



Call will begin at 1:00 pm (central)

To connect to the audio-conference:
888-830-3914
Call ID: 773-867-1778

Channel Partner Agreement Task Force December 22, 2010



Agenda

- Review communication strategy
- Review comments and questions received in response to the boilerplate agreement language
- Discussion of other sections that need to be added to the agreement.

Boilerplate Agreement Language with comments/questions

The following document contains boilerplate provisions that are generally contained in existing APICS agreements. (IA and AEP) Similar provisions will be contained in Chapter Agreements. Please note that the below language were directly taken from current agreements and as a result, will require modification if used in Chapter Agreements.

Questions and comments collected on the community of practice are noted below in in blue.

Q&A from the call on 12/8 are noted in red.

Discussion of these items will take place during the December 22 conference call.

General Comments:

- I agree with the intent and essence of the boilerplate agreement. Minor, wordsmithing and other tweaking can occur with revisions, but I say this is a 'Go'.
- I'm ok with the boilerplate subject to the minor language changes we discussed to make it "North American" flavored and refer to "channel partners in North America" as opposed to "clients"
- Base agreement needs to have language regarding course material(s) that may be modified to accommodate presentations to specific industries. If materials are altered by a Chapter, the approval of such changes, if required, should be defined.
- In terms of the basic legalese of this agreement I agree with the comments of others that it is essentially OK, assuming clean-up and clarifications as noted.
- I agree with the boiler plate agreement as shown understanding that tweaking will probably be done in minor ways.
- Concur with initial wording with provision for changes and modifications and/or further clarifications, additions, and deletions. No additional feedback from [my district].
- This chapter sees this as in fact an attempt to develop a unilateral contract. I have yet to see or hear a clear, concise and cogent explanation why this agreement is needed, much less why the deadlines are so short. The chapters should be suspicious about the whole undertaking.

I do not know how the national group intends to implement or develop many of the things they say they want to do and without a clear framework i can't explain to my chapter board or members what the effect will be.

We need more time and dialog, not just post facto communications.

- One thing I think should be looked at in this agreement, is if a similarly worded agreement should be drafted by Chapters in regards to Chapter developed materials which might be delivered under the APICS umbrella of channels which might be based upon APICS content. I am thinking of what should be in place, either through this CPA or via a different agreement, when considering materials delivered at conference (which, for the most part, they expect copyright to be transferred to APICS rather than retained by the presenter or via say Chapter APICS courses which may be APICS materials customized to particular industries or companies. Those Chapter web delivered sessions are not supposed to change the APICS material, but there is some customization of content to fit the specific client target.

PROPRIETARY AND CONFIDENTIAL INFORMATION

1. APICS shall retain sole and exclusive ownership, title, and interest in all APICS-owned intellectual property rights in the Licensed Products, International Examinations, promotional and other APICS materials (including ownership of all trade secrets, copyrights, and trademarks pertaining thereto).
2. Client acknowledges that it is given access to confidential and proprietary information solely for purposes of authorized use, as provided in this Agreement. Any information, which APICS considers to be confidential or proprietary shall, if tangible, be marked as such or, if communicated orally, designated at the time and promptly confirmed in writing as such. Information which is so marked or designated and confirmed in writing and past, present, or future research, technology development plans, business plans, client lists, business operations, finances, transactions, agreements, or proprietary products, materials, services, or technical knowledge, and other similar information. The International Examinations, Licensed Products and other APICS materials made available to Client hereunder, regardless of form or designation shall be confidential information of APICS. All such information described in this section shall be considered "**Confidential Information**" of APICS and subject to the terms of this Agreement.
3. Client will protect the confidentiality of the Confidential Information in the same manner that Client protects the confidentiality of its own proprietary and confidential information of like nature, but with no less than a reasonable degree of care.
4. Confidential Information and any copies thereof that APICS party may have permitted Client to make shall at all times remain, as between the parties, the sole property of APICS.
5. Confidential Information may not be copied or reproduced by Client without APICS' express prior written consent except as necessary for performance under the Agreement or under another agreement between the parties. If APICS' consent is granted, any such copies shall contain such proprietary rights notices as appear on the original thereof.
6. Confidential Information shall not include information: (a) previously known to Client from sources other than APICS that were without an obligation of confidence, (b) that was generated independently by Client; (c) that is published or otherwise made known to the public by APICS, or that otherwise is or becomes publicly available through no breach of the Agreement by Client. In the event Client receives a subpoena or other validly issued judicial process demanding Confidential Information, the recipient shall promptly notify APICS and tender to it the defense of such demand. Unless the demand shall have been timely limited,

