

## **DON'T MOVE THAT MERCHANT!**

The surest way for a sales agent to lose its residuals is for an agent to move a merchant that it placed with one ISO to another ISO. Below I will discuss the contractual prohibitions in an Agent Agreement against moving merchants and the impact to agents on the payment of residuals.

### **Non-Solicitation Provisions**

Agent Agreements contain non-solicitation provisions. These non-solicitation provisions prohibit an agent from soliciting merchants that it has placed with a particular ISO and moving those merchants to another ISO. Such provisions are effective for the term of the Agent Agreement plus at least three to five years after any termination of the agreement. A non-solicitation provision gives the ISO a fair degree of confidence that its merchants will remain with it for the life of the merchants.

A non-solicitation clause can also contain additional safeguards that broaden its impact. For instance, many non-solicitation provisions cover not only the sales agent, but also its affiliates, principals, employees, officers and directors. By naming these additional parties that are bound by the non-solicitation provision, the ISO effectively causes any person associated with the sales agent to refrain from soliciting the merchants that the sales agent places with the ISO.

The ISO may also expand the non-solicitation to encompass any merchant for which the ISO provides credit card processing services. Consequently, the non-solicitation provision covers not just merchants that the sales agent has placed with the ISO, but any merchant that the ISO provides credit card processing services for, even if said merchant was placed with the ISO by a different sales agent. This type of provision effectively blocks the sales agent from soliciting merchants that are processing with its ISO under any circumstances.

For the sales agent, non-solicitation provisions are important because they are the most critical provisions from the perspective of the ISO. Any violation of these provisions generally results in a material breach of the agreement which allows the ISO to terminate the residual payments to the sales agent.

Many Agent Agreements state explicitly that any breach of the non-solicitation provisions, however slight, causes the residual payments to the sales agent to terminate. This is the case even if the sales agent solicits one merchant generating a very small residual payment to the sales agent. As a result, the sales agent can lose its entire residual payment worth thousands of dollars by moving one merchant that may generate only \$25.00 worth of residuals to the sales agent. Consequently, the sales agent's compliance with a non-solicitation provision becomes critical to its continuing residual payments.

## **Common Breaches**

In my experience, when faced with these non-solicitation provisions, sales agents become quite creative in their efforts to circumvent the provisions. Sales agents are very concerned about continuing to derive income from their merchants regardless of which ISO provides the credit card processing services. Consequently, when a merchant decides it wants to leave the ISO where a sales agent has placed the merchant, the sales agent often tries to place these merchants with different credit card processors. This invariably leads to situations where the sales agent is placing its future residual payments at risk.

One way to circumvent the non-solicitation provisions that is often attempted, is to have the sales agent's brother, best friend, wife, or other trusted person enter into an Agent Agreement to solicit merchants for an ISO. The sales agent then, ostensibly under this new Agent Agreement, will seek to solicit merchants that it has placed with a particular ISO and place them with a different ISO under this new Agent Agreement. The distinction that sales agents often make in their discussions with me is that because this is a new relationship that has nothing to do with them, they should be allowed to move merchants that they have placed with a particular ISO to a new ISO through the efforts of their spouse or other person that has a new relationship with this ISO.

The problem with this way of trying to circumvent the non-solicitation provision is that it invariably results in the sales agent losing its residual payments. No matter how hard the sales agent tries to hide it, people in the industry will learn that the sales agent is moving merchants from one ISO to another. It may take time, but if a sales agent is utilizing this method in order to try to move merchants from one ISO to another, the ISO that is losing merchants will begin to question why it is losing merchants. Once it begins some kind of investigation, the ISO can usually determine that the merchants that are leaving it are all going to the same new processor. Through a process of investigation and questioning, the prior ISO can discover that the sales agent is violating the non-solicitation provisions, and can therefore, terminate residuals to the sales agent.

Another argument I hear quite often is that the merchant requested the sales agent to move to another ISO and that the sales agent did not actively solicit the merchant. The first problem with this, as far as the sales agent is concerned, is that most non-solicitation provisions cover any activity that would serve to make the merchant move to a new ISO, even if the merchant is not actively solicited by the sales agent. For instance, many non-solicitation provisions preclude the sales agent from doing anything to interfere with the contractual relationship between the merchant and the ISO. If the sales agent moves the

merchant to a new ISO, the sales agent has helped the merchant to break its contract with its existing ISO, thus, violating the non-solicitation provision.

There are some things you can do in order to allow you to move some merchants and reduce the potential for losing your residuals. I always try to insert a provision in the Agent Agreement which states that if a merchant initiates communication with a sales agent to move the merchant to another processor, the sales agent must immediately notify the ISO in question. The ISO then has ten days to try to save the merchant and keep it with its current ISO. If the ISO is unable to retain the merchant, then the sales agent is free to move the merchant to another ISO. If this provision is in place, it provides an easy and verifiable method in order to keep the sales agent from losing its residual if it moves a merchant.

The other way to move a merchant safely is to simply ask the ISO if the merchant can be moved to a new processor. If you do get permission from the ISO to move a merchant, make sure that you and the ISO enter into a written agreement that memorializes your agreement to move the merchant.

The lesson I have learned over the years is that under no circumstances should you move a merchant unless you are in compliance with your Agent Agreement or receive a signed written consent from your ISO. The risk is too great to your residuals to move a merchant under any other circumstances.

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