

IMPORTANT MERCHANT ADVANCE CONTRACT PROVISIONS

More and more of my clients are entering into contracts to sell merchant cash advance products. To assist in reviewing such agreements, I will highlight below some important provisions in the typical merchant advance reseller contract and provide hints on the types of provisions you should ask to be added to such contracts.

Changes to Compensation: Invariably, there is a provision in a merchant advance reseller agreement that allows the merchant advance company to change the commissions it pays to the sales agent. It is important to identify and ideally delete any such provisions. A sales agent should expect to be paid the same for each merchant it originates, assuming of course that the sales agent sells the merchants advance at the same discount rate. At a minimum, an agent should condition that any changes to the compensation plan be only applicable to merchants placed with the merchant advance company after changes in the compensation plan are made. That way, if the compensation plan is no longer competitive, the sales agent can place merchants with a different cash advance company while still getting paid at the same compensation level for merchants the agent has already placed with the cash advance company.

Indemnity: The sales agent should seek protection if the actions of the merchant advance company cause the sales agent to get sued. For instance, if a merchant advance company is aggressive in its collection efforts, the merchant could sue the merchant advance company and the sales agent that originated the merchant. The merchant should seek protection through an indemnity provision that states the merchant advance company will provide a defense for the sales agent in any lawsuit that arises from the actions of the merchant advance company and that it will also pay to settle that case. This is also an issue to the extent that the merchant advance company violates any laws in making the advance to the merchant. The indemnity provision should include a statement that if the merchant advance company is found to have violated any laws, the merchant advance company will protect the sales agent from any such claims.

Referring the Merchant Back: The sales agent should protect its relationship with the merchant if the merchant needs additional payment processing goods or services. To that end, the sales agent should add a provision to the agreement that states if the merchant wants any other goods and services, wants to get another merchant account or in any way needs any help unrelated to the merchant advance, that the merchant advance company will refer the merchant back to the sales agent. A sales agent does not want to have to compete with the merchant advance company when it comes to making more money from the merchants.

Exclusivity: Many merchant advance agreements state that the sales agent can only send merchant advance contracts to the one merchant advance company. It is important to identify such exclusivity terms and make sure they are deleted from the

agreement. Just to make sure, you would also want to add a provision that states unequivocally that the relationship is non-exclusive. Otherwise, if you send merchant advance contracts to a competitor, the merchant advance company that thinks you are exclusive could use that act as a reason to terminate your compensation under the agreement.

Non-Solicitation: The sales agent needs to be able to protect its agent base and potentially the merchants it places under the agreement. As such, the sales agent should have a non-solicitation provision added to the agreement that states the merchant advance company cannot directly contract with the sales agent's sub-agents to provide them with merchant advances, or any other payment processing services for that matter. An agent does not want to open itself up to potentially losing its sub-agents to the merchant advance company. The same is true of the merchants the sales agent places with a cash advance company. Once the merchant advance is over, the sales agent should be able to continue to provide payment processing to the merchant if it does not receive an ongoing residual from the merchant advance company or a related entity. The sales agent should seek to preserve its relationship and the profits it derives from the merchants under all circumstances.

Attorney's Fees: A sales agent should include a provision that states the prevailing party in any litigation is entitled to recover its attorney's fees from the losing party. A sales agent will most likely sue under the agreement if it is not paid its commission by the cash advance company. If that happens, the sales agent has an advantage if it is able to recover its attorney's fees as damages along with the unpaid commissions. A cash advance company will be more likely to settle the case sooner in the litigation process given the prospect of an ever growing legal bill that it is going to have to eventually pay.

Commission Amounts: Many cash advance contracts are structured such that the sales agent is paid part of its commission when the merchant initially gets its funds. In addition, most contracts provide that the sales agent also gets paid a portion of the funds that the merchant pays to the merchant advance company as the merchant repays its obligations. The sales agent should try to get as much, if not all, of the commissions it receives paid up front rather than be paid as the merchant repays its obligations. In addition, the sales agent should make sure that the commissions are fully earned when the cash advance is made and that the commission cannot be charged back if the cash advance company cannot collect from the merchant. Finally, the sales agent should make sure that the agreement clearly allows for the sales agent to be paid each time the merchant renews and takes another advance from the cash advance company.

Commission Payments: The sales agent should add language that makes clear that the commission payments continue for as long as the cash advance company is making money from the merchant, even if the agreement is terminated. The sales agent

needs to ensure that it is paid on renewal cash advances as a high percentage of the merchants renew the merchant advance and continue to do so repeatedly. It is important that the sales agent ensure it is paid on the renewals for so long as the merchant continues to renew the cash advances so that the sales agent can maximize its potential income under the agreement.

Make sure you carefully review any merchant advance contract for these terms and any other provisions that could potentially effect your commission payments. Cash advance appears to be here for the long term and most sales agents will be able to make a tidy profit from this new segment of our industry.

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