

A Guide to Resolving Legal Issues Affecting Agencies

by

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**FSMA RECOMMENDED CONTRACT
BETWEEN AGENCY AND CLIENT**
(Amended 04/18/17)

THIS AGREEMENT is entered into this ____ day of _____, 20___, by and between _____ (“CLIENT”) and _____ (“AGENCY”).

WHEREAS, CLIENT is the supplier, manufacturer or processor of certain merchandise or products and desires to secure the services of AGENCY, and

WHEREAS, AGENCY maintains a local market expertise as a provider of sales and marketing services in the territory hereinafter described and desires to provide such services to CLIENT;

NOW THEREFORE, in consideration of the undertakings contained herein, the parties hereto agree as follows:

1. **Representation/Territory.** CLIENT hereby appoints AGENCY as its sole and exclusive representative to provide sales and marketing services for the merchandise or products within the territory and for the compensation as described in Attachment No. 1.

2. **Service Policies.** All sales negotiations and marketing services provided by AGENCY for the account of CLIENT shall be conducted in accordance with such prices, terms and conditions as specified by CLIENT’s Policy Statement.

3. **Compensation.** CLIENT agrees to compensate AGENCY on all gross sales accepted by CLIENT in the territory. Such Compensation shall be computed on the price of the merchandise or products sold after discounts and allowances are calculated. Compensation shall be made promptly by Client within thirty (30) days after the end of each month together with a commission reconciliation statement in electronic format of all AGENCY sales invoices for products shipped by CLIENT into AGENCY’s Territory for the prior month. A delinquency charge of 1.5 percent per month (but not in excess of the lawful maximum) may be added on any amount past due. Agency shall have the right to audit Client’s commission calculations for the prior 12 months under this Agreement, at Agency’s expense, upon reasonable notice to Client.

4. **Sales and Promotional Policies.** CLIENT agrees to keep AGENCY fully informed on all sales and promotional policies and programs affecting the products or merchandise in the territory. The cost of AGENCY’s attendance at CLIENT’s sales meetings shall be borne by CLIENT.

5. **Purchase Order Reports & Negotiations.** AGENCY agrees to promptly report to CLIENT all negotiations and purchase orders for acceptance by CLIENT. Approval of all sales orders and extension of Customer credit are at the sole discretion of CLIENT.

6. **Collections & Deduction Responsibilities.** AGENCY agrees to assist CLIENT in the research of all deductions and in communication of the need for prompt and full payment by Customers for all deliveries of merchandise and products sold. AGENCY is not responsible for the payments of any Customer and CLIENT shall not deduct commissions of AGENCY for such nonpayment.

7. **Shipments.** AGENCY agrees to promptly notify CLIENT of required shipments to Customers. CLIENT agrees to promptly ship merchandise or products sold for all accepted orders.

8. **Competitive Products.** Both parties agree to abide by FSMA Policy Statement #1 on Competitive Products/Conflicts and not to declare another product represented by AGENCY as “competitive” and “in conflict” with their own as long as AGENCY satisfied the responsibilities and goals as contained therein.

9. **Consolidations.** In the event that CLIENT acquires the rights to a product serviced by a competitive AGENCY in the territory, CLIENT will follow the procedures as developed in FSMA Policy Statement #2 on Consolidations.

10. **Product Liability Indemnification.** CLIENT agrees to defend, hold harmless and indemnify AGENCY from any and all loss or damage, costs and expenses, including legal fees, incurred by any claim or action made or filed against AGENCY, claiming loss or injury of any nature whatsoever, as a result of defect in any merchandise, purchase or use of any product supplied, manufactured, or processed by CLIENT.

11. **Agency.** AGENCY shall act as an independent contractor or agent of CLIENT, and neither AGENCY nor its employees shall be considered employees of CLIENT, and neither party shall in any event be held liable or accountable for any obligations incurred by either party other than as specified herein, it being specifically understood that the respective businesses of each of the parties shall be operated separate and apart from each other.

12. **Confidentiality/Employees.** AGENCY and CLIENT shall cause its officers, directors, employees, and agents to maintain as confidential any trade secrets, technology, processes or proprietary business information which may be disclosed or acquired by either party in connection with this Agreement. During the term of this Agreement, each party agrees not to employ individuals from the other’s organization.

13. **Term.** This Agreement shall continue in full force and effect for a one-year period from the date this Agreement is entered into as listed in the first paragraph hereof. It will be

automatically renewed for an additional one-year period unless the other party notifies its intention not to renew 30 days prior to the end of the term.

14. **Termination.** Either party may terminate this Agreement for any reason by giving thirty (30) days written notice of such intention to the other party. In the event CLIENT terminates this Contract for reasons other than AGENCY's breach, CLIENT agrees to abide by FSMA Policy Statement #3 on Terminations and shall pay AGENCY severance compensation (based on the average monthly commissions for the previous 12 months) equal to one month's payment for each year of representation.

15. **Arbitration.** Any controversy or claim arising out of or relating to this Agreement shall be settled by arbitration in accordance with the rules of the American Arbitration Association held at a location close to an office of CLIENT's nearest an office of AGENCY. Judgment may be entered in any court having jurisdiction thereof.

16. **Evaluation of Performance.** The performance of each party of the terms of the Agreement will be evaluated every twelve months or sooner as to assure all responsibilities and objectives are being upheld. Within ten (10) days of such evaluation, each party should notify the other in writing of their concerns.

17. **Applicable Law.** The laws of the state of CLIENT's headquarters shall govern the application and interpretation of this Agreement.

18. **Prior Agreements/Amendments.** This Agreement cancels and supersedes any and all prior agreements, oral or written, made between the parties hereto. It can only be modified by an agreement in writing signed by all applicable parties.

19. **Binding.** This Agreement shall be binding on the parties hereto and their successors and assigns.

CLIENT:

AGENCY:

By: _____

By: _____

(Title)

(Title)

[OPTIONAL LONG-TERM CONTRACTS – REPLACEMENTS FOR ITEMS 13 & 14]

14. **Term.** This Agreement is a guaranteed one year contract and shall continue in full force and effect for a one year period from the date this Agreement is entered into as listed in the first paragraph hereof. It will be automatically renewed for an additional one year periods

unless either party notifies the other in writing of its intention not to renew sixty (60) days prior to the end of each one year term.

15. Termination. In the event either party fails to renew this Agreement for reasons other than breach of this Contract, the non-renewing party shall pay the other party severance compensation (based on the average monthly commissions for the previous 12 months) equal to one month's average commission for each year of representation or portion thereof up to a maximum of six months of commissions.

FSMA - POLICY #1
(Adopted 4/18/17)

CLIENT/AGENCY POLICY ON COMPETITIVE PRODUCTS/CONFLICTS

Client will review potential conflicts on a market-by-market basis. Agency will be permitted to represent competitive products where marketing and promotion decisions are made on a category management best practices basis provided Agency adheres to the following:

- 1) Agency will give Client advance written notification of potential competitive product representation.
- 2) Agency will use different Account Executives within its organization, whenever possible, for competitive brands.
- 3) Agency will agree to a 12-month trial representation period for representation of the competing brand.
- 4) Agency will establish with Client the brand objectives and points for evaluation on a quarterly basis. If sales objectives are met, Agency understands the representation of this competing brand will be acceptable to Client.
- 5) Agency will maintain confidentiality as required by the Agency/Client Contract. Agency will not communicate Client's proprietary prices, systems, processes, capabilities, training or business evaluations.

FSMA - POLICY #2
(Adopted 4/18/17)

CLIENT /AGENCY POLICY ON CONSOLIDATION

- a) The process of evaluation shall involve ample notification to all involved Agencies, which will be clearly communicated when the consolidation is pending.
- b) The evaluation will be objective and involve a minimum of one scheduled meeting with each Agency.
- c) Agencies will have ample time to prepare for the evaluation meeting. Client will notify the Agencies participating immediately after completing the final evaluation and decision.
- d) Individual market evaluations will be made crossfunctionally between corporate and local market management.
- e) Each Agency's attributes will be analyzed impartially.
- f) Appointments across an area or region will take into consideration local market issues and dynamics.
- g) Due process will be followed for a transition period after the consolidation decision has been agreed to.
- h) Appropriate severance will be considered based on market development and length of service before termination.

FSMA POLICY STATEMENT #3

(Adopted 4/18/17)

PRINCIPLES OF FAIRNESS IN TERMINATING SMA CONTRACTS

Sales and marketing agencies (“SMA’s”) generally operate under 30- to 90-day agreements with their client suppliers and manufacturers (“Clients”). SMA’s operating under such short term contracts are motivated in their Client representation to perpetuate a long term relationship, especially if principles of fairness exist to govern an unexpected possible contract termination.

In order to properly service a Client, an agency retains a sales and marketing staff and organizational infrastructure dedicated to meet Client’s needs on a long term basis. These involve significant capital commitments in personnel and infrastructure. Because of these long term commitments, it is important that the parties have a legally binding contract and engage in an annual evaluation of the contract terms and performance thereunder to assure all responsibilities and objectives are being upheld. These periodic reviews are important to avoid misunderstandings and to reinforce commitments.

However, if a Client is considering replacing its sales and marketing agency, the Board of Directors of FSMA recommends principles of fairness be followed to permit the Client and SMA to meet in advance of any final decision to discuss the issues and permit SMA a reasonable period of time to negotiate the issues in order to satisfy Client’s concerns.

Such a first step meeting should involve decision making principals of each organization and be held at location where privacy and constructive conversation can take place to enable issues to be discussed on a confidential basis.

For example, at such a meeting issues like conflicts and competitive products could be reconciled by adopting the fairness principles established in FSMA Policy Statement #1. Performance and commission related issues may involve the mutual development of a plan, with timelines and scorecard, to meet the Client’s goals. Other issues like consideration of creating a direct sales force may be analyzed by reviewing various research studies on the efficiencies and effectiveness of SMA’s over a direct sales force.

FSMA Board of Directors stress that industry partnerships require reasonable dealings between the parties in light of the material commitment of SMA’s on short term contracts. However, in the event a Client concludes, after its exercise of the above principles of fairness, that it will terminate the SMA, then Client should pay reasonable termination compensation consistent with the industry standard of one month’s average compensation for each year of SMA’s service to Client (See FSMA industry standard contract paragraph 14).

FSMA POLICY STATEMENT #4
(For BOD adoption 4/4/18)

ETHICAL OBLIGATIONS IN COMPETITION

Membership in FSMA requires sales and marketing agencies to adhere to the FSMA Code of Ethics as a condition of membership. For more than 100 years, including FSMA's predecessor organizations, the Code of Ethics was used to distinguish industry participants who abided by high ethical standards that were proudly displayed on business cards, lapel pins, letterhead, and wall plaques.

These membership indicia were selection assists to industry affiliates, who recognized those parties who do business ethically and adhere to a set of rules that, if violated, would result in revocation of their membership in an organization upholding high principles.

As competition becomes more intense, ethical standards of conduct become more significant, as members vie to be the winner in securing any new Clients or Customers. Today, as more Millennials enter the workplace and achieve positions of responsibility, they have insisted to their employers that a code of ethics be adopted, so that they can confidently communicate that their employer's reputation is above reproach. Millennials have grown up in a culture of collaboration and community involvement that involves respect for differences of opinion but champions furtherance of the fair dealing goals and integrity of their employer.

