

February 03, 2021

The Economic Aid Act: Changes to the PPP for New First Draw Loans and the Availability of Second Draw Loans

On December 27, 2020, the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Economic Aid Act or EAA) (Pub. L. 116-260) became law, modifying important aspects of the Paycheck Protection Program (PPP), authorizing additional amounts to be available for loans to new borrowers (new First Draw Loans), and providing for additional PPP amounts to be available for loans to previous PPP borrowers who meet new, more narrow, loan requirements (Second Draw Loans). The Economic Aid Act contains numerous additional relief programs and changes to previous relief programs. This alert focuses primarily on the changes to the PPP for new First Draw Loans and the availability of Second Draw Loans. In addition, the SBA released revised regulations providing additional detail on the changes under the EAA. As before, we urge you to check in regularly because the SBA is likely to continue to release regulations, create new FAQs, and make changes on the fly.

A Flood of Guidance... New guidance is coming out and being modified very quickly. We recommend that you regularly check this page, which often has more up to date forms and regulations. Here is a link to the current regulations that have been revised for First Draw Loans and new regulations for Second Draw Loans. In addition, various FAQs continue to be updated and issues by the SBA including the original PPP FAQ, the loan forgiveness FAQ, and new FAQs on First Draw Loan and Second Draw Loan calculations (including how to calculate the revenue reduction requirement for Second Draw Loans). Most recently, although not discussed in this alert, the SBA issued new regulations on loan forgiveness and review procedures.

I. Open Now!

Eligible borrowers are currently able to apply for First Draw and Second Draw Loans. The SBA's authority to make loans

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Government Relations, Political Law &
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has been extended until March 31, 2021 under the EAA but, as with the previous PPP, we recommend submitting your application sooner rather than later - the loan money authorized is limited.

II. Second Draw PPP Loans

In general, Second Draw Loans are subject to all previous PPP loan program requirements with a few exceptions (discussed later). For example, no collateral is required, no personal guarantees are required, the interest rate is one percent (1 percent), and the loan maturity period is five years. Borrowers are likely going to prefer using the same lender as was used for their first draw as some payroll documentation can be relied on again (though a 25 percent revenue reduction needs to be documented).

Eligibility

The Eligibility for Second Draw Loans is very different from the eligibility for First Draw Loans. It substantially narrows the pool of businesses eligible and it eliminates (at least some of) the ambiguity around the subjective “necessity” criteria. Applicants must meet all of the following requirements to apply for a Second Draw Loan:

- *Eligible Applicants.* Applicants for Second Draw Loans must be business concerns, independent contractors, eligible self-employed individuals, sole proprietors, nonprofit organizations eligible for a First Draw PPP Loan, veterans organizations, Tribal business concerns, housing cooperatives, small agricultural cooperative, eligible 501(c)(6) organizations or destination marketing organizations, or eligible nonprofit news organizations. 501(c)(6) organizations and destination marketing organizations are only eligible if they meet additional limitations on lobbying activities. The Act adds some new exclusions (detailed below) such as businesses with ownership interests held by the President, members of Congress and each of their families as well as some foreign nationals. Recipients of “Shuttered Venue Operator” grants, public companies and permanently closed businesses are also ineligible.
- *First Draw Loan Requirement.* The applicant must have previously received a First Draw Loan.
- *First Draw Loan Used, and Only for Authorized Purposes.* The applicant must have used, or will use, the full amount of its First Draw Loan on authorized uses on or before the expected date on which the Second Draw Loan will be disbursed.
- *300 Employee Limit.* The applicant must employ not more than 300 employees.
 - ***MBF Comment.*** *This means that some First Draw Loan recipients who exceeded the 500-employee limit on First Draw Loans but were otherwise eligible for a First Draw Loan under the alternative revenue or employee size limits specific to their NAICS code might not be eligible. The SBA’s normal alternative revenue or employee size limits do not apply for Second Draw Loan purposes.*
 - *The headcount methodology remains the same (prior year or rolling 12 months) as opposed to a “snapshot on the filing date”.*
 - *New and Old Exceptions.* The 300-employee limit on Second Draw Loans is subject to exceptions for businesses with a North American Industry Classification System (NAICS)

code beginning with 72 and eligible news organizations with more than one physical location that meet certain requirements.

