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SBA Issues Clarifying Guidance for PPP Borrowers in M&A TransactionsBy: [Paul Amiel](#), [Brent Beckert](#) and [Rob Atras](#)

The Small Business Administration (“**SBA**”) released a [Procedural Notice](#) to Paycheck Protection Program (“**PPP**”) lenders on October 2, 2020, providing preliminary guidance for lenders in evaluating requests from borrowers who are navigating potential change of control transactions.

Some SBA requirements apply to all change of ownership transactions, while others depend on the circumstances of the change of ownership and the status of the PPP loan. The required procedures vary depending on the circumstances of the change of ownership and the status of the PPP loan.

Notice to the Lender is Required.

Prior to the closing of any change of ownership transaction, a PPP borrower must provide its PPP lender with written notice of the contemplated transaction as well as a copy of the proposed agreements or documents that would effectuate the proposed transaction.

No Consent Restrictions if PPP Note is “Fully Satisfied”.

If the PPP note is fully satisfied prior to the closing of the transaction, no restrictions will apply to the change of ownership. The SBA clarified that a PPP loan is considered fully satisfied if the PPP borrower has repaid the loan in full or completed the loan forgiveness process in accordance with the PPP requirements and either: (1) the SBA has remitted funds to the PPP lender in full satisfaction of the PPP note, or (2) the PPP borrower has repaid any remaining balance on the PPP loan.

If Loan Remains Outstanding – Borrowers Must Determine Whether SBA Approval is Required.

If the PPP note is not fully satisfied prior to the closing of the transaction, SBA approval may be required for the change of ownership (in addition to the lender’s consent). When prior SBA approval is required, the PPP lender may not unilaterally approve the change of ownership. Whether or not SBA approval is required depends on the structure of the change of ownership transaction and the status of the PPP loan.

When SBA Prior Approval is Not Required. The SBA outlined cases where the PPP lender may approve the change of ownership unilaterally without the SBA’s prior approval. The requisite conditions depend on the structure of the transaction, as outlined below.

1. **Minority Equity Transactions.** In the context of an equity sale, SBA approval is not required in the event of the sale of less than 50% of the equity of the PPP borrower.¹
2. **Borrower Submits Forgiveness Application and Escrows the Loan Balance.** Whether structured as an asset or equity transaction, SBA approval is not required if:
 - a. The PPP borrower completes and submits a forgiveness application reflecting its use of all of the PPP loan proceeds (along with any required supporting documentation) to the PPP lender; and
 - b. An interest-bearing escrow account controlled by the PPP lender is established with funds equal to the outstanding balance of the PPP loan.²

¹ The SBA has clarified that in determining whether the 50% threshold is met, all sales and other transfers occurring since the date of the approval of the PPP loan must be aggregated.

² Following completion of the forgiveness process (including any appeal of SBA’s decision), the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.

In Other Situations – SBA Prior Approval is Required. Where a change of ownership of a PPP borrower occurs, but does not meet the conditions outlined above, the PPP lender may not unilaterally approve the change of control and the SBA's prior approval is required. To obtain prior approval from the SBA, the PPP lender must submit a request to the appropriate SBA Loan Servicing Center. Such change of ownership approval requests must include:

- the reason that the PPP borrower cannot fully satisfy the PPP note or escrow funds (described above);
- the details of the requested transaction;
- a copy of the executed PPP note;
- 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;
- disclosure of whether the buyer has an existing PPP loan and, if so, the SBA loan number; and
- a list of all owners of 20 percent or more of the purchasing entity.

The SBA noted that it may require additional “risk mitigation measures” as a condition of its approval of the transaction. In the context of an asset sale of more than 50% of the assets of a PPP borrower, SBA approval will be conditioned on the purchasing entity assuming all of the PPP borrower's obligations under the loan. This includes responsibility for compliance with the terms of the loan. In such cases, the purchase or sale agreement must include appropriate language regarding the assumption of the PPP borrower's obligations or a separate assumption agreement must be submitted to the SBA.

The SBA is required to provide a response to the approval request within 60 calendar days of receipt of the complete request.

Defining a Change of Control

According to the Procedural Notice, there are three circumstances that constitute a “change of ownership” for purposes of the foregoing requirements:

- **Sale or transfer of at least 20%** 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;
- **Sale or transfer of at least 50%** of the assets of a PPP borrower, as measured by the fair market value, whether in one or more transactions; or
- **Merger** of a PPP borrower with or into another entity.³

³ For purposes of determining whether the thresholds for a change of ownership have occurred, the SBA has clarified that all sales and other transfers occurring since the date of approval of the PPP loan must be aggregated. For publicly traded borrowers, only sales or other transfers that result in one person or entity holding or owning at least 20% of the common stock or other ownership interest of the borrower are required to be aggregated.

Additional Requirements

Regardless of whether prior approval is required, the SBA has outlined additional requirements that are applicable to all change of control transactions.

Original Borrower Must Remain an Obligor. The PPP borrower (or, in the event of a merger, the successor to the PPP borrower) must remain subject to all obligations under the PPP loan (i.e., no novation of the loan will occur by virtue of SBA and lender consent). Additionally, if the new owner or owners use PPP funds for unauthorized purposes, the SBA will have recourse against the owner or owners for the unauthorized use.

Maintaining Multiple PPP Loans. If any of the new owners or the successor arising from such a transaction has a separate PPP loan, then the PPP funds and expenses must be segregated and delineated and documentation must be provided to demonstrate compliance with PPP requirements. In an equity sale, this applies to each PPP borrower. In a merger, the successor is responsible for meeting these requirements.

