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Guidelines  
for  
Negotiating  
an  
Agreement  
between  
Sales Representatives  
and  
Manufacturers



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# GUIDELINES FOR NEGOTIATING AGREEMENTS BETWEEN REPRESENTATIVES AND MANUFACTURERS



**THIS AGREEMENT** made this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and between \_\_\_\_\_  
\_\_\_\_\_ (“Manufacturer”)

a corporation incorporated under the laws of the State /Province of \_\_\_\_\_ having its principal office  
at (address) \_\_\_\_\_ (“Manufacturer”), and

\_\_\_\_\_ (“Representative”)

a business entity under the laws of the State / Province of \_\_\_\_\_ having its principal office at  
(address) \_\_\_\_\_ (“Representative”),

as follows:

*The Representative’s business entity (e.g. corporation) must be recognized. It is unacceptable for a Manufacturer to present an agreement that is to be a personal contract.*

## 1. Appointment and Acceptance

Manufacturer appoints Representative as its authorized, sole and exclusive Representative to promote the sale of and sell its Products (as defined in Provision #3 hereof); in the Territory (as defined in Provision #2 hereof); and Representative accepts the appointment and agrees to sell and promote the sale of the Manufacturer’s Products.

## 2. Territory

Representative’s territory shall consist of all customers in the following area (hereinafter called the “Territory”).

*or:*

Representative’s territory shall consist of all customers in the area (hereinafter called the “Territory”) as stated in the attached schedule A.

*The Territory can be designated as specific states, provinces, counties, zip or postal codes, or a combination thereof in any way which clearly delineates the Territory.*

*There should be no house accounts. If there are house accounts, they must be specifically named. If future house accounts are permitted, it must be by prior written agreement.*

In the event the manufacturer reduces or otherwise diminishes the Territory or designates any customer as a “house account” during the term of this Agreement, Representative shall be entitled to commissions, when due, on all orders received from said house accounts, and from customers formerly located within the Territory within six months of receipt of notice from the Manufacturer. If the Manufacturer requests the Representative to render services to specific accounts or to render services in a geographical area outside of the Territory, the Representative shall be compensated for its efforts in the same manner as set forth in this Agreement.

## 3. Products

The “Products” of the Manufacturer to be promoted for sale and sold by the Representative are all Products of the Manufacturer.

*or:*

The “Products” of the Manufacturer to be promoted for sale and sold by the Representative are as stated in the attached Schedule B.

*The Agreement should cover all Products and services of the Manufacturer. If the Representative is not handling all of the Products or services, the Agreement should list the product lines, product categories of services the Rep is handling. It is preferable not to list Products by model or part number as these may change from time to time. It should also indicate if new Products or services developed or added by the Manufacturer are to be included.*

#### 4. Amount of Compensation



Representative's compensation for services performed hereunder shall be \_\_\_\_\_% of the "net invoice price" of the Manufacturer's Products shipped into Representative's Territory. However, when engineering, execution of the order or shipment involve different territories, the Manufacturer will split the full commission among the Representatives whose territories are involved. The Manufacturer will make this determination in consultation with the Representatives based on split commission applications submitted by those Representatives and advise the affected Representatives. The sum of the split commission shares to the affected Representatives shall add up to no less than a full commission.

Anything to the contrary notwithstanding, Representative will be compensated for orders from distributors/dealers based upon point of sale ("POS") reports received by Manufacturer from distributors/dealers. Manufacturer will pay the full commission (on the "net invoice price" to be paid by the distributor/dealer) to the Representative for the Territory into which the distributor/dealer ships the Products ordered by it, as indicated on the distributor's/dealer's POS reports.

In cases where all billings go to a customer's head offices, yet goods are sold into Territories other than the one in which the head office is located, the Representative in the head office Territory will be paid at least \_\_\_\_\_% commission, and the Representative in the destination Territory will be paid at least \_\_\_\_%. The sum of the split commission shares to the affected Representatives shall add up to no less than a full commission.

