



BIG i[®]

**GUIDE TO
AGENCY-COMPANY
APPOINTMENT CONTRACTS**

KEY CONSIDERATIONS & SAMPLE PROVISIONS

Version 1.0

This memorandum 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 the independent evaluation and negotiation of any provision in a contract and is not a recommendation that any 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.



INTRODUCTION

Agency appointment contracts form the legal foundation for the relationship between independent insurance agencies and insurance carriers. The agency-carrier contract should set forth the rights, responsibilities and obligations of the respective parties with respect to all material aspects of the relationship. The provisions in the agency-carrier contract will likely trump any other written or oral understandings between the parties. Thus, it is imperative that agencies review, understand and, when necessary, seek to negotiate the terms of these contracts before signing and proceeding with a new or existing carrier relationship.

For decades, the Big "I" Office of General Counsel has worked closely with numerous national and regional carriers to provide input and proposed revisions to new agency-carrier contracts before they are released. In connection with these efforts, many carriers have agreed to adopt more favorable terms for agencies. The Big "I" provides these specific contract reviews for free to its members through its website under the Big "I" Resources, "Legal Advocacy" tab.

While carriers' willingness to negotiate changes will vary significantly based on the carrier's policies and the relevant circumstances, an agency may be able to secure significant improvements before executing a contract. The following guidance is offered to assist agencies in identifying the key concerns that most frequently appear in the agency-company contracts. It is typical to see one or more of these items in any given contract. Nevertheless, this guidance does not – and is not intended to – identify every contract provision that may be important for an agency to consider. Agency-carrier contracts may raise a variety of other concerns that the agency should address with the applicable carrier, the agency's professional advisors (e.g., attorneys and accountants), and/or the Big "I" Office of General Counsel as appropriate.

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OWNERSHIP OF EXPIRATIONS

Ownership of expirations is one of the most critical issues for agencies to consider in agency-carrier contracts. It is the cornerstone of the independent agency system, and an agency derives much (if not most) of its value from the ownership of its expirations and records thereof. U.S. courts have generally recognized independent agents' ownership of expirations dating back to the seminal case of *National Fire Insurance Company v. Sullard*, 97 A.D. 233 (N.Y. App. Div. 1904) (finding an independent agent owned his "expiration register" over company claims). Despite this longstanding precedent, the contractual terms surrounding ownership of expiration thereto can still have significant consequences.

For example, contracts will often address the circumstances under which a carrier may take ownership of expirations, particularly after termination of the contract. Contracts may also address ancillary issues such as whether and how the company may engage in direct marketing through use of the agent's client records. Indeed, one important emerging issue is the control of records and data, which are increasingly valuable in an increasingly digital world.



KEY CONSIDERATIONS

- Ensure that the carrier affirmatively recognizes the agency's ownership of both expirations and records.
- Try to limit the carrier's ability to take control of the agency's expirations solely to the agency's non-payment of undisputed premiums collected by the agency after termination of the contract.
- Require that the carrier provides advance written notice and an opportunity for the agency to cure and/or furnish acceptable collateral security before taking the agency's expirations.
- Some contracts provide the company with a lien or security interest against agencies' books of business or expirations. The agency may want to request the elimination of any such lien or security interest, which may conflict with the agency's obligations to a lender or limit the ability to obtain financing. At a minimum, the agency should ensure that any lien or security interest applies only to the expirations or book of business with the applicable company. A broader lien or security interest could lead to the agency allowing two or more companies to have a lien or security interest against the same property.



A

The use and control of the Agent's expirations, including those on direct billed business, the records thereof, and the Agent's work product and data relating thereto, shall remain in the undisputed possession and sole ownership of the Agent. The Company shall not use its records, data or the Agent'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 Agent's expirations, including records, work product, or data relating thereto, to any other agent or broker, or affiliate or company, without prior express written permission from the Agent.

B

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.

C

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.





KEY CONSIDERATIONS

- To the extent applicable, the contract should specify whether the agency may deduct commissions on agency-billed policies.
- If the policies are direct billed or the agency is not allowed to deduct commissions, the contract should specify the timing of commission payments.
- The frequency with which the carrier may reduce the agency's commissions can vary. Carriers typically provide 30-90 days advance written notice prior to any unilateral reductions. The agency may wish to request at least 90 days advance written notice for any changes. The agency may also want to request that carries limit reduction to once per calendar year.
- The contract should have a separate commission schedule setting forth the commissions applicable to the carrier's lines of business. The agency should be aware of any language stating that the parties or the carrier will set commission rates on a policy-by-policy basis.



COMMISSIONS

While expirations constitute much of an agency's inherent value, commissions represent much of the day-to-day income and are vitally important to an agency's success. The agency should be aware of how its agency-carrier contracts address a variety of commission-related issues, including the timing of commission payments paid directly by the company, whether or not the company has the right to deduct commissions from premiums, the frequency of adjustments and the amount of advance notice, if any, that the carrier has to provide before adjusting commissions rates.

