



OFFICE OF THE GENERAL COUNSEL

**Merchants Insurance Group
Agency Agreement**

Reviewed November 2018

This contract review includes only general information and comments, and is not intended to provide specific advice about individual legal, business or other questions. It was prepared solely for use as a guide, is not a substitute for Producers' independent evaluation of any provision in a contract, and is not a recommendation that the contract be signed or rejected. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

PLEASE BE ADVISED THAT THIS REVIEW FOCUSES ON ISSUES RELATING TO THE INSURANCE INDUSTRY, AND NOT GENERAL CONTRACT ISSUES.

KEY CONCERNS

- The Agent's Confidential Business Information is only required to be treated by the Company as confidential if it is identified/marked as confidential/proprietary/or the like by the Agent.
- The Company is allowed to use the Agent's operational results for Company promotions/marketing initiatives.
- The Company can terminate the Agent for cause immediately without notice if the Agent fails to pay any money due the Company under the Agreement or loses an insurance license in any jurisdiction in which the Agent is appointed.
- There is no express run-off provision after termination of the Agreement.
- Business continued after termination of the Agreement is paid only as required by law, and "Schedule A – Commissions" terminates with the termination of the Agreement.
- The Company can change special promotion and incentive commissions at any time in its sole discretion, which could include elimination of them.
- The Profit-Sharing Plan can be changed by the Company on 30 days notice to the Agent.
- The Agreement allows the Company to take ownership of the Agent's expirations for reasons other than failure to pay premium due the Company under the Agreement.
- Upon termination, the Agent is only entitled on direct billed business to the name of the insured and effective date of the policy, not any other policy writing details.
- The Company reserves the right to suspend or revoke the Agent's binding authority at any time, without notice.
- The indemnification clauses are not entirely mutual, include no adjustment accounting for the extent of liability, if any, of the party seeking indemnification, and do not cover the Agent for following the Company's manuals, guidelines, etc.

- Notice to the Agent can be given by the Company to any address previously specified by the Agent, in addition to the Agent’s current address in the Agreement.

REVIEW OF PROVISIONS

1. APPOINTMENT AND AUTHORITY OF AGENT:

- A. The Agent’s authority is subject to the Company’s “Underwriting Manuals and Agents’ Binding Authority and supplementary instructions pertaining thereto” as they may be changed by the Company in its sole discretion. There is nothing specified about the Agent being provided with this information prior to being required to adhere to it, so if that is of concern to the Agent, the Agent can request that the Agreement be modified accordingly, such as by adding words to the end of 1.A.(ii) like “once furnished to, or made available to the Agent after notice to the Agent of the availability of such materials and changes to them.” (See Sections 1.C., and 2.A.(4) and (6), 6.B.(2) and 20.C., and comments to them.)
- C. The Agent is required to adhere to “Company procedure” which can be changed by the Company in its sole discretion. There is nothing specified about the Agent being provided with that information prior to being required to adhere to it, so if that is of concern to the Agent, the Agent can request that the Agreement be modified accordingly, such as by adding words to the end of the first sentence like “once furnished to, or made available to the Agent after notice to the Agent of the availability of such materials and changes to them.” (See Sections 1.A., and 2.A.(4) and (6), 6.B.(2) and 20.C., and comments to them.)
- F. The Agreement does not just require the Agent’s compliance with applicable federal and state laws, which would be required even without a provision in the Agreement, but goes further to specify that the Agent “represents and warrants” its compliance with these laws. It is not clear what the Company’s reason is behind this wording, but one reason may be that remedies for breach of a contract covenant may differ from remedies for breach of a contract representation/warranty. An analysis of the distinctions between these terms is beyond the scope of this review, however, if the Agent is concerned about it, the Agent can request that the Company modify the language so the intent and potential effect is clear to all parties. In addition, the Agent should note that it is required to conduct due diligence on compliance with the Violent Crime Control and Law Enforcement Act of 1994 “on a regular basis” but the Agreement does not specify what “regular basis” means. If the Agent is concerned about its definition of regular basis is consistent with the definition of regular basis by the Company, the Agent can request that the Company modify the Agreement to define regular basis by reference to a time frame, such as annually.

