

GET IT IN WRITING

Most aspects of the relationship between an agent and its ISO are governed by the written agreement between the parties, the Agent Agreement. In order to modify the Agent Agreement, it is not sufficient to merely obtain a verbal consent to make a change or even an email from the other party. As I will explain in more detail in this article, you need to make all modifications or changes in writing and get that writing signed by all parties to the agreement.

One of the most common situations where a sales agent may potentially violate an Agent Agreement is where the agent seeks to move a merchant it has placed with a particular ISO to another ISO. Merchants may become upset with a particular ISO because it has taken additional funds for a reserve fund for example. In that instance, the merchant, although still willing to process with a particular sales agent, may wish the sales agent to place the merchant with a different ISO. However, every Agent Agreement contains a provision that prohibits the sales agent from moving the merchant to another ISO without the consent of the original ISO. Consequently, the sales agent must get the consent of the original ISO before moving the merchant.

Typically, the sales agent will notify the ISO that it wants to move the merchant to a new ISO. The ISO often will provide its consent either on the phone or via email. Most sales agents I have talked to think that if the ISO provides its “written” consent in the form of an email, that the sales agent can move the merchant without violating its Agent Agreement. The question becomes whether or not this consent via email by the ISO is sufficient to allow the sales agent to move the merchant to another credit card processor without violating the Agent Agreement.

The answer to the question is that under most circumstances, obtaining verbal authorization or even authorization via email from the ISO to move the merchant is not sufficient to provide proper consent under the Agent Agreement and may subject the sales agent to termination of its residual payments. The reason is that the typical Agent Agreement contains what is called an “integration clause” which states that the Agent Agreement contains the entire understanding and agreement between the parties and can only be modified by written agreement signed by both parties to the Agent Agreement. Since the verbal authorization or authorization via email is not signed by both parties to the Agent Agreement, it may not be effective to allow the sales agent to move a merchant or to do anything else that may violate the Agent Agreement.

There are other reasons that such a verbal or email consent may not be valid or may be grounds to assert the sales agent has violated the terms of the Agent Agreement. One issue is that person providing the consent may not be authorized to do so. In some of the larger ISOs or credit card processors, the typical sales agent deals with numerous people at the ISO. A risk manager or customer service representative may not have the

authority to consent to waive provisions in the Agent Agreement. Unless the person actually has the authority to do so, obtaining the consent of that person may not be sufficient to allow for a waiver of the terms of the Agent Agreement.

The consent you get may not be sufficient even if the person that you are dealing with is the president or owner of the ISO. Many people in our industry believe that they do not necessarily need to comply with the terms of the Agent Agreement by obtaining a signed written amendment signed by both parties to the Agent Agreement because they are getting consent from the owner of the ISO. The logic goes that since the owner of the ISO provided his/her consent that consent will be binding on the company forever. But, what if the owner sells the ISO as is so common in our industry?

Because there is considerable consolidation in our industry, the person that is in charge of an ISO today may not be in charge of the ISO in the near future. Obtaining the consent of the owner of an ISO to do a particular act, particularly if it is not in writing, may come back to haunt a sales agent in the future. A new regime that takes over at the ISO may oust the previous owner or other particular employees. Once they are no longer working at the ISO, the sales agent may not have anyone to prove that there was a knowing and valid waiver of the terms of the Agent Agreement.

The standard practice for sales agents under every such circumstance when they seek to do something in violation of the Agent Agreement should be to obtain a written amendment to the Agent Agreement. This need not be an onerous process. Once you have the standard body of the amendment, all you need to do is put in the particular terms that you are changing in order to allow for a clear written amendment to the Agent Agreement. For instance, you could have a standard form of amendment that allows the sales agent to move merchants to another processor where all that is necessary is to insert the name of the merchant in the document in order to have a valid and binding amendment. Of course, the sales agent must make certain that it obtains the signature of its ISO on this document before actually moving the merchant.

As to violations of the Agent Agreement that have occurred in the past, where the ISO has not provided its proper written consent, the sales agent would be well advised to have the ISO provide its proper written consent as soon as is possible. The typical situation I have witnessed is where a sales agent has moved merchants to other ISOs in violation of non-solicitation provisions in its Agent Agreement with its ISO. Of course, the ISO provided its "consent" to these transactions, usually on the phone or via email but the sales agent never obtained a formal amendment allowing it to move the merchants.

As explained above, this consent is not sufficient to fully protect the sales agent from the potential loss of its residual stream. I have prepared amendments to Agent Agreements for clients in situation where proper consent has not been obtained. In order to get the ISO to properly document its consent to these prior acts, it is necessary to

obtain its signature on the amendment to make sure that the sales agent does lose its residual.

Even if you have violated your Agent Agreement in the past and obtained consent via email or verbally, it is important for you to go back and obtain the proper written consent in the form of an amendment to the Agent Agreement and have it signed by the ISO in order to ensure that you continue to receive your residuals. Failure to do so could have drastic consequences for you, including the potential for losing your entire residual stream.

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