SAMPLE LANGUAGE



*N.B. Contracts vary greatly in how they address commissions. Therefore, we have not provided sample language but encourage agencies to review commission provisions in light of the key considerations.





SAMPLE LANGUAGE



The Agent agrees to undertake reasonable efforts to collect from insureds all premiums for which it is responsible under this Agreement. The Agent agrees to notify the Company within 45 days after the due date of any such premiums that the Agent is unable to collect. If the Agent so notifies the Company, the Company shall relieve the Agent of collecting such premiums. The Agent is not entitled to commissions on any such premiums collected by the Company.

* N.B. The sample language above addresses the last three bullet points. It does not address the first two bullet points because contracts vary widely in how they address billing procedures.



PREMIUM COLLECTION

Premium collection is critical to agencies' daily operations. Many agencies have a role in receiving, maintaining and disbursing transacted premiums and should pay special attention to provisions affecting the flow of premiums.



KEY CONSIDERATIONS

- The agency should understand whether the contract provides for company billing, agency billing or a combination of both and the circumstances under which the company may move policies from agency billing to company billing.
- With respect to agency billed or direct billed, agents should know what is permitted and under what circumstances.
- Agencies should consider whether the carrier specifies any circumstances under which it may change the billing method from agency billed to direct billed.
- Be aware of language requiring the agency to pay premiums "whether or not collected" by the agency or similar language. This is contrary to the typical result where non-payment by an insured will cause the policy to lapse or be cancelled. If this concerns the agency, then it may wish to request that its responsibility be limited to remitting premiums that it actually receives.
- Determine whether the contract allows the agency to be relieved of collection if it turns over collection to the carriers. Carriers typically require agencies to waive commissions on any premiums collected by the carrier.
- Look out for language that limits the premiums that can be turned over to the carrier for collection – e.g., audit premiums. The agency should be permitted to turn over all uncollectable premiums to the carrier for collection.



KEY CONSIDERATIONS

- Try to ensure the indemnification obligations are mutual—i.e., that each party indemnifies the other party for the same types of claims or losses.
- The obligations of the carrier should not be limited to civil actions, which would exclude regulatory actions by the state insurance department.
- Watch for any language that would impose a so-called contributory negligence standard, whereby the carrier's indemnification obligation is eliminated entirely if the agency contributed even a small fraction of fault. Instead, the agency should seek language that apportions responsibility according to each party's respective degree of fault or a so-called comparative fault standard.
- Be aware of language, in the indemnification provision or elsewhere, that requires only the agency to cover the carrier's fees and costs in the event of a lawsuit or collection efforts against the agency. At a minimum, such a provision should be mutual and provide that the prevailing party is entitled to have its costs and fees paid by the other party.

INDEMNIFICATION

An indemnification provision describes the circumstances under which each party is responsible for compensating the other party for any claims or losses arising out of the contract. Agents should take a careful look at how any indemnification provisions are structured and what types of claims or losses might be covered.



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 after the termination of this Agreement.





CHANGES IN OWNERSHIP



KEY CONSIDERATIONS

- The agency should not be required to provide advance notice of a change in ownership. Such a requirement may violate the terms of any applicable non-disclosure agreement between the agency and the counterparty to a merger or acquisition.
- The agreement should not terminate immediately upon a change in ownership.
- The agency should not have to provide notice to the carrier for every change in ownership. A change in ownership provision should apply only to changes in a majority or controlling interest.



SAMPLE LANGUAGE

The Agent will provide written notice to the Company within fifteen (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 thirty (30) days advance written notice.





CARRIER COMMUNICATIONS WITH INSURED



KEY CONSIDERATIONS

- Be aware of any language that allows the carrier to communicate directly with, or sell directly to, the agency's clients.
- If the carrier insists on including such language, the agency may want to request one of these.

A The carrier provides advance written notice of direct sales communications with the agency's client, copy and/or identify the agency's name and contact information on all correspondence and direct policyholders to the agency for questions and requests for service.

B The carrier will pay commissions on any direct sales by the carrier to the agency's clients.

C Direct sales will not erode or in way affect the agency's ownership of expirations.

SAMPLE LANGUAGE



The Company shall not use its records or the Agent'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 Agent's expirations, work product, or records, or its records relating thereto, to any other agent or broker.



CLAIMS REPORTING

KEY CONSIDERATIONS



- Claims reporting requirements can differ significantly between carriers. Some carriers may simply require notification of actual lawsuits filed against a policyholder.
- Other carriers may require notice of any circumstance that may increase the carrier's risk of any potential claim mentioned by a policyholder to the agency.
- Agencies may wish to limit such provisions to actual notification of a claim or lawsuit. Otherwise, the agency may technically be agreeing to notify the company of every client complaint, no matter how minor.

