

PUBLICATION

PPP: SBA Issues Guidance on Changes in Ownership and Full Forgiveness Eased for Smaller Loans

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Changes in Ownership

As a result of Congress creating the Paycheck Protection Program (PPP) as part of the Small Business Administration's 7(a) loan program, Congress encumbered PPP loans with many of the rules, regulations and standard operating procedures applicable to 7(a) loans, a good number of which may be unfamiliar to the typical PPP borrowers as well lenders that have not historically made many 7(a) loans. One of these 7(a) requirements is that the SBA must approve *any* change in ownership of a borrower in the first year following disbursement of a 7(a) loan under SBA Standard Operating Procedure 50 57.

With the PPP originally scheduled to only last until June 30, 2020 with all loan proceeds having to be spent within the 8-week covered period following receipt of a PPP loan, this did not present a significant issue to many PPP borrowers that may have wanted to sell their businesses. However, as a result of the Paycheck Protection Program Flexibility Act enacted on June 5, 2020, with the extension of the covered period to 24 weeks and the extended period of time for the lender (60 days) and SBA to review an application for forgiveness (90 days), the requirement for SBA approval became more of a concern, especially considering the SBA's informal position that it preferred for all borrowers to wait until forgiveness decisions had been made before effecting a change in ownership. Ironically, the SBA had only imposed this requirement relatively recently by Procedural Notice (Control No.: 5000-19009) issued on April 1, 2019.

For several months, the SBA remained noncommittal on requests to approve changes in ownership of PPP borrowers. However, on October 2, 2020, the SBA issued a Procedural Notice (Control No.: 5000-20057) providing formal guidance on changes in ownership under the PPP (but not other 7(a) loans), which offers some relief to PPP borrowers seeking to transfer some or all of their businesses through an equity or asset sale. Not surprisingly, the Procedural Notice provides that no approval is required if the borrower has repaid its PPP loan in full or if it has applied for forgiveness with a final determination on forgiveness having been made (as evidenced by the SBA's payment to the lender) with either the full amount of the loan forgiven or the borrower having repaid any unforgiven amount.

For borrowers that have amounts outstanding under their PPP loans, the process is a little more complicated and depends, to some extent, on the percentage of the business being sold. SBA approval is not required in the event of (i) transfer (including through merger) of 50 percent or less (when combined with all other transfers occurring since the date of approval of the borrower's PPP loan) of the ownership interests in the borrower, or (ii) the borrower submits a completed forgiveness application to its lender and escrows the full amount of the PPP loan with the lender. In the latter case, the amount escrowed must be used to repay any unforgiven portion of the PPP loan.

Likewise, SBA approval is not required in the event of (i) transfer of less than 50 percent of the assets of the borrower, or (ii) the borrower submits a completed forgiveness application to its lender and escrows the full amount of the PPP loan with the lender. In the latter case, the amount escrowed must be used to repay any unforgiven portion of the PPP loan.

The borrower must seek approval of the SBA before effectuating any other ownership change, regardless of whether it is an equity or asset sale. As part of the approval process, the borrower must submit certain information to the SBA (through its lender), including the following:

- A statement of why the borrower is unable to structure the transaction so as to satisfy the requirements for a transfer without SBA approval, including a statement why any required escrow cannot be funded from proceeds of the transaction.
- The details of the proposed transaction, including a copy of any letter of intent or purchase agreement relating to the transaction.
- Disclosure of any PPP loans held by the transferee(s) prior to the proposed transaction.
- A list of all owners of 20% or more of any transferee entity.

The Procedural Notice provides that the SBA will issue a determination within 60 days of the receipt of a complete request.

Forgiveness Reductions Eased

On October 8, 2020, the SBA and Treasury issued an Interim Final Rule eliminating forgiveness reductions resulting from either a reduction in a borrower's number of full-time equivalent employees or individual employee pay if the borrower's loan (when aggregated with PPP loans to any of its affiliates) does not exceed \$50,000. To effectuate this change, the SBA and Treasury also issued a new forgiveness application – SBA Form 3508S – which is both shorter and should be easier for qualifying borrowers to complete than SBA Form 3508EZ. Borrowers that qualify to use SBA Form 3508S should note that they must still provide information evidencing that PPP loan proceeds were used in accordance with PPP requirements the same as with SBA Form 3508 or SBA Form 3508EZ (e.g., providing payroll reports and quarterly employment tax returns to evidence payroll costs).

In issuing the eased requirements, the SBA and Treasury noted that while a significant number of loans of \$50,000 or less have been made under the PPP, the aggregate amount of those loans is relatively small compared to the total amount of all PPP loans made and, thus, constituted a de minimis exemption authorized to be made under the CARES Act.

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