quashed or extended, Client shall thereafter be entitled to comply with such demand to the extent permitted by law. If requested by APICS, Client shall cooperate (at the expense of the disclosing party) in the defense of such a demand.

I suggest we explain use of term “quashed”

7. Client agrees that the Confidential Information shall be disclosed only to those employees or agents of Client who have a “need to know” such information and are under a binding obligation of confidentiality with respect to any such information received. Confidential Information shall not be disclosed to any other third party without the prior written consent of APICS. Client shall defend, indemnify and save APICS harmless from and against any and all damages, including reasonable attorney’s fees, sustained as a result of the unauthorized use or disclosure of APICS’ Confidential Information. Client acknowledges that the Confidential Information is valuable to APICS and that any threatened or actual breach of this Article 9 “Proprietary and Confidential Information” by the Client or the failure of the Client to return or turn over Confidential Information as required in the Agreement would cause irreparable injury to APICS, for which monetary damages would be inadequate. Accordingly, Client agrees that APICS shall have the right to seek an immediate injunction enjoining any such breach, threatened breach or failure by the Client. Client agrees to be responsible for all costs, including but not limited to, attorney fees, incurred by APICS in any action against the Client arising out of the Client’s breach of the terms of this Article 9 and/or the Agreement’s Confidential Information return requirements.

Point 7 references Article 9 which needs removed or updated.

8. Client shall promptly advise APICS in writing of any unauthorized use or disclosure of Confidential Information of which Client becomes aware and shall provide reasonable assistance to APICS to bring about the cessation of such unauthorized use or disclosure.

ASSIGNMENT AND TRANSFER OF RIGHTS:

Client’s rights and obligations under this Agreement may not be transferred, leased, assigned, or sublicensed without the prior written approval of APICS. This Agreement shall be binding upon and inure to the benefit of the parties' permitted successors and assigns.

Explain use of term "inure"

Q: Will the turnover from leader to leader affect this?

A: No. It solidifies it.

Q: It says “APICS” but should we add ‘both parties?’

A: Yes. We need to add both parties to that clause to make it equal for both parties.

Q: What about merging chapters?

A: Theoretically APICS would need to agree ONLY IF both chapters still exist after the merger. If one is completely absorbed, then the remaining chapter's agreement will cover the entire merged entity.

ETHICAL STANDARDS

Both parties shall at all times follow the highest legal and ethical standards. Client agrees to act in accordance with APICS' ethical standards, a copy of which will be supplied by APICS.

Clarify if APICS website Code of Conduct applies or the APICS By-Laws/Governance Code.

APICS' RIGHTS AND RESPONSIBILITIES

1. All rights and/or licenses not specifically and expressly granted to the Client in the Agreement are reserved by APICS.
2. APICS shall have the right to cease production of any Licensed Products and/or International Examinations by Client at any time.

"International Examinations" needs replaced throughout document as well as "client" replaced. Chapters need input or be protected when APICS products reach "end of life".

Q: Could we add a third bullet that allows the channel partner to have some input into that decision?

A: It's important to note that this clause does not represent any change from the current state of the relationship.

GENERAL INDEMNIFICATION

Client hereby agrees to and shall indemnify, defend, and hold harmless APICS from and against any and all claims, demands, or actions and any losses, expenses, and damages resulting directly there from (including without limitation, court costs and reasonable attorney's fees) based on any use, promotion, advertising, marketing or distribution of the Licensed Products, Third Party Materials and/or International Examinations, including but not limited to, the violation of any applicable statute, law, treaty, regulation, code, standard or requirement, worldwide.