NOTICE REQUIREMENTS



KEY CONSIDERATIONS

- The Agreement should require notice be in writing by a method that allows for confirmation of receipt.
- Notice should be effective upon receipt or refusal to accept, as opposed to being effective upon sending or a pre-determined number of days after sending.
- Be aware of language that allows the carrier to provide notice by e-mail, facsimile, or the carrier portal.

SAMPLE LANGUAGE



When either party desires or is required to give notice to the other party pursuant to any term of this Agreement, the notice shall be in writing and: (i) delivered personally; (ii) sent by a nationally recognized overnight delivery service (such as, but not limited to, FedEx), all charges prepaid; or (iii) sent by U.S. Postal Service certified mail, return receipt requested, postage prepaid. All notices shall be delivered or sent to the address for each party set forth herein or such other address as either party notifies the other of in accordance with the terms of this Agreement. Notices shall be deemed to have been given upon receipt or refusal to accept by the party to which the notice is delivered or sent.





TERMINATION



- The agency should ensure that the contract provides for reasonable advance written notice prior to termination. It is typical for contracts to provide for at least 90 days advance written notice prior to termination.
- The agency should be aware of the circumstances under which the carrier may terminate with little or no notice. The agency may want to request written notice of any termination and an opportunity to cure certain terminations.
- The agency should examine how the company will notify insureds of the termination.



This Agreement may be terminated as follows:

- A** By mutual written agreement between the Agent and the Company.
- B** The Company may terminate this Agreement only upon written notice to the Agent. Except as provided herein, such notice shall be given not less than one-hundred eighty (180) days in advance of the effective termination date except that if the reason for termination is a change in the ownership of the Agent, the notice period shall be not less than thirty (30) days or the minimum period required by law, whichever is longer.
- C** The Agent may terminate this Agreement immediately upon written notice to the Company.
- D** The Company reserves the right to terminate Agent immediately upon written notice in the event of fraud, violation of applicable insurance laws and regulations, the Agent's material breach of this Agreement, Agent's filing for bankruptcy protection, or the appointment of a receiver over any of Agent's assets; provided, however, that in the event of an alleged material breach, the Company shall provide the Agent with written notice and at least ten (10) business days to cure the alleged material breach



POST-TERMINATION RIGHTS & RESPONSIBILITIES

Agency and carrier business needs and circumstances change over time, and carrier relationships inevitably will come to an end. Some contracts, however, fail to address what happens next. As such, agencies need to consider their rights and responsibilities after a notice of termination. Of particular importance are provisions relating to: the payment of commissions on policies that continue after termination; agency's ongoing access to its clients' records, including any records in the carrier's database; the authority to service policies after termination (e.g. under a limited agency agreement); and their clients' renewal rights upon policy expiration.



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 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.



KEY CONSIDERATIONS

- Appointment contracts often permit carriers to cancel all policies as soon as permitted by applicable law. A run-off provision provides agencies and insureds with greater certainty following termination of the contracts.
- A run-off provision should provide a period of time (e.g., one year) after termination during which the carrier agrees to renew all policies that meet current underwriting standards.
- A run-off provision should specifically state that the agency has the authority to service policies following the termination of the contract and to receive commissions at a pre-determined rate (e.g., the rate in place at the time of the notice of termination).
- Be aware of provisions that require the agency to service policies but do not require the carrier to pay commissions unless provided by law.
- The agency should look out for language that allows the company to engage in selective cancellation without regard to its current underwriting standards. Such language may undermine the effect of the run-off provision.



KEY CONSIDERATIONS

- Limit inspection to Agent's records relating to the company's business, not all agency records.
- Require advance written notice prior to the inspection.
- Require the inspection to occur during normal business hours and at the company's expense.

AUDIT REQUIREMENTS



SAMPLE LANGUAGE



Upon advance written notice to the Agent, the Company may inspect the Agent's records relating to the Company's business during normal business hours. The Agent agrees to cooperate with such inspection, which the Company agrees to conduct at its own expense.



CONFIDENTIALITY



SAMPLE LANGUAGE



In the course of performing their duties and obligations under this Agreement, the Agent and Company will disclose to each other nonpublic personal identifiable information about the clients of the Agent. Both Agent and Company agree that they will not redisclose or use this nonpublic personal information except as necessary to carry out the terms of this Agreement or as necessary to effect, administer or enforce a transaction that the Agent's client requests or authorizes. This section shall not affect or in any way limit the Agent's ownership of expirations.



