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BASIC ISSUES TO NEGOTIATE WHEN ESTABLISHING A FOREIGN AGENT OR DISTRIBUTOR RELATIONSHIP

1. **Agent or Distributor?** Will the foreign representative have the authority to act on behalf of Company in relation to customers? Will the representative negotiate the terms of sale between Company and customers and receive a commission for sales? If so, the representative will generally be classified as an agent. Some countries have special legislation that protects agents which cannot be overridden by the contract.

If the representative will purchase the product at a discount and resell in its own name then the relationship is best classified as a distributorship. The distributor makes its money through a mark up in price - the difference in the price it purchases and the price it sells the product. Some countries have special legislation that protects distributors which cannot be overridden by the contract.

2. **Exclusivity.** The grant of exclusivity has many different aspects: a) Will the representative be Company's exclusive representative in the territory? b) Must the representative purchase products exclusively from Company? c) Must the representative refrain from selling or manufacturing products which are competitive with the products of Company? d) Must the representative refrain from representing any manufacturer which Company considers to be one of its competitors?
3. **Territory.** Does Company want to reserve the right to sell or manufacture in the territory on its own? Does Company have any existing customers or potential customers in the territory? Will indirect sales in the territory by Company be a violation of the grant of exclusivity to the representative?

For additional information, please contact Jean Schtokal at 517.371-8276, or via e-mail at jschtokal@fosterswift.com



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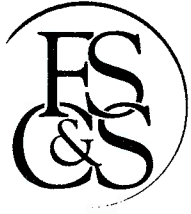
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4. Detailed Description of Products Subject to the Agreement.
5. **Commissions and Discounts.** How will the representative be paid?
6. **Performance Standards.** Will specific performance quotas or minimum purchase requirements be used to evaluate performance? Will minimum inventory requirements apply? What duties and obligations will apply to the representative? What duties and obligations is Company willing to accept?
7. **Terms and Conditions of Sale.** Will Company's general terms and conditions of sale be applicable? Are they sufficient for out of state/country sales? What are the payment terms and conditions if the representative is purchasing Company product? Will the price be paid in U.S. currency; who will assume the foreign exchange risk? Will an irrevocable confirmed letter of credit be required? Are parties signatories to the U.N. Convention on Contracts for the International Sale of Goods, which is an international "uniform commercial code" that is automatically applicable to contracts for the sale of goods between parties of member states. Does Company wish to have that Convention or the Uniform Commercial Code as adopted in the applicable U.S. state apply to these sales? Some disadvantages of relying on the Convention as opposed to the Uniform Commercial Code are that no body of established jurisprudence interprets the Convention and no authoritative forum ensures consistent interpretations world wide. It can be generally said, however, that the Convention has the effect of keeping a troubled contract moving forward to a greater extent than the Uniform Commercial Code.
8. **Federal Tax Issues.** The issue of where title to the product passes is an important U.S. federal tax issue. If title passes abroad at the foreign port of shipment, the transaction becomes a foreign sale. By creating a foreign sale, Company can attempt to maximize its "foreign source income". Company should consult with its accountants to determine whether income from these transactions is best classified as U.S. or foreign source, based upon Company's particular tax circumstances. Company will need to take that into account in negotiating and drafting the contract.

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9. **Term.** What will be the length of the contract? Should the contract provide for any renewals? Will renewals be automatic? Is there protective legislation where the sales representative is located which will determine the term of the contract?
10. **Termination.** On what specific events will termination automatically result? What will constitute a breach of the contract? What breaches deserve notice and an ability to cure? What occurs upon termination? Will Company be obligated to repurchase any of the representative's product? Will the Company have to pay the sales representative termination payments even if they are not authorized by the contract? Do local laws in the place where the agent or distributor is located require termination payments?
11. **Service and Warranties.** Will the representative be responsible for service? Who will be responsible for warranty claims? Who will extend a warranty to customers? Can the representative modify any warranty extended by Company? Will the representative be eligible to purchase parts from Company? For how long (after termination of the contract)?
12. **Liability, Indemnity and Insurance.** Who will be responsible for products liability? Will either party indemnify the other? For what? Is it necessary for the representative to have insurance coverage (general liability covering property damage and/or products liability)?
13. **Confidentiality.** Will confidential information be provided to the representative? How will that information be protected?
14. **Choice of Law and Dispute Resolution.** Will the representative agree to have the contract governed by Michigan law? Is this possible under the foreign jurisdiction's law? How and where will disputes be resolved (through court action or arbitration)?
15. **Assignment.** Can the contract be assigned by either party (with or without approval of the other)?
16. **Record keeping.** Will the representative be willing to keep accurate and detailed records of all business performed and in that regard comply with the U.S. Export Administration Act?

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17. **Compliance with Certain Other U.S. Laws.** To protect the Company from being charged with U.S. law violations through its designated representative, the representative should agree to comply with the U.S. Foreign Corrupt Practices Act (anti-bribery) and U.S. Anti-Boycott laws, among others.
18. **Non Compete.** Are post termination non-compete agreements enforceable against the sales representative? Are they specifically enforceable?

Foster, Swift, Collins & Smith, P.C. is a 106-year old law firm with nearly 100 attorneys in four Michigan offices. The firm's legal solutions are the result of experience, hard work, sound judgement and first rate professionals working cooperatively for the benefit of Foster Swift clients. The firm's attorneys are members of the following client-centered practice groups: Administrative & Municipal • Banking, Finance & Real Estate • Business & Corporate • Commercial Litigation • General Litigation • Health Care • Labor & Employment • Trusts & Estates • Workers' Compensation

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