

New Guidance from Small Business Administration on Purchase and Sale Transactions Involving PPP Borrowers

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Effective October 2, 2020, the Small Business Administration (“SBA”) promulgated a Procedural Notice (the “Notice”) identifying the circumstances under which transfers of ownership or assets of companies that have received Paycheck Protection Program (“PPP”) loans (“PPP Borrowers”) require approval of SBA or the lender (the “PPP Lender”). The Notice is important guidance to PPP Borrowers engaged in transfers of ownership or assets.

Ownership Interest Transfers. For transfers of more than 20 percent and up to 50 percent of a PPP Borrower’s ownership (stock or membership interests), PPP Lender approval alone is required and SBA approval is not required. If the transfer is for more than 50 percent of the ownership interest, or the transaction involves the merger of the PPP Borrower with another entity, PPP Lender approval is required, and the PPP Borrower must have (a) submitted its forgiveness application and (b) arranged to fund an interest-bearing escrow account with the PPP Lender in an amount equal to the PPP loan balance. Once forgiveness has been determined, the escrow shall be released to repay any balance of the PPP loan which has not been forgiven and the remainder shall be returned to the PPP Borrower or its successor.

Asset Transfers. If 50 percent or less of a PPP Borrower’s assets are to be transferred (valued at fair market value), approval of the SBA or the PPP Lender is not required. If more than 50 percent of the assets of the PPP Borrower are to be transferred, PPP Lender approval alone is required, but again the PPP Borrower must have (a) submitted its forgiveness application and (b) established an escrow account as above.

SBA Approval Required. Lender approval alone will not suffice, and SBA approval must be obtained, where the above conditions cannot be met. In those cases, the PPP Borrower must submit a request to the SBA specifying why it is not possible for an escrow to be established and information identifying the buyer, its owners, and the transaction terms. The transaction documents must include an undertaking by the buyer to assume the obligations of the PPP Borrower under the PPP loan.

Where the PPP loan obligation has been forgiven or has been repaid in full, no consent or forgiveness to a transaction is required. Similarly, if the transaction involves a transfer of less than 50 percent of the assets (measured by fair market value) of a PPP Borrower or if it involves a transfer of less than 20 percent of the ownership interests of the PPP Borrower, no consent is required.

The Notice makes clear that the PPP Borrower or its successor in interest will remain responsible for filing a forgiveness request with supporting documentation, following all SBA regulations with respect to the use of loan funds and being responsible for all certifications of the PPP Borrower.

Regardless of the terms of the Notice, the PPP loan documents should be reviewed to permit compliance with any other requirements of the PPP Lender and to avoid a possible default.

If you contemplate buying or selling a PPP Borrower and have a question, contact [Douglas Lubic](#), [Peter Greenbaum](#) or any member of the Wilentz [Business Law team](#).

Attorney

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Practice

- Corporate