The FSMA Code of Ethics, which is attached to this Policy Statement, emphasizes:

CANON #1 – HONESTY & INTEGRITY. FSMA Members should loyally and faithfully serve their Clients and always *deal fairly with their Clients' Customers.*

CANON 2 – FAIR COMPETITION. FSMA *prohibits* Members from engaging in *unfair or deceptive methods or tactics in competition.*

CANON 3 – INDEPENDENCE FROM CONFLICTS. FSMA dictates that Members shall *not have conflicts of interest* through arrangement with their Customers or an ownership interest in the Customer they serve on behalf of their Client. *Such relationships are inconsistent with a Member's capacity to deal fairly and honestly with their Clients as well as dealing equitably with all Customers of the Client.*

CANON 4 – MAINTAIN A CLIENT'S CONFIDENCES. This very important Canon dictates that the *confidential information of Member's Clients is the cornerstone of faithful*

service to the Clients and reliable guidance to Clients' Customers, which cannot be guaranteed if a Member's actions and opinions on such confidential items are breached.

CODE OF ETHICS
FOODSERVICE SALES & MARKETING ASSOCIATION

WHEREAS, Foodservice Agency members of the Association are committed to create and deliver supply chain efficiencies and best practices by collaborating with manufacturer/suppliers; and

WHEREAS, the Foodservice Agency, through long established performance, has proven to be the most effective method for delivering sales, marketing and merchandising services; and

WHEREAS, the Foodservice Agency is the best informed and the most capable industry representative in each market;

NOW, THEREFORE, every Foodservice Agency should adhere in good faith to the following principles of this Code:

1. **HONESTY AND INTEGRITY**. The foundation of the Foodservice Agency's business is honesty and integrity. Foodservice Agencies should loyally and faithfully serve their Clients and always deal fairly with their Clients' customers. No Foodservice Agency should engage in any inconsistent or irreconcilable activity, or knowingly permit any transaction to occur through their Foodservice Agency which is not fair to Clients and customers alike.
2. **COMPETITION**. The use by a Foodservice Agency of any unfair or deceptive methods or tactics in competition with another Agency, whether for their Clients or for their Clients' customers, is unacceptable. Foodservice Agencies support the principle that all Clients shall have freedom of choice in the selection of the manner of bringing their products to market.
3. **INDEPENDENCE**. The nature of the industry dictates that no Foodservice Agency shall, without the consent of its Client, be employed by, be owned by, be controlled by, or have an ownership interest in any Client's customer while at the same time representing Client. Such relationships are inconsistent with the Foodservice Agency's capacity to fairly and honestly serve Clients and to deal equitably with all customers.
4. **CONFIDENTIALITY**. Since Foodservice Agencies often possess confidential information concerning their Clients, faithful service to their Clients and reliable guidance to the Clients' customers cannot be guaranteed if actions and opinions are tainted by breaches of confidentiality.
5. **COMPLIANCE**. Foodservice Agencies should cooperate with governmental agencies in every proper way.

6. **DISPUTES**. All Foodservice Agencies should accept the principle of arbitration in disputes between themselves and their Clients or the Clients' customers.

HOW TO OBTAIN CHANGES TO AGENCY CONTRACTS

SUBMITTED BY MANUFACTURERS

by Barry C. Maloney, Esq.

We are frequently asked how Agencies can obtain changes to the contracts submitted by Manufacturers. Usually, a Manufacturer submits its contract, and there appears to be very little leverage to make changes. Although it may be intimidating to request changes in the Manufacturer's contract, we strongly recommend that, at a minimum, Agencies make two changes. One, add an "Evaluation of Performance" and two, add an "Arbitration" provision in lieu of the Manufacturer's litigation paragraph. We also encourage the change in the termination notice from 30 to 90 days and payment of termination compensation.

There are many other sections of the FSMA Recommended Form of Contract for Manufacturers and Agencies that should be considered, primarily increasing the termination notice (para 14) from 30 days to 90 days and providing for termination compensation of one month's compensation for each year of representation (para 15). However, it may be difficult to secure such changes in the Manufacturer's contract without having any experience for your representation. Therefore, we recommend that if you are unable to obtain such changes, consider inserting a paragraph (described below) providing for an annual evaluation of performance.

Such a clause will permit a discussion and evaluation of an Agency's services and give reasons and opportunity for increasing the notice on termination and compensation on termination following successful professional representation of a trading partner. Oftentimes Manufacturers don't understand the cost of doing business and investments that are made by

Agencies. At an annual review, an Agency can explain that the 30-day notice provision adversely affects each party's commitment to the economic partnership. Thus, after successful performance and review of an Agency's enhancement of a Manufacturer's business, an opportune time exists for asking for changes to a contract. Accordingly, we recommend that each contract contain an Evaluation of Performance as follows:

“Evaluation of Performance. The performance of each party of the terms of this Agreement will be evaluated every twelve months or sooner as to assure all responsibilities and objectives are being upheld. Within the (10) days of such evaluation, each party should notify the other in writing of their concerns.”

Almost all manufacturers' contracts will contain a Litigation provision as well as “Applicable Law” provisions. Litigation is expensive, ties up management and involves significant time delays until a dispute is resolved. The “litigation” provision usually states that the case will be litigated in the Courts located near the Manufacturer's principal offices and “Applicable Law” provision states that the law of the Manufacturer's home state will control. Leave the Applicable Law provisions in the form that the Manufacturer chooses but request that they replace the Litigation paragraph with the following arbitration provisions from the (para 16) standard form of Agency-Manufacturer contract as follows:

“Arbitration. Any claim or controversy arising under or relating to this Agreement will be settled by arbitration in accordance with the rules of the American Arbitration Association, held at a location close to an office of the MANUFACTURER Association nearest an office of the Agency. Judgment may be entered in any court having jurisdiction thereof.”

Neither the Manufacturer nor the Manufacturer's attorneys should find either of the two foregoing changes adverse to their contact, and almost all will willingly make such changes. Of

course, if Agencies need more reasons, they can point out that such changes are recommended by FSMA.

CONTRACT ADDENDUM

This Contract Addendum is entered into on this ____ day of _____, 20__, by and between _____ (“Manufacturer”) and _____ (“Agency”).

WHEREAS, Manufacturer and Agency have entered into an agreement dated _____, providing that Agency would provide certain services as specified in such agreement (“Agreement”), and

WHEREAS, the Agreement may not be amended without a writing between the parties;

NOW THEREFORE, the parties hereto agree to amend such Agreement as follows:

1. **Arbitration.** Any claim or controversy arising under or relating to this Agreement will be settled by arbitration in accordance with the rules of the American Arbitration Association, held at an office of the Manufacturer nearest to an office of the Agency. Judgment may be entered in any court having jurisdiction thereof.

2. **Termination.** Either party may terminate this Agreement for any reason by giving ninety (90) days written notice of such intention to the other party. In the event Manufacturer terminates this Agreement for reasons other than Agencies breach or inadequate performance, Manufacturer will pay Agency severance compensation (based on the average monthly commission for the previous 12 months) equal to one month’s payment for each year of Representation.

3. **Evaluation of Performance.** The performance of each party of the terms of the Agreement will be evaluated every twelve months or sooner as to assure all responsibilities and objectives are being upheld. Within ten (10) days of such evaluation, each party should notify the other in writing of their concerns.

4. **Effect.** Other than as amended hereby, all other provisions of said Agreement will be deemed to be in full force and effect unless a separate Amendment has been entered into.

MANUFACTURER:

AGENCY:

By: _____

By: _____

**RECEIVING COMPENSATION FOR
PRELIMINARY MARKETING ACTIVITIES**

by Barry C. Maloney, Esq.

When Agencies take on a new line, they frequently incur significant start-up costs associated with securing the representation and establishing a Customer base for the manufacturer's products. Generally, the expenses incurred by Agencies are recovered by commissions they will receive as a result of entering into a contract with the manufacturer for the sales and marketing of the products of the manufacturer. However, we are frequently consulted by Agencies who have had devoted a significant amount of time and expense to preliminary market development only to discover at the last minute that they will never be compensated by the manufacturer for these efforts.

This occurs for a number of reasons including the failure to enter into a written contract of representation prior to securing the markets for the manufacturer's products; conversion of the line to a house account; termination of the representation with a brief notice; a decision to go with another organization after substantial market development efforts expended by the Agency.

In order to avoid the adverse consequences of such activity we recommend the following:

1. Written Contract. Before beginning any preliminary sales and marketing activities for a manufacturer an Agency should always have a written agreement governing the terms and conditions of the representation.

2. Termination Compensation. There should always be included a statement indicating that upon termination of the contract, Agencies should be compensated at least one month's

average commission for each year of representation. For start-up representation, there should be a provision indicating that the preliminary out-of-pocket expenses and reimbursement of pioneering service in establishing a line will be recovered, if termination occurs within the first year of representation.

Without a written agreement, an Agency can bring a claim against a Manufacturer for recovery of these costs under a quantum meruit theory. Most jurisdictions recognize claims for the value of these services, but they are not as easily recoverable as it would be if there were a written agreement between the parties. Accordingly, we strongly urge Agency to utilize written agreements for all of their compensation arrangements.

CONVERSION TO HOUSE ACCOUNTS

ARE THERE LEGAL REMEDIES?

by Barry C. Maloney, Esq.

Two events appear to be occurring more frequently which are adversely affecting a Sales Agency's livelihood. Either a Customer is requesting a Manufacture to deal direct and cut out an Agency or a Manufacturer is converting a line or lines to House Accounts with the same effect. Oftentimes we are asked what remedies, if any, are available to Agencies in such events.

There is no simple answer for each circumstance, but the following is a summary of some of the issues that Agencies should consider to determine whether they have any remedies. Generally, the first things to look at are the terms of the Agreement between the Agency and the Manufacturer. Oftentimes, clauses are inserted into the contract that permits the Manufacturer the option to convert lines to House Accounts. In such events, then there is no remedy for recovery other than the normal compensation due on termination of a line, generally 30-90 days.

Sometimes the conversion takes place during the initial product introduction. In such events an Agency's up front investment in securing outlets for the product is lost by conversion to the House Account. One way to protect an Agency from such events is to have an understanding prior to the introduction of a new product line, that all costs and services associated with such introduction will be recoverable by the Agency in the event that the Manufacturer converts the account to a House Account.

Finally, there could be a set of facts in which the termination of a line or lines is associated with a Power Buyer's demand to a Manufacturer to deal direct and eliminate a Sales Agency. Such demands may be actionable as a tort for breach of contract or interference with business relationships when coupled with a violation of law or other unjustifiable behavior by the Buyer.

For example, if a Buyer demands that a Seller deal direct and then coerces the Seller to sell its products at a price that is deemed to be a discount in lieu of brokerage, then such action may be deemed to be a violation of Section 2(c) of the Robinson-Patman Act. In such events the demand to terminate the contract is unjustified and the Sales Agency will have a cause of action against the Buyer for damages. The damages are not just limited to the notice provisions, for example, 30 days, but rather the commissions that an Agency could have reasonably anticipated having earned had the contract not been interfered with.

It is important to Agencies to make sure that they properly educate both their Manufacturers and Customers that they are not middlemen whose services can be eliminated. But rather, they are independent companies, which providing vital value-added services on an outsourced basis on behalf of the Seller.

