



***GUIDELINES  
for Negotiating Agreements  
Between Sales Representatives  
and Manufacturers***

**Published as a NEMRA Member Resource**

## 2 NEMRA Guidelines for Negotiating Agreements

This Guideline is for negotiating agreements between sales representatives and manufacturers. *This Guideline does not cover all possible situations and alternatives, and is presented only as a guide to point out some of the matters to be considered in negotiations. This should not be construed as a recommendation, as every relationship between a representative and a manufacturer differs and cannot be covered by a standard agreement. Each agreement should be individually negotiated and prepared, and an attorney should be consulted concerning negotiation issues and the formalization of an agreement.*

*NEMRA publishes these Guidelines as a resource to the industry and in no event shall NEMRA be held liable for any costs or damages arising out of or in any way related to these Guidelines.*

THIS AGREEMENT (the "Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ by and between \_\_\_\_\_ a corporation incorporated under the laws of the State of \_\_\_\_\_ having its principal office at \_\_\_\_\_ (the "Manufacturer"), and \_\_\_\_\_ a corporation incorporated under the laws of the State of \_\_\_\_\_ having its principal office at \_\_\_\_\_ (the "Representative"), as follows:

**1. Appointment and Acceptance.** Manufacturer hereby appoints Representative as its exclusive independent sales Representative to solicit and promote the sale of the products enumerated in Section No. 3 hereof (the "Products") in the territory described in Section No. 2 hereof (the "Territory"); and Representative accepts the appointment and agrees to solicit and promote the sale of the Products in the Territory. Except for those house accounts, if any, listed on **Schedule 1** attached hereto, the Representative shall at all times have the right to sell and promote Products in the Territory, and at no time during the term of this Agreement shall the Manufacturer take any customer "in house" or otherwise limit the Representative's right to sell and promote Products in the Territory or limit the Representative's right to receive Commissions (as hereinafter defined) on account of sales of Products to customers in the Territory.

**2. Territory.** Representative's Territory shall consist of the following: \_\_\_\_\_

*The territory can be designated as specific states, counties, cities, 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.*

**3. Products.** The products of the Manufacturer applicable to this Agreement are: \_\_\_\_\_

*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, products or services the rep is handling. It is preferable not to list products by model or catalog numbers as these may change from time to time. The agreement should also indicate if new products or services developed or added by the manufacturer are to be included.*

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**Amount of Compensation.** Representative's compensation for services performed hereunder shall be \_\_\_\_\_% of the "net invoice price" of the Products shipped into Representative's Territory (the "Commission"). However, when engineering, execution of the Order (as defined below), or shipment involves different territories in which the Manufacturer has independent sales representatives, the Manufacturer will split the full Commission among the representatives whose territories are involved, and no portion of the Commission shall be retained by the Manufacturer. The Manufacturer will make this determination and advise the interested Representatives at the time the Order is submitted to the Manufacturer. The sum of the split Commission shall add up to a full Commission and no representative whose territory is involved shall receive less than \_\_\_\_\_% of the full Commission.

*The blanks should be completed with the amount of commission agreed upon. There are many different arrangements that can be worked out between a representative and a manufacturer. If a representative is expected to develop a new market, he should consider requesting a higher commission rate than ordinarily paid by the manufacturer, or for some monetary subsidy or stipend during the period of time necessary to develop the market. If the representative is asked to handle a product line for a new manufacturer and the representatives' activities could result in a significant contribution to the success of the company, the representative could request an opportunity for an equity position in the manufacturer's company. In either or both of these situations, the representative should also consider a more favorable termination clause than that ordinarily negotiated with other manufacturers.*

*The representative should consider negotiating for any one or a combination of the following forms of compensation:*

- a) *A commission based on the "net invoice price" of the manufacturer's products shipped into the representative's territory and a split of commissions when engineering, execution of the order, or shipment involves different territories (i.e., 50% to the representative in whose territory the product is engineered or specifications are prepared; 25% to the representative into whose territory the product is shipped; and 25% to representative in whose territory the order is executed).*
- b) *A monthly draw against commissions actually earned—with reconciliation of any amount due or overpaid to the representative within (30) thirty days after the end of each calendar quarter, or after the end of any period agreed upon. (Any amount due upon reconciliation to be paid by the 10th of the month following reconciliation and any overpayment to be deducted from the next commission check due the representative.)*
- c) *A retainer fee to be paid in addition to commissions on sales.*
- d) *An increased commission rate to be paid on sales which exceed certain volume levels. A quota could be established each year, based on the previous year's sales, and an increased commission rate paid on sales in excess of that quota.*
- e) *An option to acquire stock of the manufacturer. If the representative is effective in establishing customer relationships and developing market acceptance for the manufacturer's product line, the manufacturer's stock could appreciate considerably. The representative may want the opportunity to participate in the growth of the manufacturer and the appreciation of the manufacturer's stock by acquiring an option to acquire the stock. A stock option allows the representative to acquire stock at a later date at its fair market value as of the date the option is granted. The procedure for purchasing the stock and the price to be paid for the stock should be carefully negotiated with the help of a qualified attorney.*

