

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

These guidelines offer assistance to representatives and manufacturers when entering into contractual agreements.



GUIDELINES* FOR NEGOTIATING AGREEMENTS BETWEEN SALES REPRESENTATIVES AND MANUFACTURERS

1 Appointment and Acceptance:

Manufacturer appoints Representative as its exclusive selling representative to sell products (enumerated in Provision No. 3 hereof) in the territory (defined in Provision No. 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: 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 to be sold by the Representative 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 of services the agreement should list the product lines, products or services the representative 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.

4 Amount of Compensation:

Representative's compensation for services performed hereunder shall be ____% of the "net invoice price" of the Manufacturer's product shipped into Representative's territory. However, when engineering, execution of the order, or shipment involves different territories, the Manufacturer will split the full commission among the Representatives whose territories are involved. The Manufacturer will make this determination using the SIS determined by FCSI, MAFSI and NAFEM 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 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 manufacturers company. In either or both of these situations, the representative could also consider a more favorable severance 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 retainer fee or 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 accelerated 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) The establishment of a Representative's Fund in which the manufacturer would deposit a percentage of the commissions earned by the representative each month (in addition to commissions earned and paid the representative). And if the manufacturer terminates the representative without cause, the fund would be paid to the representative. However, if the representative terminates the contract, or if it is terminated by the manufacturer for cause, the manufacturer would retain the Representative's Fund.
- f) The opportunity to use a portion of the monies earned by the representative to purchase 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 a stock position. The procedure for purchasing the stock and the price to be paid for the stock should be carefully negotiated.

5

Computation and Payment of Commission:

- a) Commissions are due and payable on or before the ____ day of the month following the month in which the customer is invoiced; and if 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 electronically or by other means 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. Commissions paid during that period (listing the invoices on which commissions are being paid), and
 - 3. Commissions due and owing 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 shipping and mailing costs; taxes; insurance; and any allowances or discounts granted to the customer by the Manufacturer.

- e) "Order" shall mean any commitment to purchase Manufacturer's products which calls for shipment in to Representative's territory or which is subject to split commission in accordance with Provision No. 4 hereof.

The blanks should be completed with the day of the month on which commissions are to be paid, and the amount of the interest to be charged on commissions due and not paid. The representative might 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 dated, or
 2. The order is received by the manufacturer, or
 3. The order is accepted by the manufacturer, or
 4. The order is invoiced, or
 5. 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 possibility of the payment of commissions on distributor sales to the representative covering the territory in which the distributor makes the sale to its customer. It may also be possible to work out some split commission arrangement between the representative who covers the territory in which the distributor is located and the representative covering the territory in which the distributor's customer is located.
- d) Providing for the 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 him.

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 the 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 the Manufacturer, copies of all shipping notices, and copies of all correspondence and quotations made to the customers in the territory.

7

Terms of Sale:

All sales shall be at prices and upon terms established by the Manufacturer and it shall have the right, after detailed discussion with their representative, 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, make price quotations or delivery promises without the Manufacturer's prior approval.

8

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.

- 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 employee 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 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 or claimed breach of warranty in any way resulting from the sale of Manufacturer's products. Manufacturer will 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.
- 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 the Manufacturer shall be returned to the Manufacturer at its request.

Whenever Representative, at Manufacturer's request, takes possession of Manufacturer's products for the purpose of delivering such products to customers 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.

The Representative could consider negotiating with the Manufacturer for:

- a)** 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.
- b)** For a "most favored nations clause" (i.e., 'Any rights, payments or other benefits provided in any other agreement between the manufacturer and a sales representative [in effect during the term of the agreement] which are not provided in this agreement or which are more favorable than those provided in this agreement, shall be deemed to be incorporated into this agreement as though they were set forth herein verbatim'). In this connection, the representative should ask the manufacturer for the opportunity to review other agreements with representatives so that the representative will be aware of the provisions and arrangements which are different from those suggested by the manufacturer for the agreement being negotiated.

9 Term of Agreement and Termination:

This agreement shall be effective on the day of ____ 19____, and shall continue for ____year(s) until the ____day of 19____. It shall be automatically renewed from year to year thereafter unless terminated by either party upon ____days notice to the other by registered mail or certified mail prior to the end of the initial term of this agreement, or any renewal term.

The date on which this 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 might 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 either party upon ninety (90) days written notice to the other in the event of unreasonable or repeated failure to perform as agreed.
- b) By mutual agreement.
- c) 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.

10 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 Provision No. 10 shall be paid on or before the day of 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 Provision No. 10, there are a number of ways to reward representatives for services or tenure, some of which are as follows:

- a) The representative shall be paid full commissions when due on all orders dated during the ninety (90) 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 +0-day period commencing on the 91st day and concluding on the 150th day following the effective date of termination. (The number of days can be changed to fit the circumstances.)