PROPRIETARY RIGHTS INDEMNIFICATION

APICS hereby does agree to and shall indemnify, defend, and hold harmless Client from and against any and all claims, demands or actions and any losses, expenses, and damages resulting directly there from (including court costs and reasonable attorney fees) based on any claim that the Licensed Products and/or International Examinations, or portion thereof, violate any copyright, trademark, patent or other intellectual property rights held by any third party in the United States provided Client promptly advises APICS of any such claim in writing, and shall allow APICS to control the defense. Client agrees to reasonably cooperate at APICS' request in the defense. In no event shall Client settle any claim, lawsuit or proceeding without APICS' prior written approval.

Notwithstanding the foregoing, APICS shall have no obligation to indemnify, defend, or hold harmless Client if the claim of infringement arises out of: (1) Client's modification, revision, change or alteration of the Licensed Products, Third Party Materials or International Examinations; or (2) Client's failure to comply with the terms of this Agreement, including without limitation, its applicable foreign trademark and copyright requirements.

Q: Does that protection exist today?

A: It's assumed but it's not in writing so technically, the chapters could be held liable. This clause would add protection to the chapters.

WARRANTIES

1. Client Representation and Warranties Client represents, warrants and covenants throughout the term of this Agreement, that:

- a. It is not and will not be bound by any agreements to the contrary; and that the persons executing this Agreement are fully authorized to do so;
- b. It will not modify or revise the text or the cover of the Licensed Products, International Examinations, Third Party Materials or any other materials provided to Client by APICS, except as may be expressly authorized or licensed in this Agreement or by a writing signed by APICS;
- c. It will ensure that all permits, licenses, and other government approvals have been obtained or maintained (at its own expense), and will provide evidence of such to APICS upon request;
- d. It will perform all services under this Agreement in a workmanlike manner and to a professional standard;
- e. It will not disparage, misuse, defame or otherwise cast the "APICS" name, the Licensed Products, Third Party Materials or the International Examinations in a negative light;
- f. It will comply with all applicable statutes, laws, treaties, regulations, codes, standards, or other requirements, worldwide, including, but not limited to, foreign trademark and copyright registration and the fair trade and competition laws in each country Client operates;

Suggest 1,f be written so it is meaningful to operations in N.A.

- g. It will, upon request from APICS, provide any requested data and information pertaining to the sale, reprinting, and distribution of APICS educational materials and programs being conducted by Client;
- h. Unless licensed and authorized herein, Client shall not resell or distribute the Licensed Products, Third Party Materials and/or International Examinations for further resale or distribution by another person or entity, and in this regard, Client shall take appropriate

and reasonable measures to ensure that its customers do not resell or distribute the Licensed Products, Third Party Materials and/or International Examinations; and

- i. Client is, and shall remain throughout the term of this Agreement, a not-for-profit organization located in the Geographic Area.

Suggest we perhaps clarify that a For Profit organization requires a separate agreement.

- j. The above warranties shall be binding upon Client's successors and permitted assigns.

Q: What if you have an instructor who is for-profit and is currently buying materials through the chapter?

A: The instructor is not a channel partner so it is outside the scope of this agreement.

