

## CLIENT ALERT

### PPP Borrowers May Require SBA Consent or Escrowing of PPP Loan Balance in Connection with "Change of Ownership" Transactions

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On October 2, 2020 (almost two months after the August 10, 2020 commencement of the acceptance period for forgiveness applications), the Small Business Administration (SBA) released an [SBA Procedural Notice](#) (the "Notice") concerning required procedures for change of ownership of an entity that has received PPP loans (the "PPP Borrower"). Under the Notice, SBA approval or funding PPP loan balances into escrow may be required in connection with a change of ownership transaction and purchasers may be required to assume the PPP Borrower's obligations, in addition to PPP Lender notice and approval.

Under the Notice, a "change of ownership" will be considered to have occurred when (1) at least 20% percent of the common stock or other ownership interest of a PPP Borrower is sold or otherwise transferred, whether in one or more transactions, including to an affiliate or an existing owner of the PPP Borrower, (2) the PPP Borrower sells or otherwise transfers at least 50% of its assets, whether in one or more transactions, or (3) a PPP Borrower is merged with or into another entity. The SBA further explained that to determine whether a change of ownership has occurred, all transfers of stock or other ownership interests since the date of the PPP loan would be aggregated. For publicly traded PPP Borrowers, only sales or transfers that result in one person or entity owning 20% or more of the PPP Borrower would be aggregated.

Under the Notice, prior to the closing of any change of ownership transaction, the PPP Borrower must notify the PPP Lender in writing of the contemplated transaction and provide the PPP Lender with a copy of the proposed agreements or other documents that would effectuate the proposed transaction.

Once the notification has been given to the PPP Lender, PPP Borrowers must provide notice to and obtain SBA's prior consent to the change of ownership unless (i) the PPP loan has been fully satisfied through repayment, either by the PPP Borrower or by the SBA in response to a forgiveness application, (ii) the sale or transfer is of 50% or less of the common stock or other ownership interest of the PPP Borrower, or (iii) as set forth in more detail in the Notice, the PPP Borrower has completed a forgiveness application reflecting its use of the PPP loan and established an interest-bearing escrow account with the full amount of the balance of the PPP loan.

PPP Borrowers considering entering into a change of control transaction should note that, among other information to be included with the request for consent, the request must disclose a list of all owners of 20 percent or more of the purchasing entity. In addition, in transactions where SBA consent would be required, the transaction timeline should take into account that the SBA has sixty (60) days from receipt of a complete request to respond.

The Notice includes a number of additional requirements and further confirms that SBA approval of any change of ownership involving the sale of 50% or more of the assets of a PPP Borrower will require (i) buyer assuming all of the PPP Borrower's obligations under the PPP loan, including responsibility for compliance with the PPP loan terms, and (ii) the purchase or sale agreement or a separate assumption agreement including appropriate language regarding the buyer's assumption of the PPP Borrower's obligations under the PPP loan.

In the case of a change of ownership not involving an asset sale, including a merger, the PPP Borrower or its successor entity would remain responsible for (1) performance of all obligations under the PPP loan, (2) the certifications made in connection with the PPP loan application, including the certification of economic necessity, and (3) compliance with all other applicable PPP requirements.

Crowell & Moring will continue to monitor and provide updates regarding developments in the PPP.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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