- **MBF Comment.** *Failure to report a NAICS code on a tax return or to rely on the code in the first draw does not preclude an applicant from applying if they can legitimately categorize themselves as NAICS 72.*
- **Revenue Reduction Requirement.** The applicant must have experienced a reduction in gross receipts during the first, second, third, or fourth quarter in 2020 of at least 25 percent as compared to the applicant's gross receipts during the same quarter in 2019. Special rules apply for organizations that were not in business during all of 2019. An applicant that was in operation in all four quarters of 2019 is deemed to have experienced the required revenue reduction if it experienced a reduction in annual receipts of 25 percent or greater in 2020 compared to 2019 and the borrower submits copies of its annual tax forms substantiating the revenue decline. The regulations contain detailed definitions of "gross receipts" for this test, and a special definition applies for tax exempt entities. Special rules also apply when counting gross receipts of former affiliates. Also note that the amount of any forgiven First Draw Loan is not included in the borrower's gross receipts.
- **Necessity Requirement.** The necessity requirement still applies to applicants for Second Draw Loans. This requirement has been the subject of some controversy and applicants should keep in mind that the SBA intends to review whether borrowers met the requirement. Although it might seem that the implementation of a 25 percent revenue reduction requirement – a generally bright line criteria – qualifies applicants, the application still contains the broader necessity requirement which reads as follows: "The current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."
 - **MBF Comment.** *We recommend that borrowers who analyzed this requirement previously do so again, starting from a clean slate. Just because this requirement was met last year does not mean that it is met now. It is also not clear that a borrower whose revenue has declined but that has (or could be construed to have) access to other sources of liquidity is not eligible. Nevertheless, the PPP's elimination of the SBA's traditional "no credit elsewhere" requirement remains in effect.*
- **Affiliation Rules Apply.** The complicated affiliation rules applicable to First Draw Loans generally apply for Second Draw Loans. The regulations contain limited exceptions for certain businesses with a NAICS code starting with 72, 511110, or 5151.

In addition to the above requirements, the EAA has made it clear that certain applicants are not eligible for a Second Draw Loan. Those include:

- Any applicant primarily engaged in political activities or lobbying activities.
- Any business concern or entity owned 20 percent or more by an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong.

- Any business concern that retains, as a member of the board of directors of the business concern, a person who is a resident of the People’s Republic of China.
- Any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938.
- Any person or entity that receives a grant for shuttered venue operators under section 324 of the EAA.
- Any entity in which the President, the Vice President, the head of an Executive department, or a Member of Congress, or the spouse of such person as determined under applicable common law, directly or indirectly holds a controlling interest.
- Any issuer, the securities of which are listed on an exchange registered as a national securities exchange under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. 78f).
- Any entity that has previously received a Second Draw PPP Loan.
- Any entity that has permanently closed.

Interestingly, the SBA in its regulation on Second Draw Loans indicated that the FAQs and other sub-regulatory guidance issued by SBA and/or the Department of the Treasury apply to Second Draw Loans (with certain exceptions). Although it is unusual to affirm sub-regulatory guidance (which does not have the legal force of a regulation) in a regulation, we would recommend adhering to FAQs and other sub-regulatory guidance with the assumption that they reflect the SBA’s internal position on the subject matter. Although it is unlikely that a court would respect this as a “back-door” for holding that all of the FAQs have the force of regulations, deviating from the FAQs is likely to be a difficult and uphill battle.