With the development of electronic commerce, there will be more and more demands by Customers to have the Manufacturers sell direct. It will be necessary to educate your trading partners that you are a Manufacturer's direct sales force with local market and category expertise.

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Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Agency's Action Plan for
Unauthorized Deductions by

Suppliers

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association ("FSMA") regarding the legality of unauthorized deductions by Suppliers from commissions payments due their Agencies. As described below, such deductions by a Supplier involve not only a breach of contract but in certain instances the tort of conversion, subjecting the Supplier to a lawsuit for the commission, interest, court costs, attorney's fees and punitive damages.

You have advised us that a few Suppliers have adopted the practice of deducting from commissions payments to their Agencies certain amounts that are disputed by the Buyer. In some situations, the Agency's commission payments are not only reduced by the commission on the amount in dispute, but rather, some Suppliers have subtracted the entire amount in dispute between the Supplier and the Buyer, thereby materially adversely affecting the income of the Agency.

Under separate cover, we have provided a letter which summarizes our opinion concerning such unauthorized deductions. FSMA's members may share that letter with their Suppliers. You have also requested our comments concerning the responsibilities an Agency has to its Supplier in resolving disputed invoices with the Customer. This letter responds to this additional inquiry and includes a discussion of applicable provisions from the form of agency agreement published by FSMA as a service to its members.

I. Agency's Responsibilities in Resolving Disputes with Buyer.

The Agency's responsibilities in resolving disputes with the Buyer are also governed by the law of contracts. To avoid any uncertainty as to exactly what the responsibilities of the Buyer

and Supplier are concerning such disputes, the obligations of each should be set forth in the sales agency agreement.

The FSMA Recommended Agency/Client Contract contains several provisions that bear directly on this issue. Section 3 of the agreement specifically provides that the Supplier agrees:

“CLIENT agrees to compensate AGENCY on all gross sales accepted by CLIENT in the territory. Such Compensation shall be computed on the price of the merchandise or products sold after discounts and allowances are calculated. Compensation shall be made promptly within thirty (30) days after the end of each month. A delinquency charge of 1.5 percent per month (but not in excess of the lawful maximum) may be added on any amount past due.”

Section 6 of the agreement provides that the Agency agrees:

“AGENCY agrees to assist CLIENT in the research of all deductions and in communication of the need for prompt and full payment by Customers for all deliveries of merchandise and products sold. AGENCY is not responsible for the payments of any Customer and CLIENT shall not deduct commissions of AGENCY for such nonpayment.”

Although Section 6 indicates the Agencies will assist Suppliers in obtaining payment, this provision does not mean that Agencies are collection agents for their Suppliers. While an Agency cannot legally be forced to fulfill the role of a collection agent for its Supplier, an Agency should be willing to assist the Supplier by any reasonable means, to obtain prompt and full payment from the Buyer. Such cooperation between Suppliers and Agencies in resolving disputes with a Buyer is a far more productive and mutually beneficial approach than unilateral withholding of payment by a Supplier until the dispute with the Buyer is resolved.

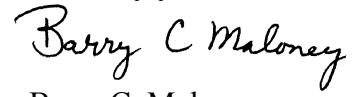
II. The Role of the FSMA Code of Ethics.

Disputes between a Supplier and an Agency should be resolved within the confines of their normal purchase and sale arrangements. When a Supplier penalizes an Agency for a dispute with a Buyer by withholding commissions or deducting the Buyer’s unpaid invoice amount from the Agency’s earning, it jeopardizes the Supplier/Agent relationship. The Code of Ethics of the Foodservice Sales & Marketing Association provides that an Agency “should at all times loyally and faithfully serve its client.” Unauthorized deductions by a Supplier break the foundation of the business relationship and may compromise the Agency’s willingness and ability to uphold this tenet.

Agencies faced with such unauthorized deductions should advise their Suppliers that such deductions are a breach of the Supplier’s contractual obligations. An Agency in this situation could legally cease to represent the Supplier and take appropriate action to recover sums owed. However, if there is a bona fide dispute involving the Agency’s efforts, an Agency should be prepared to allow the commission portion of the order to be withheld, but only if the Supplier is

negotiating in good faith for a speedy resolution. If there remain irreconcilable differences, the dispute should be submitted to arbitration, as recommended by the FSMA Code of Ethics.

Sincerely yours,

A handwritten signature in black ink that reads "Barry C Maloney". The signature is written in a cursive style with a large initial 'B' and a distinct 'C'.

Barry C. Maloney

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Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Legality of Unauthorized Deductions

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association (“FSMA”) regarding a Supplier’s deduction from its Agency’s commissions to offset unauthorized invoice deductions by Customers. As described below, such deductions by the Supplier may not only involve a breach of contract but also the tort of conversion and a potential violation of Section 2(c) of the Robinson-Patman Act.

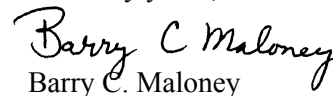
In normal trade usage an “unauthorized deduction” is generally understood to occur when a Customer deducts from a Supplier’s bona fide invoice sums not consistent with the terms of the sale. As a result of the frequency with which such deductions occur, some Suppliers have made contract changes with their Agency, or unilaterally established new policies whereby the Agency has its commissions offset for the commission portion of the unauthorized deductions to the Supplier.

The issues raised by Supplier’s policies are governed by principles of agency and contract law, as well as federal price discrimination law. Under accepted principles of the law of agency (which governs the relationship between Suppliers and their representatives), the Agency’s commission is earned when the sale is made, namely, at the time the Buyer places the order for the Supplier’s goods. The Supplier’s obligation to pay its Agency for procuring the sale is not excused simply because the Buyer may be slow in making payment or may refuse payment due to its own dispute with the manufacturer or a misunderstanding of the manufacturer’s terms. The Agency is not a guarantor of payment by the Buyer, and the Agency cannot legitimately be forced to assume this role by the Supplier. The deduction of such amounts by the manufacturer is universally actionable in a lawsuit for “breach of contract.” At a minimum, the damages recoverable from the Supplier in such an action would include the full amount of commissions earned, interest on such sums unlawfully deducted, and court costs.

Lastly, in our opinion, such acts may be deemed to violate Section 2(c) of the Robinson-Patman Act. Section 2(c) prohibits a Supplier from paying or granting to a Customer “anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof....”

Where there is an unauthorized deduction by a Customer for which a Supplier thereafter either reduces an Agency’s commission or requests a repayment for any amount of the deduction, the Supplier may be illegally rebating a commission to a Customer. Such contractual provisions may involve violations of the Robinson-Patman Act, especially where the Suppliers directly or indirectly force the Agency to accept such practices as an incident of doing business with them.

Sincerely yours,


Barry C. Maloney

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

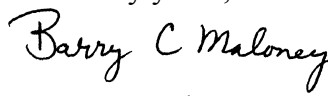
Re: Buyer's Designation of Seller's Agency
Hold Harmless Agreement

Dear Mr. Abraham:

As we indicated to you in our attached opinion, we understand that certain distributors or customers from time to time have asked certain Suppliers to replace their current sales and marketing agencies with Buyer's designees.

In our opinion, the request to Suppliers to replace their chosen sales and marketing agencies with Buyer's designees raises serious antitrust and tortious interference of contract concerns. In the event that sales and marketing agencies are contacted by such Suppliers and informed of the Buyer's policy, we recommend that the sales and marketing agencies supply a copy of this letter and our opinion of the same date together with a request that the Supplier secure a Hold Harmless Agreement in the form attached.

If Suppliers use this Agreement, they may (although we offer no assurances) protect themselves from civil liability associated with the proposed program.

Sincerely yours,

Barry C. Maloney

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Buyer's Designation of Seller's Agency

Dear Mr. Abraham:

You have asked that we advise you as General Counsel to the Foodservice Sales and Marketing Association ("FSMA") regarding the legality of requests by certain Buyers (distributors or operator customers) to Suppliers to replace their current sales and marketing agencies with Buyer's designees.

Buyer, by the nature of such request, has full knowledge that the Supplier has already chosen independent sales and marketing agencies for their products in the designated territory. In our opinion, a Buyer may be liable for tortious interference of contract when it requests that a Supplier eliminate its sales and marketing agency and replace them with its designee especially where there is no legal requirement to do so. A Supplier is legally bound to honor these rights which are contained in its binding sales agency agreement with its chosen agencies. The damages in such instances are the future commissions that an agency had a right to expect, as well as punitive damages in certain instances.

A sales and marketing agency is the representative of its Supplier and the appointment of sales and marketing agencies may only be made by the Supplier who compensates the broker. It is the Supplier who has the right to decide which sales and marketing agency shall act as its representative. A Buyer's request that a Supplier employ and pay a commission to a sales and marketing agency who is selected by the Buyer creates the inference that the sales and marketing agency is really the Buyer's representative, a practice that would clearly violate the Robinson-Patman Act, as well as the sales and marketing agency's obligations under the FSMA Code of Ethics.

Suppliers who are concerned by Buyer's request to replace their agencies should ask that Buyer to issue a Hold Harmless Agreement to protect them from potential claims from the above causes of action. In every case, it is only the Supplier who has the right to decide which sales and marketing agencies shall act as its representative.

Sincerely yours,

Barry C Maloney
Barry C. Maloney

BUYER HOLD HARMLESS AGREEMENT

THIS AGREEMENT is entered into this _____ day of _____, 20____, by and between _____ (“Buyer”) and _____ (“Supplier”).

WHEREAS, Buyer has requested that Supplier replace its legally appointed sales and marketing agency with Buyer’s designee, and

WHEREAS, Supplier is concerned with the possible liability exposure associated with such request, including the potential for interference of contract claims and violations of the antitrust laws and the Robinson-Patman Act;

NOW, THEREFORE, in consideration of Supplier’s termination of its contractually appointed sales and marketing agency, Buyer agrees as follows:

To indemnify and hold harmless Supplier and its officers, agents, and employees from any and all claims, demands, or suits known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted as of this date, arising from or related to the events and transactions which are or could be the subject matter of Buyer’s request that Supplier replace its legally appointed sales and marketing agency with Buyer’s designee.

IN WITNESS WHEREOF, the parties have executed this Hold Harmless Agreement the day and year first above written.

BUYER

SUPPLIER

By: _____

By: _____

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Legality of Solicitation of
Another Agency's Accounts

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association ("FSMA") regarding the legality of an agency soliciting the accounts of Clients who are represented by other Agencies.

The solicitation of a Client already represented by another Agency is governed by the federal antitrust laws, the law of contracts and the FSMA Code of Ethics.

Remedies for Wrongful Solicitation. Any solicitation must meet certain criteria under federal and state standards to be deemed to be legal; otherwise an Agency may be guilty of tortious interference of contract, tortious interference of business relationships or unfair competition.

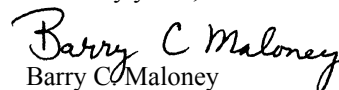
When an Agency uses unfair or deceptive practices in soliciting another Agency's account, several courses of action are open to the injured parties. Where harm to the public interest is involved, such as injury to competition, state or federal authorities are empowered to bring action to stop the practice. Where only private interests are involved, an Agency injured by solicitation may seek equitable relief to restrain the practice as well as damages for any injury. In some cases, private treble damage suits may be brought against the offending soliciting party.