2. Licensed Products Warranty

- a. APICS warrants that the Licensed Products, if and as delivered to Client shall be free from material defects in materials and workmanship for a period of 90 days after the date the Licensed Products are supplied from APICS' facility. APICS shall, at Client's option, provide a credit voucher based upon the purchase price paid by Client in lieu of a replacement unit, or provide a cash refund.
- b. APICS represents and warrants that it is not bound by any agreements to the contrary; and that the persons executing this Agreement are fully authorized to do so.
- c. The foregoing states the entire liability of APICS and the exclusive remedies of Client with respect to APICS breach of the warranty with respect to the Licensed Products and Client hereby waives any other rights with regard to breach of the warranty set forth above.
- d. THE LICENSED PRODUCTS, THIRD PARTY MATERIALS, EXAMINATIONS AND ANY AND ALL UPDATES THERETO ARE PROVIDED "AS IS" WITH THE EXCEPTION OF THE WARRANTIES EXPRESSLY PROVIDED HEREIN. THE WARRANTIES IN THIS ARTICLE 16 ARE LIMITED WARRANTIES AND ARE THE SOLE AND EXCLUSIVE WARRANTIES MADE BY APICS. APICS MAKES AND CLIENT RECEIVES NO ADDITIONAL WARRANTY, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING BUT NOT LIMITED TO, ANY WARRANTIES OF DESIGN, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EVEN IF CLIENT HAS BEEN INFORMED OF SUCH PURPOSE. APICS MAKES NO WARRANTY THAT THE LICENSED PRODUCTS DO NOT INFRINGE THE INTELLECTUAL PROPERTY RIGHTS OF ANOTHER PERSON OR ENTITY OUTSIDE OF THE UNITED STATES. NO AGENT, CONTRACTOR OR EMPLOYEE OF APICS IS AUTHORIZED TO ALTER OR EXCEED THE WARRANTY OBLIGATIONS OF APICS AS SET FORTH HEREIN.

LIMITATION OF LIABILITY

1. TO THE MAXIMUM EXTENT PERMITTED BY LAW, IN NO EVENT SHALL APICS BE LIABLE FOR ANY CONSEQUENTIAL, SPECIAL, INDIRECT, INCIDENTAL OR PUNITIVE LOSSES, COSTS OF DELAY, LOST PROFITS, FAILURE OF DELIVERY, DAMAGES OR EXPENSES OF CLIENT ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT, REGARDLESS OF HOW SUCH LOSSES, DAMAGES OR EXPENSES ARISE AND IRRESPECTIVE OF WHETHER OR NOT CLIENT HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH LOSSES, DAMAGES OR EXPENSES.
2. TO THE MAXIMUM EXTENT PERMITTED BY LAW, THE RESPECTIVE MAXIMUM LIABILITY OF APICS TO CLIENT UNDER THIS AGREEMENT, FOR ANY AND ALL CLAIMS, SHALL NOT EXCEED THE FEES PAID TO APICS BY CLIENT.

TAXES, DUTIES

1. Client shall be solely responsible for payment of all taxes, withholdings, duties or other charges relating to its receipt and/or use (including any sale, resale or distribution) of the Licensed Products, Third Party Materials, and/or International Examinations.
2. The prices and fees in this Agreement do not include any customs duties or federal, state or local taxes of any nature, including without limitation, Value Added Tax, which may be assessed in connection with the sale or delivery of the Licensed Products, Third Party Materials and/or International Examinations. Client shall be solely responsible for the payment of all such taxes and duties in full.

NON-DISCRIMINATION

Including but not limited to the authorized promotion, reprinting, distribution, or revision of the Licensed Products, Third Party Materials and/or International Examinations, Client shall not discriminate against any individual, or otherwise deny equal access to its products, on the basis of corporate affiliation, race, sex, national origin, age, disability or protected status.

INTELLECTUAL PROPERTY

1. Client agrees to include APICS' copyright notice on all copies of materials used in promoting, advertising, and marketing the Licensed Products and/or International Examinations that have been provided by APICS. Unless otherwise provided in the Agreement, said notice shall be printed in English in the following form, which must be updated upon APICS' request to include the applicable year:
2. "This product is the proprietary property of the American Production and Inventory Control Society ("APICS"). Any unauthorized use, reproduction, or transfer of this product is strictly prohibited. Copyright © APICS _____ [insert year from the applicable material]. All rights reserved."
3. Neither party shall, during the term of this Agreement or at any time thereafter, indicate or imply an endorsement of presentations, activities, or programs by the other party without the prior written approval of that party.

