

# PUBLICATION

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## Chambers of Commerce and Trade Associations Become Eligible for PPP Loans, With Certain Conditions

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COVID-19 has, without question, tragically impacted our health as well as irrevocably altered much of our way of life. Federal assistance in the form of the Coronavirus Aid Relief, and Economic Security Act (CARES Act), signed March 27, 2020, provided much needed emergency assistance in many ways across numerous sectors for our personal and economic wellbeing. Included as part of that Act was the creation of the Paycheck Protection Program (PPP), which has provided essential loans intended to assist in the survival of eligible for-profit businesses as well as certain non-profit organizations described in Section 501(c)(3) of the Internal Revenue Code (Code).

Omitted initially from the PPP, however, was an extremely valuable component of our business economy – that is, those chambers of commerce, trade associations and other non-profit organizations qualifying under Section 501(c)(6) of the Code that support and assist in so many ways the economic engines that power the nation's economy. That changed on December 27, 2020, with the enactment of the Consolidated Appropriations Act, 2021 (Appropriations Act), and in particular the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act (Economic Aid Act) included at Title III, Division N, in the Appropriations Act. Under that Economic Aid Act, chambers of commerce, trade associations and similar Section 501(c)(6) organizations can, for the first time, become eligible to receive PPP loans for certain operational expenditures crucial to their own survival.

### PPP Eligibility Requirements for Chambers of Commerce and Similar 501(c)(6) Organizations

The Economic Aid Act extends the authority of the Small Business Administration (SBA) to make PPP loans through March 31, 2021. That Act also extends the eligibility requirements for such loans to include chambers of commerce, trade associations and similar organizations described in Section 501(c)(6) and exempt from taxation under Section 501(a) of the Code.<sup>1</sup>

As long as other eligibility requirements are met (such as being in operation on February 15, 2020, among other requirements), chambers of commerce, trade associations and similar Section 501(c)(6) organizations are eligible to receive a PPP loan pursuant to Section 318 of the Economic Aid Act, amending the Small Business Act, if:

- i. The organization does not receive more than 15 percent of its receipts from lobbying activities;
- ii. The lobbying activities of the organization do not comprise more than 15 percent of the total activities of the organization;
- iii. The cost of lobbying activities of the organization did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and

iv. The organization employs not more than 300 employees.

Depending upon the organization's objectives on a day-to-day basis, the limitations on lobbying activities may not be a significant impediment to seeking needed PPP loans. However, such limitations will prove challenging for other organizations that engage in federal or state lobbying activities on a frequent basis in pursuit of a variety of objectives within their tax-exempt purposes.

### **Chambers of Commerce, Trade Associations and Similar Section 501(c)(6) Organizations**

By way of general background, Section 501(c)(6) provides an exemption for business leagues, chambers of commerce, real estate boards, and boards of trade which are not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual. A business league is generally recognized as an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit. Business leagues include trade associations and professional associations.

On the other hand, chambers of commerce and boards of trade are recognized by the IRS as organizations of the same general type as business leagues, but direct their efforts at promoting the common economic interests of all commercial enterprises in a trade or community.

Whether characterized as a business league, chamber of commerce or board of trade, PPP loan proceeds may be of significant assistance for appropriate day-to-day expenses that are so critical in pursuing the organization's objectives, whether narrow or broad. Based on the CARES Act as expanded by the Economic Aid Act, PPP loan proceeds can be used for various business expenses such as certain payroll costs, mortgage interest payments, rent payments, utility payments, certain business software costs, certain work protection expenditures such as disposable PPE, among other expenditures. PPP loan proceeds used for many of the foregoing purposes may be eligible for forgiveness in accordance with SBA guidelines.

### **Lobbying**

**PPP Loan Proceeds May Not be Used for Lobbying Activities.** While lobbying activities may very well play an important role in achieving an organization's crucial objectives, PPP loan proceeds may not be used for such purposes. Pursuant to Section 319 of the Economic Aid Act, the Small Business Act now provides that none of the proceeds of a PPP loan may be used for:

- i. Lobbying activities as defined in Section 3 of the Lobbying Disclosure Act of 1995;
- ii. Lobbying expenditures related to a state or local election; or
- iii. Expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or executive order posed or pending before Congress or any state government, state legislature or legislative body.

As to the prohibition in (i), the term "lobbying activities" as defined in Section 3 of the Lobbying Disclosure Act (LDA) provides as follows:

The term "lobbying activities" means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

The term "lobbying contact," as also defined in Section 3 of the LDA, means any oral or written communication (including any electronic communication) to a covered federal executive branch official or a covered federal legislative branch official that is made on behalf of a client with regard to (1) the formulation, modification, or adoption of federal legislation (including proposals); (2) the formulation, modification, or adoption of a federal rule, regulation, executive order, or any other program, policy or position of the United States Government; (3) the administration or execution of a federal program or policy (including negotiation, award, or administration of a federal contract, grant, loan, permit, or license); or (4) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

The prohibitions in (ii) and (iii) do not reference the LDA; and, as a result, it is not clear as to whether those prohibitions should be interpreted consistent with the LDA.