Tortious Interference of Contract or Business Relationship. When a Client is already represented by another Agency, and this contractual relationship or business relationship is known to the soliciting Agency, then in such event one of the general criteria for tortious interference is met. Generally, however, the mere solicitation itself is not tortious interference unless it involves three additional elements including: intent to breach the relationship, lack of justification and *having an improper or bad faith motive for inducing the breach*. The standards for tortious interference differ from state to state and references are made in Chapter 6, Section D of the ASMC Legal Manual for a further discussion of the issues.

FSMA Code of Ethics. Canon 2 of the FSMA Code of Ethics states: "The use by a member of any unfair or deceptive method or tactics in competition with another member, whether for their clients or for clients' Customers, is unworthy of members of the Association." *Accordingly, this Canon permits members to compete with each other and solicit the accounts of another, except if they compete with an unfair or deceptive tactic.* What is unfair or deceptive generally involves the same elements that must be proven in a tortious interference of contract or tortious interference of business relationship case.

In summary, while it is not illegal to solicit another Agency's account, any such solicitation must meet the various standards as outlined above.

Sincerely yours,


Barry C. Maloney

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
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(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Power Buyer's Request to Deal Direct

Dear Mr. Abraham:

You have requested that we advise you as General Counsel to the Foodservice Sales & Marketing Association ("FSMA") on concerns raised by members of FSMA regarding the legality of certain requests by major purchasers to suppliers demanding elimination of their sales and marketing representatives.

These Customers with a material influence on the market are also known as "Power Buyers." Regardless of the stated reasons, Power Buyers have made these requests with the intent to obtain lower prices from their suppliers. These requests are also accompanied by either explicit instructions that no Agency is to accompany the supplier on visits to the Power Buyer; that no Agency is permitted to receive information through electronic data sources; or similar practices requesting the elimination of the services normally performed by Agencies.

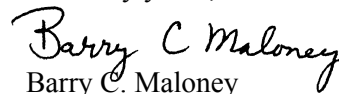
We also understand that suppliers have been terminated as sources of supply to such Power Buyers, if they fail to accommodate the Customer's request to eliminate the Agency. Finally, it is our understanding that in certain instances such Power Buyers have accepted lower prices from the suppliers while at the same time requesting from them services previously performed by the Agency.

In our opinion, the Power Buyer is liable for tortious interference of contract when it demands that a supplier eliminate the services its Agency when dealing with the Power Buyer, regardless of their self serving statements that they are not so interfering with the relationship. The damages in such instances are the future commissions that an Agency had a right to expect as well as punitive damages in certain instances.

Further, the Power Buyer may be liable under Section 2(f) of the Robinson-Patman Act which states: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." When a Power Buyer uses its economic might to demand that a supplier eliminate the services of its Agency and obtains a discriminatory price reduction which is not cost-justified, then the Power Buyer has violated Section 2(f) of the Robinson-Patman Act.

The supplier may also be guilty of a Section 2(a) violation of the Robinson-Patman Act, which prohibits a discriminatory price to be granted a Power Buyer that is not cost-justified. In addition, a supplier offering a discount to a Power Buyer in lieu of a commission is violating Section 2(c) of the Robinson-Patman Act.

Sincerely yours,


Barry C. Maloney

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Rick Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Legality of Post-Termination Covenants
Not to Compete¹

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association (“FSMA”) as to the legality of Suppliers including post-termination non-compete clauses in their contracts with sales and marketing agencies (“Agencies”).

Generally, state laws govern the legality of post-termination covenants not to compete. In certain states, like the State of California, such clauses are unenforceable. In other states, various court opinions have severely restricted their enforceability as against public policy. Even where the contractual agreement contains broader provisions, the Courts have construed them narrowly and require them to be reasonable in scope of territory and length of time. Further, each individual contract needs to be examined on a case-by-case basis to determine whether there is sufficient consideration exchanged that could justify a limited post-termination covenant not to compete.

In our opinion, FSMA members should not sign agreements with post-termination covenants not to compete, unless such provisions are reasonable in scope of territory and length of time, as well as including fair consideration exchanged for such restriction. For example, if a Supplier requests that an Agency not compete for six months after termination, then the Supplier should pay compensation equivalent to the average monthly commissions for the same period.

Other contracts may offer Agency commission guarantees, higher than normal commissions, incentives, or other provisions that may be bargained for by the Supplier in exchange for a limited post-termination covenant not to compete. Where significant consideration is missing, the covenants may be unenforceable under various state laws, and Agencies should negotiate adjustments as needed.

¹ FSMA also recommends against the use of restrictive covenants not to compete with Suppliers during the life of the contract. If conflicts arise, FSMA recommends that Agencies and their Suppliers follow FSMA Policy Statement #1.

Sincerely yours,

Barry C Maloney

Barry C. Maloney

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5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Commission Payments on
Termination –
Deductions Therefrom

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association (“FSMA”) regarding the legality of a Client’s plan to withhold payment of commissions to its foodservice sales and marketing agencies following the sale of its foodservice business to another Supplier until after the Client reconciles all Customer deductions.

In normal trade usage an “unauthorized deduction” is generally understood to occur when a Customer deducts from a Client’s bona fide invoice sums not consistent with the terms of the sale. As a result of the frequency with which such deductions occur, some Clients have made contract changes with their Agencies, or unilaterally established new policies whereby the Agency has its commissions offset.

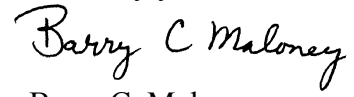
In our opinion, such acts may be deemed to violate Section 2(c) of the Robinson-Patman Act. Section 2(c) prohibits a Supplier from paying or granting to a Customer “anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof...”

Where there is an unauthorized deduction by a Customer for which the Client thereafter either reduces an Agency’s commission, the Client may be illegally rebating a commission to a Customer. While an Agency has a responsibility to reasonably assist a Client in its collection efforts, it is not a guarantor of payment by the Customer. Such contractual provisions may involve violations of the Robinson-Patman Act, especially where the Clients directly and indirectly force the Agency to accept such practices as an incident of doing business with them.

Most states have laws that regulate the timing of payment of final commissions to agencies on the termination of the relationships. These laws generally require the final

commission payment to be paid within 7-30 days of termination or the Client may be liable for double or treble damages, attorney's fees, and court costs.

Sincerely yours,

A handwritten signature in cursive script that reads "Barry C Maloney". The signature is written in black ink and is positioned above the printed name.

Barry C. Maloney

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MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Foodservice Distributors –
Confidentiality Agreements

Dear Mr. Abraham:

You have requested that we review, as General Counsel to the Foodservice Sales & Marketing Association (“FSMA”), proposed Confidentiality Agreements for FSMA sales and marketing agency members (“Agencies”) drafted by certain foodservice distributors (“Distributors”).

The proposed Distributors’ Confidentiality Agreements restrict the use of certain defined trade secrets for the duration of the working relationship and a period of time thereafter. In some cases, the Agreement then requests Agencies to sign such contract on behalf of the vendor.

In our opinion, Agencies should not sign such Confidentiality Agreements with Distributors. First, Sales and Marketing Agencies are independent contractors of their Manufacturer/Suppliers and never have authority to sign such an agreement binding a Supplier.

Secondly, Agencies are contractually bound to their Manufacturer/Suppliers and should not sign contracts with Buyers that may adversely affect their independent contractor status. They are contractually bound to keep their Buyers’ confidences as part of their contracts with their principals and subject to breach of contract and violation of the FSMA Code of Ethics for failure to adhere to such provisions (See Para 13 – FSMA Recommended Agency/Client Contract and Canon 4 – FSMA Code of Ethics).

Sincerely yours,

Barry C Maloney

Barry C. Maloney

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Distributor Pricing Demands and
Hold Harmless Agreement

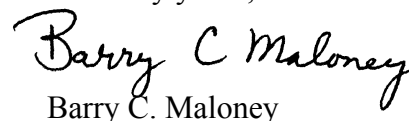
Dear Mr. Abraham:

As we indicated to you in our attached opinion, we understand that certain Distributors have asked their Suppliers to quote a discriminatory price on certain product lines in lieu of commissions paid to their appointed sales and marketing agencies.

As our opinion indicates, these demands involve serious antitrust violations. In the event that sales and marketing agencies are contacted by their Suppliers and informed of such a policy, we recommend that the sales and marketing agencies supply a copy of this letter and our opinion together with a request that the Supplier secure a Hold Harmless Agreement in the form attached *before* they consent to terminating payment of commissions to their contractually appointed sales and marketing agency.

If Suppliers use this Hold Harmless Agreement, they may (although we offer no assurances) protect themselves from civil liability associated with the proposed program. However, please note that the Hold Harmless Agreement will not protect Suppliers from activities that may be deemed to be criminal under the Robinson-Patman Act or other laws, since this would be against public policy.

Sincerely yours,


Barry C. Maloney

LAW OFFICES
MALONEY & KNOX, LLP
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2014
(202) 293-1414 (202) 293-1702 fax

Rick Abraham, President & CEO
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Distributor's Pricing Demands

Dear Mr. Abraham:

You have requested that we advise you as General Counsel to the Foodservice Sales & Marketing Association ("FSMA") on concerns raised by members of FSMA regarding the legality of certain requests by Distributors to Manufacturers demanding price quotes on certain lines without including commissions the Manufacturer pays to its sales and marketing agencies ("Agencies").

These Distributors have made these demands with the explicit instructions to their Manufacturer/Suppliers that they expect a price discount on those lines in lieu of the Manufacturer paying commissions to its appointed Agencies. Such demands are being made even though the Manufacturer has chosen to pay commissions on the affected lines to its Agencies.

In our opinion, a Manufacturer/Supplier which offers a discount to a Distributor in lieu of a commission is directly violating Section 2(c) of the Robinson-Patman Act. Furthermore, the Distributor may be liable under Section 2(f) of the Robinson-Patman Act, which states that it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this Section 2(a) of the Robinson-Patman Act.

When a Distributor uses its economic might to obtain a discriminatory price reduction which is not cost-justified, then the Distributor has violated Section 2(f) of the Robinson-Patman Act and the Manufacturer is guilty of violation of Section 2(a).

Sincerely yours,

Barry C Maloney
Barry C. Maloney

DISTRIBUTOR HOLD HARMLESS AGREEMENT

THIS AGREEMENT is entered into this _____ day of _____, 20____, by and between _____ (“Distributor”) and _____ (“Supplier”).

WHEREAS, Distributor has required that Supplier discount prices on certain product lines in lieu of the payment of commissions to their legally appointed sales and marketing agency, and

WHEREAS, Supplier is concerned with the possible liability exposure associated with such request, including the potential for interference of contract claims and violations of the antitrust laws and the Robinson-Patman Act;

NOW, THEREFORE, in consideration of Supplier’s termination of their contractually agreed to commissions on such lines to their appointed sales and marketing agency, Distributor agrees as follows:

To indemnify and hold harmless Supplier and its officers, agents, and employees from any and all claims, demands, or suits known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted as of this date, arising from or related to the events and transactions which are or could be the subject matter of Distributor’s requirement that Supplier not pay commissions to its legally appointed sales and marketing agency on such lines.

IN WITNESS WHEREOF, the parties have executed this Hold Harmless Agreement the day and year first above written.

