



# MEMO

TO: PDK Chapter Presidents  
FROM: Bill Bushaw, Executive Director  
DATE: October 23, 2013  
RE: Explanation of the Chapter Affiliation Agreement

Given significant changes made by the Internal Revenue Service during the last decade, and upon legal advice, the PDK International Board of Directors unanimously approved a motion to require all PDK chapter presidents to sign a chapter affiliation agreement. Recognizing that chapter leaders would have questions about the affiliation agreement, the board requested that its attorney create an explanation of the terms included in the affiliation agreement.

## **A. WHY DO PDK AND THE CHAPTER NEED A CHAPTER AFFILIATION AGREEMENT?**

It is important that all Chapters have a clear understanding of their relationship with PDK. In the past, Chapters have had questions regarding such things as the use of PDK's trademarks and membership lists, donations to chapters and other matters. It is PDK's hope that the Affiliation Agreement will create a clear working framework for its relationship with its Chapters.

In the Agreement, PDK is referred to as "an Indiana nonprofit corporation" in the first sentence because the original headquarters was in Indiana and the corporation was legally formed under Indiana law. Item 17 indicates that the Agreement will be governed and construed in accordance with the laws of Virginia. This is because the headquarters is now in Virginia and we have registered the corporation with the State. PDK's attorney is also based in Virginia.

## **B. EXPLANATION OF THE AFFILIATION AGREEMENT.**

Now that the question of "why" has been addressed, let's focus on the terms of the Affiliation Agreement itself.

RECITALS. Recitals are usually put in the beginning of an agreement. They are preliminary statements that explain who the parties are, and why the parties are entering into an agreement.

Section 1. This Section states that the Recitals are a part of the Affiliation Agreement.

Section 2. Grant to the Chapter

Part A. Affiliation. This section formally states the region in which the Chapter shall operate.

Part B. Intellectual Property and Trademarks. PDK owns several trademarks, including the names “PDK International” and “Phi Delta Kappa International.” This section states that PDK gives the Chapter the right to use these trademarks while it is doing Chapter business. However, the Chapter, nor any other person or business working with the Chapter, has the right to use the trademarks, other than for activities that are permitted under the Affiliation Agreement. Additionally, a Chapter does not have the right to register any trademark that incorporates any part of a PDK trademark. Further, this section is included in the Affiliation Agreement because PDK has a duty to protect its trademarks. Under U.S. trademark law, the owner of a trademark must maintain control over its trademarks. If a trademark owner permits others to use its mark, without regulating that use, the mark will essentially become part of the public domain. The trademark would then essentially become worthless.

Section 3. Relationship of the Parties.

This Section states that PDK and the Chapter agree to maintain a supportive relationship and to assist each other in matters of common interest; that the Chapter and PDK are not considered partners or agents of each other, and cannot represent themselves as such; and that the Chapter and PDK have no right to obligate each other, or make agreements on behalf of the other.

If PDK enters into an agreement, the Chapters are not liable for PDK’s breach of that agreement. Additionally, PDK is not liable for any agreement entered into by the Chapter. Chapter leadership should understand that it cannot bind PDK to an agreement, unless PDK actually signs that agreement. Additionally, Chapter leadership should never imply or represent to a third party that they are entering into an agreement on behalf of PDK.

Section 4. Obligations of PDK.

This section sets forth PDK’s obligations to the Chapter under the Affiliation Agreement.

- A. **Business Conduct.** PDK will conduct its business in accordance with its own policies and the Affiliation Agreement, under the direction of the PDK Board.
- B. **Chapter Resources.** PDK will develop and maintain form documents and resources for the benefit of the Chapters.

Section 5. Obligations of Chapter.

This section discusses the Chapter's obligations under the Affiliation Agreement. Many of these obligations are basic, common sense requirements. However, it is important to have these obligations in writing, so that the IRS can see that the Chapter has an obligation to act like a tax exempt organization.

- A. Business Conduct. The Chapter agrees to comply with PDK's governing documents and policies, as established by the Board from time to time. The Chapter agrees to promote PDK's purpose and not for profit mission. Additionally, the Chapter agrees to have at least 2 elected officers – a President and Treasurer. The term limit is four (4) years, and one person cannot fill more than one position. In order to protect the Chapter from liability, it is important to have more than one person running Chapter operations.
- B. Activities and Purposes. The Chapter agrees to sponsor events that will be consistent with PDK's tax exempt purposes. Raising money for scholarships and creating and running educational programs are activities that are consistent with PDK's purposes.
- C. Legal Compliance and Records. These are basic legal requirements that every Chapter should uphold. These requirements not only protect PDK and the Chapter, but also protect Chapter leadership. In this section, the Chapter agrees to:
  - i. comply with all applicable laws;
  - ii. maintain proper records of business transactions;
  - iii. keep minutes for all Chapter and Board meetings;
  - iv. adopt the attached policies; and
  - v. adopt Bylaws and governance documents that are similar to the form documents provided to the Chapter by PDK. Any material changes to the documents need to be approved by the PDK Executive Director.

