
HIGHWAY TO NIL – S02 Ep01, NCAA ENFORCEMENT STANDARDS**RECORDED FEBRUARY 2023****HOST: CALLAN STEIN****GUESTS: CHRISTOPHER BROLLEY AND SAMUEL HATCHER****Callan Stein:**

Hello, and welcome back to a brand-new episode of *Highway to NIL*. The podcast series that discusses legal developments in the name, image, and likeness, or NIL space. NIL, of course affects colleges and universities all over the country, particularly those in Division 1 athletics, and in this podcast series we delve deep into the current NIL rules impacting colleges and universities, and importantly, their compliance departments.

My name is Cal Stein and I'm a litigation partner at Troutman Pepper. I come to you today with two of my colleagues, to discuss a recent development in guidance released by the NCAA. This development has actually been in effect behind the NCAA curtain for a few months now, but it only recently came to light, so there's actually quite a bit to talk about.

But before we do talk about it, I think some introductions are in order. As I mentioned, my name is Cal Stein, and I am a litigation partner at Troutman Pepper. As part of my practice, I represent colleges and universities, including in internal investigations and state and federal enforcement actions and lawsuits. I also advise educational institutions on any number of topics including recently name, image, and likeness questions. Joining me today are two of my colleagues. The first is Chris Brolley, and he is of course, known to *Highway to NIL* listeners from prior episodes. Chris, why don't you introduce yourself?

Christopher Brolley:

Thanks, Cal. I'm happy to be joining another episode of our NIL podcast series. As you said, my name is Chris Brolley and I'm a health sciences litigation associate out of our Philadelphia office. I primarily represent drug and medical device companies and also advise educational institutions on matters related to NIL and compliance. I'm also now happy to introduce one of our newest members, Sam Hatcher.

Samuel Hatcher:

Thanks, Chris. My name is Sam Hatcher and I'm an associate in the firm's business litigation group in our Atlanta office. My practice is not involved much in the higher education space, but I do advise a lot of corporate and regulatory compliance matters and deal with internal investigation, including those that are aimed at deciding the level of intent given with corporate actions, which as Chris and Cal have covered in previous episodes, is likely to be an important area for NIL enforcement.

Callan Stein:

Okay, great. Let's get right into the recent development that we've all gathered to discuss, and that development is an NCAA memo that is titled *Standard of Review for Violations Related to Name, Image, and Likeness Activities*. Now, somewhat oddly, this is not a new memo.

Effectively, it articulates the same standard and guidance that the NCAA set forth in its October 26th, 2022, guidance, which we discussed here on *Highway to NIL*, in our [fourth episode](#).

Some time ago, the NCAA circulated this memo to the Division 1 Working Group, though it has only recently become known to the public. The memo includes a specific charging standard for violations of NIL activities, namely, and I'm going to quote here, "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 1 legislation and/or the interim NIL policy. The enforcement staff and NCAA Division 1 Committee on Infraction shall presume a violation occurred."

The memo, however, goes on to say that "This presumption is subject to rebuttal." And again, I'll quote it, "To rebut the presumption of a violation, the institution must clearly demonstrate that all behaviors complied with NCAA legislation and interim NIL policy." That of course, is a mouthful and we will return to the language again, later in the podcast. It is, of course, also really critical to understand what the NCAA is saying here, and essentially what they are saying is that if the available information supports a finding of an NIL violation, the NCAA is going to presume said violation, absent a rebuttal by the school. This, of course, suggests something of a reversal of the burden of proof one might typically expect, with the burden shifting to the schools to rebut a presumed violation, and we'll talk more about that as well.

There is also other information in the memo as well. So, against this foundation, let's dive in and start talking about the different components of the memo, including some of the stuff that I just mentioned. And Chris, let's start with you and let's start with the standard that I just summarized. The language from the memo kind of sounds like schools, or at least some schools, might find themselves in a situation where they are presumed guilty and must prove their innocence. Is that how you read it? And if so, talk to us about how schools might go about doing that. How are they going to prove their innocence here?

Christopher Brolley:

I think you're right. I think some people are referring to it as guilty until proven innocent, in an attempt to stem what appears to be some impermissible activity surrounding NIL and the apparent lack of cooperation. The NCAA, as you said, released a new charging standard, shifting the burden of proof from the NCAA to the institutions. This bylaw, which went into effect on January 1, 2023, now allows for the Infractions Committee to presume that an NIL violation has occurred.

The memo, as you discussed, which is merely an extension of the October 2022 guidance, provides that when available information supports an appearance of a violation, the NCAA staff and Committee on Infractions may now presume that a violation occurred. Now, once an NIL violation is presumed, the institution may rebut this presumption by clearly demonstrating that no violation occurred and that all behaviors complied with NCAA legislation and the interim NIL policy.