2. SCOPE OF AUTHORITY/NEGATIVE COVENANTS:

- A.(4) See comments to Sections 1.A. and C., and 2.A.(6), 6.B.(2), and 20.C. regarding the Company’s Underwriting Manuals and Agents’ Binding Authority.

A.(6) The reference to the Company’s Underwriting Manuals and Agents’ Binding Authority includes language about it being “furnished or made available to the Agent.” (See Sections 1.A. and C, and 2.A.(4), 6.B.(2), and 20.C. and comments to them.) If the Underwriting Manuals and Agents’ Binding Authority are only going to be “made available to the Agent” then the Company should be required to notify the Agent of the availability of such information and the changes so the Agent is aware of it and any changes to it. If the Agent is concerned about being required to comply with information made available but about which the Agent is not notified or if it is notified, the changes are not identified (thus potentially requiring substantial time to identify), the Agent can request that the Agreement be modified to require that it be notified of the availability of such information and changes to it, such as by adding to the end of the phrase “made available to the Agent” words like “with notice of such materials and changes to them.” (See Sections 1.A. and C., and 2.A.(4), 6.B.(2) and 20.C., and comments to them.)

A.(7) The Agent is not permitted to write letters about the Company to any publication without first obtaining the Company’s written approval. If the Agent is concerned about such a restriction on its right to refer to the Company in any communications with publications, the Agent can request that the provision be deleted. One example of when this could arise would be if the Company and Agent have any disagreements, and the Agent believes it is not being portrayed fairly in an article or column, then it may be prevented by the Company from communicating with the publication to request corrections/clarifications.

B. Regarding the Company’s rules and regulations, see comments to Sections 1.A. and C., and 2.A.(4) and (6), 6.B.(2) and 20.C.

3. ELECTRONIC AND OTHER MEANS OF DATA TRANSMISSION:

B. The Company has the right to transmit Data to the Agent in any way it deems appropriate, and the Agent must install and maintain all devices and systems to receive Data in the manner selected by the Company. Since carriers often have different platforms and systems requirements, it is important that the Agent be aware of this provision since the Agent bears all costs to obtain and maintain devices and systems compatible with the Company’s choices. If this is of concern to the Agent, before entering into the Agreement, the Agent can request further information from the Company about the device and systems requirements needed to assure they are workable and affordable for the Agent.

5. PRIVACY, CONFIDENTIALITY AND SECURITY OF INFORMATION:

A. Paragraphs 1 - 2: The Agent’s Confidential Business Information is only required to be treated by the Company as confidential if it is identified/marked “ ‘confidential’ or ‘proprietary’ or the like by the Agent.” This information includes all nonpublic information “owned, controlled by, or relating to the business of the Agent.” If the Agent is concerned that it is impractical for or unlikely that every communication of this important information will be marked in the way required by the Agreement to protect it

as Agent Confidential Information, the Agent can request that the provision be modified to delete the requirement that the covered information be labeled as confidential/proprietary/or the like. Since the definition of the covered information is sufficiently clear, there does not appear to be a need for further labeling, and any inadvertent error or oversight on the labeling could result in the loss of confidentiality of the Agent's information.

Paragraph 3: The Company is allowed to use the Agent's operational results for Company promotions/marketing initiatives for all/any part of its agency force as long as it does not disclose specific detail about the Agent's operational results and the Agent does not object in writing. If the Agent is concerned about this, including because the "specific detail" not allowed is undefined, the Agent can notify the Company in writing of its objection, and the Company is required to discontinue this use of Agent information.

6. TERM OF AGREEMENT – TERMINATION:

A. The Agreement allows the Company to terminate the Agent's binding authority when giving a 90-day notice of termination of the Agreement. If the Agent is concerned that termination of its binding authority so diminishes its ability to conduct business with the Company during the 90-day notice period as to make it in effect an immediate termination, the Agent can request that the Agreement be modified to delete the Company's right to terminate the Agent's binding authority when it gives the Agent a 90-day notice of termination of the Agreement. (See comments to Section 20.E.)