*Chapter leaders may have questions regarding why a Chapter is required to use PDK's form documents. There are several reasons for this. First, for IRS purposes, PDK needs to ensure that a Chapter does not add provisions to governing documents that conflict with PDK's tax exempt purpose. Second, because the Chapter is an unincorporated entity, it needs to have certain procedures in place to ensure decisions are properly made by the Chapter and Chapter leadership. Chapter leadership is especially at risk if it makes decisions that are not in compliance with basic rules of governance. Therefore, PDK wants to create a simple but legally defensible governance structure for each Chapter.*

*Third, it is easier to ensure that Bylaws conform to PDK's policies if every Chapter works from the same Bylaws form.*

- D. Bank Account. The Chapter must have a non-personal bank account. By creating a non-personal bank account, there is less of a risk that financial improprieties will occur. Additionally, personal bank accounts put those individuals at risk if there are concerns that those funds are not being handled properly. Finally, it is important for PDK to show that Chapter fees are being paid to the Chapter itself, and not to an individual.
- E. Annual Reporting. The requirements set forth in the first paragraph of this section are already required by PDK. They have been added to the Affiliation Agreement for the purpose of clarity.

#### Section 6. Membership.

This section sets forth PDK's current membership policy, including how dues are paid to Chapters. This section also discusses the use of Chapter membership lists. It states that Chapter membership lists will be available to Chapters so Chapters may contact its members for Chapter business. However, no Chapter leader or member may use the Chapter list for anything unrelated to Chapter business. Additionally, the Chapter cannot rent, sell or provide the list to any third party. This section was added in order to protect members' personal information.

#### Section 7. Fundraising.

Donations to Chapters themselves may not be deductible to the donor. Therefore, this section states that donations given to the Chapter should not be considered tax deductible unless a Chapter is otherwise advised in writing by PDK. Additionally, a Chapter should not imply to any third party that donations to the Chapter are tax deductible. While PDK and the Chapter can work together on sponsorship projects, unless otherwise agreed by PDK, the Chapter should not tell any sponsors that donations to the Chapter give them any benefits from PDK itself.

#### Section 8. Political Lobbying.

The Chapter cannot do any grassroots or direct lobbying, or endorse any candidates for political office. Conducting any lobbying puts PDK's 501(c)(3) status at risk.

#### Section 9. Confidentiality.

The Chapter and its leadership agree to keep PDK's internal activities, financial information and other proprietary information confidential.

## Section 10. Tax Requirements.

Chapters and PDK must have the same fiscal year. Additionally, PDK may need certain information from Chapters to file its taxes with the IRS. Chapters agree to provide this information to PDK.

## Section 11. Indemnification.

The term “Indemnification” essentially means that a person agrees to make someone “whole” again if a certain event takes place. The term “hold harmless” means that a person will not hold others responsible if a certain event takes place. This section is a mutual indemnification and hold harmless clause. PDK and the Chapter agree that they will indemnify the other if: they violate the Affiliation Agreement; or if any of their acts or omissions cause damage to the other.

For example, let’s say PDK is sued because a company claims PDK’s logo has infringed on its trademark. Chapters are brought into the lawsuit because they were also using the same infringing logo given to them by PDK. PDK loses the trademark lawsuit and the court states that PDK and the Chapters need to pay damages to the person who filed the lawsuit. PDK was the one who created the trademark, and then licensed the mark to the Chapters. It was PDK’s act that caused the lawsuit. Because of this indemnification provision, PDK would be required to pay the damages owed by the Chapters.

## Section 12. Insurance.

PDK would like to provide certain insurance to its Chapters. In the event it does obtain insurance that covers the Chapters, it will send each Chapter a copy of the insurance policy, so the Chapter can review its coverage. In the event that PDK is unable to provide insurance to its Chapters, it will notify each Chapter sixty (60) days prior to any changes to such policy.

## Section 13. Termination, Probation and Inactivity.

If a Chapter wants to terminate the Affiliation Agreement, it can terminate it upon sixty (60) days notice. PDK can also terminate the Affiliation Agreement upon sixty (60) days notice. The Affiliation Agreement can also be terminated immediately if the Chapter or PDK: dissolves, becomes insolvent, commits fraud or misconduct, or material breaches the Affiliation Agreement. If the Affiliation Agreement is terminated, the Chapter must immediately stop representing that it is affiliated with PDK in any way. Also, a Chapter may be placed on probation or inactive status if it fails to comply with PDK policies.

## Sections 14-18

These last sections are known as “boilerplate provisions”. These are terms that are commonly used in contracts. These provisions discuss how the Affiliation Agreement can be assigned, executed and litigated:

Section 14 states that the Affiliation Agreement will be binding if assigned to a successor organization.

Section 15 states that the person who signs the Affiliation Agreement has the authority to do so.

Section 16 states that: (i) the Affiliation Agreement can only be amended by written agreement; (ii) if one provision of the Affiliation Agreement cannot not be enforced, the rest of the Affiliation Agreement is still unenforceable; and (iii) if a party agrees not to enforce a certain provision, that party can still enforce other provisions in the Affiliation Agreement.

Section 17 states that the governing law and location for any disputes under the Affiliation Agreement would be the Commonwealth of Virginia.

Section 18 states that both parties do not have to sign the same copy of the Affiliation Agreement. Fax signatures are also acceptable.

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It is important that all Chapters understand the terms of the Affiliation Agreement. If, after reading this Memorandum and the Affiliation Agreement, you have any questions regarding the Affiliation Agreement, please feel free to contact me at [bbushaw@pdkintl.org](mailto:bbushaw@pdkintl.org) or Cathy Ruf at [cruf@pdkintl.org](mailto:cruf@pdkintl.org). Either of us would be happy to discuss the agreement with you.