This requirement suggests that institutions will likely need to provide documentary evidence and/or on-the-record statements to rebut this presumption. For example, the NCAA and the institution in question could have contrary evidence and the NCAA could still find that the institution violated the NIL interim policy if they could not clearly demonstrate that no violation occurred. Moreover, and I think importantly now for institutions to understand, is that the

NCAA's use of the phrase, "All behaviors." Now puts the onus directly on the institution to oversee or at the very least, monitor its boosters and collectives as well as prospective student athletes' family members. A key point to this memo is that it does not touch on state law and does not address enforcement by state regulators, as we have mentioned in previous episodes.

Callan Stein:

Thanks, Chris. The standard is really the thing that jumps out from this memo and the thing that I think a lot of people are talking about, but it's not the only thing in the memo. So, let's shift gears now and talk about some of the other information that we see in this memo, and that includes the listing by the NCAA of certain factors that are going to bear on whether a violation of NIL policy is presumed to have occurred and/or whether a school has rebutted such a presumption. So, Sam, why don't you take us through the factors that we see in this memo?

Samuel Hatcher:

Sure. The factors that the NCAA set forth in this memo are similar to what Cal, Chris, and Mia discussed in episode four of this podcast. There are three buckets of activities that the NCAA is looking into, those being impermissible contacts, impermissible offers, and impermissible benefits.

For impermissible contacts, the NCAA is looking at direct or indirect contacts by institutional staff members to a prospect that is not part of the NCAA transfer portal, to discuss NIL opportunities. This also includes booster or collective contacts to a prospect or their family about potential NIL opportunities before that prospect signs through the institution. One caution about this is that prospective student athletes now have to be aware for the actions of their family members. This could target contacts between, for instance, a booster and the parent of a student athlete, and that could create a violation even if the student athlete is not directly involved in those contacts.

In the impermissible offers bucket, representatives of the institution's athletic interests, including boosters and collectives, cannot announce or enter NIL agreements with a prospective student athlete prior to that student athlete's enrollment in the institution. An NIL agreement that requires a prospective student athlete to be in the location of the institution prior to enrollment as a condition of the NIL agreement. For instance, local appearances to support local businesses or to support the interest of the collective is also impermissible. So, it's a clear delineation that no NIL activity can happen until the prospective student athlete has enrolled and appeared on campus.

Finally, in the impermissible benefits bucket, institutional staff members, boosters or other institutional representatives cannot provide NIL opportunities or benefits as an inducement to secure a student athlete's continued enrollment at the institution.

Callan Stein:

All right. So, those are the first two components of this memo. Let's shift to the third. And the last thing we see in this memo is some information about the infractions process. And this was something that as a litigator, really got me interested, because I always do focus on process. And really what we have here is a three staged process that is somewhat familiar.

It starts with an investigation, then has a charging phase, and then, if necessary, gets to an adjudication phase. Let's zip through what the memo says about each and then turn to some of the practical implications of all of this. But let's start with the first stage, the investigation stage. Chris, what does this memo have to say about what investigations might look like?

Christopher Brolley:

Like you said, before an institution may be charged or adjudicated, there must be an investigation process. And so, here the memo provides two paths for investigations when the NCAA's enforcement staff learns of a potential violation. The first path is for the NCAA to conduct a limited, expedited investigation. And the second path is for the NCAA to issue a letter of inquiry.

Now, there's no requirement to choose any one path. Instead, it's up to the NCAA's sole discretion to choose the particular investigatory path. If the NCAA's enforcement staff conducts an investigation, naturally it takes the lead on all activities, including interview and document requests to the applicable parties. If they, however, choose to issue a letter of inquiry, the memo requires that the enforcement staff do a few things. First, they must identify the information that supports the presumption. Second, they must explicitly state that the burden is on the institution to rebut the presumption. And third, they must provide a deadline for the institution's response.

Callan Stein:

Thanks, Chris. And I want to get to the charging stage, but there are a couple of things about the investigations information that I found really interesting. First, I actually find it interesting that the NCAA seems to be adopting this type of two-tiered investigational approach at all. To me, it suggests sort of a triaging of cases, right? Some will be given higher priority; others will be given lower priority. That's not all that uncommon, but it does strike me as at least a bit odd, given the absence of any enforcement activity to-date. By outlining this two-tiered approach, the NCAA could well be signaling that not only is enforcement and investigational activity coming, but it's coming with substantial force. And that, of course, would be consistent with some of the news we have seen about the NCAA hiring additional enforcement personnel. So, definitely something to keep an eye on.

