



## Are you considering selling your business? Did your business receive PPP funds from the CARES Act? Will these funds affect the sale of your business?

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**By David M. Morosan, David M. Levine and Sara K. Bonaiuto**

The loan forgiveness process under the Paycheck Protection Program (PPP) has barely begun for most borrowers. And once that process begins, it can last up to 150 days before a determination is made. If you are a PPP borrower, your loan documents likely prohibit the sale of your company without the PPP lender's consent. In addition, prior to October 2, 2020, PPP borrowers were left to determine whether they also need to obtain the Small Business Administration's (SBA) consent to changes of ownership. If required, the failure to secure SBA approval of a change of ownership risked default and acceleration of the loan obligations. That unfortunate possibility loomed over already-nervous borrowers negotiating to sell their businesses.

Fortunately, on October 2, 2020 the SBA published a procedural notice that provides guidance on "*changes of ownership*" for PPP Borrowers (the Procedural Notice). The Procedural Notice provides guidelines that allow PPP borrowers to sell their businesses without prior approval from the SBA under certain circumstances.

### **Definition of a Change of Ownership**

A "*change of ownership*" is considered to have occurred when any of the following transactions occur:

1. At least 20 percent of the common stock or other ownership interest of a PPP borrower is sold or transferred (whether in one or more transactions, including to an affiliate of the borrower);

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2. The PPP borrower sells or transfers 50% or more of its assets (whether in one or more transactions); or
3. A PPP borrower is merged with or into another entity.

### **Notification to PPP Lender**

In order to close a change of ownership transaction, a PPP borrower must notify its PPP lender in writing of the contemplated transaction. Additionally, the PPP borrower must provide its PPP lender with copies of the proposed agreements and any other documents that would effectuate the transaction.

### **Exceptions to SBA Approval Requirement**

There are no restrictions on change of ownership transactions if the PPP loan has been repaid in full, or if the PPP borrower has received a loan forgiveness determination from the SBA and repaid any portion of the PPP loan that is not forgiven.

If the PPP loan has not been repaid in full, or if a loan forgiveness determination has not yet been obtained, a PPP lender may nonetheless approve of (i) a sale or transfer of 50% or less of the common stock or other ownership interest of the PPP borrower, or (ii) a sale of less than 50% or of the assets of the PPP Borrower without SBA approval.

A PPP lender may also approve of (i) a sale or transfer of more than 50% of the common stock or other ownership interest of the PPP borrower, or (ii) a sale of 50% or more of the assets of the PPP Borrower; provided that as a condition of approving these transactions without SBA approval:

1. The PPP borrower must complete a loan forgiveness application and submit it along with supporting documentation to the PPP lender;
2. The PPP borrower must set up an interest-bearing escrow account (controlled by the PPP lender) and fund the escrow account in an amount equal to the outstanding balance of the PPP loan; and
3. Once the forgiveness process is complete, the escrow funds must be used to repay any remaining (unforgiven) PPP loan balance with interest.

### **Ongoing Obligations of PPP Borrowers**

Notwithstanding a PPP lender's approval of a change of ownership transaction, unless and until the PPP loan is forgiven, a PPP borrower remains liable for 1) performance of all obligations under the PPP loan; 2) the certifications made in connection with the initial PPP loan application; and 3) compliance with all

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other PPP requirements.

### **When SBA Approval is Required**

SBA approval is required if a change of ownership transaction does not meet the conditions described above. In order to obtain the SBA's approval, a request for approval must be submitted to the SBA together with the following:

1. The reason that the PPP borrower cannot fully satisfy the PPP note or escrow the funds;
2. The details of the proposed change of ownership;
3. A copy of the executed PPP note;
4. The letter of intent and purchase and sale agreement for the change in control transaction, detailing the responsibilities of the PPP borrower, seller (if different than the borrower) and buyer;
5. If applicable, disclosure of whether the buyer has an existing PPP loan; and
6. A list of all owners who own 20 percent or more of the buyer.

Upon receipt of a request for approval of a change of ownership, the SBA has 60 calendar days within which to make a determination regarding the proposed change of ownership request.

We will continue to provide updates as details become available.

Please contact David M. Morosan, David M. Levine or Sara K. Bonaiuto with any questions about this or any other PPP-related matter.

### **ATTORNEYS**

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### **PRACTICE AREAS**

Business & Corporate

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Commercial Lending