

LEGAL UPDATES

Updated Guidance Concerning PPP Loans and Changes of Ownership

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How is Change in Ownership Defined?

On October 2, 2020 the Small Business Administration published SBA Procedural Notice (5000-20057) (the "Notice"), which was effective on that date. The Notice outlines rules that apply to PPP lenders and entities that received Paycheck Protection Program (PPP) funds ("PPP Borrowers") when there is to be a change of ownership of a PPP Borrower. A "change of ownership" occurs when:

- (1) at least 20 percent of the common stock or other ownership interests 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 percent 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.

(For PPP Borrowers that are not publicly traded, all sales and other transfers occurring since the date of approval of the PPP loan must be aggregated to determine whether the relevant threshold has been met.)

The Notice imposes a number of requirements related to changes of ownership. However, the PPP Borrower will remain responsible for (1) performance of all obligations under the PPP loan, (2) the certifications made in connection with the PPP loan application, including the certification of economic necessity, and (3) compliance with all other applicable PPP requirements, as well as obtaining, preparing and retaining all required PPP forms and supporting documentation and providing those forms and supporting documentation to the PPP lender or lender servicing the PPP loan (the "PPP Lender") or to SBA upon request.

What happens if the business satisfied the terms of its PPP loan prior to transfer?

In general there are no restrictions on a change of ownership if, prior to closing the sale or transfer, the PPP loan has been satisfied by the borrower having (a)

Related People

Daryn McBeth

Senior Government Relations Specialist

Minneapolis

612.632.3083

daryn.mcbeth@lathrogpm.com

William (Bill) D. Klein

Partner

Minneapolis

612.632.3232

william.klein@lathrogpm.com

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repaid the PPP Note in full or (b) completed the loan forgiveness process in accordance with the PPP requirements with (i) the SBA having remitted funds to the PPP Lender in full satisfaction of the PPP Note and (ii) the PPP Borrower having repaid the remaining balance, if any, on the PPP loan.

What happens if the business has NOT satisfied the terms of its PPP loan prior to transfer?

If the PPP loan has not been satisfied prior to the closing, things are a little more complicated, sometimes requiring advance SBA approval. SBA approval is NOT required in the following instances:

Sale of Stock or Ownership Interests

In the case of a sale of ownership interests or a merger, advance approval is not required if (a) 50% or less of the common stock or other ownership interest of the PPP Borrower is transferred or (b) the PPP Borrower completes a 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. (After the forgiveness process (including any appeal of SBA's decision) is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.)

Sale of Greater than 50% of the Assets

In the case of a sale of 50% or more of the assets of the PPP Borrower, advance approval is not required if the PPP Borrower completes a 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. (After the forgiveness process (including any appeal of SBA's decision) is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.)

Other Transactions

In the case of changes of ownership that do not meet the conditions set forth above, prior SBA approval of the change of ownership is required and the PPP Lender may not unilaterally approve the change of ownership. The Notice contains the steps required to obtain that approval.

The Notice also specifies that the PPP Borrower (and, in the event of a merger of the PPP Borrower into another entity, the successor to the PPP Borrower) will remain subject to all obligations under the PPP loan, and that the SBA will have recourse against the new owner(s) if the new owner(s) use PPP funds for unauthorized purposes.

What happens if the new owner has a separate PPP loan?

If the new owner(s) or successor has a separate PPP loan, then, following consummation of the change of ownership: (1) in the case of a purchase or other transfer of common stock or other ownership interests, 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.

For more information, please contact [Bill Klein](#), [Daryn McBeth](#), [Business Transactions](#) Practice Group Chair [Mark Williamson](#) or your regular Lathrop GPM contact.