

THE MYTH OF MERCHANT PORTABILITY

More and more sales agents are seeking “portability” of their merchants upon the termination of their Agent Agreements. Below I will discuss issues relating to the contractual rights of portability that can be granted under an Agent Agreement and the practical application of the rights that are granted.

What is Portability?

Before discussing portability, we must first define the relationship between the various parties to the merchant relationship. Under most circumstances, there is a credit card processor or ISO (collectively referred to herein as “ISO”) that has entered into an Agent Agreement with the sales agent. The sales agent originates the merchants and then forwards the application, Merchant Agreement and related materials to the ISO. The ISO in turn must be sponsored by a bank in order to offer credit card processing services. Although the sales agent originates the merchant and arranges for the sales agent to sign the Merchant Agreement, the sales agent is not a party to the Merchant Agreement. Only the ISO, sponsoring bank and merchant are parties to the Merchant Agreement.

Portability refers to the ability of the sales agent to move the merchants it has originated from the ISO it originally placed the merchants with, to a different ISO at some point in time. This right to move merchants occurs under certain conditions when the Agent Agreement is terminated. Portability allows the sales agent to keep control of its merchants and continue to derive an on-going residual stream from those merchants if the sales agent moves to a new ISO.

The Agent Agreement

In order to obtain portability, the issue must be specifically addressed in the Agent Agreement or the sales agent cannot move the merchants to a different ISO. A typical Agent Agreement provides that the sales agent cannot move the merchants it originally placed with the ISO during the term of the agreement and for a period of five years thereafter. This is important because moving merchants is probably the number one reason that sales agents lose their rights to the continued payment of their residual streams.

Provisions that deny the sales agent the right to move the merchants are more often being deleted or eliminated to allow the sales agents the right to “portability”. But what type of rights are the sales agents getting and are they of any value?

The typical portability provision in an Agent Agreement merely allows the sales agent to move the merchants at the end of the contract term. On its face many people believe this is a valuable right but that is not the case unless additional obligations are

placed upon the ISO. The Agent Agreement should provide that the ISO must allow the assignment of the Merchant Agreements to a different ISO and that it will help in moving the merchants to the new ISO. Unless the Agent Agreement contains these provisions, the sales agent may believe it has a valuable right to move the merchants, but as a practical matter its ability to do so is extremely limited.

Assigning Merchant Agreements

In order to have true portability, the sales agent must have the right to ask the bank and the ISO to assign the Merchant Agreements to a new sponsoring bank and ISO. This gives the sales agent the right to move the merchants without requiring every single merchant to fill out a new merchant application and sign a new Merchant Agreement when the merchants are moved. Of course, that assumes that the new ISO and sponsoring bank will accept the old Merchant Agreements.

Even if the sales agent has the right to have the Merchant Agreements assigned, this does not necessarily mean that the sales agent will be able to seamlessly move the merchants to the new sponsoring bank and ISO. Unless the merchants have been segregated in a unique BIN and ICA, the merchants may not be as portable as the sales agent believes them to be.

Unique BIN and ICA

A unique BIN and ICA can be likened to a separate bucket wherein only one sales agent's merchants are placed. Under most circumstances all the merchants in a unique BIN and ICA can be "pointed" to a new ISO without having to reprogram the merchants' credit card processing equipment or software. If the BIN and ICA cannot be pointed to the new ISO, then in order to move the merchants the agent must obtain a new merchant account and a new merchant number for every merchant. This new information must be downloaded into the merchants' credit card processing equipment to reprogram it in order for the merchant to process credit cards.

A sales agent must have its own unique BIN and ICA in order to seamlessly move the merchants without having to contact all the merchants to reprogram them. It is critical for the sales agent to request a unique BIN and ICA when it first begins working with the ISO and sponsoring bank. If not, the sales agent set up by an ISO is in a shared BIN and ICA relationship where the ISO and sponsoring bank place merchants originated from many different sales agents into the same bucket. If the sales agent's merchants are in a shared BIN and ICA, then it is impossible to "point" the BIN and ICA to a new processor because to do so would move the merchants of the other sales agents without their consent.

Consequently, the sales agent must have the right to assign the Merchant Agreements and also a unique BIN and ICA in order to have any chance of being able to move the merchants en mass without having to rewrite the merchants. If either of those items are missing from the sales agent's agreement, the sales agent will have to rewrite and/or reprogram the merchants in order to move them to a new ISO. From personal experience, I know that this is a very difficult proposition.

When working for an ISO in the past, we had a situation where our ISO quit paying us residuals on approximately 12,000 merchants because the ISO was experiencing financial difficulty. We naively believed that we could easily move those 12,000 merchants to a new ISO by rewriting them. We informed our sales department of approximately 40 sales people to begin contacting the merchants in order to move them to a new ISO where we could again begin to receive residuals from the merchants. After three months of work, our sales agents were successful in moving only 500 of the 12,000 merchants. From that experience, it became apparent that moving large numbers of merchants by rewriting them is not practical. The merchants are reluctant to sign new applications and begin searching for new companies to provide their credit card processing.

It is very important to understand exactly what type of portability a sales agent is being offered in an Agent Agreement. On the face of it, it can appear that the sales agent has the right to move merchants under the Agent Agreement. However, unless the sales agent has the right to assign the Merchant Agreements and a unique BIN and ICA, the sales agent likely will have a very difficult, if not impossible, time trying to move merchants.

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