



*Independent Insurance Agents*



*Brokers of America, Inc.*



## OFFICE OF THE GENERAL COUNSEL

### RECOMMENDED AGENCY-COMPANY CONTRACT LANGUAGE

This contract language 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 Agents' independent evaluation of any provision in a contract, and is not a recommendation that a contract including this language 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 LANGUAGE EXCLUSIVELY FOCUSES ON MAJOR ISSUES RELATING TO THE INSURANCE INDUSTRY, AND DOES NOT ADDRESS GENERAL CONTRACT ISSUES.**

#### AGENT INDEMNIFICATION

This section should be deleted from the Agreement in its entirety. An Agent is not in a financial position to indemnify an insurance company for anything beyond what he/she is liable for under common law, statutes or regulations. Section \_\_\_ of the Agreement already requires the Agent to carry E&O insurance. This should be sufficient protection for the Company.

If this provision must stay in, then it should be amended to exclude damages due to the acts, errors or omissions of the Company. In addition, the Agent should verify that his/her E&O policy will cover the liability assumed by the Agent in this provision, or the provision should be amended accordingly.

#### AMENDMENTS

The parties agree that all amendments to this Agreement, including changes in commissions, shall be by mutual written agreement. Each party agrees to negotiate with the other party in good faith in pursuing such amendments.

The Agent shall be given at least 180 days advance written notice of the Company's intent to negotiate a change in or amendment to this Agreement, including changes in commissions, before those changes shall go into effect.

Once established, commission rates shall remain in effect for at least a 12 month period.

## ARBITRATION

If any dispute or disagreement arises in connection with any interpretation of this Agreement, its performance or nonperformance, or the figures and calculations used, the parties shall make every effort to meet in good faith and settle their dispute informally. If the parties cannot agree on a written settlement to the dispute within thirty (30) days after it arises, or within a longer period agreed upon in writing by the parties, then the matter in controversy shall be settled by binding arbitration, in accordance with the rules of the American Arbitration Association (“AAA”), and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

The determination of the arbitrator(s) shall be final and binding on all parties, provided such determination is made in writing and signed by a majority of the arbitrator(s). The arbitrator(s) shall provide a short, written statement explaining the reasons for the determination. When the arbitration results in an award, such award shall include interest at the maximum amount permitted by law per annum running from the date when the amount that is the subject of the award first became due.

The costs of the arbitration shall be borne equally by the parties, provided, however, that the arbitrator(s) may assess one party more heavily than the other for these costs upon a finding that the party did not make a good faith effort to settle the dispute informally when it first arose. Each party shall be responsible for its own attorneys' fees.

Unless the parties agree otherwise, in writing, all hearings or other proceedings shall be held in the city where the Agent's headquarters are located.

## COMPANY INDEMNIFICATION

The Company shall indemnify, defend, and hold the Agent harmless against all liability, including attorney's fees and costs of investigation and defense incident thereto, arising out of or relating to:

- (1) Company acts or omissions, except to the extent the Agent causes such errors;
- (2) failure of an insured to receive notice of cancellation, nonrenewal, impairment of aggregate limits, or any other notice affecting coverage on Company billed business, whether such notices are sent to the insured by the Company or by the Agent, at the Company's request;
- (3) actions or inactions of the Agent based upon: (i) the Agent's use of forms, underwriting information, consumer and/or credit reports, or similar information supplied to the Agent by the Company or obtained by the Agent at the Company's direction; (ii) the Agent following instructions or

procedures established by the Company; and (iii) any law, regulation, order or directive issued by a governmental authority with jurisdiction over the Agent;

- (4) damages sustained by any person as a result of information furnished by the Agent to the Company, unless the Agent furnishes false information with malice or willful intent to injure;
- (5) Company error in the design, maintenance or operation of its software programs or interface environment;
- (6) any intellectual property infringement by the Agent based on software programs provided by the Company; and
- (7) errors or omissions in data communicated within the interface environment which were beyond the Agent's control.

#### CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Phrases such as “provided the Agent did not cause or contribute to such error” create a situation in which an Agent may lose all indemnification from the Company, even though the Company contributed significantly to the liability, if it is determined that it was not the direct cause. Instead, this provision should create a duty by the Company to indemnify for all liability based on the extent to which each party is at fault. This approach is consistent with language such as “except to the extent that Agent has caused or significantly contributed to or compounded such error.” This allows the Agent to have the coverage he/she needs without creating liability for the Company based on the errors of the Agent.