Maximum Loan Amount for Second Draw Loans

The general rule is that a single Second Draw Loan may not exceed the lesser of (1) two and half months of the borrower’s average monthly payroll costs or (2) \$2 million. Some important rules and exceptions apply:

- Average monthly payroll costs (see more detail below on changes to the definition of “payroll costs”) are generally based on calendar year 2020 or calendar year 2019.
 - **MBF Comment.** *Oddly, the regulation appears to eliminate the use of the twelve-month period immediately prior to the date the loan is made as an alternative in certain cases. Although addressed in the preamble, the regulation itself is not very clear on this subject.*
- For purposes of the payroll cost calculation, “the borrower must subtract any compensation paid to an employee in excess of \$100,000 on an annualized basis, as prorated for the time period during which the payments are made or the obligation to make the payments is incurred.”
[Emphasis added]
 - **MBF Comment.** *We are hoping for clarification as to what is meant by the proration reference in the portion of the regulation quoted above. It is not clear as to how this is meant to apply and there is no useful example.*

- Seasonal employers may use the average total monthly payments for payroll costs incurred or paid by the borrower for any 12-week period between February 15, 2019 and February 15, 2020. Seasonal means an employer that does not operate for more than seven months in any calendar year or that during the preceding calendar year, had gross receipts for any six months of that year that were not more than 33.33 percent of the gross receipts of the employer for the other six months of that year.
- Borrowers assigned a NAICS code beginning with 72 at the time of disbursement may borrow the lesser of (1) **three** and half months of the borrower's average monthly payroll costs or (2) \$2 million. As noted above, some borrows may need to now take a close look at their NAICS code.
- Businesses that are part of a single "corporate group" may not receive more than \$4 million worth of Second Draw Loans. Note that "corporate group" is not defined in the same way as affiliate is used in the regulations – instead it refers to entities that are "majority owned, directly or indirectly, by a common parent."

Special rules on the maximum loan amount also apply to borrowers that did not exist during the one-year period preceding February 15, 2020, farmers and ranchers, self-employed individuals, and partnerships.

Unresolved Issues with First Draw Loans

Under the regulations issued by the SBA, if a First Draw Loan is under review or the SBA has information suggesting that the borrower may have been ineligible for the First Draw Loan the SBA will not issue a loan number to the lender (meaning that the loan will not be issued by the lender). The regulations then vaguely indicate that the SBA "will notify the lender of the process to obtain an SBA loan number for the Second Draw PPP Loan, if appropriate." Not very helpful, especially if the borrower has no idea about the nature of the information in the SBA's possession.

Second Draw Loans are Generally Eligible for Forgiveness

Second Draw Loans are eligible for loan forgiveness on the same terms and conditions as First Draw Loans (with lesser documentation requirements for loans below \$150,000).

III. Changes Applicable to First Draw PPP Loans (and Newly Authorized First Draw Loan Money)

- **Previous Rules Generally Apply.** For *new* First Draw Loan borrowers, the previous PPP eligibility rules generally apply.
- **Based Period for Determining Loan Amount.** The maximum loan amount for First Draw Loans remains limited to the lesser of \$10 million and 2.5 times average monthly payroll costs (and the SBA has clarified the period over which the average is determined). Although the CARES Act states that borrowers are to calculate their maximum loan amount by using payroll costs incurred during the one-year period before the date on which the loan is made, the SBA's new regulation also allows new borrowers to choose 2019 or 2020 as the base period. Special rules also apply to ranchers, farmers, fishing boat owners, partnerships and self-employed individuals.
 - **Special Rules for Seasonal Borrowers.** The EAA defines a borrower as seasonal if it does not operate for more than seven months in any calendar year or, during the

preceding calendar year, it had gross receipts for any six months of that year that were not more than 33.33 percent of the gross receipts for the other six months of that year. A seasonal employer must determine its maximum loan amount for purposes of the PPP by using average total monthly payments for payroll for any 12-week period selected by borrower beginning February 15, 2019 and ending February 15, 2020.

