
GUIDELINES

FOR

NEGOTIATING AGREEMENTS

BETWEEN

SALES REPRESENTATIVES

AND

MANUFACTURERS



ELECTRONICS REPRESENTATIVES ASSOCIATION

111 N. Canal St. • Suite 885 • Chicago, Illinois 60606

(Phone) 312.559.3050, (Fax) 312.559-4566

E-mail: info@era.org • Web: www.era.org

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Put It In Writing!

Frequently in conversations overheard at trade shows, industry meetings, etc., we hear the comment, "Too bad we can't go back to the old days, when a handshake was better than a contract, and a person's word could be relied upon!" Frankly, we don't think that a person's word is any less binding or sincere today than it was in the past, but times have changed.

In today's business economy and especially in the electronics industry, we have seen tremendous growth and expansion. What was basically a small family industry has become the fastest growing and most pervasive business in the world. While many representation agreements are still worked out verbally in the negotiation between sales representatives and manufacturers, we have reached that point where to the benefit of both parties, it has to be in writing. Why? For a number of reasons! Here are a few:

- Manufacturing firms are merging, selling, acquiring and expanding at a rapid pace, thus changing the basic operation that was originally enforced at the time the agreement was made.
- With these changes comes a tremendous increase in the movement of people. The chance of a sales manager being in the same position five years after s/he negotiates a contract with a representative is very slim.
- The needs of the manufacturer and the services provided by the sales representative have expanded so much and now include so many different types of activities, it would be impossible to remember them on a verbal basis.
- Growth and expansion of national distributors require a formalized method of compensation of the representative based on the actual point of sale.
- With the expansion of product and the market sold to, buying and selling have become much more complicated.
- The growing number of customers that have separate design, purchasing and manufacturing locations in differing rep territories requires an equitable split-commission agreement.
- The current judiciary system has forced business people into putting everything in contract "language" in order to protect themselves from future problems in any kind of litigation.
- Unlike many years ago, most rep firms today have become business entities, operating on a long-term basis and providing their principals with continuity of management. These contracts insure that continuity.

There are many other reasons to substantiate writing a good contract to cover the agreement between a manufacturer and a representative. Basically, both parties are a lot better off when you properly and carefully "put it in writing"!

Why the ERA Guidelines?

ERA developed a contract format that is easily usable by both manufacturers and manufacturers' representatives. These guidelines provide a basic contract form and a number of alternatives in various parts of the agreement to match the particular or specific needs of a manufacturer and a representative.

GUIDELINES FOR NEGOTIATING AN AGREEMENT BETWEEN SALES REPRESENTATIVES AND MANUFACTURERS

THIS AGREEMENT made this * _____ day of ERS, _____,
by and between _____
a corporation incorporated under the laws of the State of _____
having its principal office at _____ ("Manufacturer"),
and _____
a corporation incorporated under the laws of the State of _____
having its principal office at _____ ("Representative"),
as follows:

* *Insert date on which the agreement is signed.*

1. APPOINTMENT AND ACCEPTANCE - Manufacturer appoints Representative as its exclusive representative to promote the sale of and sell its products (indicated in Provision #3 hereof); in the territory (indicated 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 the following:
(Note: The territory can be designated as specific states, counties, zip codes, or a combination thereof or in any other way which clearly delineates the area. If the territory is not a specific area and is limited only to specific customers, the customers should be named. If there are any customers or "house accounts" to be excluded from the territory, they should be clearly listed by name and location along with a statement indicating that they are excluded and no commission will be paid on orders from or sales to them. [Note: The Electronics Representatives Association does not recommend any specific territory boundaries.] While many "traditional territories" exist, the principal should create territories based on efficient and effective coverage.)

3. PRODUCTS - The "products" of the Manufacturer to be promoted for sale and sold by the Representative are:

(Note: The Agreement should cover all products and services of the Manufacturer unless the Representative is to handle only specific products or services. If the Representative is not handling all of the products or services, the Agreement should list the product lines, product categories or services the Representative 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 involved based upon split commission applications submitted by those Representatives and advise the interested Representatives. The sum of the split commission shares shall add up to a full commission. Commissions on orders resulting from "design ins" (a design or specification indicating Manufacturer's product) procured or influenced by Representative will continue for the life of the customer's program into which the product is designed even though the commission is being split between several representatives.

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

** This blank should be completed with the amount of the agreed commission. However, there are different arrangements that can be worked out between a Representative and a Manufacturer:*

a) The amount of commission can be a function of:

- i) The sales and marketing functions to be performed by the Representative.*
- ii) Whether the Manufacturer is a new or established company.*
- iii) Whether the Representative is expected to develop new markets for new or existing principals.*

b) Additional compensation could include:

- i) A fee for marketing services.*
- ii) Increased commission rates based on exceeding mutually agreed upon quotas.*
- iii) A monthly retainer.*

A Split Commission Request/Approval type of form should be submitted to the Manufacturer as soon as the Representative is aware of the circumstances requiring a split commission, and the Manufacturer should be asked to approve the request within thirty (30) days after submission by the Representative.

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 customer is invoiced provided, however, on distributor orders commissions are due and payable on or before the * ____ day of the month immediately following the month during which the Manufacturer receives a Point Of Sale report from the distributor indicating distributor's customer and the location to which the products of the Manufacturer were shipped. However, if Manufacturer has not received a distributor Point Of Sale report reflecting the shipment of products ordered by distributor to the distributor's customers within sixty (60) days after shipment of the order to the distributor, or the Representative believes that there is an error in a Point Of Sale report received by Manufacturer, the Representative shall have the right to communicate with the distributor for the purpose of obtaining or correcting Point Of Sale information.