B. The Company can terminate the Agreement immediately for cause, without prior notice to the Agent:

(1) if the Agent fails to pay any money due the Company under the Agreement. There is no notice requirement before such a termination, so even a legitimate dispute over a minor sum could result in an immediate termination for cause. If the Agent is concerned about this, the Agent can request that the Agreement be modified to require the Company to provide the Agent with written notice of a failure to pay and a reasonable opportunity to cure, such as 10 days. This approach would allow the Agent to present information to the Company about potential errors in its information and rectify any inadvertent oversights, while protecting the Company's right to timely payment.

(2) if the Agent violates any Company manuals, rules, procedures, etc. There is no requirement that the Agent be advised of changes to those materials, so allowing a termination without notice for failure to follow a procedure that the Agent is not notified of is a result the Agent may feel is unfair. (See comments to Sections 1.A. and C., and 2.A.(4) and (6), and 20.C.) If the Agent is concerned about this, the Agent can request that the Agreement be modified so termination for failure to follow Company manuals, rules, procedures, etc. is possible only after such materials are furnished to or made available to the Agent, with notice of the availability of such materials and changes to them. Also, if the violation is not intention or material, the Agent may feel that it

deserves an opportunity to cure. If the Agent is concerned about this, the Agent can request that the Agreement be modified to require the Company to provide the Agent with written notice of a failure covered by this provision and a reasonable opportunity to cure, such as 10 days.

(3) if the Agent loses its insurance license in any jurisdiction in which it was appointed by the Company. If the Agent has license(s) in good standing in other jurisdictions in which the Company has appointed the Agent, the Agent may feel that the immediate termination of the entire Agreement is a harsh outcome. If the Agent is concerned about this, the Agent can request that the Agreement be modified to allow the Company to immediately terminate the Agreement only as to the jurisdictions in which the Agent was appointed but does not have its insurance license in good standing.

- C. The Agent is deemed to have terminated the Agreement if it merges with or transfers a majority of its stock/assets/ownership to a third party without prior Company consent, or if it sells all or any portion of its book of business with the Company to a third party without prior written consent from the Company. Since most buy/sell agreements for an agency or its assets include a non-disclosure agreement, the Agent will likely be unable to both comply with that agreement and also seek prior written consent from the Company under this provision. If the Agent is concerned about this, the Agent can request that the Agreement be modified to require it to notify the Company promptly upon closing a sale of a majority of its stock/assets/ownership or all or any portion of its book of business, giving the Company the right after that to terminate the Agreement as to the new owner with reasonable notice to allow for a smooth transition. It should be noted that in the event of a termination under this provision, the Agent's debts expressly survive the termination but the Agreement is silent about any Company debts to the Agent surviving the termination, such as earned but unpaid commission or reimbursement for reports ordered in connection with the placement of insurance. If the Agent is concerned about assuring that both parties are treated the same way after termination about debts arising prior to termination, the Agent can request that this provision be modified to state that all indebtedness of either party to the other survives the termination of the Agreement. Although this issue is addressed in Sections 6.E. and G., the protection of the Company in this provision coupled with the lack of protection for the Agency in this provision may result in the Agent wanting to be sure it is addressed for each party the same way in both provisions. (See comments to Section 12.B.)
- D. Upon termination of the Agreement, the Company can cancel/non-renew any business placed by the Agent as permitted by law, and on any business required to be continued after termination, the Agent will earn commission only as required by law. (See comments to Section 7.A.) In effect, this means that there is no run-off provision other than whatever is required by law. If the Agent is concerned about the lack of an express run-off provision or the commission arrangement post-termination for continued/renewed business, the Agent can request that the Agreement be modified to add a run off clause, such as:

Policies in force prior to termination of this Agreement will be permitted to run to the applicable policy's expiration, or in the case of continuous policies, to the next anniversary of their effective dates. The Company agrees to renew all policies that meet the Company's current underwriting standards that come up for renewal within a one-year period following the date of termination of this Agreement. The Company agrees that such renewals shall be on the terms in effect on the date of termination. Subject to requirements imposed by applicable law, the Agent shall continue to perform all other duties contemplated under this Agreement necessary for the proper servicing of all insurance policies in force prior to termination of this Agreement, as well as any renewal policies bound on or after the date of the termination of this Agreement, until all such in force policies expire. The Agent shall receive commission on all such policies at the rate in place on the date of the notice of termination.

