

# CLIENT ALERT

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## SBA GUIDANCE ON PPP BORROWERS: TRANSFERS OF EQUITY AND ASSETS

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On Friday, October 2, 2020, the Small Business Administration (“SBA”) issued a [Procedural Notice](#) setting out the required procedures for companies pursuing certain equity or asset purchases or sales, or other transfers, who have also received Paycheck Protection Program (“PPP”) funds. The Procedural Notice provides new guidance on the following previously ambiguous issues for PPP borrowers:

- For purposes of PPP loans, the SBA considers a transaction to result in a “change of ownership” when:
  - at least 20% of the common stock or other ownership interest of a PPP borrower is sold or transferred, whether in one or more transactions, and including to an affiliate or an existing owner of the PPP borrower;
  - a PPP borrower sells or otherwise transfers at least 50% of its assets (measured by fair market value), whether in one or more transactions; or
  - a PPP borrower is merged with or into another entity.
- There are different approval and escrow requirements depending on (1) where the PPP borrower is in the loan payment and/or loan forgiveness process, and (2) the type of “change of ownership” that is contemplated. If SBA approval is required, that approval can take up to 60 days from the date the SBA receives all required documentation.
  - In any transaction resulting in a “change of ownership,” the PPP borrower must, prior to the closing of such transaction:
    - Notify the PPP lender of the transaction in writing, and
    - Provide PPP lender with copies of the proposed transaction documents
  - PPP lender or SBA approval IS NOT required for the following “change of ownership” transactions:
    - The PPP borrower has repaid the PPP note in full prior to the closing of the transaction, OR
    - The PPP borrower has completed the loan forgiveness process in accordance with PPP requirements AND (1) SBA has remitted the forgiveness amount to the PPP lender to satisfy the PPP note in full, OR (2) the PPP borrower has repaid any remaining balance on the PPP note
  - PPP lender approval IS required for the following “change of ownership” transactions:
    - In an equity sale or other transfer transaction:
      - Equity sale or other transfer of ownership in PPP borrower of 50% or less of the equity in the PPP borrower, OR
      - PPP borrower submits forgiveness application reflecting the use of ALL of the PPP loan proceeds AND PPP lender controls an escrow account holding funds equal to the outstanding balance of the PPP loan
    - In an asset sale transaction:
      - PPP borrower submits forgiveness application reflecting the use of ALL of the PPP loan proceeds AND PPP lender controls an escrow account holding funds equal to the outstanding balance of the PPP loan
      - In either case, the PPP borrower must request and receive PPP lender approval prior to the closing of the contemplated transaction.
- SBA approval IS required for the following “change of ownership” transactions:
  - Any transaction that does not fall into the above (for example, (i) an equity sale transaction involving the sale of greater than 50% of the equity of the PPP borrower or (ii) an asset sale transaction involving the sale of greater than 50% of the assets of the PPP borrower, in each case where the PPP loan proceeds have not been used in full, forgiveness has not yet been applied for, and/or the outstanding amount of the PPP loan cannot be satisfied in full or deposited into escrow)
  - The PPP borrower must request approval from the PPP lender, and the PPP lender must request and receive approval from the SBA prior to the closing of the transaction. In connection with the foregoing, the PPP lender is required to submit certain information, including why the PPP note cannot be satisfied in full or why an escrow account cannot be established, in a request to the SBA to approve the “change of ownership” contemplated by the PPP borrower. SBA APPROVAL CAN TAKE UP TO 60 DAYS.
  - Note: SBA approval of a “change of ownership” involving the sale of 50% or more of the assets of the PPP borrower is subject to the purchaser assuming all of the PPP borrower’s PPP obligations; notwithstanding the assumption, the PPP borrower still remains liable for all requirements under the PPP loan (for example, documentation requirements, reporting covenants, repayment).
- Even if a transaction does not amount to a “change of ownership,” the PPP borrower still must report **any** sale or other transfer of equity or merger of the PPP borrower to the PPP lender, and the PPP lender must then report such change to the SBA.
- A buyer that is a PPP borrower is not precluded from engaging in a “change of ownership” transaction with a seller that is a PPP borrower (and therefore acquiring the seller’s PPP loan), but certain segregation and delineation of use of PPP loan proceeds must be adhered to.
- PPP borrowers should keep in mind that regardless of any “change of ownership” transaction, the PPP borrower remains responsible for the performance of all obligations under the PPP loan, the certifications made in connection with the PPP loan application (including the certification of economic necessity), and compliance with all other applicable PPP requirements.

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- PPP borrowers need to contact their PPP lender well in advance of any “change of ownership” transaction closing if PPP lender or SBA approval of the transaction is needed. The approval process will take time and cannot be waived.

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