

COVID-19 Help for Small Businesses

Treatment of PPP Loan in a Business Acquisition

October 6, 2020

On Friday, October 2, 2020, the SBA released a Procedural Notice to provide information concerning the required procedures for changes of ownership of an entity that received a PPP loan.

When a business is sold it is common for all debt to be paid in full. This is often necessary for debt holders to release liens to enable the purchaser to acquire clear title.

When the debt in question is a PPP loan, however, the seller may not want to pay off the loan as it may be anticipated that all or part of the loan will be eligible for forgiveness.

The PPP loan program is administered by the SBA. These loans typically define any reorganization, merger, consolidation or other change of ownership or business structure to be a default unless the lender's prior consent is obtained.

Under the recently issued Procedural Notice, a "change of ownership" requires the prior consent of the SBA or the PPP lender to avoid the loan being in default. There are a number of conditions that must be satisfied to obtain such consent.

A "change of ownership" is defined to mean a sale or transfer of 20% or more of the equity of the PPP borrower, a sale of 50% or more of its assets (measured by fair market value), or a merger with or into another entity.

There are no restrictions on a change of ownership if the PPP loan has already been paid in full and/or forgiveness has been finally determined.

The PPP lender may approve a change of ownership, and SBA approval is not required, if the transaction is a sale of equity of 50% or less, or a forgiveness application and any required supporting documentation have been submitted and an amount equal to the outstanding balance of the PPP loan is held in an interest-bearing escrow account pending a determination of forgiveness. Once forgiveness is determined, the escrow must be disbursed first as necessary to pay any PPP loan balance not forgiven.

Similarly, a PPP lender may approve (and SBA approval is not required) a sale of 50% or more of a PPP borrower's assets if an interest-bearing escrow account is established to hold an amount equal to the balance of the PPP loan pending a determination of forgiveness. Again, once forgiveness is determined, the escrow must be disbursed first as necessary to pay any PPP loan balance not forgiven.

Prior SBA approval is required for any transaction not described above and may be subject to the inclusion of terms in the transaction documents by which the buyer expressly assumes the PPP borrower's obligations under the PPP loan.

In all cases the PPP borrower (and the successor entity in the event of a merger) will remain liable for all obligations under the PPP loan. Any new owners who misuse PPP funds will also be exposed to liability. If any new owner or successor entity has its own PPP loan, the PPP funds must be segregated and the use of such funds separately accounted for to determine compliance and forgiveness.

When planning a change of ownership transaction, a PPP borrower must anticipate these SBA requirements and the time required to comply with them.

GMH's Coronavirus Task Force is here to answer your questions. While GMH is complying with Governor Whitmer's Order, we are working remotely and available to assist you. Please contact any of the below lawyers for more Coronavirus support.

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Elizabeth "Liza" A. Favaro
(Employment, Insurance, Supply Chain)

(248) 457-7181
efavaro@gmhlaw.com



Bruce W. Haffey
(Corporate, M&A, Supply Chain)

(248) 457-7140
bhaffey@gmhlaw.com



Alexander Lebedinski
(Health Care, Immigration)

(248) 457-7058
alebedinski@gmhlaw.com



James Y. Rayis
(International)

(248) 457-7173
jrayis@gmhlaw.com



Nina M. Jankowski
(Employment)

(248) 457-7183
njankowski@gmhlaw.com