

Put It In Writing!

ERA developed a contract format that is easily usable by both manufacturers and manufacturers' representatives. Through this specimen, ERA provides a basic contract form with alternatives in various parts of the agreement to meet the particular or specific needs of a manufacturer and a representative. This form contract is not a one-size-fits-all approach expressly because one size does not fit all. The form should be used as a starting point in negotiations in close consultation with your attorney to find the best approach to govern your own principal-rep relationship.

While not every provision in this specimen contract is critical for inclusion in each principal-rep relationship, a few of the more important features contained in, or conspicuously absent from, this ERA template include:

- * Rights upon termination of the contract. Both parties may have business reasons for needing to terminate, but the agreement should include payment of post-termination commissions on sales secured by the rep to provide protection against an "opportunistic termination" by a principal looking to avoid paying commissions after the rep's efforts have proved (or are about to prove) successful.

- * Maintaining the right to trial by jury. Many contracts include arbitration provisions based on a belief that any disputes that arise will be handled faster, cheaper and more "manageably" through arbitration. Too often, they are none of these. Court proceedings, where recognized rules of discovery and evidence apply, and the right to appeal is preserved, are preferred.

- * Exclusivity. The rep should have the exclusive right to represent the manufacturer in an assigned territory or to specific accounts. Neither other sales personnel nor the manufacturer itself should have the right to dilute the independent rep's exclusivity. Of course, a provision clearly providing that the rep will be compensated on all sales regardless of the source may meet the needs of the manufacturer or other sales professionals to stay involved in the territory while also protecting the contracting rep.

- * House Accounts. To be avoided insofar as possible, house accounts are sometimes so vital to the perceived interests of the principal that failing to accept them can be a deal-breaker. When they prove to be a necessary evil, all house accounts must be set out at the time the contract is entered, and it is essential that any additions to the list may be added only with the consent of (translation: consideration provided to) the rep.

- * Indemnity/Hold Harmless Provisions. Manufacturers frequently insist the sales rep hold them harmless and indemnify them against any conduct or the making of any representations that may lead to claims asserted by third-parties. Such provisions can be agreed to, but they should be made mutual, and the manufacturer should agree to likewise hold harmless and indemnify the rep against design and manufacturing defects, service issues, antitrust or intellectual property claims, and other potential liability areas over which the rep has no control.

REMEMBER: This form contract is only an exemplar; it is not a fill-in-the-blank document, but should be utilized only in close consultation with your attorney.

**THIS AGREEMENT WAS PREPARED BY
SCHOENBERG, FINKEL, NEWMAN & ROSENBERG, LLC,
LEGAL COUNSEL TO THE
ELECTRONICS REPRESENTATIVES ASSOCIATION**

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SALES REPRESENTATIVE AGREEMENT

This Sales Representative Agreement (the "Agreement"), is made as of the ____ day of _____, 20____, between _____, a _____ (the "Company"), and _____, a _____ (the "Representative").

RECITALS

WHEREAS, the Company is a manufacturer of electronics and related products; and

WHEREAS, the Company and the Representative desire that the Representative solicit and promote the sales of the Company's products in accordance with this Agreement;

NOW, THEREFORE, in consideration of the foregoing and of the covenants and agreements herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Appointment and Acceptance. The Company appoints the Representative as its exclusive independent sales representative to solicit and promote the sales of the products set forth on Exhibit A attached hereto (the "Products") in the territory set forth on Exhibit B attached hereto (the "Territory"), and the Representative accepts the appointment and agrees to solicit and promote the sales of the Products within the Territory. The Representative shall at all times have the exclusive right to solicit and promote the sales of Products in the Territory, and except for those house accounts listed on Exhibit C attached hereto, at no time during the term of this Agreement shall the Company take any customer "in house" or otherwise limit the Representative's right to solicit or promote the sales of 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. Compensation.

(a) [OPTIONAL] The Company shall pay to the Representative a stipend in the amount of _____ Dollars (\$_____) per month until the first to occur of (i) the _____ (____) full month following the date hereof, or (ii) the first month following the month in which the Company has paid to the Representative Commissions (as defined below) in the aggregate amount of not less than _____ Dollars (\$_____).

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(b) The Company shall pay Representative commissions (“Commissions”) for all Orders (as defined below) received from customers in the Territory [at the rate(s) set forth on Exhibit D attached hereto] [at the rate of _____% of the Net Invoice Price paid by a customer]. For purposes hereof, the term “Net Invoice Price” means the invoice price (after any price rebates) less separately stated costs for any sales or excise taxes, insurance, shipping and freight. Commissions shall be earned when an Order is accepted by the Company. For purposes of this Agreement, the term “Order” includes, without limitation, purchase orders as well as “planned orders,” “blanket orders” (whether with or without specified delivery dates), “follow-on orders” (for the repeat supply of Products whether under the original order or under a different order), and volume purchase agreements (whether with or without specified delivery dates).