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### 4. Computation and Payment of Commission

- a) For sales of Products to end users, Commissions are due and payable on or before the \_\_\_\_ day of the month following the month in which the customer is invoiced. For sales of Products to distributors in the Territory, Commissions are due and payable on or before the \_\_\_\_ day of the month following the month in which the distributor issues to the Manufacturer its "Point of Sale" (as defined below) report or "Point of Transfer" (as defined below) report. If not paid when due, the amount of Commissions 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 Commission due Representative.
- c) At the time of payment of Commissions to Representative, Manufacturer will send Representative a Commission statement showing:
  1. the computation of all Commissions earned during the (90) ninety day period prior to its issuance (listing all invoices covered by the statement), and
  2. a "Point of Sale" report with respect to all distribution sales of Products to the customers in the Territory,
  3. a "Point of Transfer" report with respect to all transfers of Products by a distributor from such distributor's central warehouse to such distributor's local warehouse,
  4. Commissions paid during that period (listing the invoices on which Commissions are being paid), and
  5. the total of all Commissions due and owing to Representative.
- 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 separately stated costs for shipping and freight; taxes, tariffs, and duties; insurance; and any allowances or discounts granted to the customer by the Manufacturer.
- e) There shall be deducted from any sums due Representative:
  1. 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
  2. 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 which calls for shipment into Representative's Territory or which is subject to split Commission in accordance with Section No. 4 hereof, and includes, without limitation, purchase orders as well as "planned orders", "blanket orders" and volume purchase agreements without specified delivery dates.

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The blank should be completed with the day of the month on which commissions are to be paid, and the amount of interest to be charged on commissions due and not paid. The representative should also consider:

- a) *Requesting that payment of commissions be made on or before the day of the month following the month in which:*
  1. *the order is accepted by the manufacturer, or*
  2. *the order is invoiced, or*
  3. *shipment is made.*
- b) *Negotiating for the payment of commissions on lease agreements and the manner in which commissions will be computed (i.e. to have commissions on lease agreements payable in full at the time of the initial lease payment to the manufacturer).*
- c) *The payment of commissions (or split commissions) on distributor sales to the representative covering the territory in which the distributor makes the sale to its customer.*
- d) *Providing for payment of \_\_\_\_\_% interest per annum on commissions not paid when due accruing from the date, or providing for the execution and delivery of a promissory note by the manufacturer (with an appropriate rate of interest) when the manufacturer is delinquent in the payment of commissions due.*
- e) *Obligating the manufacturer to pay attorney fees and collection costs when it is necessary for the representative to sue the manufacturer to recover monies due and owing to it.*

**5. Acceptance of Orders.** All Orders are subject to acceptance or rejection by the Manufacturer at its home office and to the approval of the Manufacturer's credit department. Manufacturer shall be responsible for 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 by the Manufacturer from customers in the Territory, and copies of all shipping notices, correspondence, and quotations made to the customers in the Territory.

**6. Terms of Sale.** All sales shall be at prices and upon terms established by the Manufacturer and Manufacturer shall have the right, in its sole discretion, from time to time upon reasonable prior written notice to Representative, to establish, change, alter or amend prices and other terms and conditions of sale. Representative shall not accept Orders in the Manufacturer's name, nor make price quotations or delivery promises without the Manufacturer's prior approval.

### **7. Representative's Relationship and Conduct of Business.**

- a) Representative shall maintain sales office in the Territory and shall use its best efforts and devote such time as may be reasonably necessary to sell and promote the sale of Manufacturer's products within the Territory.

