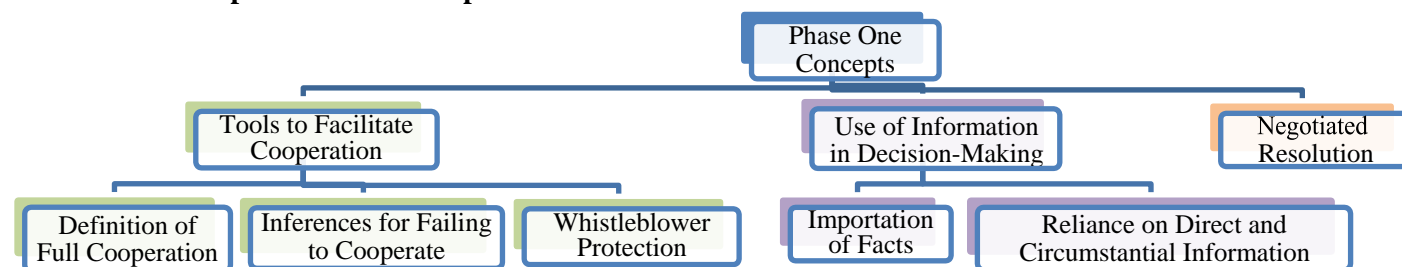


NCAA Division II Enforcement and Infractions Task Force Overview of Phase One Concepts

The NCAA Division II Management and President Councils established the Enforcement and Infractions Task Force in the summer of 2019 to review the infractions process. The Councils charged the task force with studying recent changes to the process in Division I and recommending changes to enhance the process in Division II. During its first phase of review, the task force forwarded three areas of potential enhancements to the membership for feedback: (1) tools to facilitate cooperation; (2) use of information in decision-making; and (3) a negotiated resolution process. Division I adopted legislative changes in these areas in 2018 and 2019 in response to recommendations by the Commission on College Basketball to strengthen the peer review process. The task force will collect feedback in these areas and begin additional phases of review related to the violation and penalty structures, the adjudication process and accountability.

Phase One Concepts for Membership Review.



Review of Phase One Concepts.

1. Tools to Facilitate Cooperation

a. Definition of Full Cooperation

Legislation	In accordance with Division II Bylaw 32.1.3 , institutions and individuals have an obligation to assist the enforcement staff in developing full information to determine whether a possible violation occurred. The legislation does not, however, give examples of what constitutes full cooperation.
Possible Change	Adopt legislation identifying examples of full cooperation. Examples could include: (1) affirmatively reporting noncompliance with legislation to the NCAA in a timely manner and assisting in developing full information to determine whether a violation occurred; (2) timely participating in interviews and providing complete and truthful responses; (3) making full and complete disclosure of relevant information, including timely production of materials or information requested, and in the format requested; (4) disclosing and providing access to electronic devices used for business purposes; (5) providing access to social media, messaging and other applications relevant to the investigation; (6) preserving the integrity of an investigation and abiding by confidentiality rules and instructions; and (7) instructing counsel and/or other representatives to also cooperate fully. See Division I Bylaw 19.2.3 .
Rationale	Defining what constitutes full cooperation promotes cooperation, educates parties on the enforcement staff's expectations and makes the process more transparent and efficient.
Issue	Should the legislation include examples of what constitutes full cooperation? <input type="checkbox"/> Yes <input type="checkbox"/> No

b. Inferences for Failing to Cooperate

Legislation	Although institutions or individuals must cooperate pursuant to Division II Bylaw 32.1.3 , the legislation does not expressly permit the NCAA Division II Committee on Infractions (COI) to make inferences based on noncooperation. As set forth in Division II Bylaw 32.6.2 , however, the COI may view a party's failure to submit a response to allegations as an admission the alleged violation occurred.
Possible Change	Adopt legislation permitting the COI to (1) infer that materials support an allegation if an institution or individual fails or refuses to produce requested materials; and (2) view the failure or refusal to interview as an admission that the alleged violation occurred. See Division I Bylaws 19.2.3.2.1 and 19.2.3.2.2 .
Rationale	Permitting the COI to make inferences based on a party's noncooperation will facilitate cooperation and make the process more efficient.
Issue	Should the legislation expressly permit the COI to make inferences when an institution or individual does not produce materials or participate in an interview? <input type="checkbox"/> Yes <input type="checkbox"/> No

