

TERMS TO ADD TO AN AGENT AGREEMENT

By Paul A. Rianda, Esq.

Although not an easy task, most people can read an Agent Agreement and identify the critical terms of the agreement such as the termination, non-solicitation and exclusivity provisions. The more difficult task in preparing an Agent Agreement that is favorable to a sales agent is determining what provisions need to be added to the contract to protect the agent. Below I will discuss a number of different types of provisions that an agent should request be added to an Agent Agreement if indeed they do not already exist in said agreement:

Right to Move Merchants: Although an infrequent occurrence, there are circumstances under which a merchant will become dissatisfied with a credit card processor and will want to move to another processor. This can happen, for example, if the credit card processor provides inferior service or holds the merchant's funds. However, the merchant will typically still want to continue its relationship with the sales agent. For this reason, the sales agent needs to have a clause in the Agent Agreement that allows it to move merchants, under limited circumstances, when they no longer wish to do business with the credit card processor in question. A typical provision will allow the sales agent to move the merchant but only after providing the credit card processor with written notice to allow the credit card processor to try and save the merchant.

Exclusivity: The Agent Agreement should always have a clear and explicit statement that the sales agent does not have to submit merchants and merchant applications to the credit card processor on an exclusive basis. In the past, many Agent Agreements called for the sales agent to be exclusive with the credit card processor. Many credit card processors would use a violation of this provision to cease paying the sales agents all the residuals it had built up under the Agent Agreement. Consequently, it is very important to make clear in the agreement the non-exclusive nature of the relationship.

Right to Continued Residuals: One of the most important terms that should be added to an Agent Agreement is that in spite of any expiration, cancellation or termination of the Agent Agreement, the sales agent will continue to receive residuals derived from the portfolio of merchants it has placed with the credit card processor. The preservation of the sales agent's residual stream is a critical aspect of any Agent Agreement. Without such a provision, any termination of the Agent Agreement, even one by the sales agent, could conceivably halt the sales agent's right to any further residuals under the Agent Agreement.

Right to Sell Residual Stream: In the assignment provision of a typical Agent Agreement, a sales agent should add a provision that allows it to sell its residual stream to a third party purchaser. This is not a right to move the merchants but merely a right for the sales agent to have the residual check paid to a party other than the sales agent. This allows a sales agent to receive a lump sum payment for its residuals if the sales agent has a desire to retire, needs funds for its operations or wants to get out of the bankcard business.

Breach/Cure Clause: Agent Agreements generally provide that if there is a material breach of the agreement, the sales agent loses its right to any further residual. Therefore, it is important that there be a provision in the Agent Agreement that calls for written notice of any material breach that could

potentially cause the sales agent to lose its residual. In addition, a cure period should be provided so that the agent has a certain amount of time to remedy the breach that could cause it to lose its residual. Finally, if the breach results in a monetary loss, the agent should be allowed to pay for the loss either through a lump sum payment or through offset against the agent's residuals. Once the loss has been paid, the agent's residual payments are reinstated.

No Chargeback Liability: Many Agent Agreements do not explicitly state whether or not the sales agent is liable for chargebacks and other types of merchant losses. It is prudent for a sales agent to insert a term into the Agent Agreement that states explicitly that the sales agent does not have any liability for merchant losses. Most credit card processors will counter with a clause that provides that the sales agent is liable for merchant losses but only to the extent that the sales agent commits fraud.

Non-Circumvent Provision: For sales agents that have other agents working for them (generally referred to as sub-agents), a non-circumvent provision is warranted. Such a provision states that the credit card processor cannot directly contract with the sub-agent nor attempt to get the sub-agents to terminate their relationship with the sales agent. This keeps an agent who has developed its own group of sub-agents from having them interfered with by a credit card processor.

Attorney's Fees: From the perspective of a sales agent, it is important to have an attorney's fees provision in an Agent Agreement. This allows the sales agent to obtain additional leverage if indeed a credit card processor wrongfully fails to pay the sales agent its residual. If a lawsuit is filed, the attorney's fees provision allows the sales agent to collect its residual and also to collect the attorney's fees that it incurs in pursuing the residual payments. Without such a provision, a credit card processor has little incentive to pay the agent its residuals since there is no monetary penalty for failure to pay the residuals.

In reviewing an Agent Agreement, it is very important to understand both what is contained in the agreement and what needs to be added. By making sure the provisions listed above are in the Agent Agreement or added into the agreement, the sales agent can substantially increase the likelihood it will be able to retain its residuals and enter into a profitable relationship with the credit card processor.

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