

NEWS ALERT

TAX AND BUSINESS GROUPS



SBA Provides Guidance To PPP Loan Borrowers Engaging in M&A Transactions

By Marc T. Finer | October 8, 2020

The Paycheck Protection Program (“PPP”) created under the CARES Act has provided much needed economic relief to businesses and other organizations negatively impacted by the COVID-19 pandemic. However, until recently, PPP borrowers with outstanding PPP loans were unsure about how their loan eligibility and ability to obtain loan forgiveness might be impacted by transactions such as equity interest sales, mergers, reorganizations, redemptions and assets sales. This lack of clarity often created transactional delays, raised concerns regarding loan PPP eligibility and loan forgiveness in the wake of these transactions, and in some cases, caused borrowers to repay their PPP loans rather than risk violating the law.

On October 2, 2020, the Small Business Administration (“SBA”) released an [SBA Procedural Notice 5000-20057](#) (the “SBA Notice”) which provides information concerning the required procedures for changes of ownership in an entity that obtained a PPP loan and the framework for determining whether SBA prior approval is needed for changes of ownership of the borrower entity.

According to the SBA Notice, a “change of ownership” will be considered to have occurred when (1) at least 20% of the common stock or other ownership interest of a PPP borrower is sold or otherwise transferred, (2) the PPP borrower sells or otherwise transfers at least 50% of its assets (measured by fair market value), or (3) the PPP borrower is merged with or into another entity. All sales and other transfers occurring since the date of PPP loan approval must be aggregated for purposes of making this determination.

The SBA Notice states that in all cases, prior to the closing of any change of ownership transaction, the PPP borrower must notify the PPP lender in writing of the contemplated transaction and provide the PPP lender with a copy of the proposed agreements or other documents that would effectuate the proposed transaction. The SBA Notice also states that there are no restrictions on a change of ownership if the PPP loan is fully satisfied prior to the closing of the transaction. This can be accomplished through repayment of the PPP loan in full or a combination of loan forgiveness and repayment of any unforgiven amount. If the PPP loan is not fully satisfied, the change of ownership may occur with only PPP lender approval (SBA prior approval is not required) if:

- (i) Change of ownership is structured as a sale or other transfer of common stock or other ownership interest or as a merger and:**
 - (a) The sale or other transfer is of 50% or less of the common stock or other ownership interest of the PPP borrower; or
 - (b) The PPP borrower submits a completed forgiveness application to the PPP lender, and establishes an interest-bearing escrow account controlled by the PPP lender with funds equal to the outstanding PPP loan balance.

(ii) Change of ownership structured as an asset sale and: the PPP borrower submits a completed forgiveness application to the PPP lender, and establishes an interest-bearing escrow account controlled by the PPP lender with funds equal to the outstanding PPP loan balance.

For transactions that do not satisfy the conditions of (i) or (ii) above, SBA prior approval of the change of ownership is required prior to closing. To obtain the SBA's prior approval, the PPP lender must submit a request to the SBA containing the following information:

- (1) the reason the PPP borrower cannot fully satisfy the PPP loan or escrow funds;
- (2) the details of the transaction;
- (3) a copy of the executed PPP promissory note;
- (4) any letter of intent and the purchase or sale agreement setting forth the responsibilities of the PPP borrower, seller (if different from the PPP borrower), and buyer;
- (5) disclosure of whether the buyer has an existing PPP loan; and
- (6) a list of all owners of 20% or more of the buyer.

SBA approval of any change of ownership involving the sale of 50% or more of the assets of a PPP borrower will be conditioned on the purchasing entity assuming all of the PPP borrower's obligations under the PPP loan. In such cases, the purchase or sale agreement must include language regarding the assumption of the PPP borrower's obligations under the PPP loan by the purchaser, or a separate assumption agreement must be submitted to the SBA.

For all sales or other transfers of common stock or other ownership interest or mergers, whether or not the sale requires SBA's prior approval, the PPP borrower (and, in the event of a merger of the PPP borrower into another entity, the successor to the PPP borrower) will remain subject to all obligations under the PPP loan. In addition, if any of the new owners or the successor has a separate PPP loan, then, following consummation of the transaction: (1) in the case of a purchase or other transfer of common stock or other ownership interest, the PPP borrower and the new owner(s) are responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements by each PPP borrower, and (2) in the case of a merger, the successor is responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements with respect to both PPP loans.

Regardless of any change of ownership, the PPP borrower remains responsible for (1) the performance of all obligations under the PPP loan, (2) the certifications made in connection with the PPP loan application, including the certification of economic necessity, and (3) compliance with all other applicable PPP requirements. Additionally, the PPP borrower remains responsible for obtaining, preparing, and retaining all required PPP forms and supporting documentation and providing those forms and supporting documentation to the PPP lender or SBA upon request.

The SBA Notice is welcome guidance to businesses with outstanding PPP loans and buyers who are seeking to acquire them by providing a template for obtaining the PPP lender and SBA approval if necessary, for these transactions. However, notwithstanding the SBA Notice, a number of questions still remain including the standards PPP lenders should apply with regard to change of ownership requests and whether the SBA Notice applies to changes of ownership that occurred before its issuance on October 2, 2020. The SBA Notice also adds another layer of complexity to an already complicated business environment for struggling PPP borrowers and the labyrinth of PPP rules, regulations and procedures they are required to comply with.

The SBA Notice expires on October 21, 2021.

If you have any questions regarding the Paycheck Protection Program or how it might affect your business, please contact:

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