F. See comments to Section 6.D.

7. COMMISSIONS:

A. The Company can change the commission on 90 days written notice to the Agent. If the Agent is concerned that there is no limit to the number of times the commission can be reduced, the Agent can request that the Agreement be modified to limit reductions in commission to no more than once in any 12-month period. Also, this provision states that Schedule A - Commissions terminates with the Agreement, and Section 6.D. states at the end that the Agent will be paid commission only as required by law on business required to be continued after termination of the Agreement. (See comments to Section 6.D.) If the Agent is concerned about being paid commission consistent with the Agreement for policies placed before termination and for which the commission was not paid before termination (such as direct billed policies) or policies continued after termination that were placed pursuant to the Agreement, the Agent can request that the Agreement be modified to require payment of commission earned but not paid prior to termination and commission on continuing business at the rate in effect on termination of the Agreement.

The Agreement allows commission changes to be made "at any time provided they are mutually agreed upon and special promotional and incentive commissions may be changed at the sole discretion of the Company." The Agreement does not state that such mutual agreements to commission changes must be in writing and signed by the parties, so if the Agent is concerned about avoiding potential misunderstandings on this issue, the Agent can request that the Agreement be modified so that any such mutual agreements be in writing and signed by all parties. As to the right of the Company to change special and incentive commission in its sole discretion, this would allow for those programs to be reduced, potentially to nothing, at any time and without advance notice to the Agent. If the Agent is concerned about this, the Agent can request that the Agreement be modified to require at least 30 days advance notice of changes to those programs, and to require that reductions/eliminations not be retroactive. (See Section 7.B. and comments to it.)

- B. The Agent should be aware that the Company can change the Profit-Sharing plan on 30 days written notice to the Agent, but any changes will not be retroactive.
- C. For policies in place at execution of the Agreement for which a commission is not specified in Schedule A, the Agent will be paid renewal commission at the rate in force immediately preceding execution of this Agreement, and the commission can be changed with at least 90 days written notice to the Agent. If the Agent is concerned that there is no limit to the number of times the commission on this business can be reduced, the Agent can request that the Agreement be modified to limit reductions to this commission to no more than once in any 12-month period. (See comments to Section 7.A.)

8. MONIES DUE THE COMPANY:

- F. The Agent should be aware that its obligation on Agency-billed business to make a reasonable effort to collect additional premiums developed by audit requires transmission to the policyholder of three premium notices in the 45-day period after the Company's notice of additional premium, with at least one being sent by certified mail.

9. ARBITRATION:

- B. The arbitrators "must be active or retired professionals in the insurance industry." This reduces the chances of or eliminates the inclusion of capable, seasoned business lawyers and retired judges who often serve as neutral arbitrators for the American Arbitration Association. If this is of concern to the Agent, the Agent can request that the Agreement be modified to also allow non-insurance industry lawyers and retired judges to serve as arbitrators.
- E. Each party is required to pay its own cost of participating in any arbitration, the cost of the arbitrator it selects, and half the cost of the third arbitrator and the American Arbitration Association fee. The Agent should note that it is common for arbitration provisions to call for the prevailing party to recover its costs of arbitration, including reasonable attorneys' fees as well as costs of the arbitrators and proceedings. This is done for several reasons, including to help reduce frivolous claims and to avoid claims of arbitrator bias in favor of the party paying that arbitrator. If this is of concern to the Agent, the Agent can request the Agreement be modified to entitle the prevailing party to recover all costs and expenses of the arbitration, including reasonable attorneys' fees.

