



The Green Sheet

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Reading is Fundamental

If the massive efforts of practically every company in the bank card industry are embodied in the terms of a merchant agreement, shouldn't you at least read it? Surprisingly, despite the tremendous resources expended to build solid businesses and maintain strong merchant account portfolios, many operations never bother to read, review, and understand the terms of their merchant agreements.

Our office, BankCardLaw, has observed with alarming frequency, that many of the aggravating, loss-causing merchant account problems could have been prevented by simply reading and discussing the terms of merchant applications/agreements and ensuring that these important documents reflect the understanding of the parties.

Many parties do not read and discuss the terms of merchant applications and agreements until after there is a problem. Often, it is then too late to prevent loss.

Consider that, written agreements often contain what is known in legal terms as an "integration clause."

Integration clauses often contain wording such as "Entire Agreement: This agreement, together with the accompanying merchant application constitute the entire understanding between the parties with regard to subject matter hereof and supersede all prior and contemporaneous agreements and understandings, inducements, or conditions by Bank, ISO, or sales representative whether oral or in writing, express or implied."

Simply put, when the agreement is signed, it is generally considered the final understanding of the parties. To wit, state and federal jurisdictions usually accept integrated written agreements as the final expression of the intent of the parties and are reluctant to consider oral and written understandings outside the final agreement.

Likely causes of failure to read and discuss the terms of agreement are the oft heard, "It takes too much time" or "I am just too busy." Ironically, reading and discussing the terms of agreement can save far more time and money than responding to the problems caused by failing to read.

Moreover, during the reading and discussion process the parties can identify, among other things: areas which could later pose major account problems; areas of operation needing modification; and whether or not the bank and the merchant are compatible.

Below are some common topics or provisions of merchant applications/agreements which, if not properly specified, understood, and followed, can lead to account failure and loss :

1. Merchant Type and Type of Business (i.e., MO/TO, Internet computer sales, Outbound Telemarketing, etc.). This must be accurate.
2. Definitions [of Terms], especially those which can lead to account termination such as "Excessive Chargebacks."
3. Approved/Disapproved Methods of Charge Transaction (i.e., card swipe, manually keyed, telephone entry, etc.)
4. Exclusive or Non-Exclusive merchant agreement. Can the merchant have other merchant accounts?
5. Term or Effective Date For what time period is the agreement in effect?
6. Prohibited Practices (by merchant).
7. Monthly Transaction Volume Limit, increasing and decreasing limit.
8. Mandatory Merchant Practices (i.e. as required by MasterCard, Visa, law, etc.).
9. Governing Law Which laws (state/federal) determine the effect of the agreement?
10. Termination How is termination of the agreement made; what events trigger this; how much notice is required, etc.?
11. Notice For what events must notice be given (i.e. change of business name or type), to whom should it be made, and in what form(s) (i.e., written, fax, etc.)?

What can be done to improve the treatment of merchant agreements? Banks can make sure that their ISOs and MSPs understand the terms of their merchant agreements and properly convey this information to prospective merchants during the sales process.

ISOs/MSPs and sales agents (which often represent multiple acquiring banks with different agreements) can make sure they understand and properly represent the applicable terms of agreement to the merchant. If there is a misunderstanding regarding any part of the agreement, the parties should dis-

cuss the applicable terms and conditions to ensure that they are accurate. If the terms do not reflect the understanding of the parties, they should be corrected by making amendment to the agreement. While agreements can be modified and explained after they are signed, the best time to address the provisions of a merchant agreement is before the parties sign.

The conclusion—Reading is Fundamental and it helps avoid losses to all parties. Indeed, it does no good for a merchant to painstakingly build that "ideal business" and then have it fail because they did not read or understand their merchant agreement.

It likewise does not benefit the bank, ISO/MSP, or sales representative to "make that sale" if it fails because the agreement is not understood or involves an incompatible merchant. If someone told you that you could save tremendous amounts of

time, money, and increase your return simply by reading several pages of information and then discussing it, surely you would do so. Well, someone just told you.

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