

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,  
Department of Justice, Antitrust Division  
450 5th Street, NW, Suite 7100  
Washington, DC 20530,

*Plaintiff,*

v.

NATIONAL ASSOCIATION FOR  
COLLEGE ADMISSION COUNSELING,  
1050 North Highland St., Suite 400  
Arlington, VA 22201,

*Defendant.*

**COMPLAINT**

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable relief against Defendant National Association for College Admission Counseling. The United States alleges as follows:

**I. INTRODUCTION**

1. This action challenges under Section 1 of the Sherman Act, 15 U.S.C. § 1, a number of rules that restrained competition between colleges and universities (“colleges”) for the recruitment of first-year and transfer students.

2. Defendant National Association for College Admission Counseling (“NACAC”) is the leading national trade association for college admissions. Defendant’s members are divided roughly into two groups: non-profit colleges and their admissions personnel, and high schools and their guidance counselors. NACAC’s college members compete vigorously with each other for college students, both incoming freshmen and transfer students. These colleges

compete in a variety of college services, including tuition cost, majors offered, ease and cost of application, campus amenities, quality of education, reputation of the institution, and prospects for employment following graduation.

3. One condition of membership in NACAC is adherence to NACAC's Code of Ethics and Professional Practices ("CEPP" or "Ethics Rules"), which sets forth mandatory rules for how member organizations engage in college admissions. These rules are drafted, voted on, and enforced by NACAC members.

4. As part of its CEPP, NACAC includes certain rules regarding the recruitment of students by colleges. Prior to September 2019, among these rules were ones that prevented, or severely limited, colleges from (1) directly recruiting transfer students from another college, (2) offering incentives of any kind to college applicants who applied via a process known as Early Decision, and (3) recruiting incoming college freshmen after May 1 (together, "Recruiting Rules").

5. The Recruiting Rules were not reasonably necessary to any separate, legitimate procompetitive collaboration between NACAC members. As part of its CEPP, NACAC establishes many rules and regulations for its members' conduct throughout the college admissions process, including, among others, when applications may open and close, the definitions of Early Decision and Early Access, and the use of paid agents in recruiting students. Many of these rules appear to strengthen the market for college admissions. The Recruiting Rules, however, were not reasonably necessary to achieve the otherwise market-enhancing rules contained in the CEPP, and furthermore had the effect of unlawfully restraining competition among NACAC's college members, resulting in harm to college applicants and potential transfer students.

6. By establishing and enforcing the Recruiting Rules, NACAC substantially reduced competition among colleges for college applicants and potential transfer students and deprived these consumers of the benefits that result from colleges vigorously competing for students. These Recruiting Rules, which were horizontal agreements among the schools participating in NACAC, denied American college applicants and potential transfer students access to competitive financial aid packages and benefits and restricted their opportunities to move between colleges.

7. In September 2019, NACAC members voted to remove the Recruiting Rules from the CEPP. Removal of the Recruiting Rules became effective as of the time of the vote.

8. NACAC's Recruiting Rules were unlawful restraints of trade that violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States seeks an order prohibiting such agreements and other relief.

## **II. JURISDICTION AND VENUE**

9. Defendant NACAC is located in, and represents members that do business in, the United States. The rules at issue affected primarily the provision of college services in the United States. The colleges that provide these college services charge significant prices to students, many of whom legally reside outside the state. The sale of college services, and the NACAC rules that affect the sale, are therefore in the flow of and substantially affect interstate commerce. The Court has subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. § 4, and under 28 U.S.C. §§ 1331 and 1337, to prevent and restrain Defendant and its members from violating Section 1 of the Sherman Act, 15 U.S.C. § 1.

10. Defendants have consented to venue and personal jurisdiction in this district. Venue is proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391.

### **III. DEFENDANT**

11. Defendant NACAC is a trade association comprised of college admissions personnel and high school guidance counselors and their respective institutions. Although NACAC does have members around the world, its principal focus is on college admissions in the United States. NACAC currently has in excess of 15,000 members, representing several thousand colleges and high schools. In addition to maintaining and enforcing the CEPP, NACAC provides educational training to members, engages in lobbying and other public outreach, and holds dozens of popular college fairs that allow colleges to meet and recruit prospective students.