(c) Commissions are deemed earned when the Company accepts an Order, but are not due and payable until the 10th day of the month immediately following the month in which the Company has shipped Products to a customer in the Territory. The Company shall provide to the Representative, not later than the 10th day of each month, an accounting of all amounts received by the Company for which the Representative is due a Commission hereunder. The Company shall also provide to the Representative, not later than the 10th day of each month, a POS report with respect to all distribution sales to the Accounts and in the Territory. If Commissions are paid on an amount less than the invoiced amount, documentation will be supplied upon the Representative’s request justifying the difference in reasonable detail.

(d) If an Order is designed in one territory in which the Company has an independent sales representative, but shipped into another territory in which Company has an independent sales representative, the Company shall pay a split Commission as follows: _____ percent (____%) of the Commission shall be paid to the independent sales representative in whose territory the design-in occurred, and _____ percent (____%) of the Commission shall be paid to the independent sales representative in whose territory the order was shipped. In no event shall the Company retain any portion of commissions due for the sale and/or shipment of Products to customers in the Territory, and the entire Commission shall be paid to the independent sales representatives who participated in the order.

(e) There shall be deducted from any Commissions payable to the Representative an amount equal to (i) Commissions previously paid on sales of Products which have since been returned by a customer or on allowances credited to a customer by the Company, and (ii) Commissions previously paid on sales which the Company shall not have been fully paid by the customer whether by reason of the customer’s bankruptcy, insolvency, or any other reason which, in Company’s commercially reasonable judgment, renders the account uncollectible. If any sums are ever realized upon such uncollectible accounts, whether prior to or after the expiration or termination of this Agreement, the Company will pay the Representative the Commission applicable at the time of the original sale upon the net proceeds of such collection, regardless of when such sums are received by the Company.

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3. Acceptance of Orders. All Orders are subject to acceptance or rejection by the Company at its home office and to the approval of the Company's credit department. The Company shall be responsible for all credit risks and collections.

4. Terms of Sale. All sales shall be at such prices and upon such terms as shall be established by the Company from time to time. The Company shall advise the Representative of all such changes in a timely manner. The Representative shall not accept Orders in the Company's name or make price quotations or delivery promises without the Company's prior approval.

5. Duties of the Representative. The Representative:

(a) shall devote such time and effort as is reasonably necessary to solicit and promote the sales of Products to customers in the Territory;

(b) shall conduct all of its business in its own name and in such manner as it sees fit, pay all expenses of its offices and activities, and be responsible for the acts and expenses of its employees;

(c) shall not, without the Company's prior approval, accept, alter, enlarge, or limit Orders, make representations or guarantees concerning any Product or accept the return of, or make any allowance for, any Product, unless the same shall have been approved by the Company; and

(d) shall not use or disclose any Confidential Information (as defined below) of the Company except to the extent necessary to perform its duties under this Agreement. For purposes of this Agreement, "Confidential Information" means all confidential or proprietary information regarding the Company or the Products.

6. Duties of the Company. The Company:

(a) 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;

(b) shall furnish to the Representative, at no expense to the Representative, samples, catalogs, literature and any other material necessary for the proper promotion and sale of the Products. Any literature which is not used or samples or other equipment belonging to the Company shall be returned to the Company at its request and at its expense;

(c) shall refer to the Representative all sales leads received by it from within the Territory;

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(d) shall, upon the Representative's reasonable request, provide the Representative with copies or access to all of the Company's books and records pertaining to the sale of Products in the Territory, including electronic data; and

(e) shall not, without the Representatives written consent, directly or indirectly, during the term of this Agreement and for a period of twenty-four (24) months following the expiration or earlier termination of this Agreement, solicit, hire, retain or otherwise engage or go into business with any individual or entity which is or was employed, retained or subcontracted by the Representative at any time during the twelve (12) month period prior to the date on which the Company solicits, hires, retains, or otherwise engages such person for the purpose of soliciting or promoting the sale of Products in the Territory.

7. Relationship of the Parties. Nothing in this Agreement shall be construed to constitute the Representative as the partner, employee or agent of the Company nor shall either party have any authority to bind the other in any respect, it being intended that the Representative shall remain an independent contractor responsible only for its own actions. The Representative will have sole control of the manner and means of performing under this Agreement. The Company shall not have the right to require the Representative to do anything which would jeopardize the relationship of independent contractor between Company and Representative. All information and data developed by either party, whether prior to, during the term of, or following the expiration or termination of this Agreement, is and shall remain the sole property of such party.

8. Indemnification.

(a) The Representative shall indemnify, defend, and hold the Company harmless from and against, and to pay all of the Company's losses, costs, damages and expenses, including, without limitation, reasonable attorneys' fees and costs, which the Representative may sustain or incur on account of any injury or death to any person or damage to any property or both caused by any act or omission of the Representative.