4. Except as expressly authorized herein, neither party shall use the other party's name, trademarks, service marks, logos, copyrighted material or other intellectual property outside of this Agreement without the other party's prior written approval.
5. This Article shall survive termination of this Agreement and shall continue to bind the parties hereto.

APICS LINK AND LOGO

Client agrees to place APICS' logo and maintain a link to APICS' website on the home page of Client's website. Client further agrees that in the event the display of APICS' logo and the link to APICS' website violates the terms of this Agreement, including Article 16.1(E), Client shall immediately remove or revise said link and/or APICS logo as required by APICS.

[Replace/remove reference to 16.1\(E\)](#)

ENTIRE AGREEMENT

1. This Agreement, and any Appendices hereto (which may be updated or revised by APICS from time to time), shall constitute the entire Agreement between APICS and Client, there being no other representations to the contrary, and shall supersede all prior arrangements and communications between the parties concerning such matter, whether oral or written. Except for changes made by APICS as expressly set forth herein, any agreement hereafter made shall be ineffective to change, modify, add or discharge in whole or in part the obligations and duties under this Agreement, unless such Agreement is in writing and signed by the chief officer of both organizations who are authorized to do so by the governing bodies of both APICS and Client.
2. It is acknowledged and agreed by the parties that this Agreement shall be deemed to have been prepared and drafted jointly by the parties, and that, therefore, the terms and conditions herein shall not be construed or interpreted in favor of, or against, either party on this basis.

SEVERABILITY

In the event any provision of this Agreement is held invalid by an Illinois court of competent jurisdiction, this Agreement shall be modified to delete any provisions held to be invalid for any reason. In that event, all limitations of liability and exclusions of damages shall, to the greatest extent possible, continue in full force and effect and apply to the remaining provisions. This Agreement shall be construed and enforced as if said invalid provision had never been inserted herein.

WAIVER

1. Waiver by either party of any term or condition of this Agreement or any breach shall not constitute a waiver of any other term or condition or breach of this Agreement.
2. The failure of either party to enforce, in any one or more instances, any of the terms or conditions of this Agreement, shall not be construed as a waiver of the future performance of any such term or condition.

GENERAL

1. The rights and remedies of the parties provided in this Agreement are in addition to any other rights and remedies provided at law or in equity.
2. Other than as expressly permitted within this Agreement, Client shall not use APICS' name and/or trademarks for any purpose without APICS' prior written approval.
3. Each party agrees that it shall not publicize in any way, shape, or form the terms and conditions of this Agreement to any third party (excepting its attorneys, accountants, and financial advisors) without the prior written consent of the other party.
4. Notices under this Agreement shall be addressed to the parties at the addresses set forth on the first page of this Agreement.
5. Notice shall be sent by a traceable express courier, registered or certified mail, postage prepaid, return receipt requested. The date of notice shall be deemed to be the date on which such notice was actually received. Each party shall promptly give the other party written notice of any change of address. All communications and correspondence shall be in the English language, unless otherwise agreed to in writing by each party.
6. This Agreement shall be governed by the laws of the State of Illinois and the United States without giving effect to any choice of law principles. Each party hereby submits to the exclusive jurisdiction of the state and federal courts within the State of Illinois in respect of any dispute arising out of, or in connection, with this Agreement.
7. This Agreement may be executed in one or more counterparts, each of which taken together shall be considered one and the same document.
8. Unless specifically limited in this Agreement, neither party shall be liable for any default or delay on its part in performing any obligation under this Agreement if such default or delay is caused by superior power (natural disaster, accident, war, civil disorder, strike, or any other cause beyond the reasonable control of such party or its agents or employees). In the event that either party is prevented by such an occurrence or circumstance for a period of more than 90 days from fulfilling its obligations under this Agreement, the other party may terminate this Agreement upon 90 days written notice.
9. Each party agrees that no offer, promise, or authorization of any kind to any government official will be made for the purpose of influencing decisions in order to assist party in obtaining or retaining related business.