c. Whistleblower Protection	
Legislation	The legislation does not expressly protect individuals who report information about potential violations.
Possible Change	Adopt legislation prohibiting institutions—within the context of infractions cases—from retaliating against staff members, prospects or student-athletes who report information about potential violations to his or her conference, institution or the enforcement staff. <i>See Division I Bylaw 19.2.3.3.</i>
Rationale	Protecting individuals with information about potential violations may prompt them to come forward. Institutions will need to consult their own counsel on any employment matters related to retaliation.
Issue	<i>Should the legislation expressly protect whistleblowers? <input type="checkbox"/> Yes <input type="checkbox"/> No</i>

2. Use of Information in Decision-Making

a. Importation of Adjudicated Facts	
Legislation	The legislation does not expressly authorize the COI to import adjudicated facts, or consider evidence submitted and positions taken in a court or other administrative proceeding or in a committee or similar review authorized by the institution, into the infractions process.
Possible Change	Adopt legislation permitting the COI to: (1) accept as true facts established by a decision or judgment of a court or other administrative tribunal, which is not under appeal, or by a commission, or similar review, authorized by an institution in concluding whether a violation occurred; and (2) consider evidence submitted and positions taken in such a matter. <i>See Division I Bylaw 19.7.8.3.1.</i>
Rationale	Permitting importation will save the process time and resources. It will also clarify the acceptable use of adjudicated facts, help prevent parties from taking inconsistent positions on matters, and help process violations that are known to the enforcement staff but may not otherwise be processed.
Issue	<i>Should the legislation expressly permit the COI to import adjudicated facts? <input type="checkbox"/> Yes <input type="checkbox"/> No</i>

b. Reliance on Direct and Circumstantial Information	
Legislation	The legislation does not expressly permit the COI to base decisions on both direct <i>and</i> circumstantial information.
Possible Change	Adopt legislation clarifying that the COI may rely on both direct and circumstantial information to reach its decision. <i>See Division I Bylaw 19.7.8.3.</i>
Rationale	Clarifying the information that the COI may rely upon will make the process more efficient.
Issue	<i>Should the legislation expressly permit the COI to rely on circumstantial information? <input type="checkbox"/> Yes <input type="checkbox"/> No</i>

3. Negotiated Resolution Process	
Legislation	The legislation only permits cases to be resolved via: (1) summary disposition; or (2) hearing. In the summary disposition process, the parties agree on the facts and violations and submit their agreement to the COI. The COI may accept or reject the agreed-upon facts and violations and then prescribe penalties. A hearing is held if the parties disagree on the facts and/or violations.
Possible Change	Adopt legislation establishing a negotiated resolution process where the enforcement staff may negotiate resolution of cases with parties, subject to approval by the COI. Under the process, the parties agree on the facts, violations <i>and</i> penalties. The COI will only reject a negotiated resolution if it is not in the best interests of the NCAA or the agreed-upon penalties are manifestly unreasonable. Negotiated resolutions are final, not appealable and have no precedential value. <i>See Division I Bylaw 19.5.12.</i>
Rationale	The negotiated resolution process could create efficiencies in case processing. The enforcement staff has and exercises discretion in alleging violations but does not negotiate with parties or recommend penalties. This often frustrates institutions that seek a more expeditious process. In addition, the inability to negotiate resolutions may tax the resources of the process and forgo an opportunity to secure assistance from institutions or individuals who have useful information.
Issue	<i>Should the legislation permit negotiated resolution of cases? <input type="checkbox"/> Yes <input type="checkbox"/> No</i>

Next Steps.

The task force will collect feedback in these areas through the summer of 2020. The task force will also begin additional phases of review related to the violation and penalty structures, the adjudication process and accountability.