(b) The Company shall indemnify, defend, and hold the Representative harmless from and against, and to pay all of the Representative's losses, costs, damages and expenses, including, without limitation, reasonable attorneys' fees and costs, which the Representative may sustain or incur on account of (i) any infringement or alleged infringement by the Products of any patent, copyright, trademark, trade name, or other intellectual property right of any third party; (ii) any product warranty claim 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 by any Products. A certificate of insurance naming the Representative as an additional insured party on the Company's product liability insurance policy will be provided to the Representative upon the signing of this Agreement.

9. Term and Termination.

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(a) This Agreement shall commence on the date hereof, and shall continue until the _____ (____) anniversary of the date hereof, and thereafter shall automatically renew for successive one (1) year periods unless either party gives written notice to the other of its intent not to renew this Agreement not later than ninety (90) days prior to the end of initial term or the then current renewal term.

(b) Notwithstanding anything to the contrary contained in Section 9(a) above, this Agreement may be terminated by either party:

(i) 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 sixty (60) days from the date of its receipt of such notice to cure any alleged breach;

(ii) if the other party assigns this Agreement in breach of Section 17 below;

(iii) if the other party shall be convicted of a felony or shall institute proceedings to be adjudicated a voluntary bankrupt or shall consent to the filing of a bankruptcy proceeding against it or shall file a petition or answer or consent seeking reorganization under any applicable federal or state law or shall consent to the filing of any such petition or shall consent to the appointment of a receiver or liquidator, trustee or assignee in bankruptcy or insolvency of it or its property or shall make an assignment for the benefit of creditors or shall admit in writing its inability to pay its debts as they become due; or

(iv) if the person(s) controlling the other party as of the date hereof ceases to control such party.

10. Rights to Commissions Upon Termination.

(a) Upon the termination of this Agreement by the Company pursuant to Section 9(b) above, the Representative shall be entitled to receive Commissions for all Products shipped by the Company into the Territory prior to the effective date of such termination.

(b) Unless this Agreement is terminated by the Company per Section 9(b) above, then notwithstanding such termination, the Representative shall be entitled to receive commissions on all orders procured by the Representative before termination which are received and accepted by Company at any time during the three years following termination, regardless of when such orders ship or when payment is received from the customer.

(c) If the Company sells all or substantially all of its assets outside of the ordinary course of business to a buyer which does not accept an assignment of this Agreement and agree to assume and be bound by all of its provisions, this Agreement shall thereupon terminate and the Company

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shall pay to the Representative, as liquidated damages and not as a penalty, an amount equal to the aggregate amount of Commissions paid to the Representative by the Company during the three (3) month period immediately prior to the date the Company consummates such sale.

11. Entire Agreement. This Agreement contains the entire agreement of the parties with respect to the subject matter hereof, and supersedes all prior written or oral agreements, understandings, or arrangements.

12. Law Governing. This Agreement shall be governed by, construed, and enforced in accordance with the internal laws of the State of _____, without regard to the choice of law principles of the State of _____ or of any other jurisdiction.

13. CONSENT TO JURISDICTION AND VENUE. 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.

14. Severability. In case any one or more of the 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 provisions contained herein shall not in any way be affected or impaired thereby.

15. Headings. The headings contained in this Agreement are for convenience of reference only, and are in no way intended to describe, interpret, define, or limit the scope, extent, or intent, of this Agreement or any provision hereof.

16. Waiver. No failure by either party hereto to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder by either party preclude any other or future exercise of that right or any other right hereunder by that party.

17. Assignment. This Agreement may not be transferred or assigned by either party in whole or in part without the prior written consent of the other party. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective permitted successors and assigns.

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18. Notices. All notices hereunder shall be given in writing via registered or certified mail, return receipt requested, postage pre-paid, or overnight courier, addressed to the parties as follows:

If to the Company:

Attn: _____

If to the Representative

Attn: _____

or at such other address as may from time to time be designated by either party to the other hereunder in accordance with this section. All notices and communications given hereunder shall be effective and deemed given, if mailed, on the date of receipt, as evidenced by the acknowledgment of receipt issued with respect thereto by the applicable postal authorities and, if delivered by overnight courier, on the date of receipt, as evidenced by the signed acknowledgment of receipt of the person to whom such notice or communication shall have been addressed, as applicable.

19. Attorneys' Fees. 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.

20. Counterparts; Electronic Delivery. 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. A counterpart of this Agreement executed and delivered by facsimile or electronic mail shall be equally as effective as delivery of a manually executed counterpart of this Agreement. Any party delivering an executed counterpart of this Agreement by facsimile or electronic mail shall also deliver a manually executed counterpart of this Agreement, but the failure to deliver a manually executed counterpart shall not affect the validity, enforceability, and binding effect of this Agreement.

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.

[COMPANY]

[REPRESENTATIVE]

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

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EXHIBIT A

PRODUCTS

[All products from time to time offered for sale by the Company]

or

[List specific products to be promoted by the Representative]

The term "Products" included non-recurring engineering charges, but excludes charges for tooling.

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EXHIBIT B

TERRITORY

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EXHIBIT C

HOUSE ACCOUNTS

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[EXHIBIT D

COMMISSION RATES]