- **Newly Eligible Organizations.** In addition, certain types of entities that were not previously eligible, or whose eligibility was effectively limited by the affiliation rules, are eligible for new First Draw Loans. These include the following:
 - Housing cooperatives, eligible section 501(c)(6) organizations, or eligible destination marketing organization, that employ no more than 300 employees and meet certain limitations on lobbying activities.
 - Certain news organizations and nonprofit public broadcasting entities that employ no more than 500 employees (or, if applicable, the size standard in number of employees established by the) *per location*.
- **Newly Eligible Expenses for Use and Forgiveness.** The EAA added the following categories of expenses as eligible for both proper use of PPP loan amounts and forgiveness (for both First and Second Draw Loans):
 - *Covered Operations Expenditures.* This means payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.
 - *Covered Property Damage Costs.* This means costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation
 - *Covered Supplier Costs.* This means expenditures made by a borrower to a supplier of goods for the supply of goods that (A) are essential to the operations of the borrower at the time at which the expenditure is made; and (B) is made pursuant to a contract, order, or purchase order (i) in effect at any time before the covered period with respect to the applicable covered loan; or (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan;
 - *Covered Worker Protection Expenditures.* This includes operating or capital expenditures to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency with respect to the COVID-19 expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19. Examples include drive-through windows, air ventilation or filtration systems, sneeze guards, an expansion of additional indoor, outdoor, or combined business space, onsite or offsite health screening

capability, and other assets relating to the compliance with the requirements or guidance described above, the purchase of certain types of respirators, and the purchase of N95 masks other specified personal protective equipment. This category does not include residential real property or intangible property.

- **PPP Loan Amounts May Not Be Used for Lobbying.** None of the proceeds of a PPP loan may be used for lobbying activities, lobbying expenditures related to a State or local election, or expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before Congress or any State government, State legislature, or local legislature or legislative body.
- **Employee Retention Credit Wages Not Eligible for Forgiveness.** As discussed in more detail below, it is important to be aware that payroll costs that are qualified wages considered in determining the Employee Retention Credit are not eligible for loan forgiveness.
- **Life, Disability, Vision, and Dental Insurance Included in Payroll Costs.** The definition of “payroll costs” (which is used to determine the loan amount, eligible uses, forgivable amounts, and more) has been changed to include payment for the provision of group life, disability, vision, or dental insurance (in addition to health insurance). This change is retroactive to the original effective date of the CARES Act.
- **First Draw Loan Applications Limited to One.** Any borrower who received a PPP loan in 2020 received a First Draw PPP Loan and is not eligible to receive another First Draw PPP Loan, but may be eligible for a Second Draw PPP loan.
- **Loan Forgiveness Period Flexibility.** The loan forgiveness covered period for most First Draw Loan borrowers was either eight or 24 weeks, with some language in the loan forgiveness application that appeared to allow borrowers to cut the loan forgiveness covered period short by filing the forgiveness application. The EAA has made it clear that borrowers may select a period beginning on the date the lender disburses the PPP loan and ending on any date between (i) the date that is eight weeks after the date of disbursement, and (ii) the date that is 24 weeks after the date of disbursement.
- **Simplified Forgiveness.** For loan amounts of \$150,000 or less, the EAA requires the SBA to provide for a much simpler loan forgiveness certification process.

PPP Coordination with Employee Retention Credit

The EAA retroactively changes the CARES Act employee retention credit which is likely to offer welcome cashflow for eligible companies. More specifically, the EAA removes the restriction that prevented employers that obtained a PPP loan from claiming this refundable tax credit. As a reminder, the retention credit was a tax credit made available to incentivize employers to keep employees on the payroll while their business was disrupted (due to mandated closure or a substantial decline in revenue).

The retention tax credit, which was set to expire at the end of 2020 has now been extended through June 30, 2021 and expanded in various ways that will be welcomed by eligible companies. A description of changes to the retention tax credit beyond the interaction with the PPP are discussed in more detail here.

