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The NCAA's new charging standard for NIL violations

By Cal Stein, Chris Brolley, and Brett Broczkowski

The National Collegiate Athletics Association (NCAA) released its interim policy regarding name, image, and likeness (NIL) for NCAA student-athletes in July 2021.^[1] Since then, the NCAA has released several clarifying guidance documents detailing the types of NIL activity it deems permissible and impermissible under that policy. Consistent across all these guidance documents, however, has been the key restriction that NIL opportunities afforded to student-athletes cannot be used as “pay-for-play” or as an “inducement” to attend a school or participate in a particular sport.

In October 2022, the NCAA issued one of its most consequential pieces of guidance, the main component of which was creating a new enforcement standard for NIL violations. That new enforcement standard effectively flipped the burden of proof in NIL cases, shifting it from the NCAA having to prove an NIL violation to the charged institution having to prove it did not commit a violation. This new charging standard represents a seismic shift in the NIL enforcement landscape.

In this article, we address the new charging standard, including enforcement activity to date, the likely use of circumstantial evidence by the NCAA to charge NIL cases going forward, and potential compliance challenges for institutions.

The NCAA's New NIL Charging Standard

The NCAA's new NIL charging standard (announced in October 2022) went into effect on January 1, 2023.^[2] It provides that:

When 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, the enforcement staff and NCAA Division I Committee on Infractions shall presume a violation occurred.^[3]

On its face, this new charging standard represents a marked departure from the well-known “innocent until proven guilty” standard universally applied throughout the American justice system. Quite the contrary, this new charging standard permits the NCAA to *presume* an institution’s guilt in the first place. Moreover, the charging standard does not even impose any minimal evidentiary benchmark for the “presumption” to apply—the NCAA may presume guilt based on “available information,” which could mean almost anything.

This new charging standard does provide that the charged institution may rebut the presumption of an NIL violation. However, it makes clear that the burden of rebutting a presumed NIL violation falls exclusively to the institution and that the burden in doing so is high. The institution must “clearly” demonstrate that “all” of its behaviors complied with NCAA NIL rules. Although the new charging standard does not define what constitutes a clear demonstration, the language suggests it is not an easy standard to satisfy. That hurdle is heightened by the fact that to rebut a presumption successfully, the new charging standard requires an institution to prove all its conduct (i.e., not only that which led to the presumed violation in the first place) was compliant.

NCAA NIL enforcement activity to date

The NCAA’s words on the page related to the new charging standard are critical, but so too are the actions the NCAA takes to enforce those words. Unfortunately, so far, there has been extremely limited NCAA enforcement activity and no known activity under the new charging standard. Still, there are lessons to be learned for institutions.

Since the NCAA announced its interim policy on NIL, there has been only one NCAA enforcement action relating to NIL activity (and even then, there is a strong case to be made that the enforcement activity was more focused on recruiting violations than NIL). That enforcement action, brought against the University of Miami women’s basketball team, stemmed from the improper recruitment of two women’s basketball players who ultimately transferred from an NCAA member institution to Miami.^[4] According to the NCAA, Miami began recruiting the prospects after they entered the transfer portal and, during a recruiting visit, the prospects attended a dinner at the home of a prominent Miami-based booster. According to the NCAA, the booster promoted the institution during the dinner and then posted a picture of himself with the recruits on social media. The NCAA concluded that the actions by the Miami booster and the lack of oversight by the head coach (who claimed not to have been aware of the dinner) were sanctionable and placed the women’s basketball program on one-year probation, fined the school \$5,000 plus 1% of the women’s basketball budget, suspended the head coach for three games, and placed limits on recruiting efforts.