### **IV. TRADE AND COMMERCE**

12. NACAC is the largest trade association focused on college admissions in the United States.

13. There is significant competition among colleges for college students, especially incoming freshmen. Colleges compete on a number of different dimensions of college services, including tuition cost, majors offered, ease and cost of application, campus amenities, quality of education, reputation of the institution, and prospects for employment following graduation. The focal point for that competition is the college admissions process.

14. Colleges employ a number of competitive tactics to encourage students to apply for admission to, and ultimately attend, their institutions. Colleges typically heavily advertise to prospective applicants, including by sending physical and electronic mailings, by participating in college fairs, and by direct solicitation on high school campuses. Competition, however, does not

end there. If a prospective student is accepted by more than one college, there is typically a competitive negotiation between the student and each college over the financial aid package offered to the student. Additionally, if a college has not met its enrollment goals by the summer before school begins, it often will reach back out to prospective students to make a competitive pitch to entice the student to commit to enrolling at the college in the fall. Finally, even after classes begin, many colleges advertise college transfer programs that allow students to move from one college to another between semesters.

15. In competitive circumstances, colleges would compete vigorously for students to purchase their college services. This competition benefits students because it lowers the cost of attendance and increases the incentive that the colleges have to provide high quality or innovative services. Competition also improves an applicant's ability to negotiate for a better financial aid package with the college. Defendant's Recruiting Rules, however, blunted several avenues of competition for students and disrupted the normal competitive mechanisms that would otherwise apply.

## **V. THE UNLAWFUL RULES**

16. For decades, NACAC has had a set of rules governing the college admissions process for its members. Historically, some of the rules were mandatory for all members, and others were voluntary "best practices." In 2017, NACAC members voted to reformulate the mandatory rules into the 2017 CEPP. The CEPP rules are mandatory for all NACAC members, which includes most non-profit colleges and universities in the United States, and also for any non-member institutions that participate in NACAC's college fairs. Accordingly, agreeing to NACAC membership, or agreeing to participate in a NACAC college fair, is equivalent to agreeing with other members or college fair participants to execute on the restrictions in the

CEPP. The 2017 CEPP governs many aspects of the college admissions process for its members, including, most relevant to this action, the recruitment of students.

17. The 2017 CEPP included several rules that unreasonably restricted some of the ways in which colleges recruited incoming freshmen and transfer students. The three Recruiting Rules at issue in this case are (1) the Transfer Student Recruiting Rule, (2) the Early Decision Incentives Rule, and (3) the First-Year Undergraduate Recruiting Rule. While the CEPP certainly included rules and regulations that were aimed at, and actually do, increase competitiveness between schools and ease the burden of students applying to college, these Recruiting Rules were not reasonably necessary to those procompetitive rules or any other separate, legitimate business transaction or collaboration between NACAC's members. Prior to the 2017 CEPP, virtually identical rules were voted on and included in earlier NACAC rules and have been in place for years.

**A. Transfer Student Recruiting Rule**

18. The Transfer Student Recruiting Rule was codified at paragraph II.D.5 of the 2017 CEPP and instructed that, “[c]olleges 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.”

19. The Transfer Student Recruiting Rule acted as a ban on affirmatively recruiting transfer students, unduly restraining competition for transfer students amongst colleges. Without this opportunity for colleges to compete, potential transfer students may be unaware of transfer opportunities that may provide them lower priced or higher quality college services.

20. Absent the Transfer Student Recruiting Rule, colleges can engage in significantly more recruitment of transfer students through direct solicitation or otherwise. Furthermore, colleges will likely seek to provide better experiences to their existing student base in order to retain them in the face of increased competition for transfers.

**B. Early Decision Incentives Rule**

21. The Early Decision Incentives Rule was codified at paragraph II.A.3.a.vi of the 2017 CEPP and provided that “[c]olleges 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.”

22. NACAC defined Early Decision in the 2017 CEPP as an application plan where “[s]tudents commit to a first-choice college and, if admitted, agree to enroll and withdraw their other college applications.” The Early Decision application plan is akin to an exclusive contract in any other industry. In this case, the student foregoes the opportunity to consider the competitive offers of other institutions in exchange for an early decision on acceptance. Colleges thus stand as direct competitors for Early Decision applicants, because those applicants are far more likely, if accepted, to attend the college. This results in an increased yield, which is the percentage of accepted applicants that choose to attend the college. Yield is critically important to colleges—overestimating expected yield can lead to less students attending than anticipated (thus lowering total tuition received), which could force the college to cut classes or layoff staff. The increased yield from Early Decision applicants is financially significant to colleges.