Under the now modified rule, retroactive to the adoption of the CARES Act (March 27, 2020), employers can claim the retention credit on any eligible wages (referred to in the CARES Act as “qualified wages”) that were not used to support PPP loan forgiveness and any wages that could count toward both provisions can be applied to either, but not both, at the election of the employer. Essentially this election rule prevents double dipping. Employers should review how to best maximize both their PPP loan forgiveness and the retention tax credit.

The retroactive changes to the retention credit create a potential immediate refund opportunity for PPP recipients who paid qualified wages or plan to do so through June 2021 (although we expect more guidance to be forthcoming on how to claim the credit retroactively). Employers who took PPP loans should begin to review how their payroll costs might be covered by the loan forgiveness rules and retention credit expansion in order to determine which provision to apply. As noted above, the modifications to the retention credit may expand opportunities to claim tax credits for part of 2020 and through Q2 2021.

Tax Treatment of PPP Loan Forgiveness

The EAA effectively overturns the IRS’s position that expenses paid using PPP loan forgiveness money are not deductible. In other words, a PPP borrower will both (1) avoid the PPP loan forgiveness being treated as taxable income, and (2) be able to claim a deduction for expenses paid using the PPP loan money even though the loan forgiveness was never taxable income to the borrower.

The CARES Act had specifically included a provision indicating that borrowers would not be required to recognize income when PPP loans were forgiven (so-called cancellation of indebtedness income, or CODI). Although helpful, the IRS issued Notice 2020-32, asserting that PPP loan borrowers could not deduct otherwise deductible expenses to the extent that the payment of such expenses resulted (or is expected to result) in the forgiveness of a PPP loan. The idea was that borrowers should still be prohibited from “double-dipping” by paying expenses with a forgivable loan, then deducting the same expenses. The IRS doubled down on this unpopular position in Rev. Rul. 2020-27. As noted above, the EAA has effectively overturned the IRS’s rulings. More specifically, the EAA provides that: (1) borrowers may exclude from gross income any CODI realized in connection with the forgiveness of a PPP loan; and (2) no deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of such CODI exclusion. Given this clear statement of the original congressional intent, the IRS capitulated and issued Rev. Rul. 2021-2, which reversed its position with respect to the disallowed expense deductions and implemented the revisions made pursuant to the EAA.

This is a substantial economic benefit for PPP borrowers.

WARNING! Some state tax laws do not track federal law until appropriately amended. For example, at this time the Wisconsin Department of Revenue appears to be taking the position that expenses incurred that are paid with the forgivable PPP funds are not deductible for Wisconsin income/franchise tax purposes and must be added back to Wisconsin income in the year incurred or paid. Wisconsin’s current position is described in more detail here. We recommend checking with your tax professional for each state at the time you file your returns. We also expect many state laws might be modified in the near future to provide for the same tax treatment as federal law, but that is a matter for each state legislature.

Loan Forgiveness Application Timing

The new regulations for First Draw Loans indicates that if a borrower submits a forgiveness application within 10 months after the end of the loan forgiveness covered period, the borrower will not be required to make any payments of principal or interest before the date on which SBA remits the loan forgiveness amount to the lender. For this purpose, the “loan forgiveness covered period” is the period beginning on the date the lender disburses the PPP loan and ending on any date selected by the borrower that is eight to 24 weeks thereafter. Thus, if a borrower does not submit a loan forgiveness application within 10 months after the end of the loan forgiveness covered period, the borrower must begin paying principal and interest. *Most importantly, there is no indication that the SBA will repay to the borrower any payments that were previously made even if all or a portion of the loan is subsequently forgiven. This seems to be a change from previous guidance.*

IV. Updates for Lenders

The EAA also contains improved (but not ironclad) “hold harmless” provisions for lenders which provide that a lender may rely on certifications and documents provided by borrowers, and that a lender will not be subject to any enforcement action or penalties relating to loan origination or forgiveness, as long as: (1) the lender acts in good faith relating to loan origination or forgiveness; and (2) all relevant federal, state, local and other statutory and regulatory requirements are satisfied.