The other thing that I found really interesting about this piece was of the two investigational paths, the one that sounds more serious, the letter of inquiry, sounds like it's at least going to start out with a paper record, comprising an exchange of letters, one from the NCAA, and the response from the school. Sounds like the NCAA is going to be looking for institutions to make their case and to rebut the presumption in writing, including by attaching documentation.

This, actually, I think is going to create some strong incentives for institutions to, among other things, number one, identify potential violations themselves, so that they can take steps to remedy them and build that record. And two, really get legal counsel engaged early, to help build the institutions case for rebuttal. And this could include, of course, engaging counsel to conduct an investigation before a letter is even sent. So again, a couple of things to keep your eye on there. But let's talk about the charging process, the charging phase. Sam, what does the letter say about that?

Samuel Hatcher:

Sure. The letter says that the enforcement staff will review the information that they obtain either through their own investigation or through the institution's response to the letter of inquiry. Based on that information, the enforcement staff will either allege a violation, or if they conclude that the institution rebutted the presumption that there was a violation based on the circumstantial evidence available to the NCAA, that'll end the matter and they will not proceed to allege a violation.

Callan Stein:

Yeah. What I find most interesting here, I think, is that the memo sets forth this process, but it doesn't really set forth a true standard for a rebuttal, right? I mean, it seems to leave it within the discretion of the investigators, and this could be something that creates a moving target of sorts for institutions.

But regardless, I guess what is clear is that to demonstrate compliance by the institution, they're going to have to do it through documentation. And we've talked about that a number of times right now. It's just something that I really think institutions ought to consider when they are deciding whether or how to implement a compliance program. Okay. So, let's do the last stop on the infractions process train, the adjudication step. Chris, tell us about that.

Christopher Brolley:

Yeah, and this is an interesting part of the memo. It essentially provides that if an institution agrees a violation occurred, then the institution and enforcement staff may submit a summary disposition or negotiated resolution approved by the Committee on Infractions.

Here, the NCAA is essentially forcing the institutions to turn themselves in or self-report. However, if the institution disagrees that there was a violation, the case will proceed to a contested hearing. Importantly, and as we have discussed in this episode, the committee on infractions will presume a violation occurred unless the institution clearly demonstrates otherwise.

Callan Stein:

I agree. The whole dynamic set up, the self-reporting dynamic, really creates some interesting decisions for institutions, and I'll be really interested to see how all of that plays out. It's almost like a consent decree when you're facing a state attorney general investigation. Sometimes you can get a lower penalty or mitigating factors, but there's a lot that goes into that.

Okay. This is our take on the memo, but there's actually some additional information, some additional interpretation that has come out from the NCAA. And what I'm talking about is an interview with the NCAA Vice President of Enforcement, a gentleman named Jon Duncan, that was conducted at the end of January 2023. So, after this memo was written. Sam, do you want to tell us what Mr. Duncan had to say about this?

Samuel Hatcher:

Sure, Cal. Mr. Duncan was basically outlining how this new charging standard will allow the NCAA to pursue enforcement activities in an NIL space. And Duncan summarized the standard as saying that, "The revised charging standard allows us to take a commonsense view of a fact

pattern of circumstantial evidence." So, what this suggests, at least according to Duncan's statements, is that public appearance alone might be enough to trigger an investigation. If an NIL deal looks suspicious from the outside, that might be enough to draw NCAA scrutiny and build the circumstantial evidence necessary to trigger the investigative process.

Duncan went on to say that "Once there is circumstantial evidence of a violation, the NCAA will hand it over to the school and say, 'If you don't think it's a violation, then the burden is on you, the institution, you the coach, to show that it's not.' And that's an appropriate place for that responsibility to be."

Duncan also implied that the NCAA has been attempting to bring NIL enforcement actions but has been hampered by an inability to gather non-circumstantial evidence. The revisions to the charging standard appear to be made in response to this perceived or actual inability to gather information necessary to bring in action. Duncan stated that, "We conduct an investigation and for whatever reason, we're unable to get documentary evidence or somebody on the record to say, 'You're right, that's what we intended.' That's an inducement."

I think there's two big takeaways. One is that the NCAA hasn't been taking a hands-off approach. They haven't been sitting idly by, they've been trying to look into this further, but have been hampered by the inability to get the evidence they needed under old charging standards. The other implication is that some of this inability to get documentary evidence or get on the record statements, is the fact that a lot of times the boosters or collectives affiliated with a school aren't subject to any requirement to comply with the NCAA investigation. By putting the burden on the school to rebut the presumption based on circumstantial evidence, Duncan seems to be suggesting that the NCAA is looking to more or less enlist institutions as a means of gathering information for these investigations.

