

YOUR MERCHANTS AND NON-SOLICITATION PROVISIONS

By Paul A. Rianda, Esq.

A non-solicitation provision is one of the most important clauses in a typical Agent Agreement. This provision usually survives any termination, cancellation or expiration of the agreement and hence can bind the parties for many, many years. In addition, a violation of such a provision is often cited as the reason to cease paying an agent his residual under an Agent Agreement. Consequently, the parties to an Agent Agreement should understand the way in which a non-solicitation provision operates as well as how to modify the provision for their own benefit.

What is a Non-Solicitation Provision?

A non-solicitation provision can prohibit a number of different actions on the part of the agent and the ISO. Such provisions are usually used to keep an agent from soliciting merchants away from the ISO where he placed the merchant. However, they also have other applications including prohibiting the hiring of employees of one party to the agreement by the other party to the agreement or prohibiting the solicitation of banks, vendors or agents. Each of these various scenarios will be discussed below.

One important aspect of most non-solicitation provisions in an agent contract addresses when, and if, an agent can move merchants to another credit card processor. Generally in an agent contract, a non-solicitation provision is in the agreement in favor of the ISO. That means that the non-solicitation states the agent cannot, under any circumstances, seek to move a merchant that he has placed with the ISO to another credit card processor. The fact that there are generally no exceptions to this provision means that any violation of the non-solicitation terms, no matter how trivial, can cause the agent great financial problems as will be discussed below.

Non-solicitation provisions are effective for a set period of time. At a minimum, this period is the entire duration of the Agent Agreement. However, it is not unusual for such a provision to extend from three to five years after any termination, cancellation or expiration of the agreement.

From the ISO's perspective the non-solicitation provision is primarily in place to keep a sales agent from moving the merchants with high processing volumes. As to smaller merchants, an agent generally will have a difficult time moving any significant number of such merchants. This is due to merchant apathy and their unwillingness to sign new merchant applications.

In addition to non-solicitation of merchants, there are other provisions that can be inserted in a typical agreement that prevent other types of solicitations. One of the more common non-solicitation provisions involves employees of either party to a contract. For instance, the ISO can insert a provision that prohibits an agent from employing any of the ISO's employees or vice versa.

ISOs also insert a provision that prohibits the sales agent from contracting directly with the bank or the processor that the ISO is utilizing. The typical ISO is sponsored by a bank or processing network such as Global or FDR. The ISO does not want the sales agent to contract directly with the bank or processing network, cutting the ISO out of its profit making position. Hence, the ISO will put

in place a prohibition keeping the agent from contracting directly with any bank or processing network used by the ISO.

Another more recent phenomenon utilized by sales agents is a provision that states the ISO cannot contract directly with any sub-agents or vendors that the sales agent brings to the ISO. As with the case of an ISO not wanting the sales agent to contract directly with its bank or processor, by the same token sales agents do not want anyone that they bring to the ISO “going around” the sales agent and entering into a direct agent relationship with the ISO.

Effect of Non-Solicitation Provisions:

Generally, the non-solicitation provision is linked to the termination of the residual to the agent. If indeed the sales agent moves a merchant to another processor, all the residual paid to the agent under the Agent Agreement is immediately terminated causing severe financial hardship to the sales agent. Without any exceptions to the non-solicitation provision, even moving one merchant that it is processing \$2,000 a month can cause an agent to lose his entire residual under an Agent Agreement. For this reason, it is very important to provide for some exceptions to the non-solicitation provision.

Non-solicitation provisions also provide for injunctive relief in most instances. This allows the aggrieved party to immediately file an action with the court if the non-solicitation provision is violated and ask the court for an order to stop the offending conduct. For example, if an ISO contracts directly with a sales agent’s sub-agent, then the sales agent can request the court order that the court prohibit the ISO and sub-agent from entering into any business relationship. Injunctions can be enforced through contempt of court proceedings leading to financial and potentially even criminal sanctions if the parties do not comply with the court’s orders.

Exceptions to the Non-Solicitation Provisions:

As a general rule, in the negotiation of an Agent Agreement, I insert a number of provisions that allow for reasonable exceptions to the non-solicitation provision. The main provision I usually insert allows the sales agent to move a merchant if the merchant contacts the sales agent and requests to be transferred to a different ISO. This typically occurs where an ISO holds the merchant’s funds and the merchant therefore becomes dissatisfied with the services being provided by the ISO. Under these circumstances, it is very common for the merchant to request to be moved to another processor. This exception in the agreement allows the sales agent to move the merchant without violating the non-solicitation provision.

Many times though, ISOs are wary of such exceptions unless the ISO is provided with some safeguards of its own. To alleviate the ISO’s fears, I also put in the exception provision that that the sales agent must provide written notice to the ISO that the merchant has requested to be moved to another credit card processor. The ISO is then allowed a ten day time period to try and convince the merchant to stay with the ISO. If the ISO is unsuccessful during that ten day time period in changing the merchant’s mind, then the merchant can be moved by the sales agent to another credit card processor. In addition, I will also include terms that state that the exception to the provision will not be used to move large numbers of merchants and can only be used on a periodic basis.

Your Merchants and Non-Solicitation Provisions

Another more specialized provision that I have seen allows an exception to the non-solicitation provision for the sales agent's core group of merchants. Many sales agents have a core group of high volume processing merchants that typically move with the sales agent when he moves from one processor to another. This core book of business is generally extremely important to the sales agent's overall residual stream and are merchants that he has built up a substantial level of trust with over the years. This type of core book of business often times is a group of merchants that the sales agent would like to move if he no longer wishes to submit merchants to the ISO. Such an exception allows the agent to protect his most valuable asset, his best merchants.

A non-solicitation provision is one of the most important provisions in any Agent Agreement. The parties must understand how they are structured and the ramifications of any violation of these provision in order to ensure a long and profitable relationship.

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