



National Association for
College Admission Counseling

2019 Assembly Meeting Background
NACAC's Code of Ethics and Professional Practices and Antitrust Provisions

Kentucky International Convention Center

Saturday, September 28, 2019

7:00 am – 12:00 pm

The Antitrust Division of the U.S. Department of Justice began an antitrust investigation of several provisions in the new NACAC's *Statement of Principles of Good Practice: NACAC's Code of Ethics and Professional Practices* in late November 2017. Soon thereafter, both the Antitrust Division staff of the Department of Justice and NACAC's Washington, DC based attorneys from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC began discussions of possible settlement of the investigation to avoid exposing NACAC to litigation and trial. After this almost two-year review, the Department of Justice Antitrust Division staff has not formally acted on recommendations from NACAC for a final resolution of this matter. However, we know which statements the department has objected to. As a result, the Board of Directors recommends that the NACAC Assembly delegates seriously consider deleting statements within the Code of Ethics and Professional Practices assumed to violate antitrust laws.

Our goals for this communication are to thoroughly familiarize the Assembly leadership with the current status of our discussions. In September in Louisville, we will further discuss recommendations moving forward in the Assembly Preview. Jeff Miles, NACAC's lead antitrust legal counsel from Baker Donelson will join us and share information on a proposed course for action and potential consequences of the investigation.

Proposed Motions for Assembly Action

- **Motion #1)**
On behalf of the Board of Directors, it is moved and seconded that the procedural rules are suspended, so that no amendments to the Code of Ethics and Professional Practices are permitted by the delegates of the 2019 Assembly, except those mandated or recommended by NACAC's antitrust legal counsel handling the Department of Justice Antitrust Division investigation.
- **Motion #2)**
On behalf of the Board of Directors, it is moved and seconded that the following statements be deleted from the Code of Ethics and Professional Practices as recommended by NACAC's antitrust legal counsel handling the Department of Justice Antitrust Division investigation.
(See CEPP Sections: II A.3.a; II B Introduction; II B.5; and II D.5)
- **Motion #3)**
On behalf of the Board of Directors it is moved and seconded to *extend the moratorium on enforcement of the Code of Ethics and Professional Practices (CEPP), effective immediately, and for a period of up to one year or until legal review is resolved with the Antitrust Division of the Department of Justice. The association will continue pursuing a resolution with amendments to the CEPP that might be appropriate under the terms of this inquiry.*



Rationale for Changes

The Code of Ethics and Professional Practice (CEPP) provisions about which the Department of Justice Antitrust Division has raised concerns are the following:

1.

Section II. The Responsible Practice of College Admission

A. Application Plans for First-time Undergraduates in the United States: Guiding Principles and Rationale

A.3.a.vi.

Colleges must not offer incentives exclusive to students applying or admitted under an Early Decision application plan. Examples of incentives include the promise of special housing, enhanced financial aid packages, and special scholarships for Early Decision admits. Colleges may, however, disclose how admission rates for Early Decision differ from those for other admission plans.

The Department of Justice believes this prohibits colleges from offering incentives exclusive to students applying or admitted under an Early Decision application plan. Department of Justice staff claims that this prohibits competition among colleges for Early Decision applicants.

2.

Section II. The Responsible Practice of College Admission

B. Admission Cycle Dates, Deadlines, and Procedures for First-Time Fall Entry Undergraduates: Guiding Principles and Rational

Introduction:

College choices should be informed, well-considered, and free from coercion. Students require a reasonable amount of time to identify their college choices; complete applications for admission, financial aid, and scholarships; and decide which offer of admission to accept. Once students have committed themselves to a college, other colleges must respect that choice and cease recruiting them.



Language in the introduction for **Section II.B**, provides that "once students have committed themselves to a college, other colleges must respect that choice and cease recruiting them." The Department of Justice staff suggests that this prevents colleges from competing to continue to recruit students who may be able to lower their college costs if they remain subject to competition among colleges.

3.

Section II. The Responsible Practice of College Admission

B. Admission Cycle Dates, Deadlines, and Procedures for First-Time Fall Entry Undergraduates:
Guiding Principles and Rationale

II.B.5:

Colleges will not knowingly recruit or offer enrollment incentives to students who are already enrolled, registered, have declared their intent, or submitted contractual deposits to other institutions. May 1 is the point at which commitments to enroll become final, and colleges must respect that. The recognized exceptions are when students are admitted from a wait list, students initiate inquiries themselves, or cooperation is sought by institutions that provide transfer programs.

The Department of Justice staff reads provisions in **Sections II.B.5** as prohibiting colleges from competing for students, either before or after May 1, who have committed to other colleges—unless the student initiates an inquiry. The Department of Justice staff believes that these provisions restrain competition among colleges for students and students may lower their college costs if schools remain free to solicit even students who have committed elsewhere.

4.

Section II. The Responsible Practice of College Admission

D. Transfer Admission: Guiding Principles and Rationale

II.D.5:

Colleges must not solicit transfer applications from a previous year's applicant or prospect pool unless the students have themselves initiated a transfer inquiry or the college has verified prior to contacting the students that they are either enrolled at a college that allows transfer recruitment from other colleges or are not currently enrolled in a college.



