



OFFICE OF THE GENERAL COUNSEL

**Star Insurance Company
Williamsburg National Insurance Company
ProCentury Insurance Company
Agency Agreements**

Reviewed May 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 Agencies' 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 Company can change the Underwriting Guidelines at any time.
- The Company can withdraw, suspend or modify the Agency's authority and can change the commission structure or amounts for any Agency failure to comply with limitations in the Agreement.
- The Company can change the commission to the Agency at any time with prior notice.
- The ownership of expirations section is narrow, and only expressly gives the Agency ownership of its expirations upon termination of the Agreement, and then only if all premium collected for the Company has been accounted for and paid to the Company, and if the Agency has maintained its insurance license.
- The Agency is required to name each Company that is a party to the Agreement as an additional named insured on every insurance policy required of Agency by the Agreement.
- The Agency cannot renew business after termination of the Agreement unless such renewals are required by law, and the Company will not pay commission on such renewals unless required by law.
- The Agency indemnifies the Company for all acts, errors and omissions but the Company indemnification of the Agency is reduced to the extent the Agency "allegedly" caused, contributed to or was involved in the covered acts, errors or omissions.

REVIEW OF PROVISIONS

1. APPOINTMENT AND AUTHORITY OF THE AGENCY

(b) The Company can change the Agency's authority at any time by changing its Underwriting Guidelines. In effect, this allows the Company to amend the Agreement without advance notice to the Agency. If this is of concern to the Agency, the Agency can request that the Agreement be revised to require at least 60 days advance written notice of amendments. (The 60-day time period is based on the 60-day advance written notice for either party to terminate the Agreement under Section 13.(a).)

(c) This Section covers the Company's remedies if the Agency fails to comply with the limitations in this Section. Since this Section has no limitations, it is likely the intent was to refer to the limitations in Section 1.(b). If the reference is determined to be to Section 1.(b) or the Agreement is modified accordingly, and the Agency fails to comply with the Agreement, Commission Schedule or Underwriting Guidelines, the Company can cancel, suspend or change the Agency's authority, change the commission structure or amounts, or terminate the Agreement per Section 13. In effect, this allows the Company to terminate the Agency's authority to solicit, receive and transmit insurance policies to the Company entirely and to reduce/eliminate commission due the Agency without terminating the Agreement in accordance with Section 13., even for minor breaches that are not material and could easily be rectified. In addition, there is nothing requiring the Company to provide notice to the Agency of any alleged breaches that could trigger these actions by the Company, and there is no opportunity for the Agency to explain why it is not in breach of the Agreement or to cure any breach. If this is of concern to the Agency, the Agency can request that the Company not be entitled to withdraw, suspend or modify the Agency's authority without first giving the Agency written notice of the alleged breach and at least 10 business days to cure. The Agency also can request that the Agreement be modified to require at least 60 days advance written notice to the Agency of a commission change, and to limit any commission reduction to not more than once in any 12 month period. (The 60-day time period is based on the 60-day advance written notice for either party to terminate the Agreement under Section 13.(a).) (See comments to Section 13.(c)(ii).)

2. AGENCY DUTIES AND RESPONSIBILITIES

(a)(iv) The Agency is required to retain its records of business with the Company for the time required by law or the time specified by the Company, whichever is longer. Since the Company designated retention period is not specified in the Agreement, the Agency should find out what time period the Company requires for record retention. That may be specified in the Underwriting Guidelines or in another Company provided document.

(a)(ix) The Agency is required "To perform in accordance with the standards of performance of an insurance agency in the insurance industry." This is vague and may be interpreted by different people to mean different things. Without clear information about what it means to the Company, it will be difficult or impossible for the Agency to know if its performance is

aligned to the Company's expectations. Since the Agency is required to comply with all applicable laws per Section 2.(a)(v), some may view this provision as elevating the requirements on the Agency to a non-specific higher level. If this is of concern to the Agency, the Agency can request that it be deleted from the Agreement, or at a minimum, clarified with information that can be objectively understood and applied.

4. **AGENCY'S COMPENSATION**

(a) The Company can change the commission to the Agency with prior notice. This right is not limited, and the amount of prior notice is not specified. If this is of concern to the Agency, it can request that the Agreement be modified to require at least 60 days advance written notice to the Agency of a commission change, and to limit any commission reduction to not more than once in any 12-month period. (The 60-day time period is based on the 60-day advance written notice for either party to terminate the Agreement under Section 13.(a).)

