

NCAA Adopts New NIL Enforcement Standards

By: Tate Thompson and Curry Sexton

As of January 1, 2023, the National Collegiate Athletic Association (“NCAA”) is applying a new standard of review in investigations pertaining to potential violations of its name, image, and likeness (“NIL”) rules.

According to a supplementary document used by the NCAA Division I NIL Working Group, Division I institutions will now be required to “clearly demonstrate” that, upon receiving notice of a potential infraction, the questioned activities were not in violation of the NCAA’s NIL rules. The supplementary document also provides further explanation of the NCAA’s Interim NIL Policy and what activities constitute an NIL violation. The document follows increasing requests from member institutions for the NCAA to step up its enforcement efforts, as many have opined that the current state of NIL in collegiate athletics is untenable.

Presumption of Infraction and Updated Procedure

In the supplementary document, the NCAA states that its enforcement staff will presume a violation has occurred whenever “available information supports that the behaviors leading up to, surrounding and/or related to an NIL agreement or activity were contrary to NCAA Division I legislation and/or the Interim NIL Policy.” Thus, the NCAA may now rely on circumstantial evidence of a violation rather than requiring record evidence to prove a violation occurred (such as documents or statements made during an interview).

As a result, the updated standard of review shifts the burden of proof from NCAA investigators to the member institution accused of violating NIL rules (this includes potential violations that result from the conduct of boosters and/or NIL collectives). Moreover, the institution’s burden of proof appears to be significant, as the institution “must *clearly demonstrate* that all behaviors complied with NCAA legislation and interim NIL policy” to rebut the presumption of a violation. Notably, the presumption applies to both the enforcement staff during the investigation and to the Committee on Infractions during the adjudication process.

The supplementary document also details the procedure for NIL investigations going forward, granting the enforcement staff one of two enforcement methods: (1) conducting an investigation; or (2) issuing a Letter of Inquiry (“LOI”). The investigation method reflects the more traditional route, wherein the enforcement staff requests documents, conducts interviews, and follows the standard investigation protocols provided in the NCAA Bylaws. On the other hand, the LOI approach provides an expedited option for investigators. An LOI is only required to identify any information supporting the presumption of the NIL violation, note that the burden is on the institution to rebut the presumption, and provide a deadline for the institution’s response. In either case, any investigation not resolved by the enforcement staff will “proceed to a contested hearing pursuant to Bylaw 19,” wherein the Committee on Infractions will apply the presumption.

The key takeaway from the supplementary document is that the presumption will make allegations of NIL violations much easier to prove for the NCAA. Throughout the early stages of the NIL era, the NCAA has struggled with enforcement measures because of a lack of cooperation from schools under investigation, among other obstacles. As a private institution, the NCAA does not have subpoena power, making any investigation somewhat voluntary. And, with a lack of “hard” evidence showing a violation, the NCAA has

been hamstrung in any enforcement efforts. The renewed approach, shifting the burden of proof to member institutions, simplifies the NCAA's approach to enforcement and is almost certain to lead to more enforcement activity.

Circumstances Supporting NIL Violation

The supplementary document also lists factors clarifying when an NIL violation occurs. It breaks down the types of activities that may support the presumption of an NIL violation into three categories:

1. Impermissible Contacts/Recruiters:

- An institutional staff member directly or indirectly contacts a prospect who is not in the NCAA Transfer Portal to discuss NIL opportunities.
- A representative of the institution's athletic interests (e.g., individual booster or collective) contacts a prospect or their family about potential NIL opportunities prior to the prospect signing with the institution.

2. Impermissible Offers:

- An institutional staff member in any way offers, communicates and/or guarantees an NIL opportunity to a prospect, their family or representatives during their recruitment.
- A collective and/or its representatives engage in recruiting activities and/or the promotion of specific prospects prior to their commitment to the institution.
- An NIL agreement requires a prospect to be in the locale of the institution prior to enrollment to fulfill the terms of the agreement (e.g., local appearances).
- A representative of the institution's athletics interests announces and/or enters (verbally or in writing) into an NIL agreement with a prospect prior to their enrollment at the institution.

3. Impermissible Benefits:

- An institutional staff member, booster, or another institutional representative solicits, facilitates, and/or provides additional NIL opportunities in order to secure a student-athlete's continued enrollment at the institution.

NCAA Enforcement Activity Worth Tracking

How the NCAA enforcement staff will implement the foregoing remains to be seen. Whether and to what extent the NCAA actually acts on its more favorable standard of review may depend on factors outside of the NIL realm. In light of the Supreme Court's decision in NCAA v. Alston, the legality of any NCAA restrictions on student-athlete compensation remains uncertain due to substantial antitrust concerns. Still, to avoid NCAA scrutiny, Division I institutions should apprise themselves of the renewed NIL enforcement standards.

This article is general in nature and does not constitute legal advice. The authors of this article, Tate Thompson and Curry Sexton, are members of the Seigfreid Bingham Sports and Entertainment Industry Group and routinely represent clients in collegiate athletics. If you or your organization have questions about the impact of these developments, please contact Tate or Curry at 816.421.4460.