DISTRIBUTOR

SUPPLIER

By: _____

By: _____

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Rick Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Legality of SMA Payments to Distributor

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association (“FSMA”) with respect to the legality of a Distributor requesting payments from Sales and Marketing Agencies (“SMAs”) to support an employed in-house representative of the Distributor.

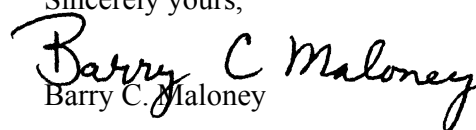
As we understand the program, the Distributor would promote the lines of the SMAs with various Manufacturers in exchange for such payments.

In the foodservice industry, all pricing and promotional fees are the expense of the Manufacturer, and it is the Manufacturer who specifies their use. SMAs never make payments from their own account to Distributors, as they may be deemed to be violations of law as described herein. An SMA is required to spend a Manufacturer’s promotional funds in accordance with the Manufacturer’s plan, but we are unaware of a Manufacturer ever authorizing such in-house brokerage payment.

With respect to the requests by a Distributor to accept an allowance from an SMA’s own account, such payments would be deemed to be a violation of Section 2(c) of the Robinson-Patman Act, which prohibits the payment of or acceptance of “any allowance ... to the other party to such transaction....” Section 2(c) of the Robinson-Patman Act prohibits the granting of a discount in lieu of commissions, and the requested payments from the SMA could only come from an SMA rebating the commissions it receives from its Manufacturers.

Furthermore, Article IV, Section 2(a), of the FSMA By-laws requires an SMA to be independent from a trade buyer. If an SMA paid an allowance to a Distributor, they would violate this By-law. Moreover, Article IV, Section 2(b), of the FSMA By-laws requires SMA members to be bound by the FSMA Code of Ethics. Canon No. 1 of the Code of Ethics thereof states: “No Member should engage in any inconsistent or irreconcilable activity, or knowingly permit any transaction to occur through their offices which is not fair to clients and customers alike.”

Accordingly, all FSMA Agency Members should not participate in such a Distributor program that violates the foregoing provisions.

Sincerely yours,

Barry C. Maloney

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Rick Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re:
Legality of Request by Clients for Agency
Proprietary & Confidential Information

Dear Mr. Abraham:

As General Counsel to the Foodservice Sales & Marketing Association (“FSMA”), you have asked us to opine on the legality of requests by their Manufacturer and Suppliers (“Clients”) of sales and marketing agencies (“Agencies”) to make disclosures of certain information that they possess with respect to the Operators that they service on a syndicated basis for their clients.

This non-public domain information is proprietary and confidential and is the property of the Agency maintained on their local, regional and national Operators customers. As such the market expertise generated therefrom is one of the significant reasons for which the services of Agencies are retained by their clients and should not be lost by the transfer of such information.

Moreover, supplying of this information may be illegal for a number of reasons, including: all Agencies have contracts with their individual employees and staff members that restrict the disclosure of the Agency’s proprietary and confidential information. Furthermore, all agreements between Agency and their syndicated clients have similar disclosure restrictions and breaches thereof may expose Agency to anti-competitive claims of third parties. Finally, and most significantly, Operators only supply the information to their Agencies with the understanding that it is being supplied on a confidential and proprietary basis and is not part of the public domain.

Accordingly, all FSMA Agencies should honor their legally binding agreements with their clients, employees, and staff members as well as the commitments they make to their syndicated clients and Operator customers.

If you have any questions with respect to our opinion, please let me know.

Sincerely yours,
Barry C Maloney
Barry C. Maloney

LAW OFFICES
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(202) 293-1414 (202) 293-1702 fax

Rick Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road, Suite #384
Lutherville, MD 21093

Re: Legality of Distributor Retail Service

Demands

Dear Mr. Abraham:

You have requested our opinion as General Counsel to the Foodservice Sales & Marketing Association (“FSMA”) with respect to the legality of a Buyer/Distributor (“B/D”) mandating the number of visits for Sales and Marketing Agencies (“SMAs”) to either: (1) directly assign its SMA personnel to perform store checks, demos and product training services at B/D branches or (2) require SMA’s to pay a third party representative of B/D to perform such services. It is also unclear but appears that B/D intends to demand an additional charge in an un-denominated amount called a “site fee” to be paid by the SMA whether such services are directly supplied by the SMA or by a B/D designated third party representative paid for by the SMA.

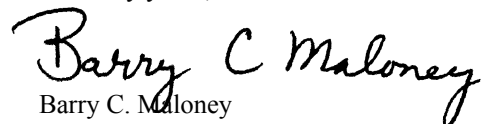
In the foodservice industry as in retail sales, all fees for services performed in connection with its brokerage contracts are the expense of the Manufacturer, and it is the Manufacturer who specifies the SMA’s contractual use thereunder, not the Buyer. SMA’s never make payments from their own account to Distributors or their designated representatives, as they may be deemed to be violation of laws as described herein.

With respect to the demand by B/D for an SMA payment from its own account, either for the demanded direct services or for the demanded payments to a B/D designated third party provider, such payments would be deemed to be a violation of Section 2(c) of the Robinson-Patman Act, which prohibits the payment of or acceptance of “any allowance ... to the other party to such transaction...” Section 2(c) of the Robinson-Patman Act further prohibits the granting of a discount in lieu of commissions, and the requested services or payments from the SMA could only come from an SMA rebating the commissions it receives from its Manufacturers.

Furthermore, in our opinion, when a B/D uses economic pressure or other tactics to induce or require an SMA to reimburse B/D for the designated services that SMA’s have not been compensated by their Manufacturing Clients, that Buyer is guilty of tortious interference with the business and contractual rights between the manufacturer and its existing agencies. A manufacturer is legally bound to honor these rights, which are contained in its binding sales agency agreement with its chosen agencies. In view of the nature of the B/D proposed mandate and knowledge of the SMA and manufacturer relationships, the damages in such instance include punitive damages.

Accordingly, all FSMA Agency Members should not participate in such a B/D program that violates the foregoing provisions without obtaining a Hold Harmless Agreement that indemnifies them from civil and criminal penalties associated with such programs.

Sincerely yours,


Barry C. Maloney

FSMA LEGAL BRIEF

*A Legal Newsletter for SMAs from FSMA
General Counsel Maloney & Knox, PLLC*

Confirming a Manufacturer's Legal Right to Choose Their Sales Agency Representatives



During FSMA's 21 year history as the national voice and advocate of its Members, there have been numerous instances of Distributors attempting to direct a Manufacturer's choice of sales agency representation. In each of these instances, FSMA General Counsel has been asked to deliver a legal opinion in order to protect FSMA members from legal jeopardy.

It is solely the legal right of a Manufacturer to choose which Agency shall act as its representative. The Agency enters into a contract with the Manufacturer only, and sells and services the Distributor on their behalf. A situation where a Distributor directs which Agency represents the Manufacturer at said Distributor involves a tortious interference with the business and contractual rights between the Manufacturer and its existing contractual Agencies. The damages in such instances are the future commissions that an agency had a right to expect, as well as punitive damages in certain instances.

Furthermore, a Distributor's request that a Manufacturer employ and pay a commission to an Agency who is selected by the Distributor creates the inference that the Agency is really the Distributors representative, a "Buyer's Broker", a practice that would clearly violate the Robinson-Patman Act, as well as the Agency's obligations under the FSMA Code of Ethics.

Section 2(c) of the Robinson-Patman Act prohibits a Manufacturer from paying or granting to a Distributor "anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof..." that is not cost-justified. When the Distributor-selected Agency passes on "anything of value...etc." to the Distributor—such actions may be unlawful and could be subject to civil and criminal liability.

In every case, it is only the Manufacturer who has the right to decide which Agency shall act as its representative.

In our opinion, the request to Manufacturer's to replace their chosen Agencies with Distributor's designees raises serious antitrust and tortious interference of contract concerns. In the event that Agencies are contacted by such Manufacturers and informed of the Distributor's policy, we recommend that the Agencies supply a copy of this **LEGAL BRIEF** and suggest to the Manufacturer that they secure from the Distributor a Hold Harmless Agreement.

If a Manufacturer uses a Hold Harmless Agreement, they may protect themselves from civil liability associated therewith. However, please note that the Hold Harmless Agreement will not protect Manufacturers from activities that may be deemed to be criminal under the Robinson-Patman Act or other laws, since that would be against public policy.

We have prepared a Legal Opinion and a Manufacturer's Hold Harmless Agreement for any Member that requires more specific information on a Manufacturer's Right to Choose.

Attorney Contact Information:

To reach the FSMA Legal Counsel, please use the following contact information:

Barry C. Maloney, Esq.
Law Offices of Maloney & Knox, PLLC
5225 Wisconsin Ave, NW #316
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Phone: (202) 293-1414
Fax: (202) 293-1702
Email: bmaloney@maloneyknox.com

FSMA LEGAL BRIEF

*A Legal Newsletter for SMAs from FSMA
General Counsel Maloney & Knox, PLLC*

Confidentiality of Commission Rates & Payments



FSMA General Counsel Barry Maloney

has recently been asked to advise the membership on the confidentiality of commission rates and payments received from their manufacturing clients. Agencies are governed by the terms of their binding contract with their Manufacturing Clients and they owe their allegiance to those contract terms

and conditions, whether written or oral, including the requirement that they will not disclose commission rates and payments.

In the event any Distributor or Operator customer (“Buyer”) makes an unlawful request to breach that contractual confidentiality between Agency and Client by asking you to reveal commission rates or payments made by Manufacturer Clients to provide transparency or any other reason whatsoever, you should advise them that you are unable to respond upon the advice of FSMA General Counsel because such requests violate the antitrust laws while, at the same time, tortiously interfering with the contract between the Manufacturer and its designated Agency. Commission rates and payments are proprietary business information and FSMA’s industry-standard contract states in paragraph 13 that:

“AGENCY and CLIENT shall cause its officers, directors, employees, and agents to maintain as confidential any trade secrets, technology, processes or proprietary business information ... in connection with this Agreement.”

Moreover, Canon 4 of the FSMA Code of Ethics states:

“Since Foodservice Agencies often possess confidential information concerning their Clients, faithful service to their Clients and reliable guidance to the Clients’ customers cannot be guaranteed if actions and opinions are tainted by breaches of confidentiality.”

The purpose of contractual terms of confidentiality is to create honest and fair dealings among the parties, and participants should not allow economic pressure by Buyers to violate those contractual terms.

Furthermore, the use of economic power by a Buyer to force disclosure of confidentialities to obtain competitive advantages not available to other buyers constitutes an antitrust violation of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act, in that the practice tends to raise the costs of disadvantaged Buyers, thereby excluding them as actual competitors, and erecting strategic barriers to entry by potential new, rival buying entities.

Where a Buyer's request for breach of confidentialities results in a discount to the Buyer in lieu of the commission, such action not only unlawfully involves a breach of the Manufacturer/ Agency Contract, it also violates Section 2(c) of the Robinson-Patman Act. A breach of contract is actionable by either the Manufacturer or Agency who may seek a Protective Order, Injunction and damages resulting from such contractual protected disclosures.

Accordingly, no Agency or Manufacturer should engage in these breaches of confidentiality to avoid these violations of law.