V. Other Ongoing PPP Loan Issues

FAQ on Loan Necessity Questionnaire

On December 9, 2020 the SBA published FAQ #53 providing elaboration around its issuance of the necessity questionnaires – forms issued to borrowers with PPP First Draw Loans in excess of \$2 million. These forms have been controversial given the vagueness and evolution of the necessity standard. The questions on the form (and lack thereof) have also created consternation for some borrowers.

While FAQ #53 does not modify the forms or their questions it does make clear that (a) the form is merely a first step in any review (i.e. borrowers subject to additional scrutiny as a result of completing the form will have further opportunities to respond to the SBA), and (b) the accuracy of the borrower’s should be judged by the facts in existence “at the time of the loan application, even if subsequent developments resulted in the loan no longer being necessary.” Nevertheless, the FAQ also notes that the “SBA may take into account the borrower’s circumstances and actions *both before and after the borrower’s certification* [emphasis added] to the extent that doing so will assist SBA in determining whether the borrower made the statutorily required certification in good faith at the time of its loan application.”

Ultimately, any borrower completing one of these forms should do so with counsel well versed in the evolution of the necessity standard as well as the FOIA implications of the information provided.

Reapplication/Increase if First Draw PPP Loan was Returned or Lesser Amount Accepted

Existing PPP borrowers that did not receive loan forgiveness by December 27, 2020 may: (1) reapply for a First Draw PPP Loan (or an increase to its existing First Draw PPP Loan, as applicable) if they previously returned some or all, as applicable, of their First Draw PPP Loan funds; or (2) under certain circumstances, request to modify and increase their First Draw PPP Loan amount if they previously did not accept the full amount for which they are eligible.

Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021 and is subject to the availability of funds. The SBA has also said that it will issue additional guidance on the process to reapply or request a loan increase.

Change of Control Transactions – Notice and Approval

The SBA previously issued a procedural notice (the Notice) to lenders setting forth required procedures for changes of ownership for entities that have received Paycheck Protection Program (PPP) loans. The two main questions arising from the Notice are:

1. Is my proposed transaction a “change of ownership” that requires compliance with the required procedures?
2. If my proposed transaction is a “change of ownership,” do I need to obtain the SBA’s approval, or will approval of the PPP lender be enough?

The following is a summary of the required procedures for changes of ownership set forth in the Notice.

Avoiding the Notice’s Required Procedures

Any PPP borrower can avoid the required procedures if it repays its PPP loan in full prior to a change of ownership transaction. Any PPP borrower can also avoid the required procedures if the loan forgiveness process is completed prior to the change of ownership, meaning either (1) the SBA has remitted funds to the PPP lender in full satisfaction of the PPP loan or (2) if the SBA remits funds in partial satisfaction of the PPP loan, the PPP borrower has repaid any remaining balance on the PPP loan. If the PPP loan isn’t fully paid off and/or forgiven, as applicable, then you’ll need to follow the required procedures.

Timing Considerations

A PPP lender is required to determine forgiveness within 60 days after receipt of a completed PPP loan forgiveness application from a PPP borrower. After a PPP lender makes a forgiveness determination, it is required to notify the SBA of such determination. The SBA is required to remit funds to the PPP lender within 90 days of receiving the determination from the PPP lender. However, if an application is flagged for review, that timetable will be longer. All in all, it could take up to 150 days (or longer) for a PPP borrower to complete the “forgiveness process” after submitting its forgiveness application.

Definition of a Change of Ownership

The SBA will consider a “change of ownership” to have occurred for PPP purposes: 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 entity; (2) the PPP borrower sells or otherwise transfers at least 50 percent of its assets (measured by fair market value), whether in one or more transactions; or (3) a PPP borrower is merged with or into another entity. If a proposed transaction doesn’t fall within any of the three categories, then it’s not subject to the required procedures and a PPP borrower can proceed with such proposed transaction without notifying its PPP lender or the SBA.

