

# Locke Lord QuickStudy: Saving Our Small Businesses: Paycheck Protection Program Loans and Changes of Ownership

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On October 2, 2020, the Small Business Administration (“SBA”) issued a [Procedural Notice](#) (the “[Notice](#)”) regarding Paycheck Protection Program (“PPP”) loans and changes of ownership. Under previous rules, PPP lenders needed the consent of the SBA to approve a change of ownership (including a change in percentage of ownership) of a PPP borrower within 12 months after final disbursement on any loan, but the SBA had not provided specific guidance about the thresholds for determining when a change of ownership is deemed to occur.<sup>1</sup> This lack of clarity created uncertainty and confusion for merger and acquisition counterparties and their lenders, created transactional delays and, in some cases, caused borrowers to repay their PPP loans rather than risk the possibility of violating law. The new guidance, which is effective as of October 2, 2020 and expires by its terms on October 1, 2021, more clearly defines changes of ownership and allows PPP lenders to unilaterally approve a change of ownership of a PPP borrower under certain prescribed conditions.<sup>2</sup>

Low Threshold for Changes of Ownership. The new guidance sets a surprisingly low bar on what constitutes a “change of ownership” in the context of the PPP. The SBA now defines a change of ownership as a transaction in which: (i) at least 20% of the equity interests of a PPP borrower is sold or transferred (including to an affiliate or an existing owner of the entity); (ii) the PPP borrower sells or transfers at least 50% of its assets; or (iii) a PPP borrower is merged with another entity.

Original PPP Loan Borrower Retains Liability. Regardless of any changes of ownership, the original PPP borrower retains responsibility for performance of all obligations under the PPP loan, including the certifications made in its PPP loan application as to economic necessity and for obtaining, preparing, and retaining all required PPP forms and supporting documentation and providing them to the SBA upon request.

Is SBA Consent Required? Under the Notice, changes of ownership may no longer need SBA consent, depending on the facts and circumstances of the PPP loan and the structure and terms of the change of ownership transaction.

There are no restrictions (including consent or notice requirements) in connection with a change of ownership transaction involving a PPP borrower if the PPP loan has been fully satisfied prior to the closing of the transaction (e.g., the loan has been repaid, or a forgiveness application has been submitted, the SBA has disbursed the funds to the PPP lender in full or partial satisfaction of the such loan, and the borrower has repaid any remaining

balance).

In addition, *SBA consent is not required* for a PPP lender to approve a change of ownership of a PPP borrower if:

- Sale or Transfer of Equity Interests/Merger – (i) The existing owners retain at least 50% of the equity interests of the borrower in connection with a transaction structured as a sale or transfer of equity interests or merger, or (ii) the borrower submits a forgiveness application to the lender and establishes and deposits with such lender an escrow amount sufficient to repay the entire PPP loan.
- Asset Sale – The sale is of 50% or more of the borrower's assets and the borrower submits a forgiveness application to the lender and establishes and deposits with such lender an escrow amount sufficient to repay the entire PPP loan.

Although SBA consent is not required for a change of ownership described above, the PPP lender is still obligated to notify the SBA within 5 days of the completion of such transaction, provide information about the identity of the new owners (including the tax identification number(s) for any owner(s) holding 20% or more of the equity interests in the business) and describe the escrow arrangements that have been established (if required).

*Prior SBA consent is required* for PPP lenders to approve a change of ownership transaction if the borrower does not meet the conditions described above. For the sale of 50% or more of a borrower's assets, SBA approval will be conditioned on the purchasing entity assuming all of the borrower's obligations under the PPP loan. The Notice provides that the SBA will provide an approval determination within 60 days of receipt of a request, which is longer than the SBA has historically taken in connection with change of ownership approval requests.

SBA and New Owners. Whether or not SBA consent is required, PPP borrowers remain subject to all obligations under the program. In addition, the SBA will have recourse against any new owners that use PPP funds for unauthorized purposes. If a new owner of a PPP borrower has a separate PPP loan, then the PPP borrower and the new owner are each responsible for segregating and delineating PPP funds and expenses. In the case of a merger, the successor entity holds such responsibilities for both PPP loans and must segregate and delineate PPP funds and expenses and demonstrate compliance with PPP requirements with respect to both PPP loans.

Your regular Locke Lord contact and the authors of this article would be happy to help you navigate the CARES Act and the related amendments to the Small Business Act as they relate to the Paycheck Protection Program or otherwise.

Organizations that plan for their recovery and are rebuilding for the future will be better positioned for a post-pandemic world. Please visit our [Adapt. Adjust. Advance. Resource Center](#) often for up-to-date information on navigating these and other important legal considerations in the postpandemic reality.

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1. SOP 50 10 5(K) "Lender and Development Company Loan Programs" – Subpart B, Chapter 8.

2. This QuickStudy summarizes the SBA requirements related to changes of control set forth in the Notice; however, individual PPP loan terms may vary based on a PPP lender's form PPP loan documentation.

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