Attorney Contact Information:

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FSMA LEGAL BRIEF

*A Legal Newsletter for SMAs from FSMA
General Counsel Maloney & Knox, PLLC*

Why Agencies Need Confidentiality and Non-Solicitation Agreements for Their Staffs



All Agency contracts with their Manufacturer clients require that the confidential and proprietary information of clients are subject to non-disclosure of such competitive information. An Agency can be held liable for breach of contract by its client, if its employees and staff members engage in unauthorized dissemination of such confidentialities.

Based on our experience, we have found that these events rarely occur when such staff members are employed by the Agency, but rather after their employment is terminated. Oftentimes, a new agency employer may put direct or indirect pressure on their new employees to share such confidentialities of their former Agency employer and their Manufacturer clients. When a staff Confidentiality and Non-Solicitation Agreement exists, such actions wrongfully induce the new Agency employer to solicit the former employee's customers in an attempt to secure new business. In such event, the former Agency employer has a cause of action against both the new employer and the former employee for his or her breach of the confidentiality provisions, as well as the violation of the non-solicitation provisions generally contained in said agreements.

Non-solicitation provisions provide that a former employee may not solicit the clients and customers of the former employer for a specified period of time (generally one to three years) after termination of employment. Non-solicitation provisions complement the confidentiality provisions, because said former employee has intimate knowledge of the confidentialities of their former employer and its clients, which puts them at a competitive advantage.

To prevent liability exposure in these circumstances, it is recommended that the successor employer create a "Chinese Wall" to preclude the former employee from contact with the clients and customers of the former employer in order to reduce the liability associated therewith. As such, these restrictions do not preclude the former employee from engaging in the occupation of providing services as a foodservice broker, but merely restricts such breaches of confidentiality and solicitation activity as it relates to the clients and customers of his former employer.

We have attached to this Legal Brief a standard form of Confidentiality and Non-Solicitation

Agreement, which Agencies should consider having each staff member and employee sign to protect the Agency from claims of its client to enforce its terms against former employees and their subsequent employers.

FSMA Legal Counsel Contact Information:

To reach FSMA Legal Counsel on this Legal Brief or other matters, please use the following contact information:

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FSMA LEGAL BRIEF

*A Legal Newsletter for SMAs from FSMA
General Counsel Maloney & Knox, PLLC*

Food Show Waiver of Liability Requests

(June 2018)



FSMA General Counsel Barry Maloney

has recently been asked to advise the membership on the legality of requests by

Food Show Sponsors (“Sponsor”) to sales and marketing agency participants at food shows (“Agencies”) to waive all liability, without exception, for participation in such shows on behalf of their manufacturer/supplier clients.

Waivers of liability are against public policy under almost all state laws. However, some Sponsors have appeared to have tracked the language of state law to create a consent exemption to override the written public-policy protections against such waivers

We would recommend not signing such Waivers because they are extremely broad and eliminate any claims against Sponsor even when their acts were, among others, intentional or grossly negligent. Accordingly, if any Agency decides to sign such a Waiver, we recommend insertion of language in the Waiver to exclude such acts caused by a Sponsor.

In the event that an Agency receives an extremely broad waiver of liability request from a Sponsor, unless the Agency refuses to supply the Waiver, we recommend that the following language be inserted in the document, where appropriate:

[Agency releases Sponsor of all liability in connection with Agency’s participation with the Food Show] ***“but excluding gross negligence, gross injudicious act, gross omission, gross intentional acts, or other gross fault of [Sponsor].”***

FSMA Legal Counsel Member Benefit:

As part of membership benefits, all FSMA Members are entitled to one hour of free counsel on legal issues affecting their business by FSMA’s General Counsel, Barry Maloney, Esq. After the first hour, services are supplied to members at a 20% discount.

Barry has represented sales and marketing agencies and manufacturers on a myriad of legal issues for more than 30 years and is the author of several legal manuals on agency law, legal briefs for trade association newsletters, and has represented sales & marketing agencies on

mergers and acquisitions and collection of unpaid commissions. In addition to being an attorney, Barry is a Certified Public Accountant, and formerly was Senior Branch Counsel to the Division of Corporate Finance of the Securities and Exchange Commission in Washington, DC.

Attorney Contact Information:

To reach the FSMA Legal Counsel, please use the following contact information:

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**STAFF MEMBER
CONFIDENTIALITY & NON SOLICITATION AGREEMENT**

THIS AGREEMENT is entered into this ____ day of _____, 20____, by and between _____ (“Agency”) and _____ (“Staff Member”).

WHEREAS, Agency utilizes certain programs, plans, processes, designs, developments, techniques, procedures, and customer and supplier information which constitute trade secrets or contain confidential and proprietary information (“Confidential Information”); and

WHEREAS, Staff Member understands that preservation of Confidential Information is essential to Agency’s business and is required to be treated confidentially by Staff Member; and

WHEREAS, Staff Member understands the need for Staff Member’s not to compete with or solicit Agency’s clients, employees, consultants and third party relationships,

NOW THEREFORE, in consideration of the position of trust and responsibility which Staff Member assumes and which may result from time to time in access to such Confidential Information, Staff Member hereby agrees to the following terms and conditions:

1. **Non-Disclosure.** Except as authorized by Agency in writing, Staff Member will not disclose, appropriate, copy, or otherwise reproduce or make notes of any Confidential Information of Agency or Agency’s Clients or Customers, either during the period of providing services to Agency or thereafter, except in the ordinary course of performance of duties on behalf of Agency to persons directly concerned with the subject matter. Such Confidential Information includes but is not limited to:

- a. Marketing plans.
- b. Business policies, procedures, proposals or operations.
- c. Financial information including costs, profits, sales, and markets.
- d. Any contracts or other information of any form relating to matters of a business nature connected with the business of Agency which is not generally known to person engaged in a business similar to that conducted or contemplated by Agency.
- e. Confidential and proprietary information of Agency’s Manufacturers or their Customers.

2. **Non-Solicitation.** In order to protect the legitimate business interests of the Agency, and in consideration for the Staff Member’s employment with the Agency, the Staff Member

covenants and agrees as follows:

a. Staff Member shall not while employed by Agency and for a period of twelve (12) months thereafter, directly or indirectly, (i) divert or attempt to divert any business opportunity or client manufacturer of Agency to any competitor of Agency, or (ii) hire or employ, or seek to hire or employ, any employee, consultant or contractor who, at any time during the twelve (12) months preceding termination of the Staff Member's employment with the Agency, was hired or employed by the Agency or Agency and the car leasing agency utilized by the Agency, or otherwise solicit or encourage such employee, consultant or contractor to terminate or modify his/her/its relationship with the Agency or Agency.

b. The Staff Member shall not, while employed with Agency and for a period of twelve (12) thereafter, participate, directly or indirectly, whether as a director, officer, owner, employee, agent, consultant, independent contractor or otherwise, in any foodservice brokerage business that competes with the business of Agency. Notwithstanding anything in this Section 2, Staff Member may be employed by a client manufacturer (but not a manufacturer that competes with any client manufacturer with which Agency has a business relationship) in any capacity including as a direct manufacturer's representative.

3. **Duty upon Termination.** Upon termination of Staff Member's affiliation with Agency for any reason, irrespective of whether the termination is voluntary, Staff Member will deliver to Agency all records, data, memoranda, manuals, notes, and other material of any nature which is in Staff Member's possession or control and which relates to the confidential, proprietary, or trade-secret matters discussed above. Staff Member agrees to maintain in the strictest confidence the trade secrets and proprietary and confidential information referred to above for a period of one year after the termination of his or her services to Agency or until such information has been made generally available to the public.

4. **Binding.** This Agreement shall be binding upon Staff Member and Staff Member's heirs, executors, administrators, and assigns, and shall inure to the benefit of Agency, its successors, and assigns.

5. **Injunctive Relief.** In the event of a breach or threatened breach of this Agreement, Agency, in addition to all other remedies otherwise available to it, shall be entitled to an injunction enjoining and restraining such breach or threatened breach, and Staff Member hereby consents to the issuance of the injunction in any court of competent jurisdiction. If Agency institutes or prosecutes an action or other legal proceeding to enforce any part of this agreement, Staff Member agrees to pay to Agency any and all costs and attorneys' fees reasonably incurred by Agency in connection with Staff Member's breach.

6. **Applicable Laws.** This Agreement shall be governed by the laws of the state where Agency's principal office is located.

IN WITNESS WHEREOF, the parties have entered into this Agreement as of the date first written above.

AGENCY:

By: _____

STAFF MEMBER:

FSMA LEGAL BRIEF

*A Legal Newsletter for SMAs from FSMA
General Counsel Maloney & Knox, PLLC*

DISTRIBUTOR CONFIDENTIALITY AND NDA AGREEMENTS (New Agreement Developed with SYSCO Corp)



Recently, Sales and Marketing Agencies have received a number of requests from Distributors and their operating subsidiaries to sign Confidentiality and Non-Disclosure (“NDA”) Agreements.

As FSMA General Counsel, we have been reluctant to endorse agreements between Distributors and Sales Agencies, because the Sales and Marketing Agency is a representative of its Client Manufacturer and subject to its Client’s direction. Our reservation related to signing an agreement with a Distributor is that it could adversely affect the Agency’s capacity as an independent contractor. Furthermore, many of the proposed Confidentiality and NDA Agreements contained unreasonable terms; had inconsistencies between Distributors and their operating subsidiaries; had unreasonable duration terms, and failed to protect the Sales Agency’s own confidential and proprietary information.

In order to develop a uniform confidentiality agreement that we could recommend that all FSMA Sales and Marketing Agencies agree to with their Clients’ Distributors, we worked with Sysco Corporation’s Legal Department to develop an acceptable agreement that would address the above concerns. With FSMA’s input, Sysco’s Corporate Legal Department prepared an agreement containing needed provisions such as mutual protection of the confidential information of both the Distributor and the Sales Agency; a two year sunset provision; coverage of the parent and all operating subsidiaries and affiliates of both parties, as well as other reasonable provisions. For your information, we have attached a template of the Agreement, which may be used with Sysco as well as other distributors, if so requested.

On behalf of FSMA and its Sales and Marketing Agencies and Client Manufacturer members, we appreciate the cooperation and assistance by Sysco Corporation in finalizing an acceptable agreement between industry partners.

Attorney Contact Information

To reach the FSMA Legal Counsel, please use the following contact information:

Barry C. Maloney, Esq.
Law Offices of Maloney & Knox, PLLC
5225 Wisconsin Ave, NW #316
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Phone: (202) 293-1414
Fax: (202) 293-1702
Email: bmaloney@maloneyknox.com

**Distributor/Sales and Marketing Agency
Mutual Confidentiality and Non-Disclosure Agreement**

This Mutual Confidentiality and Non-Disclosure Agreement (this “**Agreement**”) is entered into this ____ day of _____, 20__, by and between _____, a _____ entity, together with its operating subsidiaries and affiliates (“**Distributor**”) with its principal place of business at _____, and _____, a _____ entity, together with its operating subsidiaries and affiliates, (“**Agency**”) with its principal place of business at _____ (collectively the “**Parties**”).

