

Asset Sales, Changes in Ownership and the PPP Loan

The Small Business Association (SBA) recently issued comprehensive guidance and procedures for borrowers with Paycheck Protection Program (PPP) loans with respect to changes in the borrower's ownership or sales of their assets. The guidance is available [here](#) and has an effective date of October 2, 2020.

Importantly, prior to the closing of any change of ownership transaction (as defined below), **a borrower is required to notify its lender in writing of the contemplated transaction and provide the lender with a copy of the proposed agreements or other documents that would effectuate the proposed transaction.** In some situations, as further summarized below, SBA notice and approval are also required.

Further, regardless of any change in ownership, the borrower remains responsible for all performance obligations under the PPP, all certifications made in its application (including the certification for economic necessity), and compliance with all other PPP requirements. The borrower also remains responsible for obtaining, preparing and retaining all required PPP forms and supporting documentation and providing these documents to its lender or to the SBA upon request.

The remainder of this information memo provides details for lenders and borrowers when a borrower is entering into a change of ownership transaction.

What Constitutes a Change of Ownership?

The SBA defines a "change of ownership" as:

1. at least 20% of the common stock or other ownership interest of a PPP borrower (including a publicly traded entity) is sold or otherwise transferred, whether in one or more transactions, including to an affiliate or an existing owner of the entity;
2. the PPP borrower sells or otherwise transfers at least 50% of its assets (measured by fair market value), whether in one or more transactions; or
3. a PPP borrower is merged with or into another entity.

What are the Procedures When there is a Change in Ownership?

The SBA describes procedures for borrowers and lenders to follow depending on the circumstances detailed below.

1. **If the PPP note is fully satisfied**, there are no restrictions on a change of ownership if, prior to the closing the sale or transfer, the borrower has:
 - a. Repaid the PPP note in full; or
 - b. Fully completed and submitted the PPP Forgiveness Application, and:
 - i. The SBA has remitted funds to the lender in full satisfaction of the PPP note; or
 - ii. The borrower has repaid any remaining balance on the loan.

2. If the PPP note is not fully satisfied, the SBA has developed rules for two circumstances. The first circumstance is where SBA prior approval is not required and the second is where prior approval is required.

a. **SBA approval is not required in the following situations:**

- i. For a stock sale or a merger, if the sale or other transfer is of 50% or less of the stock or other ownership interest of the borrowers; or the borrower completes a PPP Forgiveness Application, and the lender establishes an interest-bearing escrow account with funds equal to the outstanding balance of the PPP loan.
- ii. For an asset sale, only if the borrower completes a PPP 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 an interest-bearing escrow account controlled by the PPP Lender is established with funds equal to the outstanding balance of the PPP loan.

b. **SBA approval is required** if the PPP borrower cannot satisfy the foregoing conditions. In these cases, the lender may not unilaterally approve the change of ownership. Borrowers must supply, and lenders must submit to the SBA, the following information for SBA approval:

- i. the reason that the PPP borrower cannot fully satisfy the PPP note;
- ii. the details of the requested transaction;
- iii. a copy of the executed PPP note;
- iv. any letter of intent and the purchase or sale agreement setting forth the responsibilities of the borrower, seller (if different from the borrower) and buyer;
- v. disclosure of whether the buyer has an existing PPP loan and, if so, the SBA loan number; and
- vi. a list of all owners of 20 percent or more of the purchasing entity.

For an asset sale of 50% or more of the assets, SBA approval will be conditioned on the purchasing entity assuming all of the borrower's obligations under the PPP loan, including responsibility for compliance with the PPP loan terms. The SBA states that, in such cases, the purchase or sale agreement must include appropriate language regarding the assumption of the PPP borrower's obligations under the PPP loan by the purchasing person or entity, or a separate assumption agreement must be submitted to SBA.

For all transactions, regardless of whether SBA prior approval is needed, the borrower (and, in the event of a merger of the borrower into another entity, the successor to the borrower) will remain subject to all obligations under the PPP loan. In addition, if the new owner(s) use PPP funds for unauthorized purposes, the SBA will have recourse against the owner(s) for the unauthorized use.

Lenders must also notify the SBA within five days of completion of the transaction.

What if I am the Buyer, and I Already Have a PPP Loan?

The SBA explains that if any of the new owners or the successor arising from such a transaction 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 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 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.

What if I Already Closed an Asset Sale or Change of Ownership Transaction Prior to this Guidance?

The guidance does not address how transactions completed prior to October 2, 2020 will be handled by the SBA. Regardless, borrowers should contact their lenders to apprise them of closed or pending transactions, if such transactions were not previously disclosed to the lender.

The attorneys at Bond, Schoeneck and King can help you determine the steps a borrower should take in order to properly enter and complete a change of ownership transaction. Please contact [Jeffrey B. Scheer](#), [Roderick C. McDonald](#) or the attorney at the firm with whom you are regularly in contact.



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