*Manufacturer and Representative may agree on an incentive bonus to be paid to Representative if a mutually agreeable sales target is exceeded.*

*Additional types of compensation could include:*

*Performance incentives, warehouse allowance, promotion allowance, special service allowance, consulting fee, product specialist fee, new product "pioneering," monthly retainer, forms allowance, data base maintenance allowance.*

#### 5. Computation and Payment of Commission

- a) Commissions are due and payable on or before the \_\_\_\_\_ day of the month immediately following the month in which the customer is invoiced. If commissions are not paid when due, the amount not paid will accrue interest at \_\_\_\_\_% per annum from the date due until paid.

*The Representative should not have to wait for the customer to pay before receiving commission on a sale. Representatives are the Manufacturer's sales force, and should be paid promptly, as would be any other member of Manufacturer's sales team. The event of non-payment of an invoice is covered by the following clauses. The Agreement can also obligate the Manufacturer to pay attorney fees and collection costs when it is necessary for Representative to pursue the Manufacturer to recover commissions due and owing.*

- b) Manufacturer shall either provide Representative copies of all invoices at the time Manufacturer invoices customer, and each invoice shall indicate the amount of commissions due Representative, or the Manufacturer will send a monthly tabulation of all invoices with the purchase order numbers, quantity and price, and also shall provide Representative with the amount of commission due.
- c) At the time of payment of commissions to Representative, Manufacturer will send Representative a commission statement showing:
  - i) commissions due and payable to Representative for that period and any prior periods, and
  - ii) commissions being paid (listing the invoices on which commissions are being paid).
- d) "Net invoice price" shall mean the total price at which an order is invoiced to the customer including any increase or decrease in the total amount of the order, but excluding shipping and insurance costs, sales, use and excise taxes, any allowances or discounts granted to the customer by the Manufacturer, and any tariffs, duties and export fees involved in international shipments.
- e) There shall be deducted from any sums due Representative:
  - i) An amount equal to commissions previously paid or credited on sales of Manufacturer's Products which have since been returned by the customer or on allowances credited to the customer for any reason by the Manufacturer; and
  - ii) An amount equivalent to commissions previously paid or credited on sales which Manufacturer shall not have been fully paid by the customer whether by reason of the customer's bankruptcy, insolvency, or any other reason which, in Manufacturer's judgment, renders the account uncollectible. If any sums are ever realized upon such uncollectible accounts, Manufacturer will pay Representative its percentage of commission applicable at the time of the original sale upon the net proceeds of such collection, regardless of when such

sums are received by Manufacturer.



f) "Order" shall mean any commitment to purchase Manufacturer's Products which calls for shipment into Representative's Territory or which is subject to a split commission in accordance with Provision #4 hereof.

## 6. Acceptance of Orders

All orders are subject to acceptance or rejection by an authorized officer of Manufacturer at its home office and to the approval of Manufacturer's credit department. Manufacturer shall be responsible for all credit risks and collections.

At Representative's request, Manufacturer shall supply Representative with copies of all orders received directly by Manufacturer, copies of all shipping notices, and copies of all correspondence and quotations made to customers in the Territory, as well as invoices, credit memos and evidence of payment received from customers in the Territory.

## 7. Terms of Sale

All sales shall be at prices and upon terms established by Manufacturer, and it shall have the right, in its sole discretion, from time to time, to establish, change, alter or amend prices and other terms and conditions of sale. Manufacturer shall advise Representative of all such changes in a timely manner. Representative shall not accept orders in the Manufacturer's name or make price quotations or delivery promises without the Manufacturer's prior approval.

*If reduced commissions are contemplated for competitive reasons, it should be in writing and be by mutual agreement, prior to order shipment. Furthermore, there should be a recognition that the Manufacturer's gross profit has been reduced by the same percentage as the Representative's commission has been reduced.*

## 8. Warehousing

Representative and Manufacturer may decide by mutual written agreement that Representative will carry inventory, either on a consignment or a buy-sell basis. Remuneration for warehousing ("Warehousing Fees") shall be paid in addition to commissions paid for sales made in the Territory.

a) For Consignment Inventory:

Representative shall:

- i) Provide adequate warehouse space for Manufacturer's Products.
- ii) Receive and ship goods in a timely fashion.
- iii) Provide packaging materials to ship Products.

or:

Be reimbursed by Manufacturer for packaging materials.

or:

Be supplied packaging materials by Manufacturer.