#### DIRECT BILL

When the Company is going to direct bill insureds, there should be a mutual agreement between the Agent and the Company specifying the particular lines of business that will be put on direct bill, and outlining the functions that the Company and the Agent will provide.

The Agency name should be displayed prominently on all communications from the Company to the insured, in the largest print practicable, and in any case in print no smaller than the largest used on the communication.

A copy of all bills, underwriting requests, recommendation audits, engineering reports, and cancellation notices sent to the insureds by the Company should be sent to the Agent prior to the notices being mailed to the insureds. Copies of mass mailings of public service, safety or similar materials also should be furnished to the Agent prior to mailing.

With regard to direct billed policies in force, the Company should accept responsibility for sending to the policyholders timely notices of cancellation, nonrenewal, and changes made in the insureds' policies as a result of changes in statutes, coverages or forms, and for outlining any options available to the policyholders as a result of the changes in statutes, coverages or forms. The Agent should be mentioned as the place policyholders should direct questions and requests for service.

The Agent should be able to request and receive a complete list of direct billed policyholders, together with their policy expiration dates and necessary policy writing details of coverage, including mailing labels of the list, at any time at the Agent's expense, and within a reasonable time after termination of the Agreement, not to exceed 30 days, at the Company's expense.

#### ERRORS IN COVERAGE

In the event that Company is solely responsible for errors in the preparation of policies, endorsements or certificates, Company agrees that if a policy or certificate is not issued or is issued incorrectly, the coverage requested in the application shall be deemed to be in force for a term equal to that requested in the application or for the term of the underlying policy. This provision is subject to the insured's compliance with Company's underwriting rules and restrictions and with all the terms and conditions of the policy or application and to Company's authority under applicable State law and regulations.

#### INSPECTION OF RECORDS

The Company's inspection of the Agent's records should occur only after the Company has given reasonable advance written notice to the Agent, and that it take place only during the Agent's normal business hours, and be at the Agent's office. The inspection should be limited to the Agent's records of his/her business with the Company. [Also, the Agent should have the same right to inspect the Company's records as the Company has to inspect the Agent's records.—not practical]

#### NOTICE LANGUAGE

When either party desires or is required to give a notice to the other party pursuant to any term of this Agreement, the notice shall be in writing and (i) delivered personally; (ii) sent prepaid by a nationally recognized overnight delivery service (such as, but not limited to, FedEx); or (iii) sent by United States Postal Service certified mail, return receipt requested, postage prepaid. All notices shall be delivered or sent to the address for each party set forth below or such other address as either party notifies the other of in accordance with the terms of this provision. 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.

To the Agent:

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To the Company:

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#### OWNERSHIP OF EXPIRATIONS

The ownership, use, and control of expirations, including those on direct billed business, the records thereof, and the Agent's work product, shall remain in the undisputed and exclusive ownership and possession of the Agent, and the Company shall not use its records of those expirations or work product in any marketing method for the sale, service or renewal of any form of insurance coverage or other product/service which abridges the Agent's right of exclusive ownership, use, and control of the expirations or work product, nor shall the Company refer or communicate this expiration information or work product to any other party.

However, in the event of termination of this Agreement, if the Agent has not then properly accounted for and paid all premiums to the Company for which he/she is liable under this Agreement, the use and control of the Agent's expirations, including all right, title, and interest in and to the records thereof, shall be vested in the Company as of the date of such termination. In the exercise of its right to collect any indebtedness due from the Agent through the ownership, use, and control of the Agent's expirations or work product, the Company shall use reasonable business judgment in selling the expirations and shall be accountable to the Agent for all 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. Any indebtedness due from the Agent shall not prevent application of the ownership of expirations clause in favor of the Agent if the Agent furnishes collateral security acceptable to the Company in the amount of such indebtedness, to be held by the Company until the indebtedness is satisfied. A legitimate difference of opinion between the Agent and the Company with respect to balances owed by the Agent does not constitute a failure by the Agent to pay and does not have the effect of vesting title to the Agent's expirations in the Company.

Nothing in this section shall interfere with the Company's obligation to renew policies that include contractual renewal guarantees or which must be renewed pursuant to state law, regulation or by order of government authority, and the Agent shall be entitled to receive commissions on such policies at the rate of commission in effect prior to the termination.

