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Client Advisory

Small Business Administration Issues Procedural Notice Related to PPP Loan Recipient Changes of Ownership

The Small Business Administration (“SBA”) recently issued a Procedural Notice document to Paycheck Protection Program (“PPP”) lenders. This notice outlines certain requirements that must be considered when an entity that received PPP funds is considering a change in ownership. At certain times, the SBA’s advance approval will be required. In any case, PPP borrowers will remain responsible for all terms of the PPP loan, including repayment, certifications of necessity and audit requirements.

The SBA notice outlines three circumstances when a “change in ownership” will be considered to have taken place:

- 1) At least 20% of the common stock - or other ownership interest - of a PPP borrower is sold or otherwise transferred (with no exclusion for transfers made via gift or testamentary transfer upon the death of an owner). This circumstance includes publically traded entities and applies regardless whether the change was accomplished through one or more transactions. This “change in ownership” trigger will also apply to transactions where the change in ownership is completed among existing owners or affiliated entities.
- 2) At least 50% of the FMV of the entity’s assets are sold or transferred.
- 3) A PPP borrower is merged with (even where the PPP borrower is the surviving entity) - or into - another entity.

In such circumstances, a PPP loan recipient must notify its lender - in writing - to make the lender aware of the proposed transaction and provide all relevant documents to the lender. If a borrower’s PPP note has been fully satisfied, there are no restrictions on the change of ownership as long as the PPP note was repaid in full or the loan forgiveness process was completed and the SBA remitted funds to the relevant lender in full satisfaction of the PPP note. Although, it should be noted that it is uncertain how a borrower will be able to determine whether in fact its lender has actually received funds from the SBA to complete the PPP loan forgiveness process. Further, several lenders have not yet opened their loan forgiveness portals and submission of an application to them is thus not currently possible.

If a PPP note has not yet been fully satisfied, the SBA notice outlines “change in ownership” cases that require advance approval by the SBA and those that do not. The following conditions must be met in order to permit a PPP lender to approve a “change in ownership” and bypass any otherwise

required SBA prior approval of such changes:

- 1) The change is structured as a sale or transfer of common stock or other equity interest ownership - or as a merger - and less than 50% of the stock/ownership interest is transferred. Alternatively, if a PPP borrower completes its forgiveness application and funds an escrow account controlled by the Lender for the full outstanding balance of the PPP loan, SBA approval will not be required.
- 2) The change is structured as an asset sale (greater than 50% of the fair market value of the PPP borrower’s assets) and the Borrower completes the forgiveness application and an escrow account is established for the outstanding balance of the loan.

If the circumstances described above cannot be met, the SBA’s prior approval of the transfer will be required. In such a case, the Lender is not able to make the approval determination and must submit the a request for approval to the SBA, including various documents outlined in the notice. The SBA approval may require additional security measures on the outstanding loan as a condition to granting approval and permitting the purchasing/acquiring entity to assume responsibility for the loan. The notice indicates that SBA review and determination of applicable “change in ownership” will occur within 60 days of the receipt of a request from the Lender so completing such transactions can be significantly delayed.

Whether or not SBA approval is required, the PPP borrower and/or merged entity will be responsible for all obligations under the loan and new ownership will be subject to recourse for any unauthorized use of loan proceeds.

The guidance provided through this Procedural Notice was addressed to SBA employees and PPP lenders. There has not yet been any additional guidance provided to Borrowers through Frequently Asked Questions, notices or regulations.

The Procedural Notice is located [here](#).

Should you have any questions regarding this information, please reach out to your Archer attorney or any member of Archer’s [COVID-19 Task Force](#).

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