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- b) Representative will conduct all of its business in its own name and in such manner as it may see fit. Representative will pay all expenses whatever of its office and activities and 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, enlarge, or limit Orders, make representations or guarantees concerning Manufacturer's product 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) 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, and other intellectual property. Manufacturer shall indemnify, defend, and hold Representative, its employees, agents and contractors (if any) harmless from and against, and shall pay all losses, costs, damages, or expenses whatsoever, including, without limitation, reasonable attorneys' fees and costs, which Representative may sustain or incur on account of (i) any infringement or alleged infringement by any Product of patents, trademarks, trade names, or other intellectual property of any third party, (ii) any breach of warranty in any way resulting from the sale of Products, (iii) any injury or death to any person or damage to any property or both caused or allegedly caused by any Products. Manufacturer shall also include Representative as an additional insured on its product liability insurance policy and shall provide Representative with a certificate evidencing thereof. This section shall survive the expiration or earlier termination of this Agreement.
- h) Manufacturer shall furnish Representative, at no expense to Representative, reasonable quantities of 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 the Manufacturer shall be returned to the Manufacturer at its request.
- i) Whenever Representative, at Manufacturer's request, takes possession of any Products for the purpose of delivering such Products to customers or for any other purpose, the risk of loss or damage to or destruction of such Products shall be borne by the 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 shall not, directly or indirectly, during the term of this Agreement and for a period of eighteen (18) months following the expiration or earlier termination of this Agreement, solicit, hire, retain or otherwise engage or go into business with any individual who is or was employed or retained by Representative at any time during the six (6) month period prior to the date on which Manufacturer solicits, hires, retains, or otherwise engages such person for the purpose of soliciting or promoting the sale of Products in the Territory.

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*The representative should consider negotiating with the Manufacturer for Payment of transportation and all other expenses relating to the representative's personnel attending a sales meeting or training seminar at the specific request of the manufacturer.*

**8. Term of Agreement and Termination.** This Agreement shall be effective on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and shall continue for \_\_\_\_\_ (\_\_\_\_) year(s) until the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, and thereafter shall automatically renew for successive one year periods unless either party gives written notice to the other of its intent not to renew this Agreement not later than \_\_\_\_\_ (\_\_\_\_) days prior to the end of initial term or any renewal term. Notwithstanding the foregoing, this Agreement may be terminated by either party upon a material breach of this Agreement by the other party; provided that the party claiming such breach shall give the other party written notice thereof setting forth the alleged breach in reasonable detail, and the other party shall have thirty (30) days from the date of its receipt of such notice to cure any alleged breach.

*The date on which the agreement is to become effective, the term and the expiration date should be filled in. The term of the agreement may be for a specific period of time, or for a period of time which will automatically continue if the agreement is not terminated by written notice from one party to the other.*

*The number of days required for written notice of termination should be negotiated. The representative should also consider negotiating for a contract that will not permit cancellation for one (1) year (or more) unless there is a mutual agreement to terminate, there is bankruptcy involving one of the parties, or the business of one of the parties is discontinued.*

*The termination provision could also include any one or more of the following:*

- a) *By mutual agreement.*
- b) *By either party in the event that the other shall file or has filed against a petition of bankruptcy (which is not dismissed within thirty (30) days after it is filed), or makes an assignment for the benefit of creditors.*

**9. Rights Upon Termination.** Upon termination of this Agreement for any reason, Representative shall be entitled to:

- a) 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; and
- b) Its share of split commissions on Orders dated or communicated to Manufacturer prior to the effective date of termination, regardless of when such Orders are shipped.
- c) Commissions referred to in this Section No. 10 shall be paid on or before the \_\_\_\_\_ day of the month following the month in which the Manufacturer receives payment for the Orders.

*In addition representative may be entitled to, and should consider the addition of the following:*

*"In the event of termination, Manufacturer shall make its customer orders and shipping records available to the Representative, or the Representative's duly authorized agent, for inspection at the Manufacturer's place of business."*

*In addition to the commissions referred to in this Section No. 10, there are a number of ways to reward representatives for services or tenure, some of which are as follows:*

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- a) The Representative shall be paid full Commissions when due on all Orders dated during the sixty (60) day period immediately following the effective date of termination. In addition, the Representative will be paid one-half commission when due on all Orders dated during the 60-day period commencing on the 61st day and concluding on the 120th day following the effective date of termination. (The number of days can be changed to fit the circumstances.)
- b) *By establishing a program of “severance payments.” For example: One month’s severance pay for each 2 full years as the Representative of the Manufacturer, with a maximum number of months of severance pay which can be earned (i.e., 12 months). Severance payments shall be paid monthly commencing with the 10th day of the month after the effective date of termination. Each payment shall be 1/12th of the total commissions payable to the Representative in the 12 full calendar months preceding the effective date of such termination. The number of monthly “severance payments” might be:*

