NIL Enforcement Actions are Here: How Can Institutions Prepare for Possible NIL Enforcement Actions?

By Monica Matias Quiñones

When the NCAA announced its interim policy allowing college athletes to monetize their name, image, and likeness (“NIL”), few could have predicted the NIL activity frenzy that would quickly ensue. With states racing to provide the most appealing regulatory framework for college athletes, NIL collectives dominating the marketplace, and college athletes being offered lucrative and enticing deals, the NCAA struggled to delineate and enforce rules and limits on NIL activity. However, just last month, the NCAA issued its first ever ruling on an NIL infraction and warned that it is in the process of investigating various other possible NIL violations. This new focus on pursuing discipline for NIL infractions is likely due in part to the NCAA’s adoption of Bylaw 19.7.3, which allows the NCAA to presume that an NIL infraction has occurred based solely on circumstantial evidence. With an uptick on NCAA investigations and infractions expected in the near future, NCAA member institutions should be proactive in preparing for possible NCAA inquiries regarding NIL violations.

The “NIL Presumption”

On October 26, 2022, the NCAA adopted Bylaw 19.7.3, commonly referred to as the “NIL Presumption,” which established a new presumption and evidentiary standard for NIL infractions. The NIL Presumption became effective on January 1, 2023, and states as follows:

19.7.3 Violations Presumed in Select Cases. In cases involving name, image and likeness offers, agreements and/or activities in which related communications and conduct are subject to NCAA regulation, the infractions process (including interpretive requests) shall presume a violation occurred if circumstantial information suggests that one or more parties engaged in impermissible conduct. The enforcement staff may make a formal allegation based on the presumption. The hearing panel shall conclude a violation occurred unless the institution or involved individual clearly demonstrates with credible and sufficient information that all communications and conduct surrounding the name, image, and likeness activity complied with NCAA legislation. (Emphasis added)

The NIL Presumption places the burden on member institutions to “clearly demonstrate[] with credible” evidence that an NIL rule violation did not occur. The NIL Presumption also highlights that the NCAA may now rely on circumstantial evidence, such as an anonymous tip, social media post, or news article, to presume that an NIL violation occurred. In a recently circulated NCAA memorandum, the NCAA listed several activities that may lead to a potential NIL investigation and/or violation. Amongst the prohibited conduct, the NCAA listed the following:

- 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 athletics 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.
• **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 representative of the institution’s athletics interests announces and/or enters (whether verbally or in writing) into an NIL agreement with a prospect prior to their enrollment at the institution. An NIL agreement requires a prospect to be in the locale of the institution prior to enrollment in order to fulfill the terms of the agreement (e.g., local appearances). A collective and/or its representatives engage in recruiting activities and/or the promotion of specific prospects prior to their commitment to the institution.

• **Impermissible Benefits:** An institutional staff member, booster, or other institutional representative solicits, facilitates, and/or provides additional NIL opportunities in order to secure a student athlete’s continued enrollment at the institution.

In a recent interview, NCAA Vice President of Enforcement, Jonathan Duncan, explained that despite public perception stating otherwise, the NCAA has been actively trying to pursue NIL enforcement actions. However, these efforts have been hampered by resistance from witnesses and third parties’ unwillingness to cooperate with the investigations. While the NCAA could not force parties to cooperate with its NIL investigations in the past, Mr. Duncan is hopeful that by placing the burden of proof on institutions, boosters, and collectives, the NIL Presumption will incentivize cooperation and engagement while the NCAA investigates and pursues NIL enforcement actions

**What to Expect During an NCAA Infraction Investigation**

The NCAA’s enforcement department is charged with investigating potential violations of NCAA rules, including potential NIL violations. When the enforcement staff learns of a potential NIL violation, the staff has two options: (1) conduct a limited/expedited investigation; or (2) issue a Letter of Inquiry (LOI) to an institution. If the enforcement staff decides to conduct the investigation, the staff takes the lead in all investigative activities, such as interviews with potential witnesses, review of publicly available information, and document requests. If the enforcement staff sends an LOI to an institution, the enforcement staff identifies the information it believes supports a violation and provides the institution with a deadline to respond. With the NIL Presumption in effect, the full weight of the burden is on the institution to investigate and provide evidence to demonstrate that a violation has not occurred.

Once an institution responds to an LOI, the enforcement staff may conduct an additional investigation if needed. The staff will then review the information obtained and will confirm whether a violation occurred, unless the institution provides sufficient evidence to the contrary. If the enforcement staff and the institution agree that a violation has occurred, the enforcement staff and the institution may submit a summary disposition or negotiated resolution to the NCAA Division I Committee on Infractions, who then decides whether to approve the negotiated resolution and end the matter. However, if the institution contests the violation, the matter will proceed to a contested hearing in front of a panel.

**Preparing for NCAA Enforcement Actions**

As a way to implement its new aggressive approach to policing NIL violations, the NCAA has hired several new investigators, including a former FBI and CIA agent with expertise in cybersecurity and counterintelligence. Additionally, the NCAA is set to hire a new Associate Director of Enforcement focused on overseeing NIL inquires. Lastly, the NCAA has advised that it will not pursue NIL infractions against student-athletes, and instead, it will focus on disciplining the institutions and/or third parties (e.g. boosters and collectives) involved in the potential NIL violations.

The NCAA’s new NIL Presumption and Mr. Duncan’s interview statements reaffirm the NCAA’s commitment to investigating and pursuing enforcement actions for NIL violations. Further, through the NIL Presumption, the NCAA has shifted the burden of monitoring and policing NIL activity squarely on institutions. This new paradigm allows the NCAA to ad-
address more potential violations through LOIs and concentrate their investigative efforts on selected cases. As a result, institutions now have to prepare to respond to NCAA inquiries regarding potential violations by producing “sufficient” evidence showing that a NIL violation has not occurred.

In light of these developments, it is more important than ever for institutions to implement an NIL compliance program documenting the institution’s compliance with NIL rules. A compliance program will provide two key benefits. First, the compliance program will help prevent NIL violations by educating students, staff, boosters, and collectives on the relevant NIL rules and prohibitions. Second, the compliance program will help institutions gather information and evidence that may be critical if the institution finds itself in the midst of an NCAA investigation. Lastly, we recommend that any institution facing an NIL investigation engage the help of counsel to assist the institution and guide them through the various steps in the NCAA infractions process.

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader’s Sports Law Team, or to speak with a member of the firm, please contact:

**Sports Law Team**

**Stephenie Wingyuuen Yeung**  
Chair, Sports Law Team  
215-751-22778  
syeung@schnader.com

**Monica Matias Quiñones**  
Vice-Chair, Sports Law Team  
215-751-2577  
mmatiasquinones@schnader.com

**Theresa E. Loscalzo**  
Co-Managing Partner of the Firm  
215-751-2254  
tloscalzo@schnader.com

**W. Drew Kastner**  
Co-Chair, Intellectual Property Practice Group  
215-751-2122  
dkastner@schnader.com

**Karen Baillie**  
Co-Chair, Higher Education Practice Group  
412-577-5118  
ksbaillie@schnader.com