Notification of Change of Ownership to PPP Lender

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 carry out the proposed transaction.

Change of Ownership Required Procedures

<u>Type of Sale</u>	<u>Change of Ownership?</u>	<u>PPP Lender Approval?</u>	<u>SBA Approval?</u>
< 20% of outstanding equity	No	No	No
< 50% of assets (FMV)	No	No	No
20% - 50% of outstanding equity	Yes	Yes	No
> 50% of outstanding equity	Yes	Yes	Yes, unless (1) a forgiveness application has been submitted to the PPP lender and (2) funds equal to the amount of PPP loan are deposited in an escrow account with the PPP lender
> 50% of assets (FMV)	Yes	Yes	Yes, unless the conditions above are satisfied
Merger	Yes	Yes	Yes, unless the conditions above are satisfied

In the last three situations, as long as a PPP borrower has submitted its application for forgiveness to its PPP lender and deposited funds equal to its PPP loan in an escrow account with the PPP lender, a PPP borrower can proceed with a change of ownership transaction.

If a PPP borrower has not completed one or both action items (forgiveness application or escrow) prior to a change of ownership, the PPP borrower will need to obtain the SBA's approval to the change of ownership. If the SBA's approval is required and a PPP borrower does not obtain the SBA's approval, then it should not proceed with the change of ownership or that could jeopardize its PPP loan forgiveness. If the SBA's approval is required and a PPP borrower does not obtain the SBA's approval, but still proceeds to consummate the change of ownership, the PPP borrower will have violated the

required procedures in the Notice and, presumably, the SBA would have the authority to refuse to forgive the PPP borrower's loan.

SBA Approval Request

If SBA approval of a change of ownership is required, then the PPP lender (not the PPP borrower) is required to submit a request to the SBA asking for its approval of a change of ownership. While the burden is on the PPP lender to submit the request to the SBA, PPP borrowers should do everything they can to make it as easy as possible for PPP lenders, meaning PPP borrowers should prepare the requests for PPP lenders to simply forward along to the SBA (which must contain specific information, as set forth in the Notice).

Additional Notes of Change of Control Situations

SBA approval of any change of ownership involving the sale of 50 percent or more of the assets of a PPP borrower will be conditioned on the buyer assuming the PPP borrower's obligations under the PPP loan. In such cases, appropriate language regarding the assumption of such liability must be included in the purchase agreement, or a separate assumption agreement must be submitted to SBA. In the event of an equity sale or merger, the PPP borrower (or successor to the PPP borrower, in the event of a merger) will remain subject to all obligations under the PPP loan.

If any of the new owners or the successor has a separate PPP loan, then, following consummation of the change of ownership transaction: (1) in the case of an equity sale, the PPP borrower and the new owner(s) are responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements by each PPP borrower; and (2) in the case of a merger, the successor is responsible for segregating and delineating PPP funds and expenses and providing documentation to demonstrate compliance with PPP requirements with respect to both PPP loans.

Regardless of any change of ownership, a PPP borrower will remain responsible for: (1) performance of all obligations under its 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. Additionally, PPP borrowers remain responsible for obtaining, preparing, and retaining all required PPP forms and supporting documentation and providing those forms and supporting documentation to the PPP lender or to the SBA upon request.

Finally, in the event of a sale or other transfer of common stock or other ownership interest in a PPP borrower, or a merger of such PPP borrower with or into another entity, regardless of whether it constitutes a change of ownership, the PPP lender still must notify the appropriate SBA Loan Servicing Center, within five business days of completion of the transaction, of the following: (1) identity of the new owner(s) of the common stock or other ownership interest; (2) new owner(s)' ownership percentage(s); (3) tax identification number(s) for any owner(s) holding 20 percent or more of the equity in the business; and (4) location of, and the amount of funds in, the escrow account under the control of the PPP Lender, if an escrow account is required.

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