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

Re: Buyer Designation of Sellers' Agency

Dear Mr. Abraham:

You have brought to our attention as General Counsel to the Foodservice Sales & Marketing Association instances in which Buyers (distributors or operator customers) have requested that a Supplier appoint a specific in-house Agency to service the Buyer's account.

This practice raises a number of serious issues. Foremost of these, as it relates to FSMA members, is that a Buyer who uses economic pressure or other tactics to induce or require a Supplier to use a designated Agency to service the Buyer's account may be guilty of tortious interference with the business and contractual rights between the Supplier and its existing Agencies. A Supplier/Principal is legally bound to honor these rights which are generally contained in its binding contract with its Agency. The Buyer who interferes with those rights is liable for damages such as future commissions that an Agency had a right to reasonably expect as well as punitive damages in certain instances.

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

Most importantly, Section 2(c) of the Robinson-Patman Act prohibits a principal 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..." **When the Buyer-selected Agency passes on its compensation to the Buyer, the Buyer, the Agency, and other individuals involved are in violation of the Robinson-Patman Act, and could be subject to civil and criminal liability.**

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

Sincerely yours,

*Barry C Maloney*  
Barry C. Maloney

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