A “Collective” Cheer for NIL Transparency?

Anticipating Insights As NIL Collectives Open Their Books for the First Time

Many observers of collegiate athletics have circled May 15, 2023 on their calendars – not for a big game, but because it’s the deadline for a new generation of non-profit organizations, dubbed “NIL collectives,” to submit tax returns for the first time, offering fresh insights into their operations and the roles they play in the emerging, largely opaque market for compensating student-athletes for the use of their name, image and likeness (“NIL”).

Following the enactment of various new state laws, the Supreme Court’s Alston decision,[1] and changes to NCAA rules governing the commerical use of student-athlete NIL, student-athletes were first permitted to earn compensation from their personal brand without risking collegiate eligibility on July 1, 2021. The result was the creation of a new market estimated to approach $1 billion in deals during its first year.[2] Although laws varied by state (and continue to do so), this new freedom came with some restrictions, including that NIL agreements should not compensate or incentivize student-athletes for enrollment decisions, athletic performance, or achievement. In response to these changes, a flurry of school- and sport-specific NIL collectives emerged, aiming to bring together supporters to help create and facilitate NIL opportunities for student-athletes. Many of these NIL collectives elected to pursue tax-exempt status as 501(c)(3) public charities.

General IRS Requirements for 501(c)(3) Public Charities

Section 501(c)(3) organizations are corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international sports, or prevention of cruelty to children or animals.[3] These organizations are exempt from paying federal income tax on income related to their exempt purpose, and contributions to the organizations are generally tax-deductible, providing an incentive for donors to financially support the organization. Although they are exempt from federal income taxation, NIL collectives with tax-exempt 501(c)(3) status that are public charities are required to file annual information returns on Form 990 or Form 990-EZ, unless allowed to submit Form 990-N. These information returns, which must be filed by the 15th day of the fifth month following the end of the organization's tax year, must be made available for public inspection and copying by exempt NIL collectives and will be made publicly available by the IRS.[4]

Funding and Sources

What should interested parties expect from these filings? For starters, observers will gain insight into the initial scale of donor support for the NIL collective since receiving its final determination letter granting tax-exempt status.

NIL collectives filing Form 990-N will acknowledge gross receipts normally less than or equal to $50,000 during the tax year or donor pledges or receipts less than $75,000 during their first tax year.[5] Depending on the duration of the NIL collective's tax-exempt status during the tax year, onlookers may draw conclusions about its relative success in the college landscape.

Collectives with greater donor support, on the other hand, will file more expansive disclosures via Form 990-EZ and Form 990, as shown in Figure 1. These returns include progressively more robust disclosures regarding the collective's funding sources.

***Figure 1** — Annual Return Requirements by Activity*[6]

SIZE THRESHOLD	REQUIRED FORM
Gross receipts normally **≤ $50,000**	Form 990-N
Satisfied **both** of the following: 1. Gross receipts during the year **< $200,000** 2. Total assets at end of the year **< $500,000**	Form 990-EZ
Satisfied **one** of the following: 1. Gross receipts during the year **≥ $200,000** 2. Total assets at end of the year **≥ $500,000**	Form 990

Form 990-EZ and Form 990 filers receiving contributions of $5,000 or more from any single contributor during the tax year must complete Schedule B.[7] This requires the disclosure of the donor's name, address, total contribution, and contribution type. While the names and addresses of donors are not subject to public inspection requirements, all other information is and may provide insights regarding the NIL collective's dependency on various donor levels.[8]

Some speculate that changes in NIL rules and the emergence of NIL collectives will impact college and university athletic department budgets. In the 2021-2022 academic year, donor contributions funded approximately 20% of Football Bowl Subdivision (FBS) revenues, according to the Knight Commission on Intercollegiate Athletics.[9] The impact on academic institutions remains uncertain; however, these initial filings may provide early evidence of the effect on donor behaviors and the potential magnitude of re-allocating tax-deductible donor contributions away from academic institutions to the independent NIL collectives they're affiliated with.

NIL Support and Operating Expenses

Form 990-EZ and Form 990 returns will also offer insight into both stewardship over resources and the success of NIL collectives in converting benefactors' contributions into NIL deals for student-athletes in their first tax year. Form 990-EZ requires disclosure of expenses for the following:

— Grants and similar expenditures;

— Benefits paid to or for members;

— Salaries, other compensation, and employee benefits;

— Professional fees and other payments to independent contractors; and,

— Other traditional operating overheads, such as occupancy, rent, utilities, maintenance, printing, publications, postage, shipping and other expenses.