(c) The Agency should be aware of the requirement to report to the Company the collection and collectability of any surcharge, assessment or service fees the Agency is authorized by law to collect. If the Agency is concerned that this is outside the scope of information that the Company should have about the Agency's business, a request can be made for it to be deleted from the Agreement.

5. **OWNERSHIP OF EXPIRATIONS**

The ownership of expirations Section is very narrow, stating that expirations remain the Agency's property upon termination of the Agreement if all premium collected for the Company has been accounted for and paid to the Company, and the if Agency has maintained its insurance license. This leaves numerous points important to the Agency unaddressed, such as that: the Agency owns its expirations during the term of the Agreement; the Company won't use the Agency's expirations to market or sell coverages; the Company won't refer the Agency's expirations to another agency; the Agency has a cure right for unpaid sums due the Company to avoid losing ownership of its expirations; and the Company will be required to use reasonable business judgment to sell the expirations and pay the proceeds to the Agency after deducting any Agency debt to the Company and expenses.

Given that ownership of expirations goes to the heart of the value of any agency and the number of important points regarding Agency ownership of expirations not covered in the Agreement, the Key Considerations and Sample Language below are provided to assist the Agency with determining any desired changes to request to this Section of the Agreement.

Key Considerations

- Company recognizes the Agency's ownership of expirations.
- Company's only reason for taking the Agency's expirations is the Agency's non-payment of premiums collected by the Agency.
- Company provides advance written notice and an opportunity to cure before taking the Agency's expirations.

- The Agreement must be terminated prior to the Company taking the Agency's expirations.

Sample Language

A. The use and control of the Agency's expirations, including those on direct billed business, the records thereof, and the Agency's work product, shall remain in the undisputed possession and ownership of the Agency. The Company shall not use its records or the Agency's expirations in any marketing method for the sale, service, or renewal of any form of insurance coverage or other product, nor shall the Company refer or communicate the Agency's expirations, work product, or records, or its records relating thereto, to any other agent or broker.

B. If the Agency has not properly accounted for and paid to Company all premiums collected by the Agency (less the Agency's commissions) as of the effective date of termination of this Agreement, prior to taking any action against the Agency's expirations, the Company shall provide written notice to the Agency specifying such unpaid and undisputed amounts and giving the Agency 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 Agency's receipt of the notice, the Company may withhold commissions as an offset against any unpaid and undisputed amounts owed by the Agency. 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 Agency's expirations shall vest in the Company.

C. In the exercise of its right to collect any unpaid and undisputed amounts through the use and control of the Agency'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 Agency 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 Agency's expirations to the extent of any good faith and reasonable dispute as to amounts owed by the Agency to the Company.

6. There is no Section 6. in the Agreement.

7. There is no Section 7. in the Agreement.

8. **DIRECT BILLED BUSINESS**

(e) The Agency is required to waive commission on uncollected premium after 45 days on audit premiums, and cancelled or expired policies. If the Agency is concerned about this, a request can be made to revise the Agreement so that the waiver only applies to such sums turned over by the Company for collection.

9. **AGENCY BILLED BUSINESS**

(c) The Agency should be aware of the 45-day advance notice and written Company approval requirements before changing the location of its trust account.

(e) The Agency should be aware that its authority can be suspended until the Company receives payment due for Agency billed business if payment is not received by the Company by the 15th day of the month after the Agency receives the account current from the Company covering that business.

10. **INSURANCE**

(a) The Agency is required to maintain E&O tail coverage for 12 months after termination of the Agreement or until all policies have been cancelled or non-renewed. It is important for the Agency to verify with its carrier that the required insurance amounts and duration can be maintained as required. The Big I E&O coverage available from Westport often can provide tail coverage to meet this requirement, and may be available for a longer period than is otherwise available to the Agency. If the Agency cannot obtain and maintain the coverage required by this Section, the Agency should seek the changes needed to the Agreement so the Agency can comply with this Section of the Agreement.

(b) If the Agency has Agency billed business, the Agency is required to maintain employee dishonesty coverage during the term of the Agreement and for 18 months after termination. The parameters of this coverage and who is covered may vary from one policy to another so the Agency should verify with its carrier that the required coverage and duration can be maintained. The availability of 18 months of tail coverage for this type of policy should be checked carefully, and if the Agency cannot obtain and maintain the coverage required by this Section for the duration required, the Agency should seek the changes needed to the Agreement so the Agency can comply with this Section of the Agreement.

