## Requirements for PPP Borrowers Contemplating a Change of Ownership

The SBA has now issued a "Procedural Notice" to all Paycheck Protection Program ("PPP") Lenders setting forth *new* required procedures for a **"Change of Ownership"** of an entity that has an outstanding PPP loan[1]. **All such PPP borrowers will be required to either escrow funds equal to the outstanding balance of the PPP loan or obtain the SBA's prior approval** for the Change of Ownership transaction. The specific requirements vary depending on the nature of the transaction, as discussed below.

Most PPP loan agreements contain a restriction on any change of ownership of the borrower. For purposes of the Notice requirements, a **"Change of Ownership"** occurs when:

- At least 20% of the ownership interest of a PPP borrower is sold or transferred, whether in one or more transactions, including transfers to an affiliate or existing owner;
- The PPP borrower sells or otherwise transfers at least 50% of its assets (measured by fair market value), whether in one or more transactions; or
- A PPP borrower is merged with another entity.

(A sale or transfer of less than 20% ownership interest or less than 50% of assets is not a Change of Ownership for these purposes.)

### Requirement for all PPP borrowers engaging in a Change of Ownership transaction

**Prior to closing** any transaction, the PPP borrower must **notify the lender in writing** of the transaction and provide the lender with a copy of the proposed sale or merger agreements.

### Requirements based upon the type of Change of Ownership transaction

1. *Sale or other transfer of 50% or less of ownership interest of PPP Borrower* - Prior SBA approval is NOT required. (All sales or transfers occurring since date of approval of PPP loan must be aggregated to determine if 50% limit met.)

2. *Sale or other transfer of more than 50% of ownership interest of PPP Borrower* - Prior SBA approval is NOT required if, prior to the transaction:

- The PPP borrower completes a forgiveness application and submits it to the lender; and
- An interest-bearing escrow account is established with the lender with funds equal to the outstanding balance of the PPP loan. After the forgiveness process is completed, the funds may be disbursed (first to repay any outstanding balance on the PPP loan, then the remainder to the borrower).

3. *Sale of 50% or more of assets of PPP Borrower* - Prior SBA approval is NOT required if, prior to the transaction:

- The PPP Borrower completes a forgiveness application and submits it to the lender; and

- An interest-bearing escrow account is established with the lender with funds equal to the outstanding balance of the PPP loan. After the forgiveness process is completed, the funds may be disbursed (first to repay any outstanding balance on the PPP loan).

4. *If* none *of the above is satisfied, then the transaction will* ***require prior approval by the SBA.*** The lender is required to submit a request to the SBA that includes: an explanation why the PPP Borrower cannot fully satisfy the Note or escrow the funds; the details of the proposed transaction; a copy of the PPP Note; the proposed sale or merger agreements; disclosure of whether the buyer has a PPP loan; and a list of all 20% or more owners of purchaser. The SBA has **60 days** to respond to the request and **may require additional "risk mitigation" measures**. In the case of an asset sale (50% or more), SBA approval will be conditioned on the purchaser assuming all of the PPP borrower's obligations for the PPP loan.

## Effect of all completed Change of Ownership transactions

Any change in ownership will not change the PPP borrower's obligations in connection with the PPP loan. The PPP borrower will still be responsible for:

- Performance of all obligations under the PPP loan;

- The certifications made in connection with the PPP loan application, including the certification of economic necessity;

- Compliance with all other applicable requirements; and

- Obtaining, preparing and retaining all required PPP forms and supporting documentation and providing the same to the lender or SBA upon request.

In addition, if a new owner uses the PPP loan funds for any unauthorized purpose, the SBA will have recourse against the new owner as well. If the new owner also has a PPP loan, each borrower is responsible for segregating its PPP funds and delineating its expenses to demonstrate its own compliance with the PPP rules.

The full Procedural Notice can be found here.

**This memo is intended only as a summary and general overview. If you have any questions or would like legal advice regarding the above or any other employment issue, please contact David Lawrence or Sarah Gidley.**

[1]**If, prior to closing the transaction**, the PPP borrower has **"fully satisfied"** its PPP Note by either repaying the PPP Note in full or completing the loan forgiveness process (i.e., the SBA has paid the lender and/or the borrower has repaid any remaining balance), there are **no requirements** and the PPP borrower may proceed with the Change of Ownership transaction without any further action. Note, however, that the forgiveness process is lengthy. A lender has 60 days from receipt of the application to approve and send it to the SBA, which then has 90 days to object or approve and pay the lender the forgiven amount. Some lenders will not even accept forgiveness applications yet. Therefore, it is unlikely that many PPP borrowers will have "fully satisfied" the Note at this time, which means the Notice requirements will apply.