

Education

Update on Proposed Changes to the NCAA Constitution

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On Monday, November 15, 2021, the NCAA held a [special convention](#) to discuss a proposed [draft constitution](#) for the organization. The draft constitution, circulated a week earlier, would make several significant changes to the NCAA's governance and rules if adopted. These changes target, among other things, antitrust concerns implicated by the Supreme Court's June 2021 decision in *National Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

The draft constitution would shift more authority to individual divisions and pare back the role of the NCAA Board of Governors. For instance, it would provide that "[e]ach division shall have independent authority to organize itself, consistent with the principles of the Association," and would also authorize the creation of sub-divisions or creation of new divisions.

Of particular note, the draft constitution would provide that although "[s]tudent-athletes may not be compensated by a member institution for participating in a sport," they "may receive educational benefits and benefit from commercialization through use of their name, image and likeness in accordance with guidelines established by their NCAA division." Each division, conference, and individual institution would be responsible for setting policies with respect to use of student-athletes' names, images, and likenesses, in accordance with this general principle. If enacted, this provision would codify an [interim NCAA policy](#), in place across all three divisions since this past June, of not enforcing the NCAA bylaw prohibiting student-athletes from receiving payments in exchange for use of their names, images, or likenesses.

The NCAA's interim name, image, and likeness policy emerged in response to a combination of state legislative activity—including legislation that would prohibit preventing student-athletes from profiting from their name, image, and likeness rights—and the Supreme Court's *Alston* decision. The majority opinion in *Alston*, authored by Justice Gorsuch, acknowledged that the NCAA enjoys monopoly control in the student-athlete labor market, "such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor," despite members schools competing "fiercely" for student-athletes. *Alston*, 141 S. Ct. at 2154. The Court thus ultimately upheld the district court's decision to enjoin certain NCAA limits on the provision of "education-related benefits" for student-athletes. *Id.* at 2163–65. Although the majority opinion was narrowly targeted at these education-related benefits, Justice Kavanaugh authored a concurring opinion suggesting that the NCAA's remaining compensation rules—including those governing student-athletes' ability to profit from endorsement deals and other third-party arrangements—also violate antitrust laws against price-fixing. *Id.* at 2166–69 (Kavanaugh, J., concurring).

It remains to be seen whether the NCAA's proposed constitutional changes will fully address the concerns raised by *Alston* and in particular by Justice Kavanaugh's concurrence. As noted, the draft constitution commits policymaking authority on name, image, and likeness rules to each division, conference, and institution. Although such policies would need to be consistent with the general constitutional principle that student-athletes may benefit from commercialization of their name, image, and likeness, the draft constitution otherwise commits considerable discretion to divisions, conferences, and member institutions. Policies enacted under these provisions at all three levels will likely be subject to significant scrutiny to ensure they are sensitive to antitrust concerns and state regulation, among other issues.

In addition to making member institutions responsible for maintaining written policies for name, image, and likeness monetization, the draft constitution spells out certain other responsibilities that would also

fall on member institutions. Although several of these are unchanged from the existing constitution, the draft constitution most notably articulates more specific requirements involving mental health services.

The NCAA has indicated that NCAA members may propose amendments to the draft constitution beginning on December 15, 2021. A final vote is expected to take place in January.

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