

NEGOTIATING AN AGENT AGREEMENT

When I am contacted by a new client to review an Agent Agreement, one of the first questions that I am usually asked is what are the various steps involved in negotiating an Agent Agreement. Below, I will discuss how the an Agent Agreement is negotiated from the perspective of a sales agent that is utilizing an attorney to review the contract. In this article, I will use the term “credit card processor” to refer to the wide variety of banks, ISOs and other organizations that are seeking sales agents to sell their credit and debit card products and services.

Choosing A Partner:

Whether you are a new sales agent looking to enter into the bankcard industry or an industry veteran that has decided it needs to find a new credit card processor, the first step in the process is identifying the best fit for you in terms of a credit card processor. In the current market, most credit card processors offer very similar pricing packages to their agents. Since price then, does not act as a great differentiator, the typical sales agent needs to find other ways to evaluate potential partners. Some of the things that sales agents use to evaluate potential partners are the credit card processor’s level of customer service, monetary incentives (i.e. free equipment or per-merchant bonuses) and technological features such as online applications. The most important thing to do is to make a list of the things that you as a sales agent require in a credit card processor and then go out and find the right partner.

In a number of instances, I have had sales agents come to me that have not done much industry research as to who would be the best partner for them. Instead, the sales agents may have only looked at one or two credit card processors and then made their decision on who to partner with after very little review. I find that under those circumstances the credit card processor that they have chosen is usually inadequate or may not be competitive for a number of different reasons.

In order to determine the best credit card processor for you, it is advisable to look at the various online forums and approach people knowledgeable in the industry to evaluate their relationships with credit card processors. A referral from one of these sources can be invaluable in picking the right partner for you. The objective is to make a well-informed decision about the credit card processor that you choose as your partner.

Starting the Negotiation Process:

Once you have made an informed decision as to who would be the correct credit card processor for you, the next step is to negotiate an Agent Agreement with that credit card processor. Your best course of action is to have the credit card processor send you

an electronic copy of their Agent Agreement in Word format via e-mail. It is important to obtain an electronic copy of the Agent Agreement so that your attorney can make any necessary changes in the body of the Agent Agreement. This redlined document can then be sent to the credit card processor's attorney for review. This leads to a much more efficient process of negotiating a contract rather than trying to handwrite in changes or use a separate document to set forth the changes that you are requesting in the Agent Agreement.

In my practice, once I receive an electronic copy of a contract, I have a checklist of items that I go through to make sure that the sales agent is adequately protected under the Agent Agreement. As can be expected, most of the contracts that I see are very one-sided and protect the interest of the credit card processor, but not necessarily the sales agent. My objective in reviewing and changing the Agent Agreement is to make sure it adequately protects the interests of the sales agent, while at the same time giving the credit card processor the comfort it needs to enter into the Agreement.

Depending on the Agent Agreement, I usually change or add anywhere from 10 to 15 substantive provisions in the Agent Agreement. Some of most the provisions I add include: insuring that residuals are paid upon the death of the sales agent; that the sales agent has the right to move merchants that are dissatisfied with the credit card processor; that the credit card processor cannot directly solicit the sales agents' sales offices and a right for the agent to sell its residual stream subject to a right of first refusal by the credit card processor. In addition, one of the main provisions that I usually have to modify is the "terms and conditions" under which the sales agents residual payments can be terminated.

Once I have made the appropriate changes to the Agent Agreement, I forward it either to counsel for the credit card processor or my client - the sales agent - who then forwards it to the credit card processor. After a period of time, the credit card processor will provide its responses as to whether or not it will allow the changes that I have proposed. In my experience, approximately 60 to 80 percent of the changes I propose are usually accepted by the credit card processor during this first round of negotiations. The final step in the contract negotiation is to close the gap on those remaining issues to find some compromise provisions that both parties can accept.

Closing the Deal:

Once the credit card processor identifies changes to the Agent Agreement that it is not willing to make, a conference call is often the next step in the negotiation process. During the conference call, the attorneys for both the credit card processor and the sales agent are on the call along with the business people for both parties. During the call, the goal is to find compromise provisions for the issues that are still outstanding. In my experience, the main subject matter of most of these calls is the terms under which the

agent's residuals can be terminated. Once the conference call is concluded, it is up to the attorneys to draft the compromise provisions which are circulated back and forth for another round of changes. Usually, the changes involved at this stage are fairly minimal and the parties can come to a decision as to the final version of the contract fairly quickly.

The last step in the process is to circulate the final version of the contract. It is important to carefully compare the final version to the prior drafts of the Agent Agreement to make sure that the final version reflects all of the changes that have been made throughout the process. If the changes are all reflected in the final document, it is time to sign the Agent Agreement. It is very important for the sales agent to get a copy of the Agent Agreement signed by the credit card processor. Many agents fail to do this and are left in a situation where they may not have a copy of the Agent Agreement to refer to at a later date or use in any litigation between the parties.

The process of negotiating an Agent Agreement is an important part of protecting your residual stream. The process itself is often long and frustrating, but the end results are usually worth it.

* Paul A. Rianda, Esq. is an attorney who has specialized in providing legal advice to the bankcard industry for the past 10 years. For more information about this article or any other matters, please contact Mr. Rianda at www.riandalaw.com, (949) 261-7895 or via email at paul@riandalaw.com

** The information contained herein is for informational purposes only and should not be relied upon in reaching a conclusion in a particular area. The legal principles discussed herein were accurate at the time this article was authored but are subject to change. Please consult an attorney before making a decision using only the information provided in this article.