

THE LONG AND WINDING ROAD TO AN AGENT AGREEMENT

By Paul A. Rianda, Esq.

For a “feet on the street” sales agent, the process of finding an ISO to do business with can be a time consuming and frustrating process. There are literally dozens of potential ISOs for an agent to choose from and each ISO has its own strengths and weaknesses. Below, I will provide a road map on how to approach the process of determining which ISO to choose and how to enter into an Agent Agreement with that ISO, in as efficient a manner as possible.

How To Start:

An agent needs to determine is how many different ISOs it should approach in making its determination as to which ISO offers the best program package. Many agents only begin the process with one ISO and do not evaluate others. In my experience this is a very dangerous strategy for a number of reasons.

If the agent pursues only one ISO and that ISO decides it does not want to work with the agent, the agent has to start the process all over again with another ISO. In my experience it can take anywhere from one to six months to approach an ISO and negotiate a final contract to allow an agent to submit merchant accounts to that ISO. If an agent starts out with one ISO and gets two months into the process before it realizes it does not want to use that ISO or vice versa, then the agent has to start the process all over again. For that reason, it is usually best to approach anywhere from three to five different ISOs. If one of the ISOs drops out of the running, the agent has a number of different alternatives that it can continue to pursue.

It is important for an agent to obtain information from industry professionals regarding which ISOs are accepting new sales agents and the financial packages they offer. I have been able to help a number of clients look at alternative merchant account providers. Industry trade associations are also a good place to learn this information. Once an agent has determined the list of ISOs that it wishes to pursue, the next step is negotiating the terms of the agreement.

Financial Terms:

It is imperative that sales agents obtain the best financial package that they can when entering into a new ISO agreement. In effect, the merchant account business has become a commodity business. What I mean by that, is that most ISOs offer the same deal to sales agents with very little variation. Most ISOs will give an agent a “street” rate of a 50/50 profit split over a slightly inflated cost of goods sold. However, most of these ISOs will increase the profit split to 70% in favor of the agent given a little prodding. This is the most common deal that I see, but there are some agents that are even able to do slightly better than this.

The sales agent also needs to determine what financial incentives are important to it to ensure that it gets the best financial package. Some sales agents make the bulk of their revenues from mid or non qualified transactions. Obviously, if that is the case then the agent needs to make sure that it finds an ISO that offers the best rate on these types of transactions. Also, ISOs offer various sales incentives

such as purchasing residual streams up front, stock plans, health insurance and other things that may be a benefit to a particular sales agent. These incentives are something an agent should search out in order to get the financial plan that makes the most sense.

Contracting Process:

The most time consuming and often most frustrating process is actually negotiating the contract terms between the agent and the ISO. Before beginning the contracting process an agent needs to determine exactly what it is looking for in the contract. Often issues such as perpetual residual payments, exclusivity, right to sell the residual stream and others of the like are of paramount importance for a particular sales agent. It is important for agent to sit down and write out a list of these issues, so that when negotiating the Agent Agreement the agent can make sure that all important deal points are incorporated in the Agent Agreement.

As to the actual process of negotiating the contract it is important to make sure that competent counsel reviews the Agent Agreement to make sure that the agent's residuals are protected (not just because I am an attorney but because I believe it to be true). The residual stream that is derived from an agent contract is a critical part of an agent's future financial success. Generally, the cost of having the contract reviewed by an industry attorney is fairly insignificant, given the amount of money that will be generated in the future from that contract. Agents would be well served to look for an attorney that specializes in the bankcard industry as they will be able to recognize issues that are of importance to ensuring that agents are able to keep their most valuable asset, their residual payments.

The process of negotiating the contract usually begins when the agent is provided a copy of the Agent Agreement by the ISO. It is important that the Agent Agreement be provided electronically in a Word formatted document and not as a .pdf file, so that it can be modified by the agent and/or its attorney. The process is much more efficient when both sides can highlight their changes in the document through red-lining to allow for a focused discussion of the contract terms that are at issue.

I find that I usually have anywhere from ten to fifteen different revisions to any particular contract that I review. Of those ten to fifteen changes, usually 60-70% are accepted by ISO without further comment. The next step is to have a conference call with the agent, the ISO and their respective attorneys in order to discuss the last few unresolved points in the agreement. Usually, with an explanation of the reasons why the agent is asking for certain revisions, an ISO will accept the bulk of the remaining revisions. The last contract term negotiated in almost all the contracts I have dealt with involves the termination provisions of the agent's residual stream.

Initially, most Agent Agreements provide the ISO great latitude in canceling the residual stream. The agent's goal should be to limit the circumstances under which an agent may lose its residual to a small set of clearly defined circumstances. Such circumstances can include moving merchants to another processor or causing the ISO an un-reimbursed monetary loss. The effect of the clause allowing for termination of the residual can vary greatly from ISO to ISO. Under most circumstances, the provision in the end, will call for the residual to be terminated in the event of a "material breach" of the contract. However, an agent should try to at least obtain a provision that

provides that if there is a breach that causes the ISO monetary damage, as long as the monetary damage is paid by the agent, then the agent should be able to continue to receive its residual.

Once that final contract term is negotiated, the process needs one more step for completion. Many agents sign the contract and send it on to the ISO for its signature. However, most agents do not get a signed copy of the agreement back from the ISO. The signature of both parties is necessary in order to make the agreement binding. It is therefore imperative that the agent obtain a signed copy of the agreement back from the ISO.

Even when an agent decides to contract with a particular ISO, it is always prudent to have at least one or two other open contracts with other ISOs to whom the agent can submit business. This allows an agent to quickly move to another ISO without having to prejudice its business in case of problems.

Contracting with a new ISO is a very long and drawn out process. However, it is one of the necessary evils in order to allow an agent to operate its business. It is up to the agent to make sure that it does all it can to keep its residual safe so it can operate its business in a manner that allows it the freedom to make as much money as possible.

* Paul A. Rianda, Esq. is a partner in the Southern California law firm of Kring and Chung, LLP, and has worked in and with the bankcard industry for the past 8 years. For more information about this article or any other matters, please contact Mr. Rianda at (949) 261-7700 or via email at prianda@kringandchung.com.

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