Manufacturer shall:

- i) Pay a warehousing fee equal to \_\_\_\_\_% on goods shipped into Representative's Territory.
- ii) Pay a warehousing fee equal to \_\_\_\_\_% on goods shipped outside Representative's Territory.

*We suggest that a higher warehousing fee be paid when goods are shipped outside Representative's Territory.*

iii) If for any reason Representative, at Manufacturer's request, takes possession of Manufacturer's Products, the risk of loss or damage to or destruction of such Products shall be borne by Manufacturer, and Manufacturer shall indemnify and hold Representative harmless against any claims, debts, liabilities or causes of action resulting from any such loss, damage, or destruction.

iv) Pay shipping charges or reimburse Representative for shipping charges.

v) Provide an inventory control system for replenishment of the inventory.

Representative shall have a lien on the inventory in its possession until all amounts owing Representative under this agreement are paid.

b) For Buy-Sell Inventory

Manufacturer grants Representative a discount of \_\_\_\_\_%, with the following freight terms \_\_\_\_\_, and the following payment terms \_\_\_\_\_. Representative will be given notice in writing of all changes in Company's prices, discounts and terms of sale at least one month prior to the effective date of each change. Representative will establish sales prices, discounts and sales terms.

Company agrees to allow Representative to make inventory adjustments every six months, without a restocking charge, by exchanging slow-moving inventory for a like amount of replacement goods. Representative agrees that all goods returned shall be in resalable condition.

Upon termination of this agreement for any reason, Manufacturer agrees to accept return of Representative's inventory at original cost, with return freight paid by Representative.

## 9. The Parties' Relationship and Conduct of Business

- a) Representative shall maintain a sales office in the Territory and devote such time as may be reasonably necessary to sell and promote Manufacturer's Products within the Territory.
- b) Representative will:
  - i) conduct all of its business in its own name and in such manner as may see fit,
  - ii) pay all expenses whatever of its offices and activities, and
  - iii) be responsible for the acts and expenses of its employees.
- c) Nothing in this Agreement shall be construed to constitute Representative as the partner, employee or agent of the Manufacturer nor shall either party have any authority to bind the other in any respect, it being intended that each shall remain an independent contractor responsible only for its own actions.
- d) Representative shall not, without Manufacturer's prior written approval, alter, enlarge, or limit orders, make representations or guarantees concerning Manufacturer's Products or accept the return of, or make any allowance for such Products.
- e) Representative shall furnish to Manufacturer's Credit Department any information which it may have from time to time relative to the credit standing of any of its customers.
- f) Manufacturer shall be solely responsible for the design, development, supply, production and performance of its Products and the protection of its patents, trademarks and trade names. Manufacturer agrees to indemnify and hold Representative harmless from and against and to pay all losses, costs, damages or expenses whatsoever, including reasonable attorney's fees, which Representative may sustain or incur on account of infringement or alleged infringement of patents, copyrights, trademarks, or trade names, or breach of warranty in any way resulting from the sale of Manufacturer's Products. Manufacturer will also indemnify Representative from and hold it harmless from and against all liabilities, losses, damages, costs or expenses, including reasonable attorney's fees, which it may at any time suffer, incur, or be required to pay by reason of injury or death to any person or damage to property or both caused or allegedly caused by any Products sold by Manufacturer. A "certificate of insurance", showing Representative as an additional insured party on Manufacturer's product liability insurance policy, will be issued to Representative within 30 days of the signing of this Agreement.
- g) Manufacturer shall furnish Representative, at no expense to Representative, samples, catalogs, literature and any other material necessary for the proper promotion and sale of its Products in the Territory. Any literature which is not used or samples or other equipment belonging to Manufacturer shall be returned to the Manufacturer at its request.
- h) Manufacturer will keep Representative fully informed about sales and promotional policies and programs affecting the Representative's Territory.
- i) If one (or more) of Representative's key personnel attends a sales meeting or training seminar at the request of Manufacturer, Representative shall pay travel expenses and Manufacturer shall pay all other expenses.

or:

Manufacturer shall pay all expenses related to Representative's attendance at sales meetings and training seminars.