There are numerous exceptions to the foregoing definition of "lobbying contact" in the LDA. However, the touchstone for these purposes is that lobbying activities are broadly defined in the LDA as to the prohibition in (i), and that there are no express definitions found within (ii) and (iii) so as to assist in understanding the scope of those two prohibitions. As a result, and until further guidance may be issued, extreme care must be taken so as to avoid using PPP loan proceeds for any activity that could be considered as a prohibited lobbying activity.

As noted in that certain Interim Final Rule issued on January 5, 2021 by the SBA, entitled "Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act," use of the PPP funds for unauthorized purposes will result in the SBA directing the repayment of those amounts; and, if the funds are knowingly used for unauthorized purposes, the perpetrator "will be subject to additional liability such as charges for fraud." Also, according to that Interim Final Rule, if one of the organization's members uses PPP funds for unauthorized purposes, the SBA will have recourse against that member for the unauthorized use.

**Undertaking Some Lobbying Activities Not Paid for by PPP Funds.** Although the PPP loan proceeds cannot be used for lobbying activities, eligibility for the PPP loans under the Economic Aid Act does allow the Section 501(c)(6) organization to essentially undertake some lobbying activities assuming such activities do not exceed the percentage and dollar amount limitations in the Economic Aid Act.

Unclear, however, is whether the definition of lobbying activities for eligibility purposes is going to be determined based upon definitions in the LDA or be determined using other definitions commonly associated with lobbying. Perhaps the LDA could be the starting point for determining the definition of "lobbying activities" for purposes of the eligibility requirements; however, other similar definitions are found in Section 162(e) of the Code (and the regulations thereto) which deny deductions for certain lobbying and political expenditures, as well as are found in definitions under applicable state statutes and regulations.<sup>2</sup>

**Keep Good Records.** As part of the compliance steps with respect to the PPP loan eligibility requirements under the Economic Aid Act, the organization will want to keep good records and documentation, electronic or otherwise, with respect to the activities conducted by the organization that may constitute lobbying and non-lobbying activities. For instance, activities which should typically be considered as non-lobbying functions may, without good records, be misunderstood as lobbying activities. Good records will assist in clarifying the nature of such activities for purposes of responding, for example, to an inquiry by the SBA regarding the Section 318 eligibility requirements and/or the Section 319 prohibited use provisions discussed above.

### **300 Employee Maximum**

Eligibility for the PPP loan is also conditioned upon the chamber of commerce, trade association or similar Section 501(c)(6) organization having not more than 300 employees. Pursuant to the earlier referenced Interim Final Rule, that 300 employee cap is determined based not only upon the organization's employees but also

must be combined with employees of any affiliates. Entities may be considered affiliates based on factors including, but not limited to, overlapping boards and management and identity of interest as more fully set forth in the Small Business Act. Typically, affiliation for non-profit entities is determined by reference to the power to select members of the governing board. This means that an organization cannot circumvent this maximum cap by establishing an affiliated entity and moving its lobbying activities to that entity.

That Interim Final Rule further provides that in order to help potential borrowers identify other entities with which they may be deemed affiliated under the common management standard, the Borrower Application Form, SBA Form 2483, requires applicants to list other businesses with which they have common management (including under a management agreement). The information supplied by the applicant in response to that information request should be used by applicants, according to that Interim Final Rule, as they assess whether they have affiliates that should be included in the number of employees to report on that Application.

Also, according to that same Interim Final Rule, independent contractors working for the organization are not included for PPP loan calculation purposes and thus likely would not be included in the maximum number of employees for eligibility purposes.

## Conclusion

The provisions relating to the expanded PPP eligibility and related requirements in the Economic Aid Act can be complex. Before acting upon or in regard to these provisions and requirements, careful considerations must be given to your particular facts and circumstances.

Baker Donelson stands ready to assist organizations in seeking PPP loans. If you have questions regarding the foregoing, please contact either [Carl Hartley](#), [David Webb](#), and [Jackie Henson](#) or any member of the [Firm's Tax Group](#).

<sup>1</sup> Professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity are not included in this extension.

The Economic Aid Act does extend the eligibility requirements for such loans to "destination marketing organizations" as defined in that Act; however, the purpose of this Alert is not to address those types of organizations even though perhaps qualified under Section 501(c)(6) of the Code.

<sup>2</sup> Section 501(c)(6) organizations engaging in lobbying activities are already required to comply with various lobbying statutes and regulations in addition to the LDA. For instance, and in addition to compliance with state laws, compliance (where applicable) is required as set forth in Section 6033(e) of the Code. Hopefully, additional guidance will be issued clarifying which definitions of lobbying activities will be applied as to the Section 318 eligibility requirements.