

SBA Issues New PPP Guidance Regarding Required Approval for a Sale of Assets or Transfer of Ownership of a PPP Borrower; Use of Escrow Accounts to Avoid Requirement of Prior SBA Approval

October 5, 2020

By: Michael C. Flynn

On October 2, the SBA issued SBA Procedural Notice 5000-20057, *Paycheck Protection Program Loans and Changes of Ownership* (“Notice”). A link to the Notice is set out below. The Notice sets forth SBA procedural requirements when there is a sale of stock, other transfer of ownership interests, or transfer of assets of a PPP borrower, constituting twenty percent (20%) or more of common stock or other ownership interest, or fifty percent (50%) or more of assets in an asset transfer, or merger of the borrower into another entity. The Notice sets forth the requirements that borrowers and lenders must follow in regard to such transactions, including:

- When prior SBA approval is required;
- In which transactions an escrow account to repay the PPP loan may be used to avoid having to obtain prior SBA approval;
- What must be submitted to SBA if an approval is needed; and
- Post-transaction notifications the lender must provide to SBA for any Covered Transaction, whether or not prior SBA approval is needed.

The outline below discusses these and other key provisions in the Notice:

I. APPLICABLE TRANSACTIONS (“COVERED TRANSACTIONS”)

- A. The guidance applies to changes in ownership or transfer of assets as follows (“Covered Transactions”):
- (1) At least 20 percent (20%) of the common stock or other ownership interest of a PPP borrower (including 20% of the stock of a publicly traded entity to or from one owner) 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 (50%) of its assets (measured by fair market value), whether in one or more transactions, or

- (3) The borrower is merged with or into another entity.

II. WHERE NO PRIOR SBA APPROVAL REQUIRED

- A. PPP loan has been repaid in full - no prior approval of SBA, or other restrictions, are required if the borrower has repaid the PPP Note in full.
- B. The PPP loan forgiveness process is completed – no prior approval of SBA or other restrictions apply if the borrower has completed the loan forgiveness process and:
 - (1) SBA has remitted funds to the lender in full satisfaction of the PPP Note; or
 - (2) The PPP borrower has repaid any remaining balance on the PPP loan.
- C. Prior SBA approval is not needed if the transfer is a sale of stock or other ownership interest of fifty percent (50%) or less of the common stock or other ownership interest of the PPP borrower.

III. USE OF ESCROW ACCOUNT TO AVOID SBA PRIOR APPROVAL REQUIREMENT

- A. If the PPP loan has not been repaid or the PPP forgiveness process is not yet completed, and the transaction is:
 - (1) A sale or other transfer of 50% or less of the common stock or other ownership interest;
 - (2) A sale or other transfer of any percentage of the borrower's assets; or
 - (3) A merger of the borrower with another entity;

Then prior SBA approval is not required if:

- (a) The PPP borrower completes and delivers to the lender a PPP loan forgiveness application;
- (b) An interest-bearing escrow account controlled by the lender is established with funds equal to the outstanding balance of the PPP loan; and
- (c) After the forgiveness process and any appeal is completed, the escrow funds must be disbursed first to repay any remaining PPP loan balance plus interest.

IV. WHEN PRIOR SBA APPROVAL IS REQUIRED

- A. In a Covered Transaction if the conditions in Sections II and III above are not met, the lender must obtain prior SBA approval. In that event, the lender must submit a request containing the following to the appropriate SBA Loan Servicing Center:
 - (1) The reason that the PPP borrower cannot fully satisfy the PPP Note or utilize 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 twenty percent (20%) or more of the purchasing entity.

SBA approval of any change of ownership will be conditioned on the purchasing entity assuming all of the PPP borrower's obligations under the PPP loan, including responsibility for compliance with the PPP loan terms. SBA may require additional risk mitigation measures as a condition of its approval of the transaction.

V. FOLLOW-UP REQUIREMENTS FOR LENDER AND BORROWER/NEW OWNER IN ANY COVERED TRANSACTION

A. Lender SBA notice requirement

- (1) Following completion of any Covered Transaction, the lender must notify the appropriate SBA Loan Servicing Center, within 5 business days of completion of the transaction, of the:
 - (a) Identity of the new owner(s) of the common stock or other ownership interest;
 - (b) New owner(s)' ownership percentage(s);
 - (c) Tax identification number(s) for any owner(s) holding twenty percent (20%) or more of the equity in the business; and
 - (d) Location of, and the amount of funds in, the escrow account under the control of the PPP Lender, if an escrow account is required.

B. Borrower/new owner documentation requirements if multiple PPP loans.

- (1) If any of the new owners or the successor arising from such a transaction has a separate PPP loan, the borrower and each new owner, or the new entity in event of a merger, must segregate and delineate PPP funds and expenses in order to provide documentation to demonstrate compliance with PPP requirements by each PPP borrower.

Here is a link to the Procedural Notice - <https://home.treasury.gov/system/files/136/PPP--Procedural->

[Notice--PPP-Loans-and-Changes-of-Ownership.pdf](#)

Buchalter's team of SBA PPP experts can help you understand these ever-changing program requirements. Any of the below Buchalter attorneys can assist you with PPP program issues.



Michael C. Flynn

Mortgage Banking Practice Co-Chair
(213) 891-5262
mflynn@buchalter.com



Robert S. Gillison

Shareholder
(213) 891-5014
rgillison@buchalter.com



Todd A. Mitchell

Shareholder
(503) 226-8435
tmitchell@buchalter.com



Mark Goshgarian

Attorney
(213) 891-5072
mgoshgarian@buchalter.com



Alison M. Pear

Shareholder
(503) 226-8636
apear@buchalter.com



L. David Connell

Shareholder
(503) 226-8605
dconnell@buchalter.com



Joshua M. Robbins

Shareholder, Chair of White Collar &
Investigations
(949) 224-6284
jrobbins@buchalter.com

This communication is not intended to create or constitute, nor does it create or constitute, an attorney-client or any other legal relationship. No statement in this communication constitutes legal advice nor should any communication herein be construed, relied upon, or interpreted as legal advice. This communication is for general information purposes only regarding recent legal developments of interest, and is not a substitute for legal counsel on any subject matter. No reader should act or refrain from acting on the basis of any information included herein without seeking appropriate legal advice on the particular facts and circumstances affecting that reader. For more information, visit www.buchalter.com.