*The second option might be useful if all of Representative's staff are asked to attend, or if the meeting is in a location where airfares are quite expensive.*

- j) If Representative is asked to work in Manufacturer's booth at a trade show outside Representative's Territory, they shall mutually agree on compensation for such work.
- k) Manufacturer and Representative will, on an annual basis establish mutual goals and objectives. This will include a sales forecast (with mutually agreeable details), regional trade show participation and regional advertising.

l) Representative agrees that it is the “eyes and ears” in its Territory, and will from time to time provide marketing information to Manufacturer.

m) Manufacturer and Representative will establish a feedback system, such as a Rep Council, to ensure there is a regular dialogue on all aspects of the relationship.

## 10. Non-Piracy Provision

During the term of this Agreement and for one (1) year following its termination, Manufacturer shall not:

(a) solicit or cause any employee to leave the employ of the Representative;

(b) directly or indirectly employ or retain the services of any person who was employed by the Representative at any time during the one (1) year period prior to termination for the purpose of establishing or operating a manufacturer's representative firm or other sales function for the benefit of Manufacturer.

## 11. Term of Agreement and Termination

This Agreement shall be effective on the \_\_\_\_ day of \_\_\_\_\_, .

*Termination is a very contentious issue in agreements. A 30 day notice termination clause is unfair to both parties. It fails to recognize the value of a long term relationship, and does not provide enough time for either Manufacturer or Representative to plan for a smooth transition.*

*Either:*

This agreement shall continue in force for a \_\_\_\_ year period, and shall be automatically renewed for additional one (1) year periods thereafter unless terminated by written notice from either party to the other not less than thirty (30) days prior to the end of the initial or any subsequent one year term.

*or:*

In the first three years, this agreement may be terminated by either party upon 30 days' written notice. For each year thereafter, one month will be added to the notice period, up to a maximum twelve months' notice.

*Manufacturers may be concerned that a long notice period is a problem when Representatives make changes that slowly undermine the business, such as handing the business over to a non-performing son or daughter. This concern could be met by establishing performance criteria, which, if not met, would result in the reduction of the notice period by, say, one month per year, until the situation is remedied.*

*or*

In the first year, this agreement may be terminated by either party upon 30 days' written notice. Thereafter, this agreement may be terminated by either party upon six months' written notice.

*One of the above three suggestions should be used.*

In the event the Manufacturer sells or otherwise disposes of its stock or assets, or merges or reorganizes the company in a manner which affects the production or sale of the Products being promoted and sold by the Representative, or in the event the Manufacturer changes the legal structure of its business entity, the Manufacturer shall pay the Representative commissions for all orders booked through the end of the notice period as provided in this Agreement, regardless of whether or when shipped by the Manufacturer or its successor or acquirer.

This Agreement may also be terminated:

a) By Manufacturer:

i) immediately upon written notice to Representative if there is a change of more than 50% of the present ownership or control of the Representative's business without Manufacturer's written consent.

ii) if Representative, without Manufacturer's written consent, offers, promotes or sells any product which is competitive with any product Representative is to offer, promote or sell for Manufacturer in accordance with the terms of this Agreement, and Manufacturer requests that Representative stop selling such competitive products, and Representative fails to stop selling such competitive products within forty-five (45) days after receipt of such notice by Representative, and written notice of termination is mailed to or served upon

Representative.

b) By Representative:

i) immediately upon written notice to Manufacturer in the event Manufacturer sells substantially all of the assets of its business or there is a change of 50% or more of its present ownership, or it is merged with another firm, corporation or business and Manufacturer is not the surviving company.

ii) if Manufacturer, without Representative's written consent offers, promotes or sells any product which is competitive with any product Representative is offering or selling for any other manufacturer, and Representative requests that Manufacturer stop selling such competitive products, and Manufacturer fails to stop selling such competitive products within forty-five (45) days after receipt of such notice by the Manufacturer, and written notice of termination is mailed to or served upon Manufacturer.

c) By either party

i) in the event of the other party's unreasonable and repeated failure to perform the terms and conditions of this Agreement, written notice of the failure is mailed to or served upon that party, the failure is not cured within thirty (30) days after receipt of such notice, and written notice of termination is mailed to or served on that party, or

ii) upon immediate written notice to the other party in the event that party has filed or has filed against it a petition in bankruptcy (which is not dismissed within thirty [30] days after it is filed) or that party makes an assignment for the benefit of creditors.

d) By mutual written agreement.