KEY CONSIDERATIONS

- Some contracts broadly restrict an agency's ability to use client information for any reason. Such contracts may inadvertently prohibit an agency from shopping around even if the agency has the client's consent. The agency should ensure that the contract permits it to share client information as permitted by the client or applicable law.
- The agency should be aware of requirements to keep the agreement confidential. The carrier does not have a significant interest in keeping the contract confidential. However, the carrier may have a significant interest in preserving the confidentiality of its commissions and quote data.



DATA SECURITY

Data security regulation is developing quickly in the United States. New York has enacted one of the nation's most far-reaching laws. The National Association of Insurance Commissioners (NAIC) has issued a model data security law, which a number of states are beginning to implement. Carriers are amending or revising their agency contracts to address these new laws and regulations.



KEY CONSIDERATIONS

- Be aware of and consider pushing back on provisions that impose data security requirements more stringent than the requirements of applicable law.
- Be aware of and consider pushing back on provisions that are not mutual and impose burdens and obligations on the agency without requiring the same of the carrier.
- The agency should also be aware of any contractual provisions requiring the agency to distribute privacy notices on the carrier's behalf or take on other duties or responsibilities that are not mutual.

SAMPLE LANGUAGE



The parties agree to comply with the Gramm-Leach-Bliley Act and any other applicable state or federal law protecting consumer or customer personally identifiable information. Each party shall comply with the rules and policies of the other with regard to maintaining the privacy of any and all non-public, personal information. Each party represents and warrants that it has implemented and maintains an adequate and comprehensive information security program containing safeguards designed to prevent the destruction, loss, alteration, unauthorized access, use or dissemination of non-public personal information that meets or exceeds all applicable laws and regulations. Each party will, and will require its agents and contractors to, regularly test key controls, systems and procedures as part of its program. Each party further agrees to provide prompt notice to and cooperate with the other in the event there is a confirmed breach involving non-public, personal information.





PRESERVATION OF RECORDS & COMPANY PROPERTY

SAMPLE LANGUAGE



Upon either the execution or the effective date of a particular document, the Agent agrees to diligently maintain, safeguard, and store, in an orderly fashion for a period of five (5) years after the final termination, non-renewal or cancellation of the last renewal of the policy to which the document applies, or the requirements of state law, whichever is greater, all originally signed applications, waivers, selections of coverage limits and any other policy related documents which are not forwarded to the Company for retention. These documents may be stored in electronic formats to the extent permitted by state law provided these documents are properly date stamped, regularly backed-up, and may be produced promptly upon Company's request.

Any policies, forms, applications, manuals, and other Company supplies furnished to the Agent are the Company's property. To the extent reasonably possible, any such documents shall be returned or destroyed upon the Company's request.



KEY CONSIDERATIONS

- The agency should be aware of whether it can turn over documents to the carrier for preservation and whether turning over documents alleviates the agency's responsibility under state law.
- The agency should consider whether it can meet any requirement to return or destroy company property. The agency may not have the capability to return or destroy electronic files.

FELONY CONVICTIONS

KEY CONSIDERATIONS

The agency should look out for reporting requirements that go beyond the requirements of the Federal Violent Crime Control and Law Enforcement Act of 1994 (the “Act”). For example, the agency should be aware of requirements to report criminal charges (as opposed to convictions), all convictions, or all felony convictions. The Act requires reporting of convictions for felony crimes involving dishonesty or breach of trust.

PROPOSED LANGUAGE

The Agent agrees to notify the Company in writing within ten (10) days of becoming aware that one of Agent’s officers, principals, owners, employees, or producers has been convicted of a federal or state felony crime involving dishonesty or breach of trust. This requirement applies regardless of whether the Company has appointed such person. The Agent does not have to notify the Company if the person with the conviction has received the appropriate insurance regulatory official’s consent to engage or participate in the business of insurance, provided that the consent complies with the Federal Violent Crime Control and Law Enforcement Act of 1994, 18 U.S.C. 1033(e)(2).

SCOPE OF AUTHORITY

KEY CONSIDERATIONS

- A** A scope of authority provision governs an agency’s ability to act on the carrier’s behalf.
- B** An agency should review, for example, whether and under what circumstances it has the authority to bind the carrier to certain risks and provide agency billing to the insured. The agency should then confirm that the authority granted under the contract is consistent with how the agency intends to perform.

AMENDMENTS

KEY CONSIDERATIONS

The contract should provide for a reasonable amount of notice prior to any changes, preferably at least 90 days—unless the agent agrees to the change.

PROPOSED LANGUAGE

The Company agrees to provide at least ninety (90) days advance written notice of any amendments to this Agreement. Amendments to this Agreement are effective only if they are in a writing signed by both parties.

LIMITATIONS OF LIABILITY

KEY CONSIDERATIONS

The agency should be aware of, and request the elimination of, one-sided limitations of liability. These limitations typically appear in the terms governing the agency’s use of the carrier’s electronic systems and bar the agency from recovering all or certain damages associated with using the carrier’s electronic systems.



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