCAA rev share pool amount. But the details are murky and there are numerous points that will ultimately need to be clarified.

For instance, do payments with respect to which contractual rights between colleges and collegiate athletes are memorialized before July 1, 2025 count against the annual cap for a school if they are paid in a later year? The answer is probably "yes" (which, as described above in this article, is why colleges are front-loading arrangements to be paid before July 1, 2025), but if so, to what extent? For example, if a rev share contract requires continued enrollment for a collegiate athlete from today (*i.e.*, before July 1, 2025) through the last day of the 2026-2027 academic year (*i.e.*, June 30, 2027) and provides for 50% of the payment to be made upon signing (subject to claw-back under certain mutually-agreed circumstances) and 50% of the payment to be made in July 2027 (*i.e.*, the 2027-2028 academic year), how is the payment applied (if at all) against the 2025-2026, 2026-2027 and 2027-2028 academic year annual caps? Does it depend on the claw-back conditions? Notwithstanding the claw-back provisions, is any portion "grandfathered" into the period before the *House* settlement becomes effective (and therefore completely exempt from the strictures of the *House* settlement)?[69] Further, if a payment is paid, but later clawed back,

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[67] See *Id*.

[68] *See id*.

[69] *See, e.g.*, Dennis Dodd, "*In or Out? College Athletics Preparing for Every Conundrum as Revenue Sharing Promises to Reshape Landscape*", available at https://www.cbssports.com/college-football/news/in-or-out-

does that money go back into the rev share pool? What if a claw-back is triggered but a school, despite reasonable efforts, cannot successfully recover the money – how does that impact the rev share pool?

Presumably, the NCAA and conferences will ultimately provide guidance on these nuances. These questions will require them to wade into new regulatory waters, but while they are being sorted out, schools will likely have to make their own good-faith determinations about how the rules will be applied (and may need to write rev share contracts with significant "outs" that allow them to be conform to new interpretations that may arise).

FINAL THOUGHTS

There are likely more than a few athletic directors and other college and university administrators reminding themselves to "never let a good crisis go to waste" as they prepare their strategic plan for the post-*House* era. Moving forward, schools will face an increasingly complex competitive landscape balancing rev share commitments and NIL arrangements with uncertain future media rights participation opportunities as the college sports market continues to grow and jockeying amongst Power conferences and their member institutions persists. Athletic directors and other school decisionmakers that produce brand-building and profitable returns on investments in rev share programs coupled with strategic commitments to foster meaningful NIL opportunities for their collegiate athletes will be rewarded. Schools that maintain thoughtful rev share and NIL package offerings with an eye toward the future but with a firm grasp of their institution's unique circumstances, audiences and traditions will prove to be successful in college athletics' new compensation era.

college-athletics-preparing-for-every-conundrum-as-revenue-sharing-promises-to-reshape-landscape/. As one college administrator pondered, "I don't think anybody has the answers to questions like that … about what if you sign a deal now but it's not supposed to be paid until 2026 or 2027, and it's the type of deal that's not going to be allowed under these new clearinghouse rules?"