



# SigALERT

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Please be advised that Version 7.0 of our Westamerica Bank and Merrick Bank merchant applications are now available. Effective immediately, please use these versions. After May 31st, we will no longer accept any version prior to 7.0.

## The Legal Corner with Mohammed Alvi The Business of Non-Solicitation – Evolving the Agent Agreement

It comes as no surprise that because payment processors want to protect their investment in merchant acquiring accounts, most of their sales agent agreements contain non-solicitation clauses. The processor's investment in the account includes sales & marketing, underwriting & risk, customer service and technical support, etc., and the non-solicitation clause prevents agents from depleting the processor's investment by referring existing merchants to another processor. While the concept of non-solicitation is familiar to most bankcard professionals, many processors have not considered how this restriction affects the agent business model of setting up large merchants with "multiple processors."

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Often, agents tell me that most of their business revolves around setting up "secondary" processing accounts for merchants who are already under contract with another processor. Some of their larger merchants, they say, are looking to add security to their business by having a backup processing provider. Many agents engage in this business practice expecting the processor to turn a blind eye to this industry trend. But while negotiating their agent contract, some individuals have carefully inquired: "would this violate the non-solicitation clause?"

Technically, the answer is yes.

While the payments industry has evolved towards a "multiple processing relationships" model, most acquiring banks' terms and conditions remain stagnant on the topic. Standard merchant agreements neither articulate nor address the concept of creating "additional" processing accounts for a single merchant, and many processors, weary of upsetting their sponsor banks, fail to ask for exceptions on a case-by-case basis.

Most agents will want the non-solicitation clause to be stricken completely, but processors are unlikely to comply for reasons noted above in this article. So, if an agent wishes to conduct his or her business without running the risk of terminating residuals (a topic for another article), the agent will want to negotiate with the processor for a "secondary processor exception." In this exception, the common business practice is adequately described, and the processor agrees that, as between the agent and the processor, the secondary account activation will not be counted as a violation of the non-solicitation clause. And for those seeking added security, most agents can benefit from negotiating in a "notice and cure" period, so if an issue of a violation does arise, the company and agent can mitigate before the situation escalates.

For more information on non-solicitation clauses, or to discuss agent agreements in general, please contact Mohammed Alvi at [malvi@signaturecard.com](mailto:malvi@signaturecard.com).

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