What is most interesting about this enforcement action, though, is that it was announced *after* the new charging standard went into effect but concerned conduct that came *before* its effective date. Thus, the NCAA prosecuted it under the old charging standard and was not able to presume any violations. This ultimately turned out to be quite significant. In announcing the enforcement action, the NCAA Committee on Infractions felt compelled to comment that the lack of *direct evidence* of NIL being used as an “inducement” played a significant role in the case’s outcome:

The investigation did not develop any facts directly linking activities around name, image and likeness to the prospects’ recruitment to or decision to enroll at the University of Miami.^[5]

Yet, the NCAA still decided to punish the school. Given these comments, one cannot help but wonder if the NCAA’s findings and punishments would have been different (and harsher) under the new charging standard, where the need for direct evidence would have been replaced by the ability to presume a violation, and thus flip the burden on the school to present evidence disproving it.

Even though the Miami case did *not* apply the new charging standard now in effect, there are still lessons to be learned from this enforcement action illustrating the NCAA’s overall stance on NIL enforcement.

The NCAA kept its word and punished the institution only—not the student-athletes themselves. More importantly, though, the enforcement action illustrates the NCAA’s willingness to enforce the NIL space going forward. In describing the NCAA’s new charging standard, NCAA Vice President of Enforcement Jon Duncan remarked that the new standard allows the NCAA “to take a common-sense view of a fact pattern of circumstantial evidence.”^[6] Duncan’s remarks suggest the NCAA’s lack of NIL enforcement to date is not the result of a policy decision of nonenforcement. Rather, it is possible the NCAA’s enforcement efforts have been hamstrung by a tough-to-meet charging standard and scarce resources—the latter of which the NCAA seems to have addressed with its recent hiring spree of enforcement personnel, and the former of which the NCAA has already rectified through the passage of the new charging standard.

Inducements and circumstantial evidence

As noted above, the focal point of the NCAA’s NIL policy has always been to prevent the use of NIL opportunities as inducements to attract student-athletes to a particular institution or to keep them enrolled therein. It is particularly vital to consider this concept within the context of the new charging standard; it not only makes it easier for the NCAA to charge NIL violations but also arguably broadens the scope of evidence the NCAA, at least, believes it can use to prove an NIL violation. As Duncan indicated in his remarks, the NCAA’s position is that the new standard allows it to rely on *circumstantial evidence* to determine whether to presume an NIL violation.

This raises a fundamental question for all institutions: What will the NCAA consider circumstantial evidence of an inducement? In the absence of a body of historical enforcement actions on which to rely, institutions are largely left guessing whether conduct occurring today will be considered circumstantial evidence of an inducement tomorrow. Since NIL remains in its nascent state (and NIL enforcement even more nascent than that), one of the best ways to answer this question is to look to other, more developed areas of the law that embrace similar concepts of inducements to see how prosecutors and regulators have used circumstantial evidence to prove violations under those laws.

Applicability of the AKS to NIL enforcement

One such area of the law is the federal Anti-Kickback Statute (AKS) that Congress enacted more than 50 years ago. The AKS has become a complicated and complex statute; however, at its most basic, it prohibits pharmaceutical and medical device companies (among others) from making payments to physicians, nurses, and other healthcare providers if any purpose of the payment is to *induce* the provider to prescribe its medication or use its device. The parallels between the AKS and the NCAA’s prohibitions on inducements are apparent. But unlike NIL rules, there are more than 50 years of AKS jurisprudence, prosecutions, and trials from which we can glean the types of circumstantial evidence regulators frequently use to prove an inducement has occurred. There is no reason to believe the NCAA will reinvent the wheel in this respect, so it would not be surprising to see the NCAA and other NIL regulators gravitate toward the same types of conduct (i.e., “hallmarks” of an inducement) in making out NIL violation cases in the future.

For example, one such piece of circumstantial evidence frequently seen in AKS cases involves the timing of the payment. In the NIL context, it would not be surprising for the NCAA to examine the timing of an NIL deal and use it as circumstantial evidence that there was an inducement. Take, for instance, the situation where a highly sought-after recruit announces a decision to enroll in a particular institution, and then the very next day, the student-athlete announces a million-dollar NIL deal through the institution’s collective or with a well-connected alum of the institution. The NCAA may view the temporal proximity between the athlete’s

commitment and the NIL deal as circumstantial evidence that the million-dollar NIL opportunity was used as an inducement.

