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SBA Change in Ownership Approval Guidance

SBA Releases Guidance Addressing Corporate Mergers and Acquisitions in the Context of Paycheck Protection Program Loans

Many clients have been asking about the impact of a Paycheck Protection Program (PPP) Loan and the right to forgiveness in connection with a change of control, asset sale or equity transaction. We have been asking the Small Business Administration (SBA) to publish guidance since July 2020. On Friday, October 2, 2020, the SBA released an SBA Procedural Notice to establish the procedures that companies must follow to close a merger, asset or equity transaction when the seller has an outstanding PPP loan. The guidance removes the requirement for SBA approval for many “change of ownership” transactions and eliminates much of the uncertainty when structuring these transactions.

The SBA defines a **change of ownership** for purposes of this guidance as: (1) a sale or acquisition of at least 20 percent of the common stock or other ownership interest of a PPP borrower (including a publicly traded entity), whether in one or more transactions, including to an affiliate or an existing owner of the entity, or (2) a transfer of at least 50 percent of the PPP borrower’s assets (measured by fair market value), whether in one or more transactions, or (3) the merger of a PPP borrower into another entity. For the purposes of determining a change of ownership, all sales or transfers occurring since the date of approval of the PPP loan are aggregated to determine the relevant threshold has been met.

*Depending on the status of the loan and the deal structure, SBA’s prior approval of a **change in ownership** may be required.*



SBA approval is not required when:

1. The PPP Note is fully satisfied, either through repayment or forgiveness prior to the closing of the sale or transfer;
2. The sale or other transfer amounts to 50% or less of the common stock or other ownership interest of the PPP borrower; **or**
3. The sale or other transfer of more than 50% of stock or 50% or more of its assets (measured by fair market value), if the PPP borrower:
 - completes a forgiveness application reflecting its use of all of the PPP loan proceeds and submits it, together with any required supporting documentation, to the PPP Lender, and
 - establishes an interest-bearing escrow account controlled by the PPP Lender with funds equal to the outstanding balance of the PPP loan.

Should the PPP borrower opt for a forgiveness application and escrow account, the PPP lender must use the escrow account to pay any PPP loan amounts not forgiven, plus interest. Consistent with the requirements below, the PPP lender must notify the SBA Loan Servicing Center of the location and amount of funds in the escrow account within five business days of closing the asset transaction.

PROCESS AND CONDITIONS FOR PRIOR SBA APPROVAL

If your change in ownership transaction does not qualify as one of the articulated categories above, the PPP borrower must obtain SBA approval prior to the transaction, or the note payment may be accelerated and the borrower will not be able to obtain forgiveness. To obtain SBA's prior approval of an equity transaction, the **PPP lender** must submit a request that includes:

1. an explanation addressing why the PPP borrower cannot fully satisfy the PPP Note instead of allowing the transaction to close and obtaining forgiveness;
2. details about the transaction;
3. a copy of the Executed PPP note;
4. any letter of intent or merger or acquisition agreement establishing responsibilities for PPP loan amounts;
5. disclosure of whether the buyer or acquiring company also has or had a PPP loan; and
6. a list of all owners of 20 percent or more of the purchasing entity.
7. an attestation that the PPP funds have been exhausted; and
8. an attestation that the PPP borrower has submitted a request for loan forgiveness from the PPP lender.

SBA will review and provide an approval or rejection of the transaction within **60 calendar days**.

SBA intends to review economic necessity certifications and hold original borrowers liable, regardless of whether the transaction was reviewed or approved.



ONGOING OBLIGATIONS AND PPP LENDER NOTICE REQUIREMENTS

Regardless of whether the change in ownership requires SBA approval, the PPP borrower remains responsible for PPP loan obligations and all previously made certifications. In addition, if the new owner(s) use PPP funds for unauthorized purposes, SBA will have recourse against the owner(s) for the unauthorized use. If the new owner has its own PPP loan, the PPP funds and expenses must be segregated and delineated.

Importantly, even when SBA approval is not required for a transaction, the PPP lender must provide certain information to the SBA Servicing Center within five days of the close of a transaction. The information must include:

1. the identity of the new owner(s) of the common stock or other ownership interest;
2. the new owner(s)' ownership percentage(s);
3. the tax identification number(s) for any owner(s) holding 20 percent or more of the equity in the business; and
4. the location of, and the amount of funds in, the escrow account under the control of the PPP Lender, if an escrow account is required.

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