

Small Business Administration Provides Guidance for Change of Ownership When a Seller Has a PPP Loan

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The last few months have been full of questions with no answers for companies with outstanding Paycheck Protection Program (“PPP”) loans who are interested in selling their business. Did transfer of their assets or sale of the equity in their company trigger a default under their PPP loan? Was consent required to their transaction and, if so, how was that consent to be obtained? Should the seller seek a waiver of default or consent from their PPP lender or from the Small Business Administration (“SBA”)?

The SBA took the first step in answering some of these questions in a Procedural Notice effective October 2, 2020 (the “Notice”). In the Notice, the SBA set forth required procedures for changes of ownership of an entity that has received PPP funds. The Notice applies to a change of ownership, being the sale of at least 20% of the common stock or other ownership interest, the sale or transfer of at least 50% of its assets, or merger into another entity.

The Notice sets forth different requirements based on whether or not the PPP note has been satisfied, meaning that the PPP note has been repaid in full or the loan forgiveness process has been completed. If the PPP note has not been satisfied, criteria is set forth for when prior SBA approval to the change of control is not required, including when the sale is of 50% or less of the ownership interest or assets of the seller or when steps are taken to escrow an amount equal to the outstanding PPP loan balance with the PPP lender. It’s important to note that these criteria should apply whether or not a company’s PPP loan documents specifically state that change of ownership requires SBA consent and PPP lender’s consent to the change of ownership may still be required.

Despite following the required procedures, the guidance is clear that the seller will remain responsible for the performance of all obligations under the loan, related certifications, and compliance with all other applicable PPP requirements. It will be responsible for preparation of all documentation required by the PPP lender or the SBA.

While the Notice has given some guidance to buyers and sellers who would like to move forward with deals, it makes clear that a seller won’t be off the hook once the change of ownership is finalized. The seller will still need to work with the buyer, the PPP lender, and the SBA until the PPP loan is forgiven or paid in full.

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