



**Independent Insurance Agents
& Brokers of America, Inc.**

OFFICE OF THE GENERAL COUNSEL

Berkley One Producer Agreement

Reviewed October 2020

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 Agreement lacks clear affirmative protections for the Producer's ownership and control of expirations, records and work product.
- The Agreement does not provide renewal rights to Producer for policies in force.
- The Data Privacy and Protection Addendum is unusual, onerous, and provides no protections or assurances for Producer while imposing obligations solely on Producer.

REVIEW OF PROVISIONS

B. AUTHORITY OF PRODUCER

4. Most notably, the Agreement lacks clear language providing for the Producer's ownership and control of expirations, records and work product. Section B.4 grants Producer limited authority to solicit and submit to the Company for acceptance or rejection applications for insurance (and does not provide Producer with binding authority). Producer's authority is subject to Company's Terms of Use and Underwriting Standards. The Terms of Use for the Company portal are incorporated into the Agreement as Schedule C and contain a section on "Ownership of Information."

That Ownership of Information section suggests that ownership and use of Producer information regarding applicants is covered by the "Agency Agreement governing the relationship between Berkley One and the agency to which access

to the agency portal is granted.” Yet, the Producer Agreement is largely silent on this (apart from the marketing language in Section 8.D on Premiums and Commissions discussed further below). This section further provides that any information “other than that which pertains to applicants or insureds” which Producer enters on the Company portal *becomes the property of Berkley One*, including all “data, questions, comments or suggestions.”

The Producer should ensure it is comfortable with all information not pertaining to applicants or insureds entered on the Company portal becoming the property of Company. The Producer should also seek to clarify its rights with respect to its expirations, records and work product as well as the use and control of such for marketing purposes. Sample language is provided below. **Producer should also note the broad Disclaimer and Limitation of Liability sections in the Terms of Use for the Company portal, which shift any liability or damages relating to use of the portal to Producer.**

Sample Language:

The use and control of the Producer’s expirations, including those on direct billed business, the records thereof, and the Producer’s work product, shall remain in the undisputed possession and ownership of the Producer. The Company shall not use its records or the Producer’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 Producer’s expirations, work product, or records, or its records relating thereto, to any other producer, agent or broker.

C. UNDERWRITING AND INSTRUCTIONS

2. Producer may want to request a copy of the Underwriting Standards to review in advance of signing the Agreement. While Company is required to provide “reasonable notice when practicable” for changes, the Producer may also want to request clearer definition on notice, e.g. at least 90 days’ prior written notice.
3. This clause is overly broad and ambiguous in that it requires Producer to agree to follow “any other instructions as may be communicated from time to time.” Producer may want to limit this requirement to “reasonable and lawful” instructions and require Company to provide adequate notice of such instructions, e.g. at least 90 days’ prior written notice.

D. PREMIUMS AND COMMISSIONS

2. The Producer may want to request that the Agreement be revised to require at least 90 days’ prior written notice, as opposed to 30 days, for any revisions to the

commission schedule. This would allow the Producer time to make necessary business adjustments.

8. This provision provides the Company broad discretion to engage in “direct” marketing as long as Company simply provides notice to Producer. The Producer may wish to require the Company obtain “prior written approval” before engaging in any direct marketing to its clients. The Company also states it may undertake “indirect” marketing to insureds through marketing “directed at the general public, or to certain potential insureds who are identified by means of a third party vendor, by an algorithm, by another operating company of W. R. Berkley Corporation or by other analytic or technological means.” The Producer may wish to seek more information on and further definition around the algorithmic, analytic or technological means that Company uses for “indirect” marketing, and how information about insureds is shared with other affiliated insurance companies. (See also Schedule F, Privacy Notice, “We may share Information with our Affiliates to analyze our book of business and to consolidate necessary information.”).
9. The Producer should ensure it is also comfortable with Company potentially advertising to Applicants who did not actually purchase coverage through Producer at least two years after the application was received and “after using reasonable efforts to determine whether such applicant is still working with Producer and using reasonable efforts to refer the applicant to Producer.”
12. If Producer is in breach of the Agreement at any time during the Contingent Commission eligibility period, then no contingent commission will be paid. This means even an immaterial or inadvertent breach, or a breach that Producer timely cures, could result in Producer forfeiting any contingent commission. It also does not require the Company to provide notice of such breach. Producer may want to add a requirement that written notice of any such breach be provided to Producer, and exceptions for immaterial breaches and breaches that have been timely cured. This section also allows the Company to terminate the contingent commission arrangement on only 30 days’ notice, and the Contingent Commission Agreement allows the Company to terminate the contingent commission arrangement at any time without reason. Producer may want to request changes to these two provisions to ensure the contingent commission arrangement cannot be terminated by the Company with little or no prior notice, or for no reason or without cause.