Section II.D.5, which prohibits colleges from soliciting transfer applications from a previous year's applicant or prospect pool unless the students have themselves initiated a transfer inquiry or are not currently enrolled in a college. According to the Department of Justice staff, this severely hampers the ability of colleges to compete for transfer students.

The Department of Justice staff views each of these provisions, except that relating to Early Decision exclusive benefits, as a "no-poaching agreement" among colleges through the NACAC Code of Ethics and Professional Practices. Over the last four or so years, challenges to different types of no-poaching agreements have become a major area of enforcement at the Antitrust Division. More concerning, private plaintiffs have filed antitrust lawsuits demanding significant damages allegedly resulting from no-poaching agreements.

Motions for Action and Rationale

NACAC legal counsel and NACAC representatives have spent substantial time and effort, in both meetings and telephone conferences, attempting to explain the justifications for these provisions—that is, how, on balance, they benefit rather than harm students. Those efforts, thus far, have not succeeded in persuading the Department of Justice, and we seriously doubt they will in the future.

We concluded that deleting language would be the strongest recommendation to advance to the Assembly delegates in September 2019. As a show of good faith and compliance with this investigation by the Antitrust Division of the Department of Justice, NACAC leadership is advancing the following motions for actions by the 2019 Assembly.

Proposed Motions for Assembly Action

Motion #1)

On behalf of the Board of Directors, it is moved and seconded that the procedural rules are suspended, so that no amendments to the Code of Ethics and Professional Practices are permitted by the delegates of the 2019 Assembly, except those mandated or recommended by NACAC's antitrust legal counsel handling the Department of Justice Antitrust Division investigation.

Motion #2)

On behalf of the Board of Directors, it is moved and seconded that the following statements be deleted from the Code of Ethics and Professional Practices as recommended by NACAC's antitrust legal counsel handling the Department of Justice Antitrust Division investigation:

Section II.A. Application Plans for First-Time Undergraduates in the United States: Guiding Principles and Rationale

3. Restrictive early application plans (Page 5)
 - a. Early Decision



National Association for
College Admission Counseling

Students commit to a first-choice college and, if admitted, agree to enroll and withdraw their other college applications. Colleges may offer ED I and ED II with different deadlines. This is the only application plan where students are required to accept a college's offer of admission and submit a deposit prior to May 1.

3.a.vi. (Recommend deleting)

Colleges must not offer incentive exclusive to students applying or admitted under an Early Decision application plan. Examples of incentives include the promise of special housing, enhanced financial aid packages, and special scholarships for Early Decision admits.

Colleges may, however, disclose how admission rates for Early Decision differ from those for other admission plans.

Section II.B. The Responsible Practice of College Admission (Page 7)

Section Introduction

College choices should be informed, well-considered, and free from coercion. Students require a reasonable amount of time to identify their college choices; complete applications for admission, financial aid, and scholarships; and decide which offer of admission to accept.

(Recommend deleting)

Once students have committed themselves to a college, other colleges must respect that choice and cease recruiting them.

Similarly, Colleges need protection when other institutions pressure students to submit applications or enrollment deposits before established deadlines or when they continue to solicit applications or enrollments after students have finalized their college decisions.

Section II.B. Admission Cycle Dates, Deadlines and Procedures for First-Time Fall Entry Undergraduates: Guiding Principles

Section II.B.5. (Recommend deleting) (Page 8)

Colleges will not knowingly recruit or offer enrollment incentives to students who have already enrolled, registered, have declared their intent, or submitted contractual deposits to other institutions. May 1 is the point at which commitments to enroll become final, and colleges must respect that. The recognized exceptions are when students are admitted from a wait list, students initiate inquiries themselves, or cooperation is sought by institutions that provide transfer programs.

These statements capture the spirit and intent of this requirement.

a. Whether before or after May 1, colleges may at any time respond to a student-initiated request to reconsider an offer or reinstate an application.

b. Once students have declined an offer of admission, colleges may no longer offer them incentives to change or revisit their college decision. Before May 1, however, colleges



- may ask whether candidates would like a review of their financial aid package or other incentives before their admission is canceled, so long as the question is asked at the time that the admitted students first notify them of their intent to cancel their admission.*
- c. *After May 1, colleges may contact students who have neither deposited nor withdrawn their applications to let them know that they have not received a response from them. Colleges may neither offer nor imply additional financial aid or other incentives unless student have affirmed that they have not deposited elsewhere and are still interested in discussing fall enrollment.*

Section II. D. Transfer Admission: Guiding Principles and Rationale

Section II. D 5. *(Recommend deleting) (Page 9)*

Colleges must not solicit transfer applications from a previous year's applicant or prospect pool unless the students themselves initiated a transfer inquiry or the college has verified prior to contacting the student that they are either enrolled at a college that allows transfer recruitment from other colleges or are not currently enrolled in college.

Motion #3)

On behalf of the Board of Directors it is moved and seconded to extend the moratorium on enforcement of the Code of Ethics and Professional Practices (CEPP), effective immediately, and for a period of up to one year or until legal review is resolved with the Antitrust Division of the Department of Justice. The association will continue pursuing a resolution with amendments to the CEPP that might be appropriate under the terms of this inquiry.