While Form 990-EZ allows for more aggregated expense disclosures as described in the above list, Form 990 filers must provide more detailed disclosure of their functional expenditures including, for example, fees paid for various categories of services, travel and entertainment expenses, and payments to affiliates of the collective.[10] These disclosures will provide insights into costs paid to various third party startups providing various facilitating and administrative services to NIL collectives.

Further to the issue of stewardship, both Form 990 and Form 990-EZ filers must disclose compensation paid to officers, directors, trustees, and key employees as well as any loans to or from these parties.[11, 12, 13, 14] They must also report the five highest compensated employees (excluding the aforementioned officers, directors, trustees, and key employees) earning more than $100,000 from the collective, their time commitment, and their annual compensation.[15, 16]

NIL followers will be eager to review collectives' disclosures about their program service accomplishments during the tax year, which should address the economic benefits the collective conveyed to third party charities in the form of student-athlete NIL deals during the tax year.

Perhaps of greatest interest to onlookers will be NIL collectives' disclosures regarding independent contractors. The IRS generally considers an individual to be an "independent contractor" if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. Most NIL collectives will likely approach student-athletes engaged in NIL services as independent contractors. Both Form 990-EZ and Form 990 filing NIL collectives must disclose the five largest independent contractors receiving greater than $100,000, the amount such independent contractors were paid, and the total number of independent contractors compensated more than $100,000 by the organization.

Financial Condition

Form 990-EZ and Form 990 further include disclosure requirements regarding the financial condition (*i.e.*, assets and liabilities) of the collectives and information on asset disposition. NIL collectives that file Form 990 will disclose a full balance sheet.

NIL followers will scrutinize net assets, balancing revenue and expense information to assess donor strength, financial health, and charitable program efficiency.

Summary

As NIL collectives submit their first tax returns by May 15, 2023, these filings will offer valuable insights into the organizations' funding sources, operations, and the impact of new NIL rules on donor behaviors, student-athletes and college athletics. Indeed, such insights may showcase a great success story for the market for compensating student-athletes for their NIL.

But in light of the early stages of the industry and the compensation restrictions placed on student-athletes, these insights may also reveal certain "red flags" that the NCAA or state government watchdogs will be keen to unravel (*e.g.*, fair market value of student-athlete compensation) and could fuel the emergence of disputes in this new $1 billion industry. In future articles, we will follow up with further observations based on actual filings.

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1 Sarah Eberspacher and Martin D. Edel, “National Collegiate Athletic Association v. Alston,” The National Law Review, (June 21, 2021), https://www.natlawreview.com/article/national-collegiate-athletic-association-v-alston

2 Erica Hunzinger, “One year of NIL: How much have athletes made?” Associated Press, (July 6, 2022), https://apnews.com/article/college-football-sports-basketball-6a4a3270d02121c1c37869fb54888ccb

3 “Exempt Purposes – Internal Revenue Service Code Section 501(c)(3)”, IRS web site (last accessed May 2, 2023), https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501c3#:~:text=The%20exempt%20purposes%20set%20forth,cruelty%20to%20children%20or%20animals

4 Compliance Guide for 501(c)(3) Public Charities, IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/p4221pc.pdf

5 “Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard

6 Ibid note 4.

7 “Schedule B: Schedule of Contributors,” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.

8 “Instructions for Form 990 Return of Organization Exempt From Income Tax (Appendix D. Public Inspection of Returns),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/i990.pdf.

9 Knight-Newhouse College Athletics Database, a joint project of the Knight Commission on Intercollegiate Athletics and the S.I. Newhouse School of Public Communications, Syracuse University. https://knightnewhousedata.org/fbs#!quicktabs-tab-where_the_money-1

10 “IRS Form 990: Return of Organization Exempt From Income Tax (Part IX Statement of Functional Expenses),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/f990.pdf

11 “IRS Form 990: Return of Organization Exempt From Income Tax (Part VII Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/f990.pdf

12 “IRS Form 990-EZ: Short Form Return of Organization Exempt From Income Tax (Part IV List of Officers, Directors, Trustees, and Key Employees),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/f990ez.pdf

13 “IRS Form 990: Return of Organization Exempt From Income Tax (Part X Balance Sheet),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/f990.pdf

14 “IRS Form 990-EZ: Short Form Return of Organization Exempt From Income Tax (Part V Other Information),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/f990ez.pdf

15 Ibid note 11.

16 “IRS Form 990-EZ: Short Form Return of Organization Exempt From Income Tax (Part VI Section 501(c)(3) Organizations Only),” IRS.gov web site (last accessed May 3, 2023), https://www.irs.gov/pub/irs-pdf/f990ez.pdf