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## The NCAA's new charging standard for NIL violations

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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.<sup>[1]</sup> 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.<sup>[2]</sup> 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.<sup>[3]</sup>

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.<sup>[4]</sup> 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.<sup>[5]</sup>

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.”<sup>[6]</sup> 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.

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