NIL Consortiums and Charitable Deductions

Friday, November 3, 2023

Take-Away: Money may be destroying 'big time' college athletics, with that money coming in the form of tax deductible charitable contributions taken by donors.

Background: A few weeks back a quote from the Kentucky football coach caught my eye when, after his team got thoroughly thrashed by the top-ranked Georgia football team on a Saturday afternoon, quipped after the game that Georgia "had the best players money can buy." Which, of course, was a vague reference to the current practice in college football of generously compensating football players for their name, image and likeness (NIL). For example, the football players at Utah and Ohio State receive not only full-ride scholarships to their schools, every player also receives a cost-free 4 year vehicle lease as part of their NIL 'compensation.' Or, consider the University of Michigan's leading basketball player the past three seasons who transferred for his senior year because the University of Kansas's NIL collective ''stipend' was far more generous than the University of Michigan's NIL stipend. In the new world of big-time college football and basketball, with NIL and free 'transfers' from one university to another, there is corresponding growth in NIL consortiums used to raise millions of dollars to attract, and then pay, for that talent in the form of NIL compensation.

NIL Growth: The New York Times identified more than 120 university NIL collectives, one for every university in each of the five major college football conferences. The average starter on a university football team now takes in roughly $103,000 a year, per Opendorse, a company that processes NIL payments to the players for multiple collectives. This year Opendorse expects to process over $100 million in payments to athletes, with over 80% coming from NIL collectives.

NIL Contributions Deductible?: Aggressive alumni not only want to contribute to the NIL collectives, they also want to claim their contributions as an income tax charitable contribution to the university. In June, 2023, the IRS in a Chief Counsel Advice Memo advised that these university affiliated NIL consortiums that raise cash to pay for the player compensation and benefits were not tax deductible by donors: *"Many organizations that develop paid NIL opportunities for student-athletes are not exempt"* because their focus is to help the athletes, not the general public. Thus, it should come as no surprise then that this Advice did not go down well to uber-wealthy university athletic supporters, which has consequently prompted some creative 'work-arounds' in order for a donor to claim an income tax deduction to indirectly 'pay' a player for his NIL.

> Example: The Penn State NIL collective is not a tax-exempt charity. Instead, Penn State explicitly tells its donors that their gift can still be tax-deductible if they route their funds through an affiliated charity called the BPS Foundation, which is one of 60 collectives that offer donors income tax charitable deductions, either because the collective itself has been approved for tax-exempt status by the IRS, or because the NIL collective has partnered with an outside charity. BPS Foundation takes in tax-deductible donations and then puts the donations at the disposal of for-profit collectives at around 25 universities.

> Example: Bud wants to make a $2,000 contribution to support the MSU football team. He makes a contribution to the BPS Foundation. The Foundation then turns to the for-profit side of the NIL collective and asks it 'How do you want to use it?' The NIL collective would then choose the player to do charity work and the BPS Foundation would directly pay the athlete for this charitable appearance.

> One Response: At the University of Michigan, after the Chief Counsel's Advice was published, it created a new NIL collective that agreed to a major change in its focus in order to gain IRS tax-exempt approval. Instead of allotting 70% of the collective's revenue to athletes as it initially planned,

the UofM collective will now pay the athletes 30% of the revenues and use the balance for more direct charitable work.

Tax-Exempt Partner-'Insubstantial Private Benefit:' One approach to is fold a free-standing *nonprofit* NIL into a larger operating tax-exempt charity and call what the NIL does 'insubstantial' by comparison to the larger charity's other tax-exempt activities. An *insubstantial* private benefit is apparently not a problem for an otherwise publicly supported 501(c)(3) entity.

DAF: Some donors now contribute funds to a donor advised fund (DAF) and then direct the DAF's distribution of the contributed funds to a university's athletic foundation. While in theory these entities, i.e., the athletic foundation and the university's athletic programs, operate independently, it is no surprise that donors view them to be the same, especially when it comes to their desire to claim an income tax deduction to 'help the university.'

Conclusion: NIL collectives are now deeply embedded in the college sports and the billions of dollars those athletic programs generate. Universities are now 'jumping ship' from long established conferences to join new conferences across the continent, just to gain larger pay-outs from conference TV contracts. The same amount of money that is flowing in and out of college athletics can explain, at least in part, why players are regularly changing from one college program to another, prompted in large part by their access to generous NIL money. And now we find creative 'work-arounds' where donors can claim charitable income tax deductions for their indirect contributions to pay athletes for their name, image, and likeness, and four-year vehicle leases for all 85 players on the football roster.