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.)

No. of Consecutive Years as a Representative for the Manufacturer	No. of Monthly Severance Payments
More than 2 years/less than 4 years	1
More than 4 years/less than 6 years	2
More than 6 years/less than 8 years	3
More than 8 years/less than 10 years	4
More than 10 years/less than 12 years	5
More than 12 years/less than 14 years	6
More than 14 years/less than 16 years	7
More than 16 years/less than 18 years	8
More than 18 years/less than 20 years	9
More than 20 years/less than 22 years	10
More than 22 years/less than 24 years	11
More than 24 years/less than 26 years	12

- c) 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.)
- d) In the event of the termination of the representative for any reason, the manufacturer agrees to be fair and reasonable in compensating the representative for the representative's efforts in developing customers in the territory which place orders or can reasonably be expected to place orders after the effective date of termination.
- e) 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.

11 General:

This agreement 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 for selected) sales representative firm(s) of the manufacturer) to discuss and exchange ideas of mutual benefit to the manufacturer and the representative. Sales representative, 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) 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 the 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.

**The format and considerations do 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 recommendations, as every relationship between representative and 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 problems and the formalization of an agreement.*

THE CONTRACT'S THE THING!

There are still some in this industry who go back in time to when the only contract you needed between a manufacturer and a representative was a handshake. In today's business world, with the changes taking place as rapidly as they are, when the manager of today is gone off to another company tomorrow, those companies that have not bound their businesses to the clear definitions of a written contract between them may find themselves deep in controversy and litigation that will take months or years to unravel. We are faced with these realities in our modern business world...

Manufacturing firms are merging:

The company we started out doing business with five years ago can be an entirely different one today. And the difference could very well not be in our favor.

People change faster than companies:

Name the company you represent that hasn't had a change in sales or marketing management (from district on up to headquarters) in the last five years.

Unlike many years ago, most representative firms today have become business entities:

Representative firms operate on a long-term basis and provide their principals with continuity of management. These contracts insure that continuity.

We constantly have government looking over our shoulders:

Demanding that we put everything into contract language to protect ourselves from future problems in any kind of litigation. Every so-called "Sales Representatives Protection Act" legislation has as its recurrent theme: "Put it in writing,"

What to say in the contract? What to cover?

The contract on the following pages was not developed on a one-sided or biased basis. It provides recommendations and suggestions for contract language that will positively reinforce the best type of agreement.

WE'RE BOTH NOT THE SAME AS WE USED TO BE. AND, AS A RESULT, OUR RELATIONSHIP FLUCTUATES...

We all have short memories:

What we started out promising to do and being promised would be done for us become hazy and complex with each passing year. We have a tendency to forget (without reference to something in writing) what our original intent was when we first talked about our mutual responsibilities.

Our needs change:

Our outlook changes. The business gets more and more complicated. We're both not the same as we used to be. And, as a result, our relationship fluctuates over the years.

How to start?

After the interview and the agreement by both sides that there is a healthy "mix" between the two of you, the manufacturer and the representative should sit down with this contract format and review each area in detail, making notes as to changes, additions, deletions. Following this preliminary approach, each party should then review the contract to see if there are any items not included that they require as part of their agreement.

Then call in counsel to make the necessary arrangements for further strengthening the agreement, get it into proper language and get it typed and signed into effect. This detailed, painstaking process is more traumatic than a handshake. But it's a more businesslike approach that can add lasting value to your relationship.

RECOMMENDED PRINCIPAL/REPRESENTATIVE AGREEMENT

Name of Officer: _____

Address: _____

Name of Principal: _____

Address: _____

Dear Name of Officer:

This letter confirms that Name of Principal (hereinafter "The Company"), and any of the Company's subsidiaries or related companies, engages Name of Manufacturers' Representative Agency Company (hereinafter "The Representative") commencing Date under the following terms and conditions:

1. The Representative shall keep the Company informed as to the general conditions which pertain to or affect the sale of its products.
2. The Representative will serve as an independent contractor and be responsible for payment of all applicable social security, withholding and other employment taxes. The Representative will bear all expenses incurred in its sales endeavors except those which the Company agrees to pay for in writing.
3. The Representative will diligently promote the sale of the Company's products and act as the Company's exclusive sales representative for all accounts (recite territory) and will make no representations, warranties or commitments binding the Company without the Company's prior written consent. Additionally, there shall be no house accounts or non-commissionable accounts in the territory unless accounts have been thoroughly reviewed and mutually agreed upon by both parties.
4. The Company agrees to promptly pay the Representative, as compensation for his/her services a commission of (specify) on the gross invoice amount of sales shipped into the Representative's exclusive territory. Payments (including all payments due for sales representatives and road staff hired and supervised by the Representative) shall be sent immediately to the Representative on or before the ()th day of the month following the month in which the goods are shipped (or payment is received directly by the Company). The commission rate specified in this paragraph cannot be changed unless mutually agreed upon in writing.
5. The Representative shall receive commission on all shipments into its exclusive territory. Commissions shall also be paid on all orders originating from customers within the Representative's exclusive territory, regardless whether said orders are sent by the Representative or received directly by the Company from customers over the telephone, through the mail, by FAX, or through other means without the Representative's assistance. The Representative will also receive a split commission in accordance with the Specifier Identification System (SIS) approved by FCSI, MAFSI and NAFEM. There will be no deductions or chargebacks from the Representative's commission for any reason without the express written consent of both parties and the Representative shall not be responsible for the payment or collection of delinquent accounts.
6. The Company shall provide the Representative without charge the necessary supplies, promotional materials, reprints of advertisements, and such other items as the Company may deem advisable for promotion of its business and will make available to the Representative those pamphlets, advertising, promotional and sales materials free of charge and in reasonable quantities.

7. The Company shall maintain an accurate set of books and records regarding commissions due and shall furnish the Representative with copies of all invoices within () days. Commission statements containing accurate purchase order numbers, shipping dates, customer's names and address, invoice numbers and invoice dollars amounts.
8. The Company agrees to employ the Representative for a minimum period of (specify) from the effective date hereof through (specify). This Agreement cannot be shortened without the express written consent of both parties. In the event notice of termination is not sent by either party via certified mail, return receipt requested at least (3) months prior to the effective termination date, this Agreement shall be automatically renewed, under the same terms and conditions, for an additional (specify) period.
9. At the termination of this Agreement, a final accounting shall be made between the parties, The Company shall maintain an accurate set of books and records regarding commissions due the Representative following the termination of this Agreement and the Representative shall be paid full commission on all accepted orders in-house (optional: re-orders) at the date of termination which are shipped after the termination date. In the event the Company terminates this Agreement after it has been in effect for at least One (1) year, the Company agrees to pay the Representative a termination fee in an amount equal to One (1) month's average commissions, based on the twelve (12) calendar months preceding the month of the effective termination date, multiplied by the number of years this Agreement was in effect on the date of such termination; and said termination fee shall be paid within two (2) weeks after the termination of this Agreement.
10. During the term of this Agreement and for a period of One (1) year thereafter, neither party will hire or otherwise utilize the services of any employee or sales associate of the other. Both parties agree that the loss of such employee or sales representative would result in irreparable harm and grants to the other the right to seek damages and an injunction in a court of equity or other competent jurisdiction to enforce its rights hereunder. Arbitration Clause: Any case or controversy arising among or between the parties hereto, this Agreement or the subject matter herein, shall be settled by arbitration in the State of (specify) under the then prevailing rules of the American Arbitration Association. The decision of the arbitrators shall be final and binding and the prevailing party shall be entitled to recover all reasonable attorney fees and costs.
11. The Company shall provide the Representative with the names of all persons and companies within its exclusive territory requesting information on the Company's products, together with general correspondence, quotes, supply, price and timely delivery information.
12. The Company agrees to indemnify and hold the Representative harmless against any and all losses, legal fees, court costs and reasonable expenses arising from or in connection with claims for the infringement of any patent rights, property damage or personal injury arising from the products manufactured by the Company or sold by the Company pursuant to this Agreement.
13. This Agreement forms the entire understanding between the parties. It cancels and supersedes all prior agreements and understandings. There shall be no change or modification of any of the terms in this Agreement unless it is reduced to writing and signed by both parties.
14. This Agreement shall be binding upon each of the parties hereto, their heirs, successors, assigns and successors in interest.
15. If any term or provision of this Agreement shall to any extent be invalid or unenforceable, the remainder of the Agreement shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.
16. Any failure by either party to enforce this Agreement at any time or to exercise any option provided for herein will not constitute a waiver of any provisions of this Agreement.

17. All notices called for under this Agreement must be in writing and will be deemed given when mailed, certified mail, return receipt requested, to a party at its address written above or at such other address as a party may hereafter designate in writing to the other party.

Name of Officer, we look forward to working with you on this matter. In that regard, please sign this original Agreement in the spaces below where indicated and return it promptly to our office; you should keep the copy for your files.

Very truly yours,

Name of Agency Company: _____

By: _____

Name of Officer: _____

Title: _____

Date: _____

Accepted and Agreed to: _____

By: _____

Name of Officer: _____

Title: _____

Date: _____