## PAYMENT PROCEDURES

Provide that the period of time allowed to pay balances doesn't commence until a correct, billable and deliverable policy is furnished to the agent or until the effective date, whichever is later. Also provide that the company is obligated to pay balances due the agent on the same basis that the agent must pay the company. Also add provision relieving the producer of liability for audit premiums, including noncancellable surety bond anniversary premiums, where timely notice of inability to collect is given to the company. Timely notice should be a minimum of sixty days. Also include provision that if the insurer is unable to issue a policy in a timely manner because of delay by the insured or the agency, the company issue a billable estimated premium binder which would be added to the agent's account current as though the policy had been received. If the delay was caused by the company, the estimated premium binder would not be issued, and payment would be made through the agent's account current when the policy was issued.

## PERSONAL GUARANTEE

It is recommended that the personal guarantee be deleted from the Agreement in its entirety. In the event the Agency is a corporation, a personal guarantee generally states that the person signing the guarantee will be personally responsible for the guarantee. This could result in the signer's personal assets being subject to a judgment against the Agency if the Agency does not pay the judgment.

## RECORD RETENTION

The Agreement should specify the relative responsibilities of the Agent and the Company for the retention of records, including the length of time that the records must be retained.

## REHABILITATION

Before taking any steps to terminate the Agreement (except termination for cause), in order to avoid termination, the Company should be required to make a good faith effort to reach mutual agreement with the Agent on a written plan for rehabilitation for a period of one year or more. That agreement should specify what the Agent must do to avoid termination, and how the Company intends to assist the Agent to avoid termination.

The written rehabilitation plan will not be included in the Agreement because it will vary according to the circumstances. All rehabilitation agreements should, however, include the following elements:

- (i) identification by the Company of the problem areas;

- (ii) mutual agreement between the Company and the Agent on performance objectives and specific dates for accomplishment;
- (iii) periodic meetings at which the performance objectives will be reviewed; and
- (iv) the length of plan, which generally should extend for one year.

#### RENEWAL/RUN-OFF

Upon termination of the Agreement, all renewals that meet current underwriting standards and that come up within a one-year period following termination should be renewed for a term of at least one additional year upon the terms in effect prior to termination.

The Agent should be permitted to continue to service the business and to receive the rate of commission in effect on the date of the notice of termination on policies including a contractual guaranty of renewal and on policies renewed pursuant to state law or regulation, and by order of government authority.

In the event of termination, the parties agree to enter into a Limited Agency Agreement setting forth the contractual rights of both parties, the services to be provided to the policyholders, and the Agent's right to continue to perform routine service functions on the business.

Following the termination, the Agent should have the right to decide whether existing policies should be reinsured, replaced or continued in force.

The Company should assume the responsibility of notifying insureds of its intent not to renew policies following the Agent's termination. The Company and the Agent should agree on the wording of the notice to be used, subject to the requirements of law.

#### SALE OF AGENCY

In the event that the Agency is sold, transferred or merged and the Company terminates the Agreement in accordance with its terms, then the Agent shall have a reasonable transition period to be move the business placed with the Company to other carrier(s) of the Agent's choice.

#### TERM OF AGREEMENT

It being the intent of the Agent and the Company to provide for stability in their relationship, this Agreement shall remain in force for a term of not less than \_\_\_\_ consecutive years, commencing anew on each succeeding January 1, unless terminated pursuant to the terms of this Agreement.

## TERMINATION

There should be a provision in the Agreement that entitles the Agent to at least 180 days advance written notice before being terminated by the Company. This notice should be required to include the specific reasons for the Agent's termination.

When there is a provision for termination of the Agreement if the Agent owes money to the Company, language should be inserted which provides written notice to the Agent of the amount the Company believes that the Agent owes. The Agent then should be provided with a reasonable amount of time in which to cure the default prior to termination. Routine bookkeeping errors by the Agent and legitimate disputes between the Agent and the Company as to the amounts owed should not trigger the termination provision.

The Company should be able to terminate the Agreement by written notice to the Agent if the Agent fails to pay money owed to Company within 10 days after receipt of written notice from the Company of the amount the Agent owes. This should not apply to routine differences in booking errors by the Agent or to legitimate disputes between the Agent and the Company as to the amounts owed.

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