Another type of circumstantial evidence the NCAA could borrow from the AKS is the concept of “fair market value” for NIL services. The NCAA could, for instance, examine whether the compensation being paid to a student-athlete represents “fair market value” for the services being provided by the student-athlete. If the value of the payment far exceeds the value of the services, the NCAA may consider it circumstantial evidence that the true purpose of the payments is to induce the student-athlete.

A final example of circumstantial evidence the NCAA could borrow from the AKS is whether the student-athlete actually performed the obligations required by the NIL contract. If a student-athlete receives NIL compensation despite failing to perform all their obligations under an NIL agreement, the NCAA may view the agreement as an inducement. Put another way, if a student-athlete is paid NIL money but does not provide sufficient NIL services, it would not be surprising to see the NCAA question what the student-athlete actually did to earn the money. And in doing so, the NCAA may answer its own question by presuming that the student-athlete’s enrollment in (or continued enrollment at) the institution led to the compensation.

No single category or piece of circumstantial evidence may be dispositive. And whether any of the above examples of circumstantial evidence are sufficient to prove an NIL violation will always depend on the specific circumstances of the case. But it would not be surprising to see the NCAA or any other NIL regulator trying to prove NIL violations in the same way that federal prosecutors have been charging and proving AKS cases for decades.

Compliance challenges for schools

As previously noted, by flipping the burden of proof from the NCAA to institutions, the new charging standard imposes considerable challenges on institutions. Given this, it is more important than ever that institutions develop, implement, and maintain a series of NIL compliance “best practices.” Doing so will not only help prevent NIL violations in the first place but will also prove helpful in defending against any presumed violation that does occur. Below are best practices we strongly recommend institutions implement:

1. **Develop and maintain an NIL compliance program.** An effective NIL compliance program should be in writing and clearly set forth the goals and expectations of the institution and its athletic department as it relates to NIL. The policy should present these goals and expectations for staff (especially athletic staff and coaches), student-athletes, organizations affiliated with the school (i.e., boosters and collectives), and any other related personnel. And it should provide clear mechanisms for investigating and punishing individuals who do not comply with institutional rules and policies.
2. **Assign personnel to monitor and enforce the compliance program.** A compliance program is only as good as its implementation. For years, regulators have universally panned “paper compliance programs” (i.e., those that appear on paper but are never actually implemented, let alone maintained or enforced). Particularly in NIL—where student-athletes, institutional staff, collectives, and boosters may not be fully aware of all NIL regulations—institutions should assign personnel to monitor and enforce its compliance program. Institutions, not student-athletes, stand to be punished for NIL violations. Therefore, institutions have a strong incentive to monitor their own student-athletes’ activities to ensure compliance.
3. **Conduct training of staff, boosters, collectives, student-athletes, and the families of student-athletes regarding NIL rights and responsibilities.** Education will be another of an institution’s best defenses against NIL violations. The better all stakeholders understand the scope of permissible (and impermissible) NIL-related activities, the more likely they are to comply with both the institution’s

compliance plan and the NCAA's NIL policies. Remember, if any of those stakeholders violate the NCAA's NIL policies, any punishment will flow to the institution, not the other stakeholders.