(c) The Agency should be aware of the requirement to give the Company proof of the insurance required not just at the start of the Agreement but on every anniversary of the Agreement as well.

(d) The Agency should be aware of the requirement to give the Company 10 days advance written notice not only of termination or cancellation of any policy required under the Agreement but also of any policy change.

(e) The Agency is required to name each Company that is a party to the Agreement as an additional named insured on every insurance policy required of the Agency under this Agreement. In general, an additional named insured will only be added to a policy if the additional named insured is a co-owner, business affiliate or business partner of the insured, such as might be the case for a cluster when the an insurance agency is part of a cluster. Given these points, it is important for the Agency to verify with its carriers that all three Company entities that are parties to the Agreement can be added as additional named

insureds to all insurance policies required of the Agency by the Agreement. If the Agency cannot have all three of the Company entities added to the insurance policies as additional named insureds as required by this Section, the Agency should seek the changes needed to the Agreement so the Agency can comply with the Agreement.

11. **INTELLECTUAL PROPERTY**

(b) The Agency should be aware that the Agreement does not confer any rights to use the Company Marks without the Company’s prior written approval, and once granted, the Company can revoke such permission at any time.

(e) The Agency agrees to indemnify the Company for claims that the Agency’s actions related to business solicited under the Agreement violate applicable state or federal privacy and consumer protection laws. (See comments to Section 16. regarding Indemnification.)

13. **TERMINATION**

(b) The Agreement allows for its termination by mutual Agreement of the parties. Since it is a written agreement, it is best that any termination also to be documented in a writing signed by all parties. That should avoid misunderstandings about the Agreement’s status. If this is of concern to the Agency, a request can be made to revise the Agreement to require termination by mutual agreement to be via a writing signed by all parties.

(c)(ii) The Agreement is terminated immediately upon the “Agency’s material breach... including any failure to remit premiums to the Company as required under this Agreement...” This applies in the event of a minor payment deficiency, even of a very small amount based on a good faith mistake or good faith dispute about what is due, and there is no cure right for the Agency. If this is of concern to the Agency, the Agency can request that the Agreement be modified to entitle the Agency to written notice of the alleged breach and at least 10 business days to cure. (See comments to Section 1.(c).)

(c)(iv) The Agreement is terminated immediately upon “Suspension, probation, revocation or termination of Agency’s license.” If the Agency remains licensed and in good standing in at least one state where it is appointed to conduct business for Company, there may be uncertainty about if the Agreement is terminated only as to the state(s) where the license actions above have been taken or if the Agreement is terminated in its entirety. If this is of concern to the Agency, a request can be made to revise the Agreement so the immediate termination for those license actions applies only for the state(s) where such actions have been taken.

14. **RIGHTS AND DUTIES UPON TERMINATION**

(a) The Agency’s rights to renew policies stops upon termination of the Agreement for any reason. If this is of concern to the Agency, the Agency may want to request that the Agreement be revised to delete the revocation of authority to renew in-force policies and to

add a run-off provision. Sample Language is provided below to assist the Agency with any requested changes to this section of the Agreement.

Sample Language

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 come up for renewal within a one-year period following the date of termination of this Agreement and that meet the Company's current underwriting standards. 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 Agency 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 Agency shall receive commission on all such policies at the rate in place on the date of the notice of termination.

(c) The Company is not required to quote or bind renewal business after termination of the Agreement unless required by law or regulation, and there is no provision for any commission to the Agency for any renewal business. If this is of concern the Agency, the Agency may want to request that the Agreement be modified to delete the language regarding the Company not quoting or binding renewal business and add a run-off provision. (See comments to Section 14.(a) and the Sample Language provided.)

(d) The Company is required to pay commission upon termination of the Agreement only if required by law or the Agreement. The only provision in the Agreement concerning the Company's obligation to pay commission upon or after termination is in Section 14.(e), so see the comments to that Section below. The Commission Schedule, which is incorporated into the Agreement, does not provide any rights to commission payment upon or after termination.