## 12. Rights upon Termination

a) In addition to those rights afforded by the provisions of Provision #8 hereof dealing with warehousing, Representative shall be entitled to:

i) Commissions on all orders calling for shipment into Representative's Territory which are dated or communicated to Manufacturer within 60 days following the date of termination, regardless of when such orders are shipped, or releases and shipments on such orders take place; and

ii) Its share of split commissions on orders including those referred to in Paragraph (a) (i) of this Provision #12.

b) Commissions referred to in this Provision #12 shall be paid on or before the tenth (10th) day of the month following the month in which the Manufacturer receives payment for the orders, or any portion thereof.

c) In addition to the commissions to be paid to Representative pursuant to the other paragraphs of this provision, Manufacturer agrees to be fair and reasonable in compensating Representative at the time of or after termination, for Representative's efforts in developing customers in its Territory which, because of Representative's efforts, would be likely to continue to purchase Products from the Manufacturer after termination.

*The Agreement should not contain a provision preventing Representative from representing a competing line after termination. Non-competition clauses are an unfair restriction on a Representative's right to earn a living. However, a Representative could agree to such a provision, provided full commission is paid during the non-competition period, for new orders received from the Territory by Manufacturer.*

## 13. General

This Agreement contains the entire understanding of the parties, shall supersede any other oral or written agreements, and shall be binding upon and inure to the benefit of the parties' successors and assigns. It may not be modified in any way without the written consent of both parties. Representative shall not have the right to assign this Agreement in whole or in part without Manufacturer's written consent.

## 14. Construction of Agreement

This Agreement shall be construed and enforced according to the laws of the State / Province of \_\_\_\_\_.

## 15. Disputes and Arbitration

Any controversy or claim not exceeding \$25,000 arising out of or relating to this Agreement or the breach thereof, is subject to arbitration in accordance with the rules of the American Arbitration Association. Controversies or claims in excess of \$25,000 shall be resolved through court proceedings in the State / Province and county where the Representative's principal office is located.

**16. Notices**

All notices, demands or other communications by either party to the other required under the terms of this Agreement shall be in writing and shall be effective upon personal delivery or if sent by mail seventy-two (72) hours after deposited in the U.S. or Canadian mail, first class postage, prepaid, Registered or Certified, and all such notices given by mail shall be sent and addressed as follows until such time as another address is given by notice pursuant to this provision #16:

To Manufacturer:	To Representative:
_____	_____
_____	_____
_____	_____

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written in multiple counterparts, each of which shall be considered an original.

MANUFACTURER:	REPRESENTATIVE:
_____	_____
By: _____	By: _____
Title: _____	Title: _____

**GUIDELINES FOR AGREEMENTS - KEY POINTS**

- PREAMBLE Representative's business entity (e.g.. Corp.) must be recognized.
- APPOINTMENT Clear exclusivity, i.e. "authorized, sole and exclusive Representative".
- TERRITORY Clearly specified; exclusions (if any) by prior written agreement.
- PRODUCTS Ideally "all products"; Representative to be paid for service outside Territory.
- COMPENSATION Clearly specified; include split commission scenario.
- COMM. PAYMENT Payable month after shipment.
- ORDER ACCEPT. Manufacturer to provide copies of paperwork upon Representative's request.
- TERMS OF SALE Set by Manufacturer; price / commission reductions, if any, by written mutual agreement.
- WAREHOUSING Specify warehousing fee or buying arrangement; state responsibility for insurance, etc.
- RELATIONSHIP Representative is independent contractor; parties should plan mutual goals & objectives.
- NON-PIRACY Manufacturer will not hire any of Representative's personnel.
- TERM "Evergreen" agreement is best; i.e. renewed annually unless terminated in last 30 days.
- RIGHTS Pay commission for 60 days following cancellation; no "non-comp." without compensation.
- GENERAL Cannot assign agreement without permission.
- CONSTRUCTION Preferably according to the laws of the Representative's home state / province.
- DISPUTES Arbitration for sums under \$25,000; Courts for sums over \$25,000.
- NOTICES To be in writing.
- SIGNATURES Both parties sign on behalf of their respective business entities.

