

PPP Update: SBA Issues Guidance on M&A Transactions

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On October 2, 2020, the Small Business Administration (the “SBA”) issued a procedural notice (the “Notice”) detailing the requirements for an entity (a “PPP Borrower”) that received a Paycheck Protection Program (“PPP”) loan (“PPP Loan”) to enter into a change of ownership/sale transaction without defaulting on such loan. The Notice provides much needed guidance, particularly in light of months of delays in the PPP Loan forgiveness process. A brief summary of the Notice’s requirements is provided below. [Click here](#) to download the Notice for more detailed information.

- **What is a “Change of Ownership Transaction”?** The Notice’s requirements are applicable in any Change of Ownership Transaction. A “Change of Ownership Transaction” is generally deemed to occur where the PPP Borrower (i) sells or transfers 20% or more of its common equity, (ii) sells or transfers 50% or more of its assets or (iii) merges with another entity.
- **What impact will fully repaying a PPP Loan or receipt of a full forgiveness determination have on consummating a Change of Ownership Transaction?** None. There are no restrictions on a Change of Ownership Transaction if the PPP Loan is either (i) fully repaid or (ii) fully forgiven pursuant to the SBA’s loan forgiveness process. However, if a PPP Borrower received only partial loan forgiveness prior to such transaction, the remaining PPP Loan balance would be required to be repaid at closing.
- **If the PPP Loan has not been fully repaid or forgiven, do I need to disclose the Change of Ownership Transaction to my lender?** Yes. The PPP Borrower must (i) notify the lender servicing the PPP Loan (the “PPP Lender”) in writing of the contemplated Change of Ownership Transaction and (ii) provide the PPP Lender with the definitive agreement(s) pertaining to such transaction.
- **When is the SBA’s prior approval of a Change of Ownership Transaction not required?** The SBA’s prior approval is not required where a PPP Borrower sells or transfers (i) 50.0% or less of its common equity (when aggregated with all transfers of common equity since the PPP Loan was approved) or (ii) 49.9% or less of its assets. The SBA’s prior approval is also not required where a PPP Borrower sells or transfers (i) 50.1% or more of its common equity or (ii) 50.0% or more of its assets, if the PPP Borrower (a) submits a forgiveness application to the PPP Lender and (b) establishes with the buyer an interest-bearing escrow account controlled by the PPP Lender with funds equal to the outstanding balance of the PPP Loan. Instead, the PPP Lender alone can approve the transaction.

After the forgiveness process (including any appeal of the SBA’s decision) is completed, the funds placed into escrow must be disbursed first to repay any remaining PPP Loan balance plus interest.

- **When is the SBA’s prior approval of a Change of Ownership Transaction required?** If a Change of Ownership Transaction does not meet the requirements noted above, then the PPP Lender and the SBA must approve it. Unfortunately, the approval requirements are onerous and the SBA has 60 days to make a determination. The PPP Lender must submit the Change of Ownership Transaction request to the appropriate SBA Loan Servicing Center and include detailed information such as the following: (i) the reason why the PPP Borrower cannot fully satisfy the PPP Loan or the escrow funds requirement; (ii) the details and documents of the

requested transaction; (iii) disclosure of whether the buyer/acquiror has an existing PPP Loan; and (iv) a list of all owners of 20% or more of the purchasing entity. If the SBA approves the request, the buyer will be responsible for the PPP Loan.

The SBA pointed out in the Notice that this narrow change of ownership guidance does not relieve the borrower of responsibility for audit risk items such as the certification of economic necessity made in connection with the PPP Loan application. The SBA has previously stated that PPP Loans over \$2 million will be audited.

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