Lender's Notice to the SBA. Finally, within 5 business days of completion of the transaction, the PPP lender must notify the appropriate SBA Loan Servicing Center of the following:

- The identity of the new owner(s) of the common stock or other ownership interest.
- The ownership percentage(s) of the new owner(s).
- The tax identification number(s) for any owner(s) holding 20 percent or more of the equity in the business.
- If an escrow account is required, the location of, and the amount of funds in, the escrow account under the control of the PPP lender.

Given the fast pace of developments, businesses are encouraged to seek advice from qualified legal counsel concerning these matters.

For more information, please see the following resources:

1. Prior Haynes and Boone Guidance on the Paycheck Protection Program:

- a. [Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program](#) (updated June 8, 2020)
- b. [SBA Issues New Guidance on PPP Loan Forgiveness](#) (June 1, 2020)
- c. [SBA Issues New Guidance on Certification of Necessity Safe Harbor](#) (May 13, 2020)
- d. [SBA Extends Loan Repayment Safe Harbor Date, Provides Additional Guidance on Employees of Foreign Affiliates](#) (May 7, 2020)
- e. [Could Retention of PPP Loan Funds Create False Claims Act Liability?](#) (updated May 6, 2020)
- f. [CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business](#) (April 6, 2020)
- g. [Full List of Haynes and Boone Alerts on PPP](#)

2. Prior SBA Guidance on the Paycheck Protection Program:

- a. [PPP Frequently Asked Questions](#) (updated August 11, 2020)

- b. [PPP – Frequently Asked Questions on Loan Forgiveness](#) (updated August 11, 2020)
- c. [Interim Final Rule 1](#) (originally posted April 2, 2020)
- d. [Interim Final Rule on Applicable Affiliation Rules](#) (originally posted April 3, 2020)
- e. [Interim Final Rule on Additional Eligibility Criteria and Requirements for Certain Pledges of Loans](#) (originally posted April 14, 2020)
- f. [Interim Final Rule on Requirements for Promissory Notes, Authorizations, Affiliation, and Eligibility](#) (originally posted April 24, 2020)
- g. [Interim Final Rule Additional Criterion for Seasonal Employers](#) (originally posted April 27, 2020)
- h. [Interim Final Rule on Disbursements](#) (originally posted April 28, 2020)
- i. [Interim Final Rule on Corporate Groups and Non-Bank and Non-Insured Depository Institution Lenders](#) (originally posted April 30, 2020)
- j. [Interim Final Rule on Nondiscrimination and Additional Eligibility Criteria](#) (originally posted May 5, 2020)
- k. [Interim Final Rule on Extension of Limited Safe Harbor with Respect to Certification Concerning Need for PPP Loan Request](#) (originally posted on May 8, 2020)
- l. [Interim Final Rule on Loan Increases](#) (originally posted May 13, 2020)
- m. [Interim Final Rule on Treatment of Entities with Foreign Affiliates](#) (originally posted May 18, 2020)
- n. [Interim Final Rule on Loan Forgiveness](#) (originally posted May 22, 2020)
- o. [Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities](#) (originally posted May 22, 2020)
- p. [Interim Final Rule on Revisions to First Interim Final Rule](#) (originally posted June 11, 2020)
- q. [Interim Final Rule on Additional Revisions to First Interim Final Rule](#) (originally posted June 12, 2020)
- r. [Interim Final Rule on Revisions to the Third and Sixth Interim Final Rules](#) (originally posted June 17, 2020)
- s. [Interim Final Rule on Revisions to Loan Forgiveness Interim Final Rule and SBA Loan Review Procedures Interim Final Rule](#) (originally posted June 22, 2020)
- t. [Interim Final Rule on Additional Eligibility Revisions to First Interim Final Rule](#) (originally posted June 24, 2020)
- u. [Interim Final Rule on Certain Eligible Payroll Costs](#) (originally posted June 25, 2020)
- v. [Interim Final Rule on Appeals of SBA Loan Review Decisions Under the PPP](#) (originally posted August 11, 2020)
- w. [Interim Final Rule on Treatment of Owners and Forgiveness of Certain Nonpayroll Costs](#) (originally posted August 24, 2020)

3. Resources on the SBA Economic Injury Disaster Loan (EIDL) Program:

- a. [Looking for an Alternative to PPP? Taking a Second Look at the Economic Injury Disaster Loan Program](#) (Haynes and Boone Alert, May 1, 2020).
- b. [SBA's COVID-19 Disaster Loan Program](#) (Haynes and Boone Alert, March 24, 2020)
- c. [SBA EIDL Resource Page](#)

4. Resources on the Federal Reserve Main Street Lending Program:

- a. [Modest Use of Main Street Lending Program Reported as Federal Reserve Continues to Fine Tune its Features](#) (Haynes and Boone Alert, September 25, 2020)
- b. [The Federal Reserve Releases Additional Guidance on the Loan Facilities Available to For Profit Businesses](#) (Haynes and Boone Alert, August 7, 2020)
- c. [Federal Reserve Expands Main Street Lending Program to Include Nonprofit Organizations as Borrowers](#) (Haynes and Boone Alert, July 31, 2020)
- d. [The Federal Reserve Releases Additional Guidance, Terms, Conditions and Agreement Forms and Expands the Program to Allow for Broader Borrower Participation](#) (Haynes and Boone Alert, June 10, 2020)
- e. [Federal Reserve Main Street Lending Program Resource Page](#)

Additional Questions? Contact a member of the Haynes and Boone [Finance](#) or [Corporate Practice](#) Groups at Haynes and Boone, including the following individuals:

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