

## Summary of the U.S. Department of Justice’s Investigation of the National Association for College Admission Counseling (NACAC) Regarding Certain Admissions Practices

September 4, 2019

### Issue

The National Association for College Admission Counseling (NACAC) maintains a mandatory Code of Ethics and Professional Practices (“the Code”). The Code prohibits the following admissions practices:

- Offering incentives exclusive for early decision applicants, i.e., incentives not available to applicants under other admission plans,
- Recruiting students who have already enrolled, registered, declared their intent, or submitted contractual deposits to other institutions, unless the student initiates the contact, and
- Soliciting transfer applicants from the previous year’s applicant or prospect pool, unless certain conditions are met, including the student's initiating the contact.

In 2017 the Antitrust Division of the U.S. Department of Justice opened an investigation into whether these provisions are anti-competitive and might violate federal antitrust law.

### The Upcoming NACAC Vote

On September 28, 2019, during the NACAC Annual Meeting, a 215-member NACAC Assembly will vote on whether to remove the provisions of concern from its Code. The NACAC Board of Directors is recommending the changes to its Assembly because of the extraordinary costs of a continuing investigation and potential trial and other adverse effects on the association and its activities. The results of the vote are deemed by NACAC to be essential to its ability to resolve this matter with DOJ.

Last week, NACAC sent a [communication to its members](#) and in part advised members that:

- “Approving these measures is in the best interest of NACAC and its members and an essential step to help bring closure to a two-year, ongoing investigation by the Antitrust Division of the US Department of Justice (DOJ).”
- The changes being proposed at NACAC’s late September meeting are essential to move toward a resolution with DOJ.
- Failing to make these changes will, in NACAC’s view, “have serious negative consequences for NACAC’s finances and ability to operate, including the possibility of extremely costly and time-consuming litigation and, potentially, even more burdensome requirements mandated by federal authorities.”
- Despite NACAC counsel’s best efforts, DOJ “has not been persuaded to close its investigation but rather has told [NACAC] that the investigation will continue unless [NACAC makes the changes in its Code].”
- “Until now, on the advice of our legal counsel, NACAC senior leadership has kept the content of our discussions with the department strictly confidential. However, now that there is a strong possibility of the department’s obtaining a consent decree that could have serious implications for the association, we are sharing this information with our membership and recommending a path forward.”

- “As such, we believe the best course of action is to make the changes to our [Code] that the department is requiring.”

### **Timeline**

- 2017: The U.S. Department of Justice initiated an investigation into whether various provisions in NACAC’s Code might violate antitrust law. As part of this investigation, DOJ served NACAC and others with civil investigative demands requiring production of documents and depositions of NACAC officials and representatives, including members of a NACAC steering committee involved in drafting the Code. NACAC fully complied.
- 2018: NACAC engaged in cooperative discussions with DOJ. NACAC discussed a possible voluntary settlement agreement with DOJ regarding DOJ’s concerns without the need for a suit against NACAC or a consent decree. DOJ ultimately rejected that proposed settlement.
- At a meeting with high-level DOJ officials to discuss resolution of the investigation, DOJ officials told NACAC that they perceived there is a "misunderstanding" among educational institutions about their obligations under the antitrust laws and that a consent decree against NACAC would send a "message" about those obligations.
- 2019: NACAC continued to pursue efforts to resolve the issues amicably. DOJ, however, informed NACAC that a consent decree would be required.
- In terms of next steps, it is anticipated that DOJ will file a complaint and a consent decree at the same time. DOJ is not expected to do so until after the late September NACAC vote on changes to its Code regarding the provisions of concern to DOJ (see above). Once the complaint and consent decree are filed, there will be a period of public comment, as required by antitrust statutes. Thereafter, a federal court will determine whether to enter the decree as an enforceable order.

### **Other Considerations**

- Once a final consent decree is entered as a court order, NACAC will abide by the terms of the consent decree as an association and urge its members to act accordingly.
- While institutions may individually determine and apply their recruiting and admissions practices as they each see fit, attention to the letter and spirit of the consent decree will be essential to safeguarding institutions against future investigation by DOJ for agreements or understandings among institutions about how they will recruit students.
- Consider discussing with your campus leadership and admissions team how these changes could impact campus operations, since the admissions cycle is about to begin. Consider checking in with your admissions team before the Sept. 28 NACAC Annual Meeting to get their sense of the situation.
- Institution-specific questions and related legal inquiries should be directed to campus counsel.