*(The following are examples of severance arrangements which may be negotiated. If representative has been involved in substantial market developments, he should consider an arrangement which provides for more substantial severance payments.)*

<b>Number of Consecutive Years as a Representative for the Manufacturer</b>	<b>Number of Monthly Severance Payments</b>
More than 2 years but less than 4 years	1
More than 4 years but less than 6 years	2
More than 6 years but less than 8 years	3
More than 8 years but less than 10 years	4
More than 10 years but less than 12 years	5
More than 12 years but less than 14 years	6
More than 14 years but less than 16 years	7
More than 16 years but less than 18 years	8
More than 18 years but less than 20 years	9
More than 20 years but less than 22 years	10
More than 22 years but less than 24 years	11
More than 24 years but less than 26 years	12



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*By payment of a portion of future commissions for a period of time after termination, depending upon the number of years of service (i.e., if the representative has served the manufacturer 10 years, one-half of commissions that would have been earned by the representative if the contract had continued in force during the three-year period following the date of termination).*

*Provide for greater severance payments in the event of termination when a manufacturer intends to service the territory through a direct factory salesman or a former employee of the manufacturer who is or intends to become a sales representative.*

**10. General.** This Agreement, together with any attachments, contains the entire understanding of the parties, shall supersede any other oral or written Agreements, and shall be binding upon, or inure to the benefit of, the parties' successors 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.

*The representative might also consider the establishment of a manufacturer-sales representatives council (made up of company delegates and a delegate from each [or selected] sales representative firm(s) of the manufacturer) to discuss and exchange ideas of mutual benefit to the manufacturer and the representative. Sales representatives and manufacturers can benefit by the exchange of ideas, and the sales representative may be very helpful to the manufacturer in product and market development and planning. Manufacturer should pay transportation and other expenses relating to the representative's attendance at meetings of the council.*

a) This Agreement shall be construed according to the laws of the State of \_\_\_\_\_.

b) All notices under this Agreement shall be in writing and shall be sent by certified mail or overnight courier, as follows:

If to Manufacturer: \_\_\_\_\_

Attn: \_\_\_\_\_

If to Representative: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Attn: \_\_\_\_\_

or to any other address by written notice in accordance with this section. Any notice given hereunder shall be effective upon delivery.

c) Neither party shall assign any of its rights or obligations under this Agreement without the prior written consent of the other. This Agreement shall be binding upon the parties hereto, and their respective successors and permitted assigns.

d) This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement.

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- e) This Agreement is the entire agreement between the parties pertaining to the subject matter hereof, and supersedes all previous agreements, negotiations or understandings, written or oral, between the parties.
- f) This Agreement may only be modified, amended or supplemented by a writing executed by the parties hereto.
- g) In the event of any dispute between the parties arising from or relating to this Agreement, the prevailing party in such dispute shall be entitled to recover from the non-prevailing party its reasonable attorneys' fees and costs arising from or related to such dispute.
- h) No term or provision of this Agreement shall be deemed waived, and no breach or default shall be deemed excused, unless such waiver, consent or excuse is in writing, and signed by the parties hereto. A waiver by a party hereto of any breach or default by the other party to this Agreement shall not constitute a continuing waiver, or a waiver of any subsequent breach or default hereunder by the other party.
- i) In case any one or more of the terms or provisions in this Agreement should be declared by a court, arbitrator, or governmental agency or department to be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining terms and provisions contained herein shall not in any way be affected or impaired thereby.
- j) THE PARTIES AGREE THAT ANY SUIT, ACTION, OR PROCEEDING ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY TRANSACTION CONTEMPLATED HEREBY, SHALL BE INSTITUTED SOLELY IN THE UNITED STATES DISTRICT COURT FOR THE \_\_\_\_\_ DISTRICT OF \_\_\_\_\_, OR ANY COURT OF THE STATE OF \_\_\_\_\_ LOCATED IN \_\_\_\_\_ COUNTY, AND EACH PARTY IRREVOCABLY SUBMITS AND CONSENTS TO THE EXCLUSIVE JURISDICTION OF THOSE COURTS AND WAIVES ANY AND ALL OBJECTIONS TO JURISDICTION OR VENUE THAT ANY SUCH PARTY MAY HAVE UNDER THE LAWS OF THE STATE OF \_\_\_\_\_ OR OTHERWISE.

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

MANUFACTURER: \_\_\_\_\_

By: \_\_\_\_\_

Title \_\_\_\_\_

REPRESENTATIVE \_\_\_\_\_

By: \_\_\_\_\_

Title \_\_\_\_\_