23. The Early Decision Incentives Rule explicitly limited the scope of competition for Early Decision students by removing the ability of colleges to incent students financially or

otherwise. At base, the only form of payment an institution may provide in exchange for the exclusive contract with an applicant is the early decision itself. The rule prohibited all other forms of competition specifically targeted at particular Early Decision applicants.

24. Absent the Early Decision Incentives Rule, colleges are free to use any number of competitive levers to more aggressively recruit students. Some institutions may prefer to offer only the early decision, while others might compete more aggressively, such as by offering scholarships, preferential housing, or early course registration for those admitted under Early Decision.

**C. First-Year Undergraduate Recruiting Rule**

25. The First-Year Undergraduate Recruiting Rule was codified at paragraph II.B.5 of the 2017 CEPP and required that, among other things, “[c]olleges 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.” Furthermore, while the rule allowed colleges to “contact students who have neither deposited nor withdrawn their applications to let them know that they have not received a response from them,” it also commanded that schools could “neither offer nor imply additional financial aid or other incentives” were available unless the student had “affirmed that they [had] not deposited elsewhere and [were] still interested in discussing fall enrollment.”

26. The First-Year Undergraduate Recruiting Rule imposed significant restraints on a college’s ability to recruit students. The rule created an arbitrary deadline of May 1 for all colleges to cease improving their recruitment offers to students, even though many students do not decide on a college until well after May 1 and many colleges therefore can reallocate resources to make better offers after May 1. Furthermore, the rule imposed significant hurdles



before a college could improve its offer to a prospective student, requiring that the student first affirm *both* that they “[had] not deposited elsewhere” and were “still interested in discussing fall enrollment.” By directly limiting the ability of colleges to improve their offers to students, the First-Year Undergraduate Recruiting Rule operated as a significant restraint on competition.

27. The arbitrariness of the May 1 deadline was fully highlighted by the recognized exception to the rule “when students are admitted from a wait list.” Section II.C of the CEPP regulates institutions’ use of wait lists and explicitly authorizes schools to accept students off of a wait list as late as August 1, even when those students have already committed to attend another school. NACAC thus allows for vigorous competition over a student already committed to another school when a change in circumstances frees up a spot for a student on the wait list. The change in circumstances that free up additional resources to make a better offer is not conceptually distinct, but the rules explicitly allowed the former and prohibited the latter, restricting an opportunity for students to benefit from the sorting process.

28. Absent the First-Year Undergraduate Recruiting Rule, institutions are free to continue to improve their offers to students after May 1, to the benefit of those students. If students have made up their minds about their school of choice, or are otherwise insensitive to the change in circumstances, they can simply reject any further offers received from other schools. For students who may change their minds due to a more beneficial offer, continued recruitment can only work to their benefit.

## **VI. VIOLATION ALLEGED**

29. Defendant’s college members are direct competitors in college services and compete vigorously for students. Defendant coordinated and enforced an anticompetitive

agreement that restrained colleges from improving their offers or otherwise competing vigorously to be selected by students in the college admissions process.

30. Defendant's Recruiting Rules eliminated significant forms of competition to attract students. These rules, which were horizontal agreements between NACAC's college members, denied college applicants and potential transfer students access to potentially better financial aid packages and benefits and restricted their opportunities to move between colleges that offered superior services.

31. Accordingly, Defendant's Recruiting Rules constituted unreasonable restraints of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

## **VII. REQUEST FOR RELIEF**

32. The United States requests that this Court:

- (a) adjudge and decree that Defendant's Recruiting Rules are unreasonable restraints of trade and interstate commerce in violation of Section 1 of the Sherman Act;
- (b) enjoin and restrain Defendant from enforcing or adhering to any Recruiting Rules that unreasonably restrict competition for students;
- (c) permanently enjoin and restrain Defendant from establishing similar rules in the future, except as prescribed by the Court;
- (d) award the United States such other relief as the Court may deem just and proper to redress and prevent recurrence of the alleged violations and to dissipate the anticompetitive effects of the illegal agreements entered into by Defendant; and
- (e) award the United States the costs of this action.

Dated: December 12, 2019

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA



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