4. **Implement a reporting process to help monitor student-athlete NIL activity.** One of the best ways for an institution to prevent NIL violations is to create an environment of transparency and compliance where student-athletes, athletics staff, coaches, and anyone else within an institution feel comfortable talking openly about NIL activity and concerns. The greater the transparency between the various stakeholders and the institution regarding NIL activities, the better prepared the institution will be to address any potential issues. If, for example, individuals feel comfortable enough to report concerns internally, the institution can take quick action to investigate and rectify potential problems before they ripen into NCAA enforcement actions. But if individuals do not feel secure in reporting potential issues, they may feel compelled to go outside the institution, which can hasten enforcement activity and deprive the institution of the ability to fix it.
5. **Document everything.** As the old legal saying goes: "If it's not written down, then it didn't happen." With the new charging standard requiring institutions to prove their innocence, institutions have more incentive than ever to create and maintain documentary evidence of their own compliance with NIL rules and policies. Institutions would be wise to keep well-organized and complete records of all efforts to comply with NCAA NIL policy and legislation. If an institution does not thoroughly document its compliance efforts, there is little-to-no chance it will be able to meet its burden to rebut a presumed violation.

At bottom, the NCAA's new charging standard effectively requires institutions to take immediate steps to avoid or mitigate potential circumstances to lower the risk of NIL-related enforcement findings. There is no question that the NCAA's new charging standard places significant burdens on institutions—most notably to clearly demonstrate their full compliance with NIL rules and policies—including ensuring compliance of third parties, like boosters and collectives, whose conduct could be attributed to the institution. Because NIL enforcement is a complex and rapidly evolving area of the law, institutions must stay updated on developments to better understand the risks and complexities.

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Takeaways

- The new name, image, and likeness (NIL) charging standard from the National Collegiate Athletics Association (NCAA) flips the traditional concept of the burden of proof by allowing the NCAA to presume an NIL violation based on circumstantial evidence and requiring institutions to then rebut that presumption by "clearly demonstrating" their compliance with all NCAA NIL policies.
 - The NCAA has been consistent from the outset of NIL that its primary focus is prohibiting the use of NIL opportunities as inducements to student-athletes.
 - The NCAA has indicated that its future NIL enforcement actions will continue to focus on whether NIL opportunities are used to induce a student-athlete to commit to or otherwise remain at an institution.
 - Since there is no history of NIL investigations and enforcement activity, the best indicators of the types of circumstantial evidence the NCAA (or other NIL regulators) will likely consider are found in the enforcement activities related to other laws that similarly prohibit inducements, like the federal Anti-Kickback Statute.
 - Given the new charging standard's requirement that institutions rebut presumptive violations, it is more
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critical than ever that institutions develop and implement a comprehensive NIL compliance program that involves dedicated personnel, education of all stakeholders, and thorough recordkeeping of all compliance efforts.

1 National Collegiate Athletics Association, “Interim NIL Policy,” July 1, 2021, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.

2 National Collegiate Athletics Association, “NCAA Division I Institutional Involvement in a Student-Athlete’s Name, Image and Likeness Activities,” October 26, 2022, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf.

3 National Collegiate Athletics Association, “Standard of Review for Violations Related to Name, Image and Likeness Activities,” October 2022, https://images.saymedia-content.com/.image/cs_srgb/MTk1NTM0MTQ3NTgwNjAxMzk1/standard-of-review-for-nil-activities-2.pdf.

4 National Collegiate Athletics Association, “Recruiting violations occurred in Miami (Florida) women’s basketball program,” news release, February 24, 2023, <https://www.ncaa.org/news/2023/2/24/media-center-recruiting-violations-occurred-in-miami-florida-womens-basketball-program.aspx>.

5 National Collegiate Athletics Association, Negotiated resolution with the University of Miami (Florida), Case No. 020161, February 24, 2023, https://ncaaorg.s3.amazonaws.com/infractions/decisions/FEB2023D1INF_COIPublicReportUniversityMiamiFL.pdf

6 Chris Carlson, “NCAA wants to rein in boosters abusing recruiting rules. Should Syracuse, Adam Weitsman be worried?” *Syracuse.com*, February 10, 2023, <https://www.syracuse.com/orangebasketball/2023/02/ncaa-wants-to-rein-in-boosters-abusing-recruiting-rules-should-syracuse-adam-weitsman-be-worried.html>.

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