

The Small Business Administration Issues Guidance on Change of Ownership of Entities with Outstanding PPP Loans

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On October 2, 2020, the Small Business Administration (SBA) released a procedural notice to the Paycheck Protection Program (PPP) Lenders “concerning the required procedures for changes of ownership of an entity that has PPP funds (borrowers).” In short, it lays out the factors to consider when determining (a) whether a change of a borrower’s ownership will be deemed to have occurred; and (b) when its necessary to obtain the SBA’s consent with respect to that change in ownership.

Initially, the notice confirms what Lenders have been saying – namely, that lenders will not be required to obtain SBA consent when (a) a forgiveness application has already been submitted; and (b) the value of the loan is escrowed. With respect to this latter point, the SBA’s guidance requires that the escrow be with the lender.

The obligation to obtain SBA consent remains the lender’s obligation. Conversely, the borrower’s obligations are governed by the loan document, except that the new guidance requires the borrower to (a) notify the lender in writing of a transaction prior to closing; and (b) provide the lender with the sales & purchase agreement or other similar agreements. Based on the guidance, it appears that lenders may be required to revisit any completed change of ownership transactions where a lender’s consent to borrower was inconsistent with the guidelines that follows.

Below is a summary of the key provisions in the SBA’s procedural notice:

- It defines a change of ownership as the:
 - Transfer of at least 20 percent of the common stock or other ownership interest of a Borrower;

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- Transfer of at least 50 percent of the borrower's assets; or
- Borrower is merged with or into another entity.
- When evaluating "change of ownership," it is necessary to aggregate all sales and other transfers occurring since the date of approval of the PPP loan to determine whether the relevant threshold has been met.
- SBA prior approval is not required:
 - If the sale is for fewer than 50% of the borrower's shares; or
 - If the sale is for more than 50% of the borrower's shares, or is a covered asset sale or merger and the borrower (a) completes and submits a forgiveness application; and (b) establishes an interest-bearing escrow account that is controlled by the PPP Lender and contains funds equal to the outstanding balance of the PPP loan.
- In the case of the post-acquisition assumption of a PPP loan:
 - If SBA approval is required for a change in ownership involving the sale of 50% or more of the assets will be conditioned on the purchasing entity assuming all of the PPP borrower's obligations under the PPP loan, including responsibility for compliance with the PPP loan terms.
 - The SBA will review and provide a determination within 60 calendar days of receipt of a complete request and the SBA may require additional risk mitigation measures as a condition of its approval to the transaction.

The SBA's procedural notice clarifies that SBA consent is not required if the loan has already been forgiven or paid off.

Finally, it is noteworthy that, irrespective of any change in ownership, the SBA's position is that the borrower "remains responsible for . . . the certifications made in connection with the PPP Loan application including the certification of economic necessity."

Although somewhat ambiguous, the language does not require a certification of necessity to remain true at the time of forgiveness or transfer of ownership. Therefore, it can reasonably be read to mean that the borrower remains subject to available penalties if it did not make the certification in good faith at the time of the loan application. We will continue to watch for additional guidance from the SBA as the issues surrounding change of ownership come to the fore.

If you have concerns about the accuracy of your PPP loan data or have received notice of a government inquiry, or simply wish to conduct an internal investigation to proactively uncover any potential issues, Bailey Glasser is prepared to assist you in navigating you through these legal issues.

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