If the commissions are not paid when due, the amount not paid will accrue interest at * ____ % per annum from the date due until paid.

b) Manufacturer will send 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 weekly tabulation of all invoices with purchase order numbers, quantity, price and commission due.

c) At the time of payment of commissions to Representative, Manufacturer will send Representative a commission statement showing:

- i) commissions due and owing 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 (even though such increase or decrease takes place after the effective date of termination), 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 that 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.

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

** The blanks should be completed with the day of the month in which commissions are to be paid and the amount of the interest to be charged on commissions due and not paid.*

(Note: Also, commissions could be paid on or before the ____ day of the month following the month in which the order is shipped to the customer or when the Manufacturer is paid by the customer.

If the Representative is entitled to commissions on a Lease Agreement, the Agreement should indicate the manner in which commissions will be computed and when they are to be paid [e.g., payable in full at the time of the initial lease payment to the Manufacturer].

Indicate whether or not the following are to be commissionable:

- (a) Engineering;*
- (b) Research and development;*
- (c) Non-recurring start-up costs;*
- (d) Cancellation charges;*
- (e) Tooling;*
- (f) Environmental qualification and specification;*
- (g) Compliance testing;*
- (h) Drawings and handbooks;*
- (i) Documentation;*
- (j) Packaging;*
- (k) Repair and reworks;*
- (l) Surcharges & "add-ons" for increases in raw materials/other OEM supplies.*

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.)

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.

If Manufacturer notifies customer of its acceptance or rejection of an order, a copy of any written notification shall be transmitted to the Representative. At least once every month 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.

7. TERMS OF SALE - All sales shall be at prices and upon terms established by Manufacturer, and it shall have the right, in its discretion, from time to time, to establish, change, alter or amend prices and other terms and conditions of sale. Representative shall not accept orders in the Manufacturer's name or make price quotations or delivery promises without the Manufacturer's prior approval.

8. REPRESENTATIVES 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 it may see fit,
- ii) pay all expenses whatever of its office 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 that it may have from time to time relative to the credit standing of any of its customers.

f) Representative shall abide by Manufacturer's policies and communicate same to Manufacturer's customers.

g) 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, 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. Manufacturer will also include Representative as an additional assured on its product liability insurance policy.

h) 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.

i) 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.

j) Manufacturer will keep Representative fully informed about sales and promotional policies and programs affecting the Representative's territory.

(Note: The Agreement can also include payment of transportation and all other expenses relating to Representative's personnel attending a sales meeting or training seminar at the request of Manufacturer.)

9. TERM OF AGREEMENT AND TERMINATION - This Agreement shall be effective on the day of _____, _____, and 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. This Agreement may also be terminated:

- a) By Manufacturer immediately upon written notice to Representative by registered or certified mail

if there is a change of fifty (50%) percent or more of the present ownership or control of the Representative's business without Manufacturer's written consent.

b) By Manufacturer 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 written notice of this breach of the Agreement is mailed to or served upon Representative, the breach is not cured within ten (10) days after receipt of such notice by Representative, and written notice of termination is mailed to or served upon Representative.

c) By Representative:

i) 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 written notice of this breach of the Agreement is mailed to or served upon Manufacturer, the breach is not cured within ten (10) days after receipt of such notice by the Manufacturer, and written notice of termination is mailed to or served upon Manufacturer, or

ii) immediately upon written notice to Manufacturer by Registered or Certified mail 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.

d) 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; or

e) By mutual written agreement.

10. RIGHTS UPON TERMINATION

a) Upon termination of this Agreement for any reason, Representative shall be entitled to:

i) Commissions on all orders calling for shipment into Representative's territory which are dated or communicated to Manufacturer prior to the effective 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 10.

b) Commissions referred to in this Provision #10 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.

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.

(Note: In addition, the following can be included:

a) In the event of termination, Manufacturer shall make its customer orders and shipping records available for inspection by the Representative, or the Representative's duly authorized agent.

b) A provision for the Representative to receive severance payments or an extended "notice of termination" period based upon the Representative's term of service.)

11. 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.

12. CONSTRUCTION OF AGREEMENT- This Agreement shall be construed according to the laws of the State of _____ .

13. DISPUTES AND ARBITRATION - The parties agree that any disputes or questions arising hereunder, including the construction or application of this Agreement, shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in force, and that the arbitration hearings shall be held in the city in which the principal office of the party requesting arbitration (with the American Arbitration Association) is located. If the parties cannot agree upon an arbitrator within ten (10) days after demand by either of them, either or both parties may request the American Arbitration Association to name a panel of five (5) arbitrators. The Manufacturer shall strike the names of two (2) on this list, the Representative shall then strike two (2) names, and the remaining name shall be the arbitrator. The decision of the arbitrator shall be final and binding upon the parties both as to law and to fact, and shall not be appealable to any court in any jurisdiction. The expenses of the arbitrator shall be shared equally by the parties, unless the arbitrator determines that the expenses shall be otherwise assessed.

14. NOTICES - All notices, demands or other communications by either party to the other shall be in writing and shall be effective upon personal delivery or if sent by mail seventy-two (72) hours after deposited in the United States 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 14:

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:

