

# M&A Transactions Involving PPP Loans: Important Guidance from the SBA

*Amundsen Davis Financial Services Alert*  
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On October 2, 2020, the Small Business Administration (SBA) issued Procedural Notice No. 5000-20057 addressing procedures applicable to a “change of ownership” of a borrower who has received a loan under the Paycheck Protection Program (PPP). This procedural notice sets forth important guidance as to whether or not the SBA’s prior approval is required in connection with a change of ownership.

## **When does a change of ownership occur?**

For purposes of the PPP, a change of ownership occurs when:

- At least 20% of the common stock or other ownership interest 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;
- The 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.

## **What notice should be provided by the PPP borrower to the PPP lender?**

In all cases, the PPP borrower must provide the PPP lender with written notice and a copy of the proposed transaction documents.

## **If the PPP loan has been fully satisfied, are there any restrictions?**

If the PPP borrower has (a) repaid the PPP loan in full or (b) completed the loan forgiveness process and the SBA has remitted funds to the PPP lender in full satisfaction of the PPP loan or the PPP borrower has repaid any remaining balance on the PPP loan, there are no restrictions on a change of ownership.

## **If the PPP loan has not been fully satisfied, when is the SBA’s prior approval not required for a change of ownership?**

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Prior approval from the SBA is not required for, and the PPP lender may unilaterally approve, a change of ownership structured as follows:

- Sale of 50% or Less of Ownership Interests. A sale or other transfer of 50% or less of the common stock or other ownership interest of the PPP borrower.
- Other Sales of Ownership Interests and Mergers. A sale or other transfer of the common stock or other ownership interest of the PPP borrower or a merger if (a) the PPP borrower has used all of the PPP loan proceeds, (b) the PPP borrower has completed and submitted to the PPP Lender a forgiveness application, together with any required supporting documentation, (c) an interest-bearing escrow account controlled by the PPP lender is established with funds equal to the outstanding balance of the PPP loan, and (d) after the forgiveness process (including any appeal of the SBA's decision) is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.
- Asset Sales. A sale of 50% or more of the PPP borrower's assets (measured by fair market value) if (a) the PPP borrower has used all of the PPP loan proceeds, (b) the PPP borrower has completed and submitted to the PPP Lender a forgiveness application, together with any required supporting documentation, (c) an interest-bearing escrow account controlled by the PPP lender is established with funds equal to the outstanding balance of the PPP loan, and (d) after the forgiveness process (including any appeal of the SBA's decision) is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.

**If the PPP loan has not been fully satisfied, when is the SBA's prior approval required for a change of ownership?**

Prior approval from the SBA is required for, and the PPP lender may not unilaterally approve, a change of ownership which is not structured as set forth above. The procedural notice indicates that the SBA will provide a decision within 60 days of receiving the request for prior approval.

**What if the acquirer also has a PPP loan?**

If an acquirer in a change of ownership structured as a sale or other transfer of common stock or other ownership interest or a merger has a separate PPP loan, then, following consummation of the transaction: (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.

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**What other matters should be considered?**

Parties should review PPP loan documents for any covenants or default provisions which may be applicable to a transaction, regardless of whether the above “change of ownership” definition is met.

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