(e) The Company agrees to pay the Agency commission on renewal business after termination of the Agreement only if required by law. In addition, if the Company is required by law to allow the Agency to service business after termination, the Agreement specifies that the commission will be the minimum allowed by law, and such amounts will be paid quarterly. If this is of concern to the Agency, a request can be made to modify the Agreement so that the Agency will receive commission for servicing and renewing policies after termination of the Agreement at the rate in place on the date of notice of termination. (See comments to Section 14.(a) and (c) regarding a run-off provision.)

15. **CONFIDENTIALITY**

(a) The Agreement requires the parties to keep confidential the information and materials shared between them that are "confidential and proprietary...(including the terms of this Agreement)...." There is no definition or description of what qualifies as "confidential and

proprietary” other than the terms of the Agreement itself, and different people may have different perspectives on what those terms cover. In addition, since the clause defines the terms of the Agreement itself as being confidential and proprietary, and the ability to share confidential and proprietary information is limited to those with “a need to know the information to perform the services under this Agreement...”, the Agency would not be allowed to share the Agreement with its outside counsel or accountants since those professionals perform no services under the Agreement. If the Agency is concerned about these issues, a request can be made to modify the Agreement to define/describe the terms confidential and proprietary more completely, and to expressly state that the Agency can share the Agreement with its outside counsel and accountants.

16. **INDEMNIFICATION**

Indemnification clauses should be mutual and identical, so each party gives and receives protection for the same claims in the same way. The indemnification in the Agreement by the Agency to the Company is broader than the Company indemnification of the Agency. The parties covered are not identical (Agency parent, subsidiaries, affiliates, and representatives are not covered by the Company indemnification of the Agency but are covered by the Agency indemnification of the Company), the parties whose acts or omissions are covered are not identical (acts of contractors of the Company are not covered by the Company indemnification of the Agency but are covered by the Agency indemnification of the Company), and acts covered are not identical (the Agency must indemnify the Company for the Agency’s breach of the Agreement but there is no parallel obligation by the Company to the Agency for a breach of the Agreement by the Company). And significantly, a different standard of liability applies to the Company and the Agency – the Agency is required to indemnify the Company regardless of the Company role or contribution to the act, error or omission, but the Company indemnification of the Agency is reduced by the extent to which the Agency “allegedly caused, was involved in, or contributed to such act, error or omission.”

If these issues are of concern to the Agency, especially the different standards that apply (including the mere allegation that the Agency, was involved in or contributed to the act, error or omission), the Agency should request changes to make the clauses the same. In addition, it is unusual to see an indemnification clause reduce the potential liability of the indemnifying party merely by an allegation of potential misconduct by the indemnifying party; rather, the extent of liability is typically determined by the percent of liability assigned to each party by the court or arbitrator deciding any dispute covered by the indemnification clause. If that is of concern to the Agency, the Agency can request that the word “allegedly” be deleted from the second to last sentence of Section 16.(b).

17. **COMPANY’S RIGHT OF OFFSET; ACCORD AND SATISFACTION**

(a) The Company can offset money owed to the Agency under this Agreement or any other agreement against premium deposits held by the Company or other outstanding balances or money the Agency owes the Company. If this is of concern to the Agency, the Agency can

request that the Agreement be modified so the offset under this Agreement applies only to money due from and to the Agency under this Agreement.

18. INSPECTION AND AUDIT OF AGENCY

(c) The Agency should be aware that the Company reserves the right to conduct background investigations on the Agency and its staff to satisfy itself that the Agency is in compliance with applicable laws regarding who can engage the business of insurance, and that the Agency will not employ anyone who will negatively impact the Company's ability to do business or its reputation. The standard for what can negatively impact the Company's reputation is not specified, so if that is of concern, the Agency can request a modification to the Agreement to add an objective description.

20. ASSIGNMENT

The Agency is required to give 90 days advance written notice to the Company of a sale or transfer of its business so the Company can decide whether to allow the Agreement to be assigned to the new owner or terminate the Agreement. Many buy-sell agreements include a non-disclosure clause that restricts disclosure to others prior to closing, so this clause may be troublesome to the Agency. If this is of concern to the Agency, a request can be made to revise the Agreement to require notice to the Company within 15 days after the sale of a controlling interest in the Agency.

26. JOINT AND SEVERAL LIABILITY

The Agency should be aware that the Agreement makes each entity signing on behalf of a party jointly and severally liable for the acts of any other entities signing for that party, and specifies that if the law makes members of partnerships or other business associations subject to personal liability, the liability of each member is joint and several.
