CLIENT ALERTS & INSIGHTS

SBA Guidance on PPP Loans in the Context of a Sale of a Business

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On October 2, 2020, the SBA released the attached guidance relating to whether the SBA will be required to consent to a "change in ownership" of a business. A "change in ownership" is deemed to be any of the following:

- A sale of 20% or more of the common stock or other ownership interests of a PPP Borrower;

- A PPP Borrower transfers 50% or more of its assets; or

- A PPP borrower is merged with or into another entity

1. The SBA does not have to consent to a change in ownership in the following circumstances:

A. The PPP loan is fully satisfied prior to the change in ownership, which requires the following elements:

a. The PPP loan has been repaid in full; or

b. The PPP borrower has completed the process for forgiveness and the SBA has remitted funds to the PPP lender to satisfy the PPP loan

B. If the PPP loan is not fully satisfied prior to the change in ownership (see elements in (A) above) and the transaction is structured as a sale of equity interests if:

a. Less than 50% of common stock or other ownership interests are transferred; or

b. (i) the PPP borrower completes its forgiveness application and

(ii) the PPP borrower establishes an interest bearing escrow account which is controlled by its PPP lender. Escrowed monies must be deposited in the full amount of the outstanding PPP loan.

C. If the PPP loan is not fully satisfied prior to the closing (see elements in (A) above) and the transaction is structure as an asset sale if:

(i) the PPP borrower completes its forgiveness application and

(ii) the PPP borrower establishes an interest bearing escrow account which is controlled by its PPP lender. Escrowed monies must be deposited in the full amount of the outstanding PPP loan.

2. If none of the circumstances set forth in item 1 above are applicable, then the SBA must consent to the change in ownership and the SBA will have up to 60 days from its receipt of a request for consent to make a decision. If the SBA is not required to consent to a change in ownership, a PPP lender may unilaterally approve the change in ownership.

A few other items of interest to note:

1. If a purchaser also has a PPP loan, the purchaser should treat its current PPP loan and the PPP loan of the target as two separate loans and should keep separate records as to how proceeds of each loan are spent (i.e. do not co-mingle funds or use PPP proceeds of the target to pay for expenses of the purchaser and vice versa).

2. The PPP borrower (selling entity) remains responsible for certifications made at the time of the application and for obtaining, preparing and submitting PPP related documentation to the PPP lender.

Note that the guidance does not specify how transactions closed prior to the issuance of this guidance will be treated. Many transactions did involve an escrow, but the escrow was not always with the PPP lender.

If you have any questions, please contact a member of Benesch's Commercial Finance & Banking Practice Group.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

