

To: Clients and Colleagues

From: Stuart H. Sorkin, Esq.

Re: SBA issues guidance regarding PPP
Loans and Change in Ownership of
PPP Borrowers

Date: 10/5/2020

On Friday, October 2, the U.S. Small Business Administration (SBA) issued Procedural Notice 5000-20057. This notice provides guidance for lenders administering loans under the Paycheck Protection Program (PPP) when a PPP borrower desires to enter into a change of ownership transaction before either the PPP loan has been repaid in full or the PPP loan has been forgiven. The notice further provides guidance for change of ownership transactions when only the PPP lender prior approval is required for the change in ownership and those change in ownership transactions where prior approval is required by both the PPP lender and the SBA.

For purposes of this guidance, the SBA has defined a change in ownership as:

1. at least 20% of the common stock or equity of the borrower is sold or transferred in one or more transactions (including to an affiliate or other existing owner);
2. the sale or transfer of at least 50% of the assets of the borrower in one or more transactions; and
3. the merger of the borrower with or into another entity.

Under these guidelines, the following change in ownership transactions shall only require the approval by the PPP Lender and not the SBA:

1. The PPP note is fully satisfied—*i.e.*, repaid in full, or the loan forgiveness process has been completed;
2. The PPP note is not fully satisfied, and the transaction is a stock sale:
 - a. The change of ownership is 50% or less of the common stock or ownership interest of the PPP borrower (aggregated since the time of loan approval); or
 - b. The PPP borrower completes and submits a forgiveness application and supporting documentation reflecting the use of all PPP loan proceeds *and* creates an interest bearing escrow account controlled by the PPP lender with funds equal to the outstanding loan balance. The escrow funds will be disbursed following the loan forgiveness decision.
3. The PPP note is not fully satisfied and the PPP borrower desires an asset sale for 50% or more of borrower's assets (measured by fair market value) without SBA approval, then the PPP borrower shall (i) submit a forgiveness application and supporting documentation reflecting the use of all PPP loan proceeds *and* (ii) create an interest bearing escrow account controlled by the PPP lender with funds equal to the outstanding loan balance.

If the change of ownership for a PPP borrower does not qualify for one of the above described transactions, then the change in control of ownership transaction must be approved by the SBA. The SBA has 60 calendar days from the date the SBA receives all of the following documentation to approve the change of ownership:

1. the reason that the PPP borrower cannot fully satisfy the PPP note or escrow funds as described above;
2. the details of the requested transaction;
3. a copy of the executed PPP note;
4. 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;
5. disclosure of whether the buyer has an existing PPP loan, and, if so, the SBA loan number; and
6. a list of all owners of 20 percent or more of the purchasing entity.

If SBA consent is not required, the PPP lender is still required to provide information to the SBA regarding the transaction, including: the identity of the new owners and their percentage ownership; tax ID numbers of all owners of more than 20% of the equity of the business; and the location and amount of funds in the escrow account, if required.

It is important to note that a change in ownership does not relieve the original PPP borrower from being responsible for all its obligations to obtain, prepare, and retain all related documentation for the PPP Loan and certifications related to the PPP loan and to provide the SBA with all supporting documentation upon request.

In addition, if any of the new owners or the successor arising from the transaction(s) in question has a separate PPP loan then, following consummation of the transaction(s): (1) in the case of a purchase or other transfer of common stock or other ownership interest, the PPP 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 PPP 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.

Based upon the foregoing, this guidance provides significant incentives for the PPP loan to be repaid **prior to the closing** on a change in ownership or face having to escrow the PPP loan balance with the lender.

We hope you find this memorandum helpful.

If you have any questions, please contact me.