WHEREAS, Agency serves agent to one or more suppliers/manufacturers (“**Principals**”) in providing agency sales and marketing services in the foodservice trade channel (“**Agency Sales and Marketing Services**”), and

WHEREAS, in the course of the provision of Agency Sales and Marketing Services for Agency’s Principals, each party (a “**Disclosing Party**”) may disclose to the other party (the “**Recipient**”) certain Confidential Information (as such term is defined herein below), which shall be deemed to be confidential; and

WHEREAS, the Confidential Information may be disclosed in many such form(s) including oral and/or written disclosure, disclosure through training and/or disclosure through observation of products or prototypes of products, services, business plans, business documents, materials and/or property;

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

1. Definition.

“**Confidential Information**” means, in respect to each Party:

- (a) any information in which such Party claims a proprietary and/or confidential interest;
- (b) all confidential matters of such Party including, without limitation, technical know-how, trade secrets, technical data, new product strategy, new products or processes, analysis, compilations, concepts, technical processes, formulae, recipes, specifications, inventions, research projects, customer lists, pricing, pricing policies, operational methods, financial information, marketing information and other business affairs;
- (c) any information of a confidential nature concerning such Party’s customers, suppliers or employees; and
- (d) any information such Party has received from others which they are obliged to treat as proprietary and/or confidential.

The Confidential Information of either Party includes all of the above information with respect to any entity controlling, controlled by, or under common control with, such Party.

Confidential Information shall not include information which: (a) is in the public domain prior to the date of its disclosure to Recipient by the Disclosing Party; (b) is known and can be shown to be known by Recipient prior to the date of its disclosure to Recipient by Disclosing Party; (c) becomes part of the public domain by publication or otherwise, and is not the result of any unauthorized act or omission on the part of Recipient; (d) can be demonstrated to have been supplied to Recipient by a third party who is under no obligation to the Disclosing Party to maintain such information in confidence; or (e) is independently developed by Recipient without the use of the Confidential Information.

2. Obligation of Confidence. Each Party hereby acknowledges and agrees that the Confidential Information constitutes valuable information, and the provisions of this Agreement are necessary to protect the secrecy and confidentiality thereof.

(a) Recipient shall (i) maintain the Confidential Information in strict confidence and take all reasonable steps to prevent its disclosure to third parties; (ii) use at least the same degree of care as Recipient uses in maintaining the secrecy of its own Confidential Information (but no less than a reasonable degree of care); and (iii) prevent the removal of any proprietary, confidential or copyright notices placed on the Confidential Information.

(b) Recipient may use the Confidential Information only in connection with the performance of the Agency Sales and Marketing Services with Distributor. Recipient shall not, at any time, make any use of the Confidential Information for any other purpose.

(c) Recipient shall keep the Confidential Information confidential at all times and shall not disclose the Confidential Information to any person including its employees except to its employees, representatives, advisors and agents who have a need to know such information in connection with assisting Recipient for the purposes set forth in paragraph 2(b) above and who are required to keep such information confidential.

(d) Notwithstanding the foregoing in this Section 2, Recipient may disclose to Principals, on whose behalf it is performing Agency Sales and Marketing Services with Distributor, and who have a need to know the Confidential Information provided that: (i) Distributor has been notified of the identity of such Principals and has agreed to the disclosure of Confidentiality Agreement under this Section 2(d), (ii) only the necessary portions of Confidential Information required by such Principals to evaluate and utilize the Agency Sales and Marketing Services is disclosed, and (iii) Principal has a Confidentiality Agreement in place with Distributor or has a Confidentiality Agreement acceptable to Distributor in place with Recipient.

3. Return of Materials and Information. All Documents made available hereunder, including all copies, notes, summaries, and abstracts thereof, shall be returned to the Disclosing

Party or destroyed upon completion of the Agency Sales and Marketing Services with Distributor or upon written request by the Disclosing Party, and Recipient shall certify in writing that it has complied with the provisions of this Agreement.

4. Opportunity to Seek Protective Order. In the event Recipient is requested or required by applicable law, regulation or legal process (including a subpoena or other administrative or judicial request), to disclose any Confidential Information of the Disclosing Party, Recipient shall promptly notify the Disclosing Party so that it may seek a protective order or other appropriate remedy. Unless the demand shall have been timely limited, quashed or extended, Recipient shall thereafter be entitled to comply with such demand to the extent required by law. If requested by the Disclosing Party, Recipient shall provide reasonable cooperation (at the expense of the Disclosing Party) in the defense of a demand to disclose Confidential Information.

5. Patent, Copyright or Trademark Infringement. Nothing in this Agreement is intended to grant any new or additional rights under any patent, copyright or trademark, nor shall this Agreement grant the Parties any new or additional rights in or to the Confidential Information, except the limited right to review and use such Confidential Information for the purpose outlined herein.

6. Ownership. As between the Parties, all Confidential Information shall remain the property of the Disclosing Party. Recipient agrees not to assert any claim of ownership to the Confidential Information of the Disclosing Party or any portion thereof. Nothing set forth in this Agreement shall require Parties to share any Confidential Information with the other, and the Disclosing Party makes no representation or warranty as to the accuracy or completeness of any Confidential Information disclosed hereunder.

7. Injunctive Relief. It is understood and agreed that damages are an inadequate remedy in the event of a breach or intended or threatened breach by any Party under this Agreement and that any such breach by any party will cause irreparable harm, injury and damage; accordingly, the Parties agree that the damaged party may be entitled, without waiving any additional rights or remedies (including monetary damages) otherwise available to it at law, or in equity, or by statute, to seek preliminary and permanent injunctive relief in the event of a breach or intended or threatened breach by any Party.

8. Survival. The foregoing obligations of all Parties shall continue for a period of two (2) years from the date of last disclosure of Confidential Information by either party, unless a specific portion of the Confidential Information disclosed becomes generally known to the public before the expiration of such two (2) year period through no fault of the Receiving Party. However, with respect to trade secrets, such obligations will survive for so long as such Confidential Information constitutes a trade secret under the Uniform Trade Secrets Act.

9. Governing Law. THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF THE STATE OF THE PRINCIPAL PLACE OF BUSINESS OF DISTRIBUTOR AS SET

FORTH IN THE FIRST PARAGRAPH ABOVE (REGARDLESS OF THE LAWS THAT MIGHT OTHERWISE GOVERN UNDER APPLICABLE PRINCIPLES OF CONFLICTS OF LAW) AS TO ALL MATTERS, INCLUDING BUT NOT LIMITED TO MATTERS OF VALIDITY, CONSTRUCTION, EFFECT, PERFORMANCE AND REMEDY. The county in which the principal place of business of Distributor is located as set forth in the first paragraph above and the closest state or federal court to the principal place of business of Agency shall each be a proper (but not exclusive) place of venue for any suits to enforce this Agreement, and any legal proceedings to enforce the provisions hereof may be brought in the state or federal Court sitting in such county or the closest state or federal court to the principal place of business of Agency. Each Party hereby further irrevocably waives any claim that any such court lacks jurisdiction over it, and agrees not to plead or claim, in any legal action or proceeding with respect to this Agreement brought in any of the aforesaid courts, that any such court lacks jurisdiction over it or that such court is located in an inconvenient forum.

10. Miscellaneous. This Agreement constitutes the final, complete and exclusive agreement between the Parties concerning the subject matter of this Agreement and supersedes all prior agreements, understandings, negotiations and discussions, written or oral, between the Parties with respect thereto. Any modification, rescission or amendment of this Agreement shall not be effective unless made in a writing executed by both Parties. In case any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement, and this Agreement shall be construed and enforced as if such invalid, illegal or unenforceable provision(s) had never been contained herein, provided that such invalid, illegal or unenforceable provision(s) shall first be curtailed, reformed, limited or eliminated to the extent necessary to remove such invalidity, illegality or unenforceability with respect to the applicable law as it shall then be applied. Any waiver of, or promise not to enforce, any right under this Agreement shall not be enforceable unless evidenced by a writing signed by the party making said waiver or promise. The undersigned each represents that it has been duly authorized to execute and deliver this Agreement. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be deemed an original, including facsimile copies, but such counterparts together shall constitute but one and the same instrument.

DISTRIBUTOR: _____ **AGENCY:** _____

By: _____ By: _____

Printed Name _____ P r i n t e d N a m e : _____

Title: _____ Title: _____

Date: _____

Date: _____

FSMA RECOMMENDED
AGENCY AND MANUFACTURER
CALL REPORT CONFIDENTIALITY AGREEMENT

This Call Report Confidentiality Agreement is entered into on this ____ day of _____, 20____, by and between _____ (“Manufacturer”) and _____ (“Agency”).

WHEREAS, Manufacturer has requested that Agency supply to Manufacturer copies of Agency’s Call Reports; and

WHEREAS, the information contained in said Call Reports is confidential and proprietary to Agency; and

WHEREAS, Agency agrees to supply Manufacturer these Call Reports, subject to the terms and conditions of this Agreement;

NOW THEREFORE, the parties hereto agree as follows:

1. **Call Reports**. Manufacturer agrees that the Call Reports submitted by Agency are confidential and proprietary and are the sole property of Agency. Manufacturer agrees not to assert any claims of ownership to the Call Reports or any portion thereof, whether or not Agency has failed to label each Call Report submitted with the designation “*Confidential and Proprietary – All Use Is Restricted by Agreement of Confidentiality.*”

2. **Obligation of Confidence**. Manufacturer acknowledges and agrees that the Confidential Information constitutes valuable information, and the provisions of this Agreement are necessary to protect the secrecy and confidentiality thereof.

- (a) Manufacturer shall maintain the Call Reports in strict confidence and take all reasonable steps to prevent its disclosure to third parties and will prevent the removal of any proprietary, confidential, or copyright notices placed on the Confidential Information.
- (b) Manufacturer may use the Call Reports only in connection with the performance of the Agency’s services with Manufacturer.
- (c) Manufacturer shall keep the Call Reports confidential at all times and shall not disclose them to any person, including its employees, except to its employees, representatives, advisors, and agents who have a need to know such information

in connection with assisting Manufacturer for the purposes set forth in paragraph 2(b) above and who are required to keep such information confidential.

3. **Return of Materials and Information.** All Call Reports made available hereunder, including all copies, notes, summaries, and abstracts thereof, shall be returned to the Agency upon completion of the Agency's services with Manufacturer, and Manufacturer shall certify in writing that it has deleted all digital copies and complied with the provisions of this Agreement.

4. **Injunctive Relief.** It is understood and agreed that damages are an inadequate remedy in the event of a breach or intended or threatened breach by Manufacturer under this Agreement and that any such breach by any party will cause irreparable harm, injury, and damage; accordingly, the Manufacturer agrees that Agency may be entitled, without waiving any additional rights or remedies (including monetary damages) otherwise available to it at law, or in equity, or by statute, to seek preliminary and permanent injunctive relief in the event of a breach or intended or threatened breach by Manufacturer.

5. **Survival.** The foregoing obligations of Manufacturer shall continue for a period of two (2) years from the date of last disclosure of the Call Reports. However, with respect to trade secrets, such obligations will survive for so long as such Call Reports constitute a trade secret under the Uniform Trade Secrets Act.

6. **Governing Law.** The laws of the state of Agency's principal offices shall be the exclusive jurisdiction and shall govern the application and interpretation of this Agreement.

7. **Prior Agreements/Amendments.** This Agreement cancels and supersedes any and all prior agreements, oral or written, made between the parties hereto. It can only be modified by an Agreement in writing signed by all parties.