F. ELECTRONIC ACCESS

4. The Agent may want to request advance written notice of any modification to the electronic portal.

G. BILLING

1. Producer does not have the option to choose agency billing.

H. RECORD RETENTION AND AUDIT

1. The Company has the right to require Producer to provide copies of “complete records of all transactions pertaining to the Policies and applications for Policies” at any time. This is an unusual provision and could be used to circumvent any restrictions on inspection and audit. This language could effectively shift the entire time burden and cost to Producer.
3. The Company has the right to examine, audit and copy Producer’s records “as often as it determines to be reasonable during normal business hours, either while this Agreement is in effect or after it terminates.” The Producer may want to request, at a minimum, “reasonable” notice of any audit request and a limit on such right after applicable state and federal law no longer require record retention.
4. Producer is required to notify the Company in writing of “all contacts and correspondence received from insurance or regulatory or other governmental authorities relating to services provided under this Agreement.” This requirement is overly broad and could be read to require notice of communications that are standard and immaterial. The Producer may want to request that notice is only required for communications “that could have a material impact” on services provided under this Agreement instead of simply “relating to” the services.

I. INDEMNITY

1. While the provision is mutual, it does not clearly provide for comparative as opposed to contributory fault standards for indemnification. It may be helpful to clarify that any indemnification is made except to the extent the other party caused or contributed to the losses, claims, liabilities, expenses or damages. (See also Limitation of Liability in Schedule C, Terms of Use).

K. ASSIGNMENT; CHANGE OF CONTROL

2. The Producer may want to revise the requirement for notice to apply only to the consolidation, assignment, transfer or merger of a majority of the Producer’s business, including the sale, assignment or transfer of a majority of Producer’s expirations or business placed with the Company. The term “substantial” could be interpreted as requiring notice for the sale of less than a majority share.
3. The Producer may want to request at least 30 days’ prior written notice of termination upon a Change in Control, as opposed to immediate termination. See also Section L.1.b.

L. TERMINATION OF AGREEMENT

- 1.d. The Producer may wish to request this termination right be made mutual and for better definition of what constitutes “exceeding authority” under the Agreement.
- 1.f. The Producer may wish to modify what type of breach will trigger immediate termination rights, such as an uncured material breach of the Agreement.
- 2. The Producer may wish to add that the provision does not apply to monies that are subject to a good faith and reasonable dispute.
- 4. While the Agreement provides that the Producer shall remain the broker of record for all expiring policies after termination, the Producer may wish to address the issue of renewal after termination. Below is sample language.

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 Producer 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 Producer shall receive commission on all such policies at the rate in place on the date of the notice of termination.

Q. PRIVACY AND DATA SECURITY

Schedule D (Data Privacy and Protection Addendum) is unusual in that it appears meant for the Company’s technology service providers and has not been tailored to address the unique relationship between an independent insurance agent or broker and an insurance carrier. The Data Privacy and Protection Addendum is entirely one-sided in favor of the Company and imposes requirements that may significantly exceed applicable laws and regulations. For example, Section (c)(ii) requires the Producer to employ Multi-Factor Authentication for any individual accessing internal Producer networks remotely. Section (c)(iii) generally requires data to be encrypted while in transit. Section (c)(iv) requires the Producer and Producer’s subcontractors and agents to engage a nationally recognized accounting firm to conduct at least one of several types of extensive security audits on an annual basis. This is an especially onerous, costly, time-consuming and unusual requirement to impose on an independent agent or broker.

Section (d) further requires Producer to conduct its own security risk assessments as well as complete the Company's security questionnaire(s), incorporated by reference. The Producer may want to request copies of any questionnaires that will be required. Section (e) also places unilateral requirements on the Producer in the case of a security "Event" (defined to include any act or attempt, successful or unsuccessful, to gain unauthorized access to, disrupt or misuse an Information System...). The definition of Event is overly broad by including even unsuccessful attempts to breach Producer's information systems, and it could possibly be broad enough to include even the receipt of a phishing email that is deleted without harm. Additionally, the Producer is required to notify the Company by telephone within 48 hours of becoming aware of such Event. Note also that Sections (e)(iii) and (iv) shift all costs associated with a breach to the Producer, with no limitations on liability or accounting for any contributory negligence by Company.

At a minimum, the Producer should request that all rights and obligations pursuant to Schedule D be made mutual. Producer is providing sensitive data to Company as well and should receive at least the same assurances as to Company's security. If the Company is held to the same standards, it may also be more receptive to scaling back some of the more onerous requirements and agreeing to a more reasonable and industry-standard data privacy and protection addendum.

R. COMPLIANCE WITH LAW

The Producer may wish to request that this provision be made mutual.

S. CHANGES IN AGREEMENT

1. Company should be required to provide changes to the Agreement on at least 90 days' prior written notice if the only way to reject is a notice of termination.
2. The Producer may wish to request at least 90 days' prior written notice for changes to the underwriting rules or Insurers in Schedule A.
