

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
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.

Sincerely yours,

Barry C. Maloney

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