MANUFACTURER:

By: _____

AGENCY:

By: _____

LAW OFFICES
MALONEY & KNOX, PLLC
5225 Wisconsin Ave., NW, Suite 316
Washington, D.C. 20015-2055
(202) 293-1414 (202) 293-1702 fax

Richard Abraham, President
Foodservice Sales & Marketing Association
1810-J York Road #384
Lutherville, MD 21093

Re: Legality of Request by Clients for Agency
Proprietary & Confidential Information

Dear Mr. Abraham:

As General Counsel to the Foodservice Sales & Marketing Association (“FSMA”), you have asked us to opine on the legality of requests by their Manufacturer and Suppliers (“Clients”) of sales and marketing agencies (“Agencies”) to make disclosures of certain information that they possess with respect to the Operators that they service on a syndicated basis for their clients.

This non-public domain information is proprietary and confidential and is the property of the Agency maintained on their local, regional and national Operators customers. As such the market expertise generated therefrom is one of the significant reasons for which the services of Agencies are retained by their clients and should not be lost by the transfer of such information.

Moreover, supplying of this information may be illegal for a number of reasons, including: all Agencies have contracts with their individual employees and staff members that restrict the disclosure of the Agency’s proprietary and confidential information. Furthermore, all agreements between Agency and their syndicated clients have similar disclosure restrictions and breaches thereof may expose Agency to anti-competitive claims of third parties. Finally, and most significantly, Operators only supply the information to their Agencies with the understanding that it is being supplied on a confidential and proprietary basis and is not part of the public domain.

Accordingly, all FSMA Agencies should honor their legally binding agreements with their clients, employees, and staff members as well as the commitments they make to their syndicated clients and Operator customers.

If you have any questions with respect to our opinion, please let me know.

Sincerely yours,

Barry C Maloney
Barry C. Maloney

COLLECTING PAST DUE COMMISSIONS

by Barry C. Maloney, Esq.

We are frequently contacted by Sales Agencies for assistance in collecting receivables from their Manufacturers. Oftentimes it takes a demand notice by a lawyer or the filing of a request for arbitration or lawsuit in order to coerce parties into paying sums that they are legally responsible to pay Agencies.

Fortunately for Agencies, there are numerous state laws which provide that commissions are to be paid within certain time frames or the nonpaying Supplier/Manufacturer is responsible for attorneys' fees, court costs, and damages equal to double or triple the actual commissions owed. We have attached hereto a chart to identify those states providing laws governing post-termination commissions. As an FSMA member benefit, we can assist Agencies in these collections and our fee may be payable on a contingency basis.

The key to collections is to put the non-party on notice as soon as possible. Of course, a written contract specifying the terms and conditions of the engagement is always the most effective way of proceeding in the event that an Agency has to litigate.

If there is a bona fide dispute, one of the easiest ways to resolve the matter without the expense of litigation is arbitration. A standard arbitration clause may be found in the FSMA Recommended Contract Between Clients and Agencies. Litigation should be the last step, but it may be necessary to prepare legal demands when normal communication and collection letters are unsuccessful.

**FSMA
STATE LAWS GOVERNING
POST-TERMINATION COMMISSION PAYMENTS***

State	Written Contract Required ⁽¹⁾	Days Due ⁽²⁾	Exemplary Damages ⁽³⁾		
			3x	2x	Atty Fees+Costs
Alabama	X	30	X		X
Arizona	X	30	N/A	N/A	X
Arkansas	X	30	X		X
California	X	contract	X		X
Colorado	X	contract	X		X
Connecticut	No	30		X	X
Georgia	X	30		X	X
Illinois	No	13	X		X
Indiana	X	14	X		X
Iowa	No	12	N/A	N/A	X
Kansas	No	30	N/A	N/A	N/A
Kentucky	X	30		X	X
Louisiana	No	30	X		X
Maine	No	30	X		X
Maryland	No	45	X		X
Massachusetts	Sometimes	7&14	N/A	N/A	N/A
Michigan	No	45		X	X
Minnesota	No	3		X	X
Mississippi	X	21	X		X
Missouri	No	30		X	X
Nebraska	No	14		X	N/A
New Hampshire	X	45	Note	Note	X
New Jersey	No	7/30	N/A	N/A	X
New York	X	5		X	X
North Carolina	No	45		X	X
Ohio	No	13	X		X
Oklahoma	No	14	N/A	N/A	X

State	Written Contract Required ⁽¹⁾	Days Due ⁽²⁾	Exemplary Damages ⁽³⁾		
			3x	2x	Atty Fees+Costs
Oregon	X	14	X		X
Pennsylvania	X	14		X	X
South Carolina	X	contract	X		X
Tennessee	No	14	X		X
Texas	X	30	X		X
Utah	X	14/30	X		X
Virginia	X	30	N/A	N/A	N/A
Washington	No	30	N/A	N/A	X
Wisconsin	No	practice		X	X

- 1) There are exceptions.
- 2) If contract is written, commissions are due as provided therein; otherwise, the days are as listed.
- 3) Generally, states that provide for double commissions also permit the recovery of commissions. Some states require 10 days' notice before exemplary damages can be awarded. Where no exemplary damages are specified, at a minimum, the commissions are recoverable. Minnesota provides for payment of commissions plus 1/15 of commission for each day of non-payment up to 15 days. Missouri allows for commissions due plus one month's average commissions. New Hampshire does not specify the amount of exemplary damages.

COMPLYING WITH THE PERISHABLE AGRICULTURAL COMMODITIES ACT
by Barry C. Maloney, Esq.

Foodservice sales and marketing agencies (“SMAs”) are subject to the licensing requirements of the Perishable Agricultural Commodities Act, known as “PACA.” Although foodservice SMA’s neither take title to nor possession of the fresh and frozen fruits and vegetables that they solicit for sale, the Act still **covers the mere solicitation by SMAs**, and there is no exemption for this obvious legal distinction.

Unfortunately, the net result is that foodservice SMAs are **required to pay an annual licensing fee of \$995 for its principal office and \$600 for each additional branch office.**

There also are catch-up fees for the main and branch offices of SMAs who have failed to file for prior periods. However, **in our opinion you can exclude any branch office not engaged in the solicitation of fresh or frozen produce.**

There is a monthly penalty for not filing for the PACA license on time, which varies based on the date of the incidences, up to a maximum of 24 months. Although PACA exempts SMAs whose sales of frozen produce are less than \$230,000 per year, *there is no exemption for any SMA engaged in the sale of fresh produce.* For an SMA that has multiple offices, even though individual offices may be less than \$230,000 in volume, this requirement is cumulative. An office is defined as any location from which sales are solicited.

The application requires the identification of the legal entity and the name, Social Security number, and home address of owners, partners, members, managers, officers, directors, and stockholders owning more than 10% of the entity. Details must be provided if any identified persons has filed for bankruptcy or was a member of a firm that has filed for bankruptcy, or if such person was ever convicted of a felony. The application also requests information on any person who is employed by the Applicant who was affiliated with another entity in which the PACA license was suspended, revoked, or found to have committed a flagrant or repeated violation of PACA for which there is an outstanding fine.

Previously, on behalf of FSMA members, we explained to the USDA, which supervises PACA, the unfairness in requiring licensing for SMA's for the mere act of negotiating for the sale of the fresh and frozen produce. We explained the terms of sale and delivery are all set by the Supplier and SMAs do not take title or delivery of the produce. We argued that as such SMAs are

not parties that contribute to possible delays. The USDA explained that they are merely enforcing the act as written and claim PACA can only be changed by an act of Congress. If FSMA members request, we will explore with the USDA the possibility of regulatory rule making to expand the PACA exemptions for foodservice SMAs. In this regard we may solicit your assistance so we can show how this regulatory requirement is adversely affecting FSMA members.

Further questions with respect to the PACA application can be answered by calling (800) 495-7222, extension 1, or emailing pacasearch@usda.gov. The PACA website is www.ams.usda.gov/paca.

FSMA ADVOCACY FOR SALES AND MARKETING AGENCIES

As the voice of the foodservice industry, FSMA is uniquely positioned to **address sensitive issues** affecting both Suppliers and their Sales & Marketing Agencies that are **overreaching and unfair**.

While an individual **Agency may have economic or other consequences on an individual basis**, as the voice of the industry FSMA can respond to issues **affecting those Agencies without disclosing their identity**.

The following is a summary of historical positions that FSMA has successfully advocated on behalf of Agencies:

- Established the recognized **industry-standard Agency/Manufacturer Contract**.
- Provided standard forms for contract **addendums for competition/products and conflicts**; consolidation, and **fairness terms in the event of termination**.
- Challenged Manufacturing **deductions of previous commissions paid** after an Operator subsequently files for bankruptcy.
- **Challenged demands to replace Agencies** with a Distributor/Buyer's own designee.
- **Opposed Distributors' unfair requests**, including onerous insurance requirements, product liability, indemnification, and hold-harmless claims for acts of the Manufacturer.
- Published numerous legal opinions **opposing unauthorized deductions** by Manufacturers.
- Opposed uncompensated terms for proposed **covenants not-to-compete surviving after termination**.
- Challenged the **legality of Agency payments to Distributors**.
- Drafted **limitations in contracts for Call Reports and Confidentiality Agreements**.
- Assisted in **collecting past-due commissions**, especially following termination.
- Established a **Code of Ethics for all FSMA members**, which facilitates fair conduct and compliance with laws by all.

- **Attended *FTC vs. Sysco* trial to provide industry guidance** pending the US District Court's injunction ruling for potential antitrust violations in the proposed merger.

FSMA ADVOCATES FOR MANUFACTURERS/SUPPLIERS & UNBIASED SUPPORT ON KEY INDUSTRY ISSUES

FSMA is the voice of the foodservice industry, and uniquely positioned to **address sensitive issues** affecting both Suppliers and their sales and marketing agencies (“SMA’s”) that are **overreaching, unfair, and will have potential adverse economic impact on the industry.**

While an individual **Supplier may have economic or other consequences on an individual basis and is limited in their ability to respond**, as the voice of the industry FSMA can respond to issues **affecting those Suppliers and the entire industry, without disclosing their identity.**

The following is a summary of positions that FSMA has successfully advocated on behalf of Manufacturers, saving for its members millions of dollars in potential lost revenues and reduced operating expenses:

- FSMA Members have unanimously adopted a **Code of Ethics for all FSMA members**, which facilitate fair conduct and compliance with the law by all. A badge of honor, reliability, and fair dealing that distinguishes FSMA members from others in the foodservice industry.
- Opposed demands by Distributors and other Power Buyers **to appoint their own SMA’s to obtain a discriminatory price** at the expense of the Manufacturer.
- Opposed demands by Distributors **to secure discriminatory volume pricing discounts** by creation of **faux in-house buying clubs**.
- Opposed demands requiring Suppliers to quote **discriminatory prices on certain product lines without payment of commissions**.
- **Attended *FTC vs. Sysco* trial to provide industry guidance** pending the US District Court’s injunction ruling for potential antitrust violations in the proposed merger.
- Limited the extent of Distributor **confidentiality and non-disclosure agreements**.
- Opposed demands by Distributors that would permit the Distributor to **replace the Supplier’s SMA with its own school specialist**.
- **Opposed demands by Distributors on a Supplier’s SMA that are not required by law** and unnecessarily increase Manufacturers’ costs.
- Established the recognized **industry-standard Manufacturing/Agency Contract**.
- Opposed demands by Buyers that **they designate Supplier’s SMA’s**.

- **Challenged Distributors' requests on SMA's** for breach of Suppliers' confidentialities.