Antitrust Tips for Attending a ‘Virtual’ Trade Association Meeting

Trade associations serve many valuable purposes for employees and businesses alike. They serve as forums for professionals within a particular industry, subject to applicable legal parameters, to share knowledge and best practices, develop lobbying and public relations strategies, and adopt technological standards to ensure safety and operability. They also provide an important networking function by bringing together individuals with common interests and connections to meet each other in a professional setting. Such trade association activities can be important in employees’ professional advancement and, when structured appropriately, are perfectly lawful.

When structured inappropriately, however, trade association activities can create serious legal risks. In particular, by bringing together employees from competing businesses, trade associations create opportunities for improper competitive coordination under the antitrust laws. For example, without proper oversight, the legitimate sharing of knowledge and best practices can quickly enough spill over into unlawful collusion. At their worst, trade association meetings have occasionally been the settings for criminal, price-fixing cartels. Thus, in no uncertain terms, the Federal Trade Commission warns that “it is illegal to use a trade association to control or suggest prices of members.”
The antitrust risks from trade association meetings are not limited to the creation of criminal cartels. The Federal Trade Commission explains that trade associations can also violate the antitrust laws by establishing “disguised means of fixing prices,” such as inappropriate “information-sharing programs, or standardized contracts, operating hours, accounting, safety codes, or transportation methods.” Beyond that, in recent years, trade associations have also been targeted for adopting bylaws or even “codes of ethics” that have the effect of improperly limiting the freedom of members to compete for customers or geographic reach.

Compliance Tips for Traditional Trade Association Meetings

In light of the antitrust risks from trade association activities, businesses over the years have developed a number of strategies for mitigating such risks from trade association meetings. These strategies include:

- Starting meetings with an antitrust compliance reminder
- Having legal counsel approve meeting notices and agendas in advance
- Keeping accurate and concise minutes of meetings
- Forbidding discussions or surveys about prices, costs, margins, terms of sale, business strategies, or wages, without the advance approval of counsel
- Forbidding discussions of boycotts or “blacklisting”
- Forbidding the adoption of rules or policies that unreasonably restrain trade
- Minimizing off-the-record or “sidebar” conversations among competitors
- Ensuring the fairness and openness of any technological standards being adopted
- Allowing any qualified applicant to join a trade association
- Allowing every member to participate in trade association activities, subject to the trade association’s bylaws, rules of order, and reasonable safeguards
- Making a “noisy exit” from any meeting or discussion that crosses the line into impropriety
- Having meetings monitored by legal counsel, where warranted

To be clear, none of these are “one-size-fits-all” strategies that are necessarily required or even appropriate in every context. However, when reasonably tailored to the situation at hand, an appropriate combination of these strategies has proven an effective way to lessen antitrust risks from having employees or executives attend trade association activities.

Compliance Tips for ‘Virtual’ Trade Association Meetings
Seemingly overnight, the pandemic changed how trade associations operate. What until recently were often in-person affairs held at airport hotels or conference centers have transformed into meetings held “virtually” over the phone or, increasingly, on internet-based videoconferencing tools. While some of these changes may prove temporary as the country reopens, there is little doubt that virtual trade association meetings and networking events will increasingly be part of the “new normal” for years to come.

Attendees of virtual trade association meetings should remember that the antitrust laws apply with equal force to virtual meetings as they do to in-person meetings. Therefore, all of the rules that would usually apply for an in-person trade association meeting—as well as virtual networking events or cocktail hours—should continue to apply for a virtual meeting.

However, virtual meetings also create their own set of unique challenges. Businesses therefore can consider adopting special strategies to ensure antitrust compliance at virtual meetings. These strategies may include:

- **Taking precautions when “sharing” screens.** Presenters should take all necessary precautions before “sharing” their screens with other attendees, to ensure that proprietary information like price lists, business plans, or even incoming emails are not inadvertently displayed to other attendees. In particular, to help minimize the risk of inadvertent sharing, before sharing one’s screen a presenter should close any unnecessary applications and turn off email and chat notifications. Presenters should also consider if there might be any competitive sensitive information in places like their internet browser bookmarks, their desktop images, or any file names that may be visible.

- **Balancing security with openness.** Many trade associations have prudently adopted security measures to prevent intrusions or “bombing” activities. For instance, many videoconferencing tools can be configured to require attendees to enter a password, or to allow the host to control who may attend or speak during a meeting. While these precautions can be very important from a security perspective, they must be balanced against the need for trade associations to follow their own rules for transparency and nondiscrimination. A virtual meeting should have the same level of openness and access as may be required for an in-person meeting. This could mean that every individual eligible to attend a meeting receives the invitation for the meeting and a reasonable opportunity to obtain the meeting’s login information, and that no eligible participant is blocked from joining or participating in the meeting improperly.

- **Limiting private side communications.** Attendees should exercise caution when using email, breakout, or “chat” tools to hold side conversations during virtual meetings. In particular, attendees should be careful to avoid the appearance of improperly “teaming up” with other attendees to determine the course or outcome of a meeting. This risk is especially a concern for any employees who may serve as officers or directors of a trade association, or in any other role that binds them to a trade association’s bylaws or other rules of order.
• **Seeking safety in numbers.** All else being equal, there is generally less opportunity for mischief from a meeting that includes a large number of participants than from a meeting with a small number of participants. More importantly, there is less opportunity for mischief from a meeting that includes a diverse array of industry stakeholders (e.g., customers, consultants, or regulators) than from a meeting that only includes direct competitors. This consideration is particularly important to consider before using conferencing software that supports smaller, breakout meetings, separate from the larger, primary meeting.

• **Acting as if the virtual meeting is being recorded.** As a rule of thumb, it is a good practice to act as if every virtual trade association meeting or networking event is being recorded. It is important to note, however, that some jurisdictions prohibit the recording of private meetings without the consent of all participants.

• **Making a “noisy exit,” virtually.** When a line has been crossed, the rules for “noisy exits” largely remain the same whether a meeting is virtual or in-person. However, virtual meetings can pose unique technological constraints, such as the automatic muting of individuals who are not designated speakers. If an individual feels the need to make a “noisy exit” but is technologically unable to make a sound, then that individual will have to use other channels. Where a group chat feature is available, that may be the best option for expressing a noisy exit in real time. But to keep a record of the noisy exit, a follow-up communication by letter or email is an option to consider.

• **Reevaluating whether to have legal counsel monitor the meeting.** It is almost certainly less expensive for legal counsel to attend a virtual meeting than an in-person one. Therefore, trade associations and individual members may want to reevaluate whether it makes sense to have legal counsel monitor virtual meetings.

Again, none of these are “one-size-fits-all” strategies that are necessarily required or even appropriate for every context. However, as more and more executives and employees attend virtual trade association meetings and networking events, businesses should update their compliance strategies accordingly. After all, despite the pandemic, the antitrust laws continue to apply with full force and effect.

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