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Client Alert: SBA Clarifies PPP Rules for M&A Transactions

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On October 2, 2020, the Small Business Administration (SBA) released SBA Procedural Notice Control No. 5000-20057 (Procedural Notice) regarding Paycheck Protection Program (PPP) Loans and changes in ownership. Prior to the release of the Procedural Notice, there was significant uncertainty around structuring M&A transactions with PPP borrowers, including what sort of transaction would trigger a “change in ownership” for purposes of the PPP and whether or not a PPP borrower required SBA consent before consummating an M&A transaction. The Procedural Notice sets forth the requirements and procedures for M&A transactions that result in changes in ownership of a PPP borrower.

“Change in Ownership” Defined

According to the Procedural Notice, the following transactions will constitute a “change in ownership” for purposes of the PPP:

- At least 20% of the common stock or other ownership interest of a PPP borrower (including a publicly traded entity) is sold or otherwise transferred, whether in one or more transactions;¹
- The PPP borrower sells or otherwise transfers at least 50% of its assets (measured by fair market value), whether in one or more transactions; and
- A PPP borrower is merged with or into another entity.

Change in Ownership Transaction Consent Requirements

Pursuant to the Procedural Notice, the requirements for a transaction that meets the “change in ownership” definition depend on the circumstances surrounding the transaction, as outlined below.

- No approval is required on a change in ownership if, prior to closing the sale or transfer, the PPP note has been fully satisfied, meaning that:

- The PPP borrower has repaid the PPP note in full; or
- The PPP borrower has completed the loan forgiveness requirements and:
 - The SBA has remitted funds to the PPP lender in full satisfaction of the PPP note; or
 - The PPP borrower has repaid any remaining balance on the PPP loan.
- Approval from the PPP lender, but not the SBA, is required if, prior to the closing of any change in ownership transaction, the PPP note has not been fully satisfied but falls into one of the following categories:
- The change of ownership transaction is structured as a sale or other transfer of common stock or other ownership interest or as a merger, and:
 - The transfer is of 50% or less of the common stock or other ownership interest of the PPP borrower;² or
 - The PPP borrower submits a completed forgiveness application, including any required supporting documentation, to the PPP lender, and establishes an interest-bearing escrow account controlled by the PPP lender equal to the outstanding balance of the loan.
- The change of ownership transaction is structured as an asset sale and, prior to the sale, the PPP borrower submits a completed loan forgiveness application, including any required supporting documentation, to the PPP lender, and establishes an interest-bearing escrow account controlled by the PPP lender equal to the outstanding balance of the loan.
- Approval from the SBA, in addition to approval from the PPP Lender, is required for any change in ownership transactions that do not meet the conditions stated above.

SBA Consent Requests

If a change in ownership transaction requires prior consent from the SBA, the PPP lender must submit a request for consent, which must include:

- The reason that the PPP borrower cannot fully satisfy the PPP note or establish an escrow account as described above;
- The details of the transaction;
- A copy of the executed PPP note;
- Any letter of intent and the purchase and sale agreement, which sets forth the responsibilities of the PPP borrower, seller (as applicable) and buyer;
- Disclosure of whether the buyer has an existing PPP loan, and if so, the SBA loan number; and
- A list of all owners of 20% or more of the purchasing entity.

Other Requirements

The Procedural Notice also requires that for all sales or other transfers of common stock or other ownership interest or mergers, whether or not the SBA's prior approval is required, the PPP lender must notify the SBA within five (5) business days of the completion of the transaction and include:

- The identity of the new owner(s) of the common stock or other ownership interest;
- The new owner(s)' ownership percentage(s);
- The tax identification number(s) for any owner(s) holding 20% or more of the equity in the business; and
- The location of, and the amount of funds in, the escrow account under the control of the PPP lender (as applicable).

Additionally, the Procedural Notice specifies that, regardless of any change in ownership, the PPP borrower will remain responsible for the following throughout the life of the PPP loan:

- 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 PPP requirements; and
- Obtaining, preparing, and retaining all required PPP forms and supporting documentation and providing such forms and documentation to the borrower's PPP lender or the SBA upon request.

Although the Procedural Notice has answered many change in control questions relating to M&A transactions, it is important for PPP borrowers to review their individual PPP loan notes as well. While the PPP was created under the existing SBA 7(a) loan program, the SBA did not require PPP lenders to use a standard PPP or other 7(a) program loan note, but instead allowed PPP lenders to create and utilize their own PPP loan notes. Since PPP loan notes are not standardized, PPP lenders may have different procedures, "change in control" definitions, notification requirements and consent requirements than those provided in the Procedural Notice.

It is critical to structure an M&A transaction involving a PPP borrower to comply with the requirements set forth in the Procedural Notice and to engage with the seller and seller's PPP lender early in the M&A process to avoid delays and unnecessary confusion and expenses. If you have any questions about the PPP or this latest guidance, please contact your Vorys attorney today.

About the Vorys M&A Group:

We advise public companies, middle-market private companies, closely-held and family-owned businesses, and start-up and emerging companies, as well as boards of directors, special committees, financial sponsors, and private equity/venture capital firms, in global M&A transactions. Our M&A attorneys represent clients in a broad spectrum of industries, including retail, oil and gas, energy, consumer products, restaurants, manufacturing, insurance, health care, financial institutions, homebuilding, distribution, pharmaceuticals, technology/software, and real estate. Additionally, members of our M&A team have served as in-house General Counsel at public and private companies.

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¹ The Procedural Notice specifies that for these purposes, all transactions occurring since the date of PPP loan approval must be aggregated to determine whether or not this threshold is met, except in the case of publicly traded borrowers whereas only transactions that result in one person or entity holding at least 20% of the common stock or other ownership interest of the borrower must be aggregated.

² The Procedural Notice specifies that for these purposes, all transactions occurring since the date of PPP loan approval must be aggregated to determine whether or not this threshold is met.