Callan Stein:

Yeah. Those are really good points and boy, anyone who's listening to this, I would encourage you to read the interview with Mr. Duncan. It's a pretty unvarnished view of this standard and how enforcement is going to proceed. Really powerful and interesting stuff.

So, now we've gone through the memo itself. We've gone through Mr. Duncan's interpretation of it. Let's talk about some of the key practical takeaways. What are some practical things that we all view as important coming out of this memo? And I will start with something that we all have described as perhaps a little bit of a victory lap. What I'm talking about is something that Sam just mentioned, circumstantial evidence.

Now, listeners of the *Highway to NIL* will recall that in prior episodes, we predicted that the enforcement action when it came, was going to be predicated largely on circumstantial evidence to punish violators. And boy, does it look like we were correct with that prediction. In fact, the NCAA seems to have taken it even a step further than perhaps we anticipated. First by saying that, "Look, if the circumstantial evidence points to a violation, that's going to lead to a presumption that an institution has to rebut."

And then beyond that, to what Sam just summarized from the interview with John Duncan, public appearance alone could be sufficient circumstantial evidence to at least warrant an investigation. So, circumstantial evidence is going to be the name of the game. We've thought it for a while, but this memo and the comments by John Duncan certainly confirm it. Chris, how about you? What's a takeaway from your perspective?

Christopher Brolley:

I think what we're seeing right now is that the NCAA is really actively trying to beef up its enforcement division. We think something's coming soon. For example, the NCAA is set to soon be hiring an associate director of enforcement to specifically oversee NIL inquiries. And just recently, they hired a handful of new investigators and enforcement staff, which interestingly includes a former FBI and CIA agent with expertise in cybersecurity and counterintelligence.

And I think it must be said and repeat what Sam just said, is that the lack of NIL enforcement today is probably not the result of NCAA's unwillingness or hands-off approach, but instead, quite possibly a lack of cooperation between all parties involved in NIL. What incentive do institutions have to self-report or turn themselves in while others are benefiting from skirting the NIL laws? With the new charging standard and increased resources, we definitely expect more enforcement actions in the NIL space to come.

Callan Stein:

Yeah, that all makes perfect sense to me, and I'll tell you, as someone who represents institutions, my ears certainly pricked up when I heard, "Former FBI and CIA agents are going to be hired." That's a good one. Sam, what about you? What have you got for us in terms of a key takeaway here?

Samuel Hatcher:

I think one final key takeaway is that this NCAA guidance and this NCAA charging standard exists entirely separate and apart from state law. A number of states have passed NIL legislation, that we expect the state attorney general will be the ones investigating and enforcing.

And this memo does not address that issue at all. The NCAA appears to be staying within its lane and focusing on enforcement of institutions that are subject to NCAA rules. But it will be interesting to see the intersection between these NCAA enforcement activities and any investigations or enforcements brought by state AGs under the various state laws that regulate NIL activities.

Callan Stein:

Yeah, I really agree with that, especially given some of the things we just heard from you, Chris, and from you, Sam, about the difficulties the NCAA has had getting documents and evidence from non-member institutions. Certainly, that would be something a state AG could contribute to.

Before we close, let me talk about one more thing, one more big theme that comes from this memo, and that is the renewed importance for institutions to create and implement an NIL compliance program. That just got, I think, a lot more important for schools. For one, enforcement is coming. We've seen it, we've heard it on this podcast, it's coming and it's coming fast. And schools need to protect themselves by monitoring their students, by monitoring their NIL activities, their boosters, educating everyone. That is pure prevention.

Second, and perhaps even more importantly, we've talked a lot about the rebuttable presumption standard that is set forth in this memo. And as Chris mentioned at the beginning, the rebuttable presumption standard makes it even more important that institutions have

documentation of their compliance effort. Simply put, as lawyers, we say this all the time, if it's not written down, then it's not going to help. It's not going to help the schools clearly demonstrate their own compliance. So, schools need to have a compliance program in place before a violation or a presumed violation occurs. That's the only way a school has any chance of having the proof it's going to need to demonstrate its compliance, or at least to demonstrate its good faith efforts to comply.

Okay. With that, we now are out of time here today, so I want to bring this discussion to a conclusion, and I really want to thank you Chris and you, Sam, for joining us on the podcast. I also want to thank everyone for listening. If you have any thoughts or comments about this series or about this episode, I invite you to contact any of us directly. I can be reached at callen.stein@troutman.com. Chris can be reached at christopher.brolley@troutman.com, and Sam can be reached at sam.hatcher@troutman.com. You can subscribe and listen to other Troutman Pepper podcasts wherever you listen to podcasts, including on Apple, Google, and Spotify. Thank you for listening and stay safe.

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