10. OWNERSHIP OF EXPIRATIONS:

- B. The Agreement allows the Company to take ownership of the Agent's expirations for reasons other than the Agent's failure to pay premium due the Company under the Agreement. The only reason the Company should be able to take ownership of the Agent's expiration is for the Agent's non-payment of premium due under the Agreement. In addition, this provision does not provide any right of the Agent to dispute sums alleged to be due the Company or cure any alleged failure to pay, which would be typical in other

business agreements. (See comments to Section 6.B.(1).) Also, if the Company does acquire the Agent's expirations, the Company can decide to sell them, and there is nothing requiring the Company to apply proceeds from such a sale to money due from the Agent and turn the balance (less reasonable expenses) over to the Agent. If these points are of concern to the Agent, the Agent can request that the Agreement be modified with wording like:

If the Agent has not properly accounted for and paid to Company all premiums collected by the Agent (less the Agent's commissions) as of the effective date of termination of this Agreement, prior to taking any action against the Agent's expirations, the Company shall provide written notice to the Agent specifying such unpaid and undisputed amounts and giving the Agent at least 30 days from receipt of the notice to pay the unpaid and undisputed amounts or furnish collateral security reasonably acceptable to the Company. Following the Agent's receipt of the notice, the Company may withhold commissions as an offset against any unpaid and undisputed amounts owed by the Agent. If, within the time specified in the Company's written notice, the Company does not receive reasonably acceptable collateral security or payment in full of all undisputed amounts, the use and control of the Agent's expirations shall vest in the Company. In the exercise of its right to collect any unpaid and undisputed amounts through the use and control of the Agent's expirations, the Company shall use reasonable business judgment in selling such expirations and shall be accountable to the Agent for any sums received, which, net of expenses, exceed the amount of indebtedness. The Agent shall remain liable for the excess of the indebtedness over the sums received by the Company from any such sale. Notwithstanding any other provision of this Agreement, the Company shall not have any right to the Agent's expirations to the extent of any good faith and reasonable dispute as to amounts owed by the Agent to the Company.

12. AGENCY SALE OR TRANSFER:

- B. The Agent is required to give the Company 30 days advance notice of a sale or transfer of all or any part of its business or ownership of it, its book of business with the Company, or power to manage and/or set policy for the Agent. This may be troublesome to the Agent for several reasons. Even though the Company is required to keep that information confidential if marked as such (see comments to Section 5.A.), giving such a notice to the Company may be a breach of a non-disclosure agreement the Agent has with the potential buyer. (See comments to Section 6.C.) If the Agent is concerned about these issues, the Agent can request that the Agreement be modified so that both its and the Company's needs are both protected, with wording such as:

The Agent will provide written notice to the Company within 15 days after the effective date of any change in ownership of a majority or controlling interest of Agent. Following receipt of such notice, the Company may decide to terminate this Agreement upon 30 days advance written notice.

13. **DIRECT BILLED POLICIES; COMPANY PROGRAMS:**

- B. The Company is required to list the Agent by name on policies, endorsements, cancellations, and billing notices, but is not required to include the Agent's contact information. In addition, the Agent will only receive billing notices when requested in writing. If the Agent is concerned that its contact information is not included on Company generated communications to policyholders, the Agent can request that the Agreement be modified to include the Agent's contact information along with its name on those materials. Also, if the Agent wants copies of billing notices, the request for that must be in writing and must adhere to the requirements of Section 20.K.
- C. The Agent should note that as with Section 13.B., if it wants copies of communications on direct billed premium collection, the Agent's request must be in writing, adhering to the terms of Section 20.K.
- H. If the Agent is concerned that on direct billed business, it will not receive policy-writing details consistent with its ownership of expirations, the Agent can request that the Agreement be modified to require that the Company also provide the Agent with policy-writing details.

16. **INDEMNIFICATION:**

- A.- B. These indemnification clauses are not entirely mutual, include no adjustment accounting for the extent of liability, if any, of the party seeking indemnification, and do not provide for recovery by the prevailing party of costs and fees in a dispute. In addition, the Agent is not covered by the Company's indemnification for following the Company's manuals, guidelines, instructions, procedures, etc. even though the Agent is required to indemnify the Company if the Agent fails to do so. These points can all be addressed in a way that treats both parties fairly and in the same way, by wording such as:

Each party agrees to indemnify, defend and hold harmless the other party ("Indemnified Party") against any and all demands, claims, damages, losses, liabilities, judgments, or settlements including, without limitation, reasonable attorneys' fees and costs of investigation and defense incident thereto (collectively "Claims"), arising out of or relating to the indemnifying party's acts or omissions, except to the extent that the Indemnified Party's acts or omissions caused the Claim. Each party shall promptly notify the Indemnified Party upon receipt of any Claim or legal action arising out of or relating to this Agreement or the parties' relationship. The rights and responsibilities established in this section shall survive indefinitely the termination of this Agreement.

20. MISCELLANEOUS:

- C. This provision requires the Agent to adhere to Company rules and procedures, and for the Company to “make available” to the Agent those materials and amendments to them. There is nothing specified about the Agent being provided with or notified of this information prior to being required to adhere to it – only that it will be made available to the Agent. If that is of concern to the Agent, the Agent can request that the Agreement be modified accordingly, such as by adding words to the end of the first sentence like “once furnished to, or made available to, the Agent after notice to the Agent of the availability of such materials and the amendments to them.” (See Sections 1.C., and 2.A.(4) and (6), 6.B.(2).)
- D. The Company takes an immediate lien on any unpaid commission/compensation it owes the Agent. This may impair the Agent’s ability to obtain a business loan/line of credit, so if that is of concern to the Agent, the Agent can request that it be deleted from the Agreement. (See comments to Section 20.F.)
- E. The Company reserves the right to suspend or revoke the Agent’s binding authority at any time, and there is no notice requirement. If this is of concern to the Agent, the Agent can request that, absent cause, any change to its binding authority be preceded by reasonable advance written notice, such as 30 days. (See comments to Section 6.A.)
- F. The restriction on the Agent pledging commission without the prior written consent of the Company may impair the Agent’s ability to obtain a business loan/line of credit. If this is of concern to the Agent, the Agent can request that it be deleted from the Agreement. (See comments to Section 20.D.)
- G. The first sentence of this provision is one-sided, in favor of the Company, but it should be mutual. That would be easy to accomplish and fair to both parties, by a slight wording adjustment, such as: “The forbearance or neglect of either party to insist upon strict compliance by the other party with any provisions of this Agreement, whether continuing or not, shall not be construed as a waiver of any rights or privileges of the party forbearing or neglecting to insist upon strict compliance by the other party. (See Section 20.Q. for a provision in which the impact of a waiver of provisions of the Agreement is mutual.)
- K.a. Notice to the Agent should not be allowed to be given to an old address that the Agent “previously specified to the Company in writing,” as that could have been years before this Agreement, and the address no longer valid. Notices required or desired under the Agreement should be given at the address specified in this Agreement, or updated after it in accordance with this provision.
- S. This provision allows the parties to add materials, such as exhibits, schedules, riders, and addenda to the Agreement after execution of the Agreement, by “mutual consent” of the parties. A written agreement signed by the parties should only be added to or amended by another writing signed by the parties, evidencing their clear mutual consent to the

addition/amendment. If the Agent is concerned about this, the Agent can request that the words “mutual consent of the parties hereto” be revised to “written agreement signed by the parties hereto.”

- V. This provision identifies the Sections of the Agreement that survive the termination of the Agreement. Section 1.C. is not listed, which covers the Agent’s right to be reimbursed for costs of reports, like MVRs, CLUE reports, etc. Also, Section 7. Commissions is not listed, which may put at risk the Agent’s ability to be paid commission on business placed prior to termination but for which the Agent has not yet been paid. If the Agent is concerned about this, the Agent can request that the Agreement be modified to add Sections